# Tweet in haste... repent at leisure

Does the Paris Brown issue and increasingly many others, mean that good recruitment practices should include pre-employment vetting of social media as a matter of course? Had this question been asked ten years ago a deafening silence would have ensued – social what?

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The recent furore surrounding Paris Brown and her inappropriate tweets highlights the embarrassment that an individual's online activities can cause, not only to themselves, but also to their employers. Jamie Cameron, a Senior Associate, at law firm Burges Salmon

And this is where the difficulty lies, there is very little in the way of established legal guidance on how to approach this issue. Whilst the employment tribunals are beginning to deal regularly with the use, or more usually misuse, of social media during employment, there are no reported decisions, as yet, on the practice of pre-employment vetting using social media - nor is any specific legislation in place. However, that doesn't mean employers should ignore social media, Kent Police doubtlessly regret their decision not to check Paris Brown's Twitter account before appointing her to the high profile role of Youth Crime Commissioner. UKIP, too, has had to deal with embarrassing and potentially damaging revelations relating to Facebook pictures and postings of some of its candidates. The negative publicity these rows have generated could have been avoided by a simple vetting exercise before the appointments were made. Given that an estimated 40 percent of job applications contain false or misleading information, should all employers be vetting the online activities of candidates as a matter of course?

The answer is that an increasing number of employers are vetting would-be employees; sometimes as part of the formal recruitment process, in other cases, informally by recruiting managers undertaking their own research. Is this trend really beneficial? Is too much information a dangerous thing? Do you really need to know that your potential new billing assistant 'likes' yesterday's episode of "Made in Chelsea" - and, on a more serious level, does snooping expose you to legal risk both in terms of data protection and privacy issues as well as potential discrimination claims? In practice, this form of vetting is likely to be useful to employers and justifiable, particularly in the recruitment of senior or high profile roles. However, employers will need to take care about the way in which they handle this process and deal with the information they obtain.

Whilst the legal issues surrounding pre-employment vetting through social media have not yet been tested by the UK courts or tribunals, these issues have been considered elsewhere. Perhaps fittingly, as the birthplace of Facebook, the United States has been leading the way with employers making the headlines by insisting that job applicants provide their passwords so they can carry out a full search of their personal Facebook accounts. In response, six US states have introduced legislation making it illegal for employers to require applicants to divulge their Facebook passwords. However, an attempt to bring this in on a national basis was rejected and organisations in the US are expected to continue to take a proactive approach to the use of social media as a vetting tool.

In contrast, France and Germany have already taken steps to ensure that only those social media sites which have been established for professional purposes (such as LinkedIn) and where information is publicly available can be used as part of a recruitment process. Indeed Germany is going further and is considering draft legislation which would make it illegal for employers to refuse to hire applicants based on information gleaned from social media sites. Interestingly, even without the 'stick' of legislation, UK employers are seemingly adopting a more measured approach; for example there have been no reported instances of employers requiring applicants to provide social media password details. Could this be in response to a statement issued by Facebook that they view this practice as a breach of their terms of service; indeed they have threatened to take legal action if required? Employers may also have taken notice of "very serious concerns" raised by the Information Commissioner about requesting Facebook passwords. The ICO's view is that this practice would be in breach of the Data Protection Act 1998 (the "DPA") as it would be "excessive".

Turning to data protection issues, the DPA states that organisations should not hold "excessive" information about individuals. Employers using information from social media sites as part of a recruitment process will be "data controllers". As such, they will be required to process information in a "fair and proper" manner. There is no case law on what this means in this context, but to minimise risks, employers should ensure that vetting is carried out in a targeted way to find out required information, for example to verify information provided in the recruitment process, such as details of a candidate's employment history. Typically this will involve using professional and work-related sites such as LinkedIn rather than Facebook. Employers should also ensure that candidates are warned in advance of any vetting that will take place. A survey revealed that in the UK only nine percent of the respondents thought that their online activities may impact on future career prospects. This contrasts with the 41 percent of employers who had rejected candidates because of information obtained online. These results reveal an unrealistic expectation amongst social media users that their online activities are private. The right to privacy is protected under Article 8 of the European Convention on Human Rights which provides that an individual has "a right to respect for his private and family life, his home and his correspondence" and is incorporated in UK law through the Human Rights Act 1998. The right to privacy is directly enforceable against a public body but may also be relevant to private sector employers as employment tribunals (as public bodies) are required to act in a way that is compatible with this right.

The English courts have considered the question of the right to privacy in relation to blog postings and have identified a two stage approach to privacy issues: (a) does the individual have a reasonable expectation of privacy in relation to the particular information in question? (b) if so, is there a countervailing public interest to justify overriding the expectation of privacy? In unfair dismissal cases relating to an employee's use of social media, tribunals, as part of their own decision-making process, have considered how the individual's right to privacy impacts on the reasonableness or otherwise of the employer's decision to dismiss. To date, tribunals have not been persuaded by the employee argument that the right to privacy should be extended to cover postings on social media sites, even on "private" sites where information was available to a limited group of users (see for example *Crisp v Apple Retail (UK) Ltd** ET/1500258/11). The general approach is that people should have little expectation of privacy in relation to anything they post online; once a post is online you lose control over the content and so too your right to privacy. This means that the right to privacy is unlikely to have any real impact on the recruitment practices of most employers in terms of vetting using social media sites.

However, before you whip out your smartphones and tap on the Vet-a-Candidate app. beware the discrimination claim as this is probably the greatest risk to employers of pre-vetting candidates using social media. Unlike the majority of employment claims, the right not to be discriminated against arises before employment even starts and discrimination awards are uncapped. ●

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*Source: Online Reputation in a Connected World – Cross-Tab – January 2010

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