Summary of presentation to HRINZ Conference 2011 9 August 2011

SOCIAL TECHNOLOGY IN THE WORKPLACE

Trust and Confidence

Both the employer and the employee have an obligation not to destroy trust and confidence. On the one hand, the employer has to be able to trust that the employee is not wasting valuable work time and not bringing the employer into disrepute. On the other hand, the employer puts their trust in the employer that they will treat them fairly, reasonably and with respect and dignity.

Employee use of Time

Employees can waste a considerable amount of an employer's time using social technologies for personal reasons. Browsing websites, blogs, social networking pages and online magazines and newspapers can potentially go unnoticed and be a drain on resources. If employees are being paid to work during this time, this type of time wastage can be akin to theft, especially if excessive.

Conduct outside the Workplace

Employees are increasingly being caught out posting disparaging remarks about their boss, their colleagues, or the company they work for, on social media sites. Many employees don't seem to realise the permanence of online postings. Even if you delete online comments they remain in cyberspace. Often online postings can be seen by hundreds of people and it is inevitable that someone will have a link back to the employer

Bullying and Harassment

In *Wellington Free Ambulance v Adams* the employee, Alana Adams, had several complaints made against her by colleagues in the emergency communications center where she worked. One employee complained she was rude and condescending, that she made comments about him under her breath, spoke down to him, and that she had abused him on Facebook and in text messages. An online chat had taken place whereby Ms Adams had insulted the colleague numerous times. During an investigation several other colleagues echoed the complainant's concerns. Ms Adams was dismissed by her employer and sought interim reinstatement. The Employment Court denied her application for interim reinstatement as her return to work was likely to be disruptive.

The case highlights the fact that work tensions that spill over onto Facebook and social media sites can be taken into account in an employer's investigation.

Bringing the employer into disrepute

In *Hohaia v New Zealand Post* the employee Lyndon Hohaia, a Postie, had set up and run two Facebook sites in his own time called "PostieLad" and "PostieLand". The sites included unflattering posts about NZ Post operations and colleagues.

Mr Hohaia thought only one of the sites was open to the public and the other was accessible only to "friends" he invited. He had set up the sites to give friends and fans a bit of "a laugh". NZ post conducted a disciplinary process and dismissed Mr Hohaia for serious misconduct; Mr Hohaia claimed unjustified dismissal and sought interim reinstatement.

The Employment Relations Authority said that, at the very least, the nature of Mr Hohaia's Facebook statements suggested a significant loss of respect, trust and confidence in his employer. Further, the Authority said that Mr Hohaia's negative attitude towards his employer may have seriously hindered his ability to undergo reinstatement sincerely and fully. Accordingly the Authority denied Mr Hohaia interim reinstatement.

Bringing the employer into disrepute can be a breach of policy, a breach of fidelity and/or good faith. The level of disrepute is relevant; the size of the audience has a large part to play in assessing whether the employer's name or brand has been damaged.

Breaching Policy

The case of *Arthur D Riley v Wood* concerned communications via email and breaches of company internet policy. Jessica Wood was an administrative assistant with Arthur D Riley & Co Limited. Ms Wood had been frequently warned about her personal use of the internet and the telephone at work; she had forwarded offensive emails and her use of the telephone for personal calls was really high. The employer began auditing her and she was warned twice for breaching policy.

Despite these warnings, Ms Wood forwarded an email on her work computer with the subject line "*Eleven Most hot People!!!!!!!*" The email contained images of people in various poses, either completely nude or scantily clad. The employer found the email, as it was auditing her, and formed the opinion that the email contained objectionable material that was aimed at offending. She was summarily dismissed for serious misconduct.

The Employment Court said that "relevant circumstances" were: the workplace culture, the house rules, the state of the employee's awareness of the company's expectations and the consequences of the employee' conduct. The Employment Court found that the employer's culture was "reasonably conservative" and this was reflected in its internet policy. Ms Wood knew of the standards that prevailed. The Employment Court found that, according to the standards of the company, the employer was justified in considering that some of the images sent by Ms Wood were objectionable.

Although Arthur D Riley & Co Limited failed to strictly follow its own policies, the Employment Court found that, in all the circumstances, the employer acted as a fair and reasonable employer in concluding that Ms Wood had committed serious misconduct. Accordingly, employer was justified in dismissing Ms Wood.

Confidentiality

An employer's duty of confidentiality is an implied term of every employment agreement, and continues after the end of the employment relationship. Despite this, it should always be expressly included in employment agreements and dealt with in policies. Social media presents a real risk that information leaked online will be seen by an international audience of thousands.

Policies

Different workplaces have different cultures in respect of the use of social media. Even if your workplace encourages the use of social media and the internet, it is obviously not desirable for staff to be wasting time on non-work-related internet usage. In developing policies around the use of social media, employers should:

- **Consider the current workplace culture.**

- **Be fair, a complete ban might be unreasonable.**
- **Clarify what is acceptable, what is not.**
- **Make clear the consequences of misuse.**
- **Make sure employees are aware of policies.**
- **Make sure policies are followed.**

Monitoring

Employers can easily obtain information about how much time their employees spend on personal email and internet use. An employer is entitled to monitor an employee's internet usage. This is particularly so if you have reasonable cause to believe they are 'stealing' time or breaching company policy. Monitoring may not always result in a disciplinary process; it may result in tighter restrictions or a company-wide reminder about usage policies.

Privacy

Covert monitoring of employees that is intrusive and done purely out of curiosity or nosiness will likely be in breach of the Privacy Act 1993. It may also amount to a breach of the employer's duties of good faith and trust and confidence. Where there is a genuine basis for covert monitoring it may be fair and lawful.

The employer in *Logan v Hagal Company Limited* owned a health food store where Ms Logan worked as a retail assistant. The employer became aware of financial discrepancies relating to the store. The employer, without notifying staff, installed video cameras. The video surveillance captured four separate instances involving Ms Logan. The employer dismissed Ms Logan. Ms Logan argued that her employer's use of video surveillance without her knowledge was unlawful and unfair. The Employment Relations Authority held that the video surveillance was set up in response to the employer's genuine concerns about stock and financial discrepancies, which could not be explained, and therefore it did not infringe on the privacy rights of any employees or customers of the store. However, the Authority concluded that the employer's decision to dismiss Ms Logan was procedurally unfair. The Authority took into account the video evidence, which indicated that Ms Logan has failed to adhere to the standard procedures required of her and in doing so breached the duty of trust and confidence. The Authority reduced the remedies by 50% to take into account Ms Logan's contributory conduct.

Disciplinary Action

Misuse of social media may result in disciplinary action and dismissal of an employee.

The first port of call is the employee's employment agreement and any relevant employment policies:

- **What do these allow for?**
- **What are the limits?**
- **Has there been a prima facie breach?**
- **What are the consequences?**

Other relevant circumstances are:

- **Employee's attitude to their conduct**
- **Workplace culture**
- **Existence of previous warnings**
- **Size of the audience that received the information**
- **Damage to the employer's reputation**

If the employee's activity amounts to a serious breach of the employment agreement or policy, the employer may be able to justify a dismissal, following a fair process.

The new section 103A justification test in the Employment Relations Act 2000 is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This test leaves open a range of possible responses by the employer; the employer needs to think very carefully about how to fairly deal with the situation.

Conclusion

We recommend that employers enjoy the benefits of social media and use it to their business advantage. However, employers should address the use of social technology in the workplace so that employees know where they stand, and what their freedoms and limitations are.