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Internal Disciplinary Procedures – Internet and Social Media. Dilemmas of Bilateral Relations

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Situation analysis and introductory remarks.

Nowadays, Social Media and the Internet are useful and powerful tools within society. It provides great convenience to conduct activities within the job market such as: free web advertising, talent hunting or collecting precious marketing data. However, in some cases, Social Media and the Internet can be a “bone of contention” between the employer and employee relationship.

The main purpose of this essay is to demonstrate bilateral relations between internal disciplinary procedures between Companies and the Internet – Social Media, in light of the Unfair Dismissals Acts 1977-2007. It will be presented in relation to the following determinants¹:

- screening or vetting employees,
- ownership of the Social Media account,
- productivity,
- employer brand protection,
- internal disciplinary procedures,
- the Internet and Social Media usage policy.

This thesis includes three chapters, introductory remarks, and a relevant list of sources. The first chapter defines one of the main sources of the Irish Employment Law – the Unfair Dismissals Acts 1977-2007 and the conditions resulting from it, in regards of disciplinary procedures².

The second chapter of the essay addresses dilemmas of bilateral relations between internal disciplinary procedures and the Internet – Social Media. This part analyses dilemmas based on the above circumstances.

¹ William Fry Employment Report 2013, *Social Media in the Workplace*, Dublin 2013, p. 3.

² *Unfair Dismissals Acts 1977-2007*, [online:] [<http://www.irishstatutebook.ie/eli/1977/act/10/enacted/en/html/>], accessed on the 20.10.2015.

The third chapter discusses possible remedies in avoiding the termination of an employment contract and further action based on disciplinary procedures.

1. Conditions resulting from the Unfair Dismissals Acts 1977-2007.

Unfair dismissal is defined as³:

The dismissal of an employee is deemed to be an unfair dismissal unless, having regard for all the circumstances, there were substantial grounds justifying the dismissal: Unfair Dismissal Act 1977, s 6.

In other words, the burden of proof (on the employer) has to be based on significant, reasonable grounds for dismissal, as for example employee conduct or redundancy. It is important to stress that unfair dismissal applies only to employees “who have at least one year’s continuous service with the same employer”⁴. The exception from that rule can be observed in *McGowan v McLaughlin* case, where the plaintiff was in pregnancy⁵.

The Unfair Dismissals Acts 1977 (Act) came into force on the 15th of April 1977. It was amended several times, however the most significant correction is from 1993 – Unfair Dismissals (Amendment) Act 1993⁶. The Act applies when the contract of employment is terminated with or without the notice by employer or employee terminate the contract as results of employer behaviour (constructive dismissal)⁷. In some cases, unfair dismissal can be automatic – for example in the reason of religious opinion or unfair selection for redundancy. The main objective of the Act is to provide relative protection to employees and prevent unfair dismissal. Additionally, it is worth mentioning that the Unfair Dismissals Acts 1977 to 2007 is a group of Acts, which should be treated as one act⁸.

³ H. Murdoch, *Murdoch’s dictionary of Irish Law*, Dublin 2004.

⁴ Ibidem.

⁵ *McGowan v McLaughlin* [2000] ELR 106, EAT.

⁶ *Unfair Dismissals (Amendment) Act 1993*, [online:] [<http://www.irishstatutebook.ie/eli/1993/act/22/enacted/en/print.html>], accessed on the 20.10.2015.

⁷ *Unfair Dismissals Acts 1977-2007*, op. cit.

⁸ *Unfair Dismissals Act 1977 (10/1977)*; *Worker Protection (Regular Part-Time Employees) Act 1991 (5/1991)*, in so far as it relates to the *Unfair Dismissals Acts 1977 and 1991 (repealed)*; *Unfair Dismissals (Amendment) Act 1993 (22/1993)*; *Protection of Employees (Part-Time Work) Act 2001 (45/2001)*, in so far as it relates to the *Unfair Dismissals Acts 1977 to 1993*; *Civil Service Regulation (Amendment) Act 2005 (18/2005) (Part 6)*; *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 (27/2007)*.

Section 6. of the Act provides the circumstances for unfair dismissals⁹. For the purpose of this particular thesis, only some grounds will be taking into account. They are:

- “the religious or political opinions of the employee”,
- sexual orientation – employment equality legislation.

On the other hand, Section 6 of the Act lists grounds for fair dismissal such as¹⁰:

- competence,
- conduct,
- Other 'substantial grounds': Code of Practice on grievance and disciplinary procedures

The above grounds will be analysed in the second chapter.

The Code of Practice on grievance and disciplinary procedures is a particularly interesting subject. This aspect is related to Section 42 of the Industrial Relations Act 1990, which says that every employer has to provide a written version of disciplinary procedures for his employees¹¹. This legal instrument provides a wide range of tools for the employer (for example, a warning system, termination of bonuses, transfers, etc.), before the final process of fair dismissal. Under section 14 (1) of the Unfair Dismissals Acts¹²:

An employer shall, not later than 28 days after he enters into a contract of employment with an employee, give to the employee a notice in writing setting out the procedure which the employer will observe before and for the purpose of dismissing the employee.

Employee should be familiar with the disciplinary procedures and receive a copy of it. Before dismissal, the employer has a legal duty to pursue all actions set down at the

⁹ *Unfair Dismissals Acts 1977-2007*, op. cit.

¹⁰ *Ibidem*.

¹¹ *Industrial Relations Act 1990*, [online:] [<http://www.irishstatutebook.ie/eli/1990/act/19/enacted/en/html>], accessed on the 21.10.2015.

¹² *Unfair Dismissals Acts 1977-2007*, op. cit.

disciplinary procedures document. This positive duty on the employer helps to avoid unfair dismissal and ensure that only good and fair procedures¹³ are carried out.

2. Internal disciplinary procedures – Internet and Social Media. Dilemmas of bilateral relations.

Internet and Social Media are defined in an Encyclopaedia such as¹⁴:

Social media is a new driver of the convergent media sector. The term social media refers to technologies, platforms, and services that enable individuals to engage in communication from one-to-one, one-to-many, and many-to-many. While the Internet has always allowed individuals to participate in media not only as consumers but also as producers, the social aspect of media convergence.

The use of Social Media at work can be analysed in relation to several determinants, which were already mentioned in the introduction. The first element is a vetting and screening process for new employees. A good example to illustrate this screening process is the state of affairs of Paris Brown – Police Officer and Crime Commissioner in Kent, UK. Paris posted abusive- discriminate message on her Twitter account when she was between 14 and 16 years of age¹⁵. Because of that, she had to quit her job. This particular situation shows that previous internet activity can be accountable for future employment. Also, Paris`s recruitment officer was to blame for not doing a proper candidate screening which was required by the nature of the job. According to the Irish survey, 86% of employers screen potential candidate`s Social Media profiles. Unsocial language has also a significant influence for the final decision¹⁶. The Paris Brown case can be also taken into account in Irish jurisdiction as an example of fair dismissal for

¹³ Workplace Relations Commission, *Code of Practice on Grievance and Disciplinary Procedures*, [online:] [https://www.workplacerelations.ie/en/Good_Workplace_Relations/codes_practice/COP3/#], accessed on the 21.10.2015.

¹⁴ Encyclopaedia Britannica, [online:] [<http://www.britannica.com/topic/social-media>], accessed on the 21.10.2015.

¹⁵ The Guardian, *Youth crime commissioner Paris Brown stands down over Twitter row*, 9th of April 2013, [online:] [<http://www.theguardian.com/uk/2013/apr/09/paris-brown-stands-down-twitter>], acc. 23.10.2015.

¹⁶ William Fry Employment Report 2013, op. cit., p. 4.

employee conduct. Additionally, in an Irish context, an important case is *Kiernan v Awear* (2007)¹⁷. In this instance, Ms. Kiernan posted an unflattering opinion about his branch Manager on the “Bebo” website (youth social network website). Once AWear’s management “discovered” (screened) the unfavourable comment, Ms. Kiernan was dismissed based on the disciplinary procedure for gross misconduct. The Employment Appeals Tribunal held that the employer acted “disproportionately in dismissing” and awarded a contribution of €4000.00. Kiernan’s case is a compelling example of bilateral relations between Social Media and disciplinary procedures. EAT emphasised that dismissal in that instance was inconsequential, as gross misconduct did not take place. This case also gives a different view to issues such as a disciplinary policy cannot prevent employees to post unmannerly comments within their social media accounts. However, in some cases internal disciplinary policy has a significant impact. One example of this is another Irish case: *O’Mahony v PJF Insurances Limited* (2010)¹⁸. Here, the plaintiff Ms Aoife O’Mahony posted on her Facebook account offensive and invidious messages about her employer – PJF Insurances Limited (especially about one of the company director). A disciplinary meeting took place and finally she was fired. The tribunal at this state of affairs held that that dismissal was fair, because of gross misconduct and breach of trust for the employee, which in the future can cause a bad reputation for the company. This case presents three different determinants of relation between internal disciplinary procedures and Social Media: employer brand protection, internal disciplinary procedures and the Internet and Social Media usage policy. A similar case is a British one: *Crisp v Apple Retail Ltd*, where an employee publicised a few critical comments about the Apple company on his Facebook¹⁹. A British Court held that the employee’s action could destroy a company’s reputation and that the dismissal was fair.

Ownership of the Social Media Account is another aspect worthy of a deeper analysis. A leading American case in ownership is *Eagle v Edcomm* (2013)²⁰. In this instance, Dr. Linda Eagle used her private LinkedIn account to promote her employer

¹⁷ *Kiernan v Awear*, case no. UD643/2007, MN508/2007.

¹⁸ *O’Mahony v PJF*, case no. UD 933/2010.

¹⁹ *Crisp v Apple Retail Ltd.*, case no. ET/1500258/11.

²⁰ *Eagle v Edcomm*, case no. 11-4303, E.D.Pa.

by her professional reputation and relationship. When she left her job Edcomm used her private LinkedIn and changed the password. The American court held in Linda`s favour, because there was no evidence of ownership of the account by Edcomm as it was a private profile. Notwithstanding, a British case: *Hays Specialist Recruitment (Holdings) Limited v Ions* (2008) shows that contacts in LinkedIn account which were “collected” during employment are employer property²¹. A similar judgment was in *Whitmar Publications Limited v Gamage and Others* (2013)²². All the above examples show how important internal disciplinary procedures are in order to avoid similar actions.

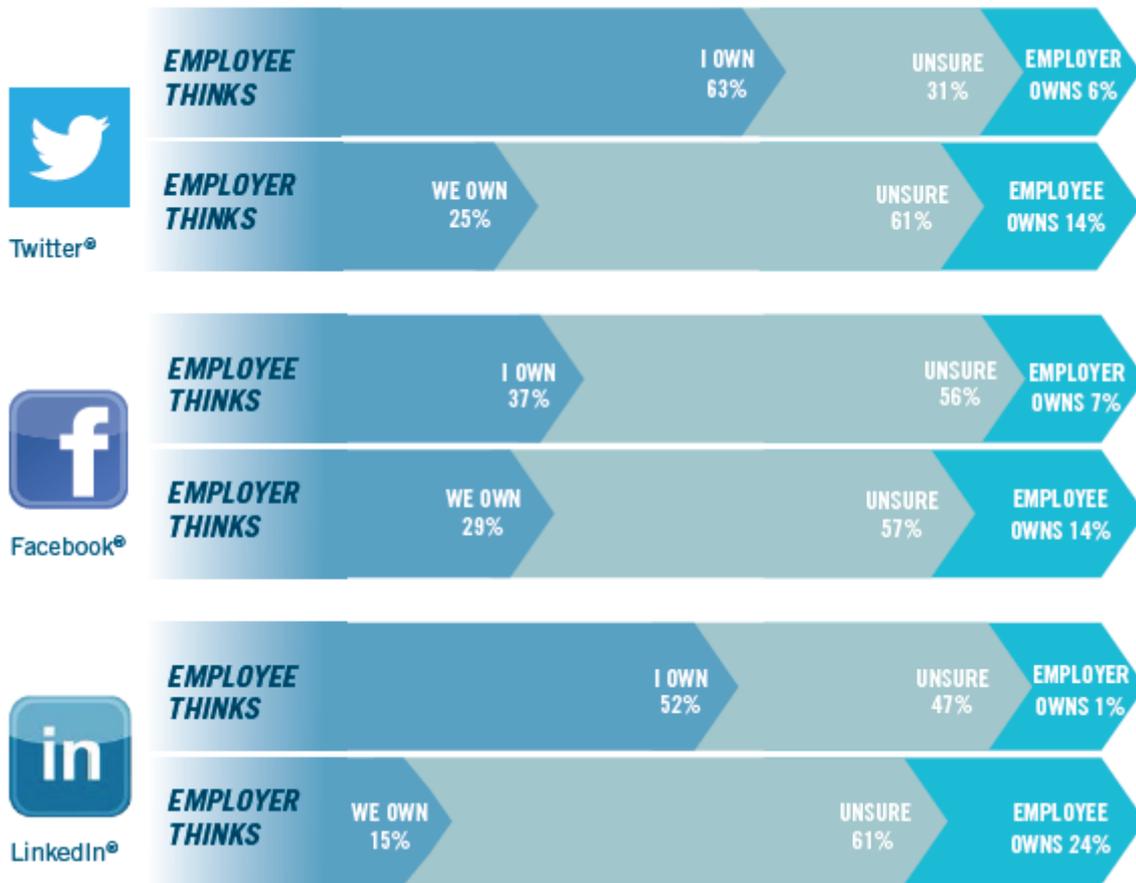
As can be seen from the above cases, Social Media account ownership after an employment contract termination can be a contentious issue. It is important to stress that only 17% of Irish employers protect their future ownership of Social Media accounts²³. The Count below presents results of a survey where employers and employees were asked: “who owned the followers, contacts and friends on an employees personal social media accounts?”

Count 1: “who owned the followers, contacts and friends on employees personal social media accounts?”

²¹ *Hays Specialist Recruitment (Holdings) Limited v Ions*, case no. EWHC 745 (Ch).

²² *Whitmar Publications Limited v Gamage and Others*, case no. EWHC 1881 Ch.

²³ William Fry Employment Report 2013, op. cit., p. 6.



Source: William Fry Employment Report 2013, op. cit., p. 6.

An important Irish case regarding the Internet and Social Media usage policy is *Toland v Marks & Spencer* (2013)²⁴. This particular case deals with a dismissal caused by breaching the company's Social Media regulations. Similar to the Kiernan and O'Mahony cases, an employee posted the following comment about a colleague (which distressed the Sore Manager): "lol, ur mental (other staff member), I like it!!" and "lol wats ur rds like?". Marks & Spencer decided to dismiss Ms Toland for breaching the "Company's Social Networking policy". The tribunal decided in favour of Ms Toland for an unfair dismissal. The reason for this is that Marks & Spencer was not able to prove that a disciplinary meeting took place, so the employer violated their disciplinary procedures. The Employment Appeals Tribunal ordered €18,000 compensation for Ms Toland. The *Toland v Marks & Spencer* case shows again a very strong relationship between a company's policy and the using of Social Media. Similarly, in *Walker v*

²⁴ *Toland v Marks & Spencer*, case no. UD865/2011.

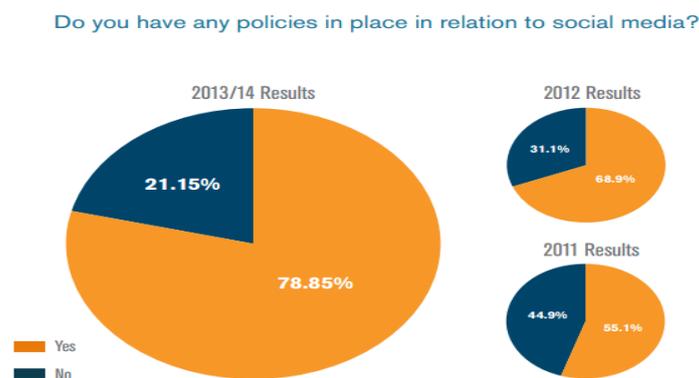
Bausch & Lomb (2009), where the intranet usage policy was not available to employees²⁵. The result was the plaintiff was awarded €6,500.

At the end of these considerations concerning bilateral relations between internal disciplinary procedures and Social Media it should be mentioned the employees productivity aspect. According to Irish research, employees spend around 56 minutes of their time on Social Media platforms (not related to work)²⁶. In the monthly cycle, this adds up to 22 hours, which is equivalent to almost 3 working days. It is tempting to say that time spent in Social Media activity is stolen time from the employer.

3. Possible remedies and interpretation of results.

Every law system needs some improvements. However, all procedures can be amended in order to avoid future issues.

The above results drive towards a conclusion that using Social Media can be conditioned by the internal disciplinary procedure. Based on “Social Media in the Workplace Around The World 3.0” survey 78.85% of employers have a policy regarding Social Media²⁷:



²⁵ *Walker v Bausch & Lomb limited*, case no. UD 179/2008.

²⁶ William Fry Employment Report 2013, op. cit., p. 8.

²⁷ Proskauer's third annual global survey, *Social Media in the Workplace Around the World 3.0*, [online:] [<http://www.proskauer.com/files/uploads/social-media-in-the-workplace-2014.pdf>], accessed on the 3.11.2015.

Compared to 2011 and 2012, the number of internal policies significantly increased. However, 21.15 % of employers do not have Social Media regulations, which creates potential risk.

In order to protect a business's reputation from employees and data exposure on Social Media, employers should adopt some preventative tools. During recruitment or the screening process, candidates should be informed about all of the vetting stages, including Internet screening. The contract of employment should include queries regarding ownership of Social Media accounts (during or after termination of the contract) along with intellectual property queries. However, the most important tool is the internal disciplinary procedure, which will regulate Social Media use during working time, breaks and after working time. The procedure should define which employees are permitted to post comments and under which circumstances. It should also state sanctions for inappropriate or abusive language to other Social Media users.

The investigation process and governance procedures are essential parts of the policy and they have to be updated on a regular base. Finally, Social Media and Internet use policy have to be communicated to all employees by an adopted distribution channel. According to Unfair Dismissals Acts 1977-2007, the employer has a legal obligation to provide written procedures which could include Social Media and Internet policy²⁸.

The final question is when an employer is authorised to monitor Social Media use? Currently, in the Irish legal system there is no common law or acts which deal with that question. Therefore, internal disciplinary procedures have a significant and key impact as part of training for employees. Irish data protection law and electronic privacy regulations also need to be considered within this context. In some particular cases internet/media use will be strictly prohibited – for example in a financial company such as PayPal.

²⁸ *Unfair Dismissals Acts 1977-2007*, op. cit.

To conclude, I would like to quote the words of the Irish polymathic scholar – John Pentland Mahaffy, which are fitting to the current situation: “In Ireland, the inevitable never happens and the unexpected constantly occurs”²⁹.

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²⁹ D. McEvoy, *The Little Green Book of Irish Wisdom*, New York 2014.

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