





Social Media and Employment: The Legal Implications

- Social Media and the Employment Lifecycle (Paul Gonzi)**
 1. The recruitment stage – privacy, data protection and discrimination
 2. Social Media use during Employment – banning and monitoring
 3. Vicarious Liability and the Employer’s responsibility – victimisation, harassment and defamatory libel.
- Skype for Business: Secure, compliant and productive (Uros Kastelic)**
- Evolving Legal Issues (Thomas Bugeja)**
 1. Ownership Disputes – who owns your likes and followers?
 2. Social Media misconduct: your company’s image at stake – Human Rights considerations. Where to draw the line?
 3. Social Media Policies – self-regulation as the way forward





Social Media and the Employment Lifecycle [Paul Gonzi]



1. **The recruitment stage** – privacy, data protection and discrimination
2. **Social Media use during Employment** – banning and monitoring
3. **Vicarious Liability and the Employer’s responsibility** – victimisation, harassment and defamatory libel.

Social Media .. WHAT ?





Designed by Vecteezy

Social Media .. WHAT?

Californian Law : *“an electronic service or account, or electronic content, **including, but not limited to,** videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Website profiles or locations.”*


Illinois Law : *“an Internet-based service that allows individuals to: (A) construct a public or semi-public profile within a bounded system, created by the service; (B) create a list of other users with whom they share a connection within the system; and (C) view and navigate their list of connections and those made by others within the system.”*

Social Media .. WHAT?

Malta : Teachers (Code of Ethics and Practice Regulations) – S.L. 327.02

“Media : means the social media (including web- and mobile- based technologies) such as social networks and blogs; digital media including e-email, internet, text messaging; electronic media and print media ”



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Social Media .. FACT !

SOCIAL MEDIA

- SPONTANEITY
- GLOBAL REACH
- PERMANENCE
- SEARCHABILITY
- INEXPENSIVE
- BIG DATA

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Social Media .. FACT !

SOCIAL MEDIA

- SPONTANEITY
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- INEXPENSIVE
- BIG DATA

DOUBLE EDGED SWORD

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Social Media .. DOUBLE EDGED SWORD - EMPLOYER

marketing, monitoring, evaluating, selling, communicating with staff, news alerts, feedback, discussion forums, blogs, recruitment

EMPLOYER

negative comments, loss of reputation, lost IPRs, security risks, airing of grievances / hanging dirty laundry, waste of production time

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Social Media .. DOUBLE EDGED SWORD - EMPLOYER

sharing, learning, news, liberal speech, making friends, gaming, chatting, dating, PR, contacts etc..

EMPLOYEE

negative comments, loss of reputation, lost IPRs, security risks, airing of grievances / hanging dirty laundry /identity theft

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Social Media .. LEGAL MINEFIELD

... FREEDOM OF SPEECH, OTHER FUNDAMENTAL FREEDOMS, LIBEL, VICARIOUS LIABILITY, IPRS - OWNERSHIP OF PROFILES, DATA AND CONTACTS, DATA PROTECTION, COPYRIGHT, TECHNOLOGY CONTRACTS, SOFTWARE LICENSING, CONSUMER TERMS, COMMERCIAL CONTRACTS ...

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#Social Media .. *There aint no social media law ..*

- No Social Media Law
- But there are traditional laws that apply to social media.

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Social Media .. Traditional laws that apply ..

1. Data Protection Act
2. Employment and Industrial Relations Act
3. Equal Treatment in Employment Regulations
4. Criminal Code
5. IPR Laws (Copyright Act, Patents & Design Act)
6. Consumer Laws
7. E-Commerce
8. Press Act

... just to name a few

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SOCIAL MEDIA : THE RECRUITMENT STAGE

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Social Media During the Recruitment Stage

- i. Recruitment - costs money & time
- ii. Civil Code (Chap 16) Article – Article 1037 : *[culpa in eligendo]*

"Where a person for any work or service whatsoever employs another person who is incompetent, or whom he has not reasonable grounds to consider competent, he shall be liable for any damage which such other person may, through incompetence in the performance of such work or service, cause to others."

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In 2015 only 4% of recruiters do NOT use social media to recruit.

<http://www.jobvite.com> – online survey

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Most effective source of recruitment :

<http://www.jobvite.com> – online survey

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72% of recruiters say data analytics important to their hiring process :

: Length of average job tenure / Length of tenure with current employer / Mutual connections / Commitment to organisation / Design work examples / patterns / preferences


<http://www.jobvite.com> – online survey


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 Salegourmet a provider of catering and provisioning for the airline industry


- analysed big data [information in their internal systems, performance review systems, POS data, sales performance and comp systems – and data from external systems – compensation, demographics, recruiting informatics, traffic and transportation, and social media.]
- The patterns revealed enabled “fully staffed” status for the first time ever, and lowered unwanted turnover from 50% to 27%.


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Social Media During the Recruitment Stage

- > What are the legal risks ?
- > Are there limitations / constraints ?
- > Are employers obliged to in certain cases (e.g. public roles?)
- > Is there a difference between *sourcing vs screening* ?


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Social Media During the Recruitment Stage

The key risks :

- (i) **The Discrimination Trap**
- (ii) **The Privacy & Data Protection Balance**

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Social Media During the Recruitment Stage

The Discrimination Trap

1. Claims of Discrimination in Malta – a growing trend

- Court of Appeal (Inf.)- *Glynis Valerie Pace vs British High Commission (Malta)* (14.01.15)
- IT (Case No 3252.YMS) : *Basak Kristin Degiremenci Vs Jimmy Aquilina* (18.05.2015)
- Court of Appeal (Inf.) – *R. Spiteri Vs St Microelectronics (Malta) Ltd* (30.09.2015)

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Social Media During the Recruitment Stage

“Discrimination” ... very extensive definition

... in various laws ...


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Social Media During the Recruitment Stage

The Discrimination Trap : Express Prohibition against discrimination : ETIE

“It shall be unlawful for a person to subject another person to discriminatory treatment, *whether directly or indirectly*, on the **grounds** of a particular religion or religious belief, disability, age, sex, including discriminatory treatment related to gender reassignment and to pregnancy or maternity leave [...], sexual orientation, or racial or ethnic origin in any situation referred to in regulation 1(4)” (Article 3; S.L. 452.95, Equal Treatment in Employment Regulations ‘ETIE’)

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Social Media During the Recruitment Stage

The Discrimination Trap : Express Prohibition against discrimination : ETIE

"These regulations shall be applicable to all persons in relation to: (a) conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions;"

(Article 1(4); S.L. 452.95, Equal Treatment in Employment Regulations 'ETIE')


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Social Media During the Recruitment Stage

The Discrimination Trap : Express Prohibition against discrimination : ETIE

"'Employment' means [... also] the process of recruitment or training of any person with a view to engagement in employment"
(Article 2 S.L. 452.95, 'ETIE')


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Social Media During the Recruitment Stage

The Discrimination Trap : Very broad definition of discrimination : EFMW

"... [it is] unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise [including by word of mouth] a vacancy for employment which discriminates between [male and female] job seekers or to request from job seekers information concerning their private life or family plans [...]:"
(Art. 10; Equality for Men and Women Act; Chapter 456)

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Equality for Men and Women Act

Social Media During the Recruitment Stage

The Discrimination Trap : Very broad definition of discrimination : EFMW

"...'discrimination' means discrimination [between men and women] based on sex or because of family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics ... ; (Chapter 456)

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Employment and Industrial Relations Act


Social Media During the Recruitment Stage

The Discrimination Trap : Express Prohibition against discrimination : EIRA

"It shall not be lawful for any person - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment..." (Article 26(1); Chapter 452, EIRA)

"the term "offering employment" includes recruitment or training of any person with a view to engagement in employment and in regard to a person" (Article 26(2)(4) - EIRA)

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Employment and Industrial Relations Act

Social Media During the Recruitment Stage

The Discrimination Trap : Very broad definition of discrimination :

"discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association" (- Chapter 452, EIRA)

[except : reasonably justified exclusions or genuine occupational requirements]

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Employment and Industrial Relations Act

Social Media During the Recruitment Stage

The Discrimination Trap :

Article 46 : Offence against Act by company is deemed to be an offence by officer (manager, director, secretary or similar officer) ... unless committed (i) without his knowledge AND (ii) proven that he exercised all due diligence.

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Social Media During the Recruitment Stage

Therefore :

- i. The definition is very broad – not tied to a specific ground;
- ii. The recruitment process must, itself, be non-discriminatory;
- iii. The selection criteria must not be discriminatory;

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Social Media During the Recruitment Stage

The **recruitment process** must itself be non-discriminatory.

“It shall be unlawful for an employment agency to subject a person to discriminatory treatment –

- (a) by refusing to provide any of its services; or*
- (b) in the terms or conditions it offers to provide any of its services; or*
- (c) in the manner in which it provides any of its services.”*

(Article 8 ETIE)

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- 1. The **selection criteria** must not be discriminatory.
- 2. Decision must definitely not be based on the **‘protected criteria’**.

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Social Media During the Recruitment Stage


- ✓ **> You now know several ‘protected characteristics’ relating to the individual.**
- ✓ **> The social media gave you knowledge to information which you would not (or should) not ask about.**
- ✓ **> Since unlawful to “request from job seekers information concerning their private life or family plans” .. What does ‘request’ mean?**


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Social Media During the Recruitment Stage

- > **Burden** : The burden of proof is on the person recruiting/employing.
- > **Presumption** : the Court or Industrial Tribunal shall uphold the complaint if the defendant does not prove that he did not commit that unlawful act.
- > **With disabilities** – the employer must provide ‘reasonable accommodation’ [Definition of Disability is very wide]

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Social Media During the Recruitment Stage


The Discrimination Trap :

[ECJ Case C-54/07] : **Public statement in interview.**

LinkedIn
HR
XYZ Ltd

“Our Co. is growing... we need at least 3 new assistants... with years of experience, but ideally not Libyans/Moroccans as our clients do not enjoy having non-Europeans in their homes..”


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Social Media During the Recruitment Stage

RISKS :


1. Tribunal may take such *“measures as it may deem fit* (including cancellation of any contract or any clause in a contract which is discriminatory)”; and/or
2. Tribunal may order **compensation** for loss and damages; and/or
3. **Fine** Multa not exceeding €2329.37 and/or imprisonment up to 6 months

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SOCIAL MEDIA : Privacy & Data Protection during recruitment and employment

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FAQs


Social Media : Privacy & Data Protection


(A) Is accessing employee’s social media construed to be :

- (i) a form of monitoring of the employee?
- (ii) a potential breach of the employee’s legitimate expectation of privacy?

(B) Is using personal data belonging to an individual obtained from social media construed as ‘processing of personal data’ for purposes of the data protection act?

(C) **Can** an employer lawfully monitor social media and process personal data on social media (e.g. for disciplinary purposes)?


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Social Media : Privacy & Data Protection

- **No express prohibition** against an employer accessing/using data stored on social media.
- **Some jurisdictions** (E.g. California, Illinois etc) **have legislated** to prohibit employers from forcing employees to grant access to their social media or to provide their passwords (**social media snooping/ forced friending**). [Not in MT]

But what laws might apply to restrict an employer ?

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PRIVACY


"Everyone has the right to respect for his private and family life, his home and correspondence"- Article 8, European Convention of Human Rights (1950)


- Also enshrined under : Council of Europe, Convention 108 (1982); European Convention Act (Chapter 319); Constitution of Malta
- **Hoffman** : Privacy : "the social expectation that an individual must be able to participate in determining how information about him is used or communicated to others, and be assured that such information is properly protected against inappropriate use"

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- > Is a posting on social media 'private'? Is it private correspondence ?
- > Is there a difference if settings are : 'Private'; 'Friends only'; 'Public' ?
- > If Public .. Does the employee lose his legitimate expectation to privacy ?
- > Is there a difference between "obtaining public information VS obtaining information by encroachment" ?


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PRIVACY APPLIES ALSO AT WORK

1. **Niemitz v Germany** – ECHR – right to privacy must also be protected at the workplace.
2. 'Reasonable expectation of privacy' – **Halford v UK (ECHR)**

Exceptions to 'right to privacy' – in accordance with the law and necessary in a democratic society

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NOT EVERYTHING DONE IN PUBLIC IMPLIES LOSS OF THE RIGHT TO PRIVACY

Peck v the United Kingdom App no. 44647/98, (ECHR 28 January 2003).

Facts : Applicant tried to commit suicide in public and was caught on Police CCTV, subsequently released to the media, allegedly causing him humiliation.

ECHR : Held applicant had a reasonable expectation of privacy (although in public, it was at night and dark, and didn't expect to be seen). Although CCTV monitoring was legitimate, the airing on media exceeded his rights to privacy.

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BUT ... THE RIGHT TO PRIVACY IS NOT ABSOLUTE

Pay Vs UK (2009) IRLR 139 :

Facts : Employer discovered images of employee (employed in treatment of sex offenders) on the internet involved in bondage, sadomasochism and domination.

Court held : even though dismissal was a potential infringement of privacy, this could be justified because it conflicted with employee's role in working with sex offenders.


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AND NOTE EVERYTHING DONE IN PRIVATE... IS NECESSARILY PROTECTED BY PRIVACY !

> **Gosden Vs Lifeline Project (UK ET/2802731/2009)** : Gosden used personal email to forward a sexist and racist email to another employee which encouraged its forwarding. Employer was right to dismiss as the email was not for purely personal use.

> **Preece V JD Wetherspoons (UK ET/2104806/10)**: Wetherspoons were right to dismiss an employee who posted comments criticising customers. The postings were not private because although sent to 'friends' she had **646 friends** !

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CONCLUSION :

An individual may raise a claim for breach of privacy – but the extent to which this will hold will depend on :

- (i) Public nature of the statement/posting
- (ii) The number of persons who had access
- (iii) The link between the posting and the employment/employer
- (iv) Subject to other fundamental rights / legitimate interests

It is not the tool that matters .. But the consequences of its' use.

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DATA PROTECTION

- **Data Protection legislation** was initially enacted as an extension of the *right to privacy*.
 - An instrument to implement/enforce the right to privacy (which is a fundamental right, but not necessarily an absolute right).
- EU **Charter of Fundamental Rights (2000)** :- Enshrines data protection as a fundamental right which is distinct from the right to private and family life.
- DP law seeks to create a **BALANCE**.

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Data Subjects (Individuals) have RIGHTS	BALANCE	Data Controllers & Data Processors have OBLIGATIONS
↓		
Data protection Principles Requirement to register (notify) FREEDOM OF EXPRESSION		

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The relevant laws ..

EU Directives :

- EC Directive 95/46
- EC Directive 2002/58
- (new EU Regulation in the pipeline)

Maltese Law :

- Data Protection Act, Chapter 440
- Processing of Personal Data (E-Communications) S.L. 440.01

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Other Legal Notices :

1. Notification and Fees (Data Protection Act) Regulations - S.L. 440.02
2. Third-Country (Data Protection) Regulations – S.L.440.03
3. Processing of Personal Data (Protection of Minors) Regulations– S.L.440.04
4. Data Protection (Processing of Personal Data in the Policy Sector) Regulations S.L. 440.05
5. Processing of Personal Data (Police and Judicial Cooperation in Criminal Matters) Regulations S.L.440.06
6. Transfer of Personal Data to Third Countries Order S.L. 440.07 (Tax Purposes)
7. Processing of Personal Data For the purposes of the General Elections Act and Local Councils Act Regulations (S.L. 440.08)
8. Processing of Personal Data (Education Sector) Regulations S.L. 440.09

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Applicability : Maltese Data Protection Laws


Apply To :

- (1) Processing by automated means + non-automated means where personal data forms part of a filing system.
- (2) Processing in the (i) **context of the activities of an establishment** of a controller in MT; or (ii) an MT embassy abroad; or (iii) if **equipment** for processing is in MT;

Do NOT Apply to:

- (1) Processing in the course of a purely personal activity
- (2) Processing concerning public security


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'Personal Data' = "Any Information relating to an identified or identifiable natural person". -> [CJEU Cases C-101/01, C-70/10, C-141/12, C-291/12, C342/12, C28/08, C-212/13]<<

An identifiable person = is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".


Data Subject = "a natural person to whom the personal data relates".


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'Sensitive Personal Data' = "Personal data that reveals


1. race or ethnic origin,
2. political opinions,
3. religious or philosophical beliefs,
4. membership of a trade union,
5. health, or sex life


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Data Controller: "A person who alone or jointly with others determines the purposes and means of the processing of personal data"


Data Processor: "A person who process personal data on behalf of a controller"


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Controller or Data Processor or Data Subject ?

1. Employer ?
2. Recruiter ?
3. Social Media Provider ?
4. Employee ?


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Processing = "Any operation or set of operations which is taken in regard to personal data, whether or not it occurs by automatic means ... and includes .."

collection, recording, organisation, storage, adaptation, alteration, retrieval, gathering, use, disclosure by transmission, dissemination or otherwise making information available, alignment or combination, blocking, erasure or destruction of such data;


(CJEU Cases : C-131/12; C-212/13; T-249/03)

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Therefore :


the access, use, copying .. **any operation/s** .. of personal data which is on **social media**
= **processing**
for the purposes of Data Protection Laws.

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PROCESSING RULES

- (1) Compliance with the **8 Principles**
- (2) Based on one of the **6 Lawful Grounds**. (Note 6 other grounds for S.P.D.)
- (3) Subject to
 - (1) Rules on **transfers** outside of Malta (Note : Adequate Protection / Authorisation / Unambiguous Consent / Necessity)
 - (2) Rules applicable to **Data processors** (contract/instructions/security)
 - (3) **Rights of Data Subject** (informed/access/rectification)
 - (4) **Security Measures & Agreements with Data Processors**
 - (5) **Prior Notification**




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PROCESSING RULES

6 GROUNDS WHICH ALLOW PROCESSING

- (1) **Consent** (freely given)
- (2) Necessary for **performance of a Contract**
- (3) Necessary for compliance with **legal obligation** of controller
- (4) Necessary to protect the vital interests of the data subject
- (5) Necessary .. In the public interest ..
- (6) Necessary .. for a purpose that concerns a **legitimate interest** of the controller or of such third party to whom personal data is provided, except where such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject...




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PROCESSING RULES

6 Grounds for Sensitive Personal Data NO PERSON SHALL PROCESS SENSITIVE PERSONAL DATA ... EXCEPT

- (1) **Explicit Consent**
- (2) **Necessary ... to comply with duties or exercise his rights under any law regulating the conditions of employment**
- (3) Necessary to protect vital interests of the data subject (or of a third-party); or
- (4) Necessary to **for legal claims to be established, exercised or defended**
- (5) By a non-commercial entity (e.g. foundations) re its members
- (6) By a health professional... for health and hospital care purposes
- (7) For research and statistical purposes




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Data Protection : PROCESSING RULES

8 PRINCIPLES

1. Fair and **Lawful**
2. In accordance with Good Practice
3. Collected for specific, explicitly stated and legitimate **purposes**.
4. Not processed for any **incompatible purpose/s**
5. Must be adequate and relevant to the purposes
6. Must be no more than is necessary and is not kept for a period longer than necessary.
7. Must be Correct and up to date.
8. All reasonable measures must be taken to complete, correct, block or erase data to the extent that such data is incomplete or incorrect.




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CONSENT

1. **Consent is 1 out of 6 Grounds**

*"Any **freely given specific and informed** indication of the wishes of the data subject by which he signifies his agreement to personal data relating to him being processed"*


2. **Need not always be EXPLICIT – except with "sensitive personal data"**




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CONSENT

Q. Can the uploading of photos, videos and other user generated content (especially if settings are 'public') on social media be **inferred as freely given unambiguous consent** for the further processing by an employer for purposes of employment (and disciplinary issues)?





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CONSENT

THEREFORE :


- 1. AVOID** replying on consent of your employee, especially implied consent.
- DO** establish, in advance, the ‘purposes’ in a contract and/or in a Data Protection Policy which clearly expresses the use of social media – from recruitment to employment to post-termination...


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KEEP IN MIND ..


- 1. Having a Policy = NOT a licence to do anything**
- 2. When dealing with social media keep in mind the guidance/rules on :**
 - 1. Monitoring Limitations** (e.g. CCTV, Geo-Location, Call Data,)
 - 2. Automatic processing**

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... Going back to Recruitment


- 1. Have Recruitment T&Cs** that clarify you (or your recruiter) may monitor publicly available social media sites for certain purposes; Seek **consent** on acceptance of the terms.
- 2. Treat all applicants equally.**
- 3. Monitoring of social media should be ring-fenced / exclude the ‘untouchables’** – set the ground rules.
- 4. Comply with DP principles / grounds /conditions.**

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SOCIAL MEDIA : VICARIOUS LIABILITY


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Can an employer be responsible for actions of his employees on social media?

<< YES >>

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- (1) General Vicarious Liability – Civil Code; Article 1037**
- (2) Specific Laws :**
 - 1. Harassment**
 - 2. Libel**

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HARASSMENT

- **Harassment and Sexual harassment** : “subjecting a person to any unwelcome act, request, conduct, including spoken words, gestures or the production, display or circulation by any means of written words, pictures or other material which could reasonably be regarded as offensive, humiliating, hostile, degrading or intimidating to such person. – EIRA

[see also : Equal Treatment in Employment Regulations, Equal Opportunities Act, and Equality for Men and Women Act .. which also define ‘sexual harassment’]

- Can be committed in any way/form.
- Must be offensive, hostile, degrading or humiliating – subjective element
- Can be committed by both an employer as well as an employee


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THEREFORE HARASSMENT can occur also on Social Media

- **Webb v State of Queensland (AUS) 2006, QADT**


Employee was found guilty of sexual harassment by harassing colleague on Facebook and via email.


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An employer can be held vicariously liable in view of its obligations :

1. “Duty to ensure the health and safety at all times of all persons who may be affected by the work carried out for such employer” – OHS, Chap 424
2. “Employers shall also be deemed to have discriminated against a person if they (b) neglect their obligation to suppress any form of harassment at their workplace.” – ETIER, Article 3(4)
3. “The employer shall take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion” – ETIER, Article 12A

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Employer held responsible for Fraping ...

Otomewo Vs Carphone Warehouse Ltd 2011 (ET 2330554/11) : Colleagues used employee’s mobile and changed the FB update to read ‘finally came out of the closet ... I am gay and proud’. [Frapping]

Tribunal : (1) upheld claim of sexual orientation harassment and (2) **found the employer to be vicariously liable** :


“the actions were done at work, during work hours and involved dealings between staff and their manager”


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NOTE : but the law refers to ‘workplace’ ?


- US/UK- CaseLaw extends also to social media – as long as there is a ‘connection’ to the employment/work/colleagues...
- **Crowley v LL Bean Inc ;** (1st Circ. 2002) 303 F.3d 387.
- **Graham v Portrae Stevedores,** (UD 574/200) (Ireland)
- **Blakey v Continental Airlines.** (N.J. 2000)751 A.2d 538.


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Therefore :

- ✓ **DO** adopt adequate policies which extend to social media, including outside of working hours;
- ✓ **DO** adopt Grievance Procedures;
- ✓ **DO** act immediately;
- ✓ **DO** take note of actions taken by the company;
- ✓ **DO** treat as confidential;


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LIBEL : Can defamatory libel be committed through Social media?

- "**Defamatory libel**" [Press Act] : "whosoever shall by any means mentioned in article 3, libel any person, shall be liable on conviction to a fine (multa)"
- **Article 3** defines "**printed matter**" as: "writing printed in typographical characters or by lithography or any similar device or process on paper or other substance."

Therefore, as such, nothing excludes libel on social media.


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LIBEL ON SOCIAL MEDIA:


1. **John Cassar White v Dr. Sladden nomine** (online libel case)
2. **Richard Cachia Caruana v Joe Grima** (first Maltese FB libel case – inversion of onus of proof) :

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CAN THE EMPLOYER BE VICARIOUSLY LIBEL FOR EMPLOYEE'S COMMENTS ON SOCIAL MEDIA ?

- (I) **Art. 23 Press Act** >> Claimant can sue [civilly and criminally] (i) **author** and (ii) **editor** or (iii) **publisher** (if the others are not known)
- (II) **Is the employer** : the author? an editor ? A publisher ?
- (III) **Art. 25** >> These persons shall be **deemed** to have acted knowingly, in default of evidence to the contrary.


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CAN THE EMPLOYER BE VICARIOUSLY LIBEL FOR EMPLOYEE'S COMMENTS ON SOCIAL MEDIA (e.g. on company blog, twitter, website etc)?


1. **Dr Louis Galea v Etienne St John Et Noe (2015)** – every republication of a libel is a potential new libel.
2. **Michael Falzon v Sammy Meilak et** - adopting comments as your own.


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>> Does the e-Commerce Act "mere-conduit" or 'hosting' exclusion apply ? Notice and Take down ? ... >> Not yet tested by Maltese Courts


1. **Daphne Caruana Galizia (Rik Nru 46/11 - 19.10.2015)** – responsible for failing to take down third-party comments on her website – **adopting comments as her own.**
- *Referred to controversial **Delphi Vs Estonia (ECHR - 16.06.2015).***

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TRADE LIBEL Article 29 :

*Whosoever ... shall publish any statement which he knows or with due diligence could have known to be false and which is **likely to damage any business concern or other property**, shall be liable to pay, in addition to the damages ... a sum not exceeding € 11,646.87.*

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Evolving Legal Issues

Dr. Thomas Bugeja

1. **Ownership Disputes** – who owns your likes and followers?
2. **Social Media misconduct:** your company's image at stake –
 - o **Human Rights considerations.** Where to draw the line?
3. **Social Media Policies** – self-regulation as the way forward


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Ownership Disputes


Who 'owns' your likes and followers?

1. **Twitter 'followers'**
2. **Facebook 'Likes'**
3. **LinkedIn 'Contacts'**




Importance of social media in certain industries:
PR, Communications, Journalism, Marketing

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Twitter – The Basics




- o Twitter allows users to tweet – send instant messages made up of text or text/content restricted to 140 characters
- o Users sign up from the sign up page and create a Twitter 'handle' –e.g. @thomasbugeja
- o Once the user starts tweeting – the profile starts to rake up 'followers' – other Twitter users who want to 'follow' the user's tweets

Followers = Reach = Value = Money


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Twitter – Who owns your account?




- o **Twitter Terms and Conditions** provide:
 - You are responsible for safeguarding the password that you use to access the Services and for any activities or actions under your password.*
 - the Account, as all accounts are, is the exclusive property of Twitter and its Licensors*
- o Control is vested in the person controlling the login details – without login details – there is no access to the account

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Twitter – Who owns your account?




In an employment context:

- o Is an account still owned by an employee if the account was opened following instructions from an employer?
- o Does an employer company have any rights over accounts opened by employees in the course of their work?
- o Does a company have rights over Twitter handles using the company name in their handle e.g. @MITLathomasbugeja?


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Twitter – Who owns your account?





- o Laura K was chief political correspondent for BBC News and used @BBCLauraK handle.
- o She garnered 60,000 followers which followed her tweets, which focused on British politics and real-time updates
- o Laura K subsequently moved to ITV (BBC's direct competitors) and **changed her handle from @BBCLauraK to @ITVLauraK** effectively transferring her 60,000 followers to the competition.

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 **PhoneDog v Kravitz (US)** 


- Employee Noah Kravitz worked for PhoneDog, a tech blog based online. Noah created a twitter account during his employment named @PhoneDog_Noah, wherein he gained 17,000 followers
- Kravitz left PhoneDog and changed his Twitter handle, turning into @noahkravitz
- PhoneDog sued Kravitz on a number of grounds including; trade secret misappropriation and interference with economic advantage





 **PhoneDog v Kravitz (US)** 

PhoneDog claimed:

- Each Twitter follower was worth \$2.50 in advertising revenue potential – and that therefore Kravitz owed them:
\$2.50 X 17,000 followers x 8 months = \$ 340,000 in damages and lost advertising
- It was not seeking damages for loss of ownership but for interference with its right to generate marketing revenue through its Twitter account





 **PhoneDog v Kravitz (US)** 

Kravitz argues:

- PhoneDog had no proof of the accounts’ ownership – he had created it
- Damages of \$340,000 could in no way be ascertained
- Followers were free to ‘subscribe’ or ‘unsubscribe’ – therefore ‘followers’ could not be owned


Case was settled out of court and therefore no judgment exists on the merits related to ownership of accounts and followers




 **Who owns your Twitter Account?**

“ consensus seems to be that if an employee is tweeting under only their own name, there is no way a brand could seek to claim ownership of such a profile. Conversely, an employee running a branded feed would pretty obviously not be able to take the profile with them if they left.” – The Wall tech blog

@ThomasBugeja – owned by myself
 @MITLA – owned by MITLA
 @MITLATHomasbugeja - ???





 **‘PhoneDog’ remedies in the Maltese Context**

i) **Twitter Trademark Policy** – if a hijacked Twitter account is being used to mislead others through the unauthorised use of trademarks’ Twitter will suspend the account and notify the account holder.

However this provides no remedy if the ‘hijacker’ changes the name and pictures and keeps the followers only.


ii) **Misappropriation of Trade Secrets**
 - no mention of trade secrets under Maltese law except for Article 29(2) of the Food Safety Act where the law prohibits inspectors from divulging trade secrets.





 **PhoneDog’ remedies in the Maltese Context**

iii) **Fraud, Theft or Misappropriation**
 Employers may arguably claim that the ‘hijacking’ of the account in question is misappropriation of ‘trade secrets’ –
Police v Lisa Borain – Police prosecuted an employee for misappropriating a confidential client list. Borain was acquitted since the Police erroneously accused Borain of misappropriating money and not the list




iv) **Civil claim – tort/contract**
 Best way to protect these interests is to includes these provisions in a social media policy/employment contract and then enforce them in the Civil Courts – also through possible pre-liquidated damages




LinkedIn Contacts

- LinkedIn is a social media website targeting professionals who seek to network and create professional contacts online
- LinkedIn allows user to make 'connections' which as a whole form the user's network of professionals.
- LinkedIn T&Cs make it clear that *'between you and others, your account belongs to you'*
- But do employers have rights over LinkedIn connections or accounts? In what way?

LinkedIn Contacts

- **Hayes Specialist Recruitment v Mark Ions** – defendant used a confidential email database to upload emails to LinkedIn and convert them into connections. Court granted pre-action disclosure and acknowledged the 'confidential nature of the connections'
- **Whitmar Publications v Gamage & Ors** – defendant ex-employees of plaintiff, left company, used LinkedIn contacts to issue press release regarding a competing firm and hijacked the LinkedIn login details- Court found in favour of plaintiff company.







LinkedIn Contacts

In both cases, Court considered:

- Who set up the account? Company or employee?
- Was account opened before or during employment?
- Was maintaining the LinkedIn account part of the work duties?
- Whether there are non-compete clauses, policies or social media policies regulating such ownership







LinkedIn Contacts / Twitter Followers

Can they be considered copyrighted 'databases'?

Under the Copyright Act, Chapter 415 of the Laws of Malta:

11. (1) *Copyright [...] shall vest initially in the author or in the joint authors: Provided that in the case of computer programs and databases where a work is made in the course of the author's employment, in the execution of his duties or following the instructions given by his employer, the economic rights conferred by copyright shall be deemed to be transferred to the author's employer, subject to any agreement between the parties excluding or limiting such transfer. In respect of other works eligible for copyright, in such circumstances, subject to any agreement to the contrary between the parties, the copyright shall always vest in the author or joint authors.*






Can these Contacts or Followers be 'databases'?

Copyright Act, Chapter 415 of the Laws of Malta:

"a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means"

3(4)A database shall not be eligible for copyright unless by reason of the selection or arrangement of its contents, it constitutes the author's intellectual creation. Moreover the copyright conferred to a database shall not extend to its contents and shall be without prejudice to any rights subsisting in such contents themselves.






Database Case-law Malta

Yellow Pages (Malta) Limited vs Jurgen Neumann et

- *"...meta gew prodotti l-Yellow Pages ta' Malta kien hemm originalita` fix-xoghol, fit-tqassim tas-sezzjonijiet diversi u fil-format li ntaghzel, u dawn iwasslu biex jinholoq id-dritt ta' l-awtur fuq ix-xoghol in kwistjoni. Kien hemm l-originalita` ta' xoghol awtonomu u indipendenti, u ghalkemm il-kontenut ta' l-istess individualment mhux protett, il-forma generali hija frott tal-kreativita` tax-xoghol ta' lattrici."*



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Other Case Law

Nautech Services Limited v CSS Limited (2014) Jersey

- Employees moved to competing firm taking with them client database
- Work contacts were copied to personal emails onto new work phone
- Contacts used for the benefit of new employer CSS
- Court found that database was copyright protected confidential information
- Exception made for LinkedIn – despite Nautech having paid for premium account
- LinkedIn User Agreement – content and info belong to the User

Judicial recognition – LinkedIn contacts belong to the Employee(for now)



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Social Media misconduct:
- your company's image at stake

Human Rights consideration
- Where to draw the line?



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Misconduct and Dismissal under Maltese Law:

Chapter 452, EIRA defines an unfair dismissal as one which:

- Is **not made on the grounds of redundancy or for a good and sufficient cause**
- Is **made against a person acting in furtherance of a trade dispute**
- Which although **made on the grounds of redundancy is discriminatory**

No definition of 'good and sufficient cause' but EIRA provides a list of what cannot constitute good and sufficient


e.g. Marriage, whistleblowing, pregnancy, transfer of business




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Traditional Misconduct:

- o Crime
- o Theft
- o Violence
- o Insubordination
- o Sabotage
- o Absenteeism
- o Bullying
- o Sexual Harassment
- o Breach of Duties
- o Breach of Company policy
- o Lack of performance
- o Lack of Punctuality
- o Waste of Time
- o Lack of Productivity
- o Damage to company image
- o Damage to company reputation
- o Loss of clientele
- o Disrespect to Superiors
- o Divulging Confidential Information
- o Abuse of sick leave/entitlements
- o Breach of Health & Safety
- o Gross Negligence



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What does the Social Media bring to the table:


- o SM can **expose** misconduct
- o SM can be a tool for the commission of misconduct

More importantly:

- o SM **redefines** the boundaries between work and private life
- o SM **transforms** every employee into a brand ambassador and representative
- o SM's reach **magnifies** accidents, mishaps and blunders

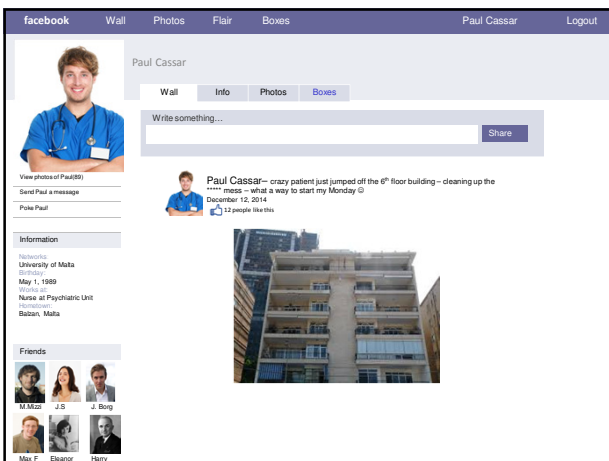
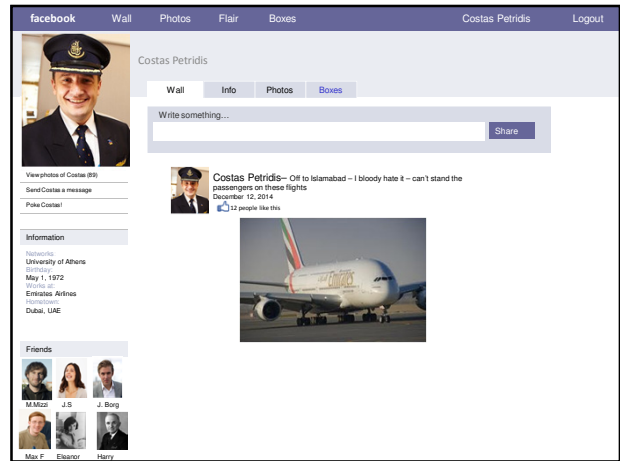
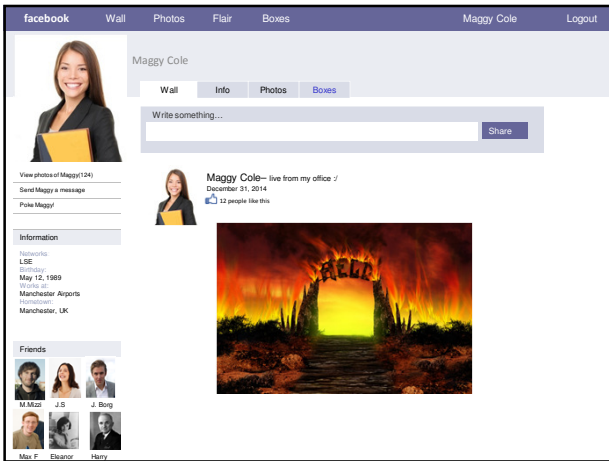
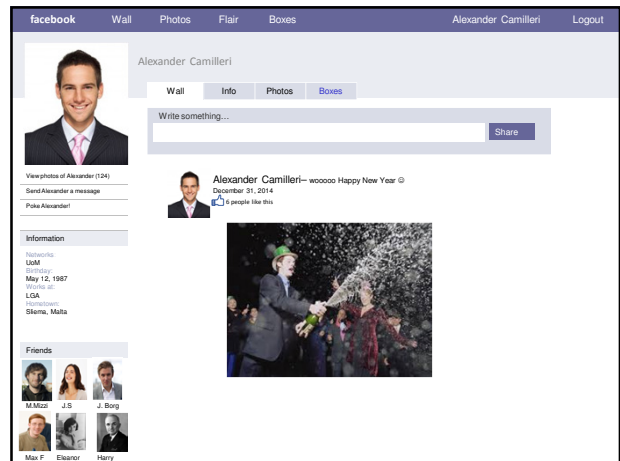
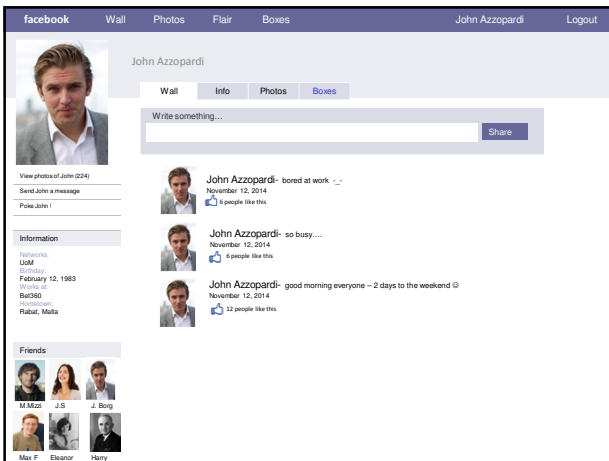



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DISCLAIMER








Social Media Dismissal Cases:

- Wasting time on social media – *Grant and Ross v Mitie Property Services (UK)* (unfair)
- Being caught lying to employer via social media- *Dekort v Johns River Tavern (AU)* (fair)
- Portraying work as ‘Hell’ on SM - *Weeks v Everything Everywhere Ltd (UK)* (fair)
- Offending employer’s clientele– *Wasaya Airways LP v. Air Line Pilots Assn (CN)* (unfair)
- Breaching Client confidentiality – *Credit Valley Hospital v. Canadian Union of Public Employees (CN)* (fair)



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Social Media Dismissal - Conclusions

In the absence of specific social media laws – **General Employment Law Applies**

Principles:

- o **Proportionate** reaction to misconduct
- o **Prior warnings**
- o Employee must be given the **right to state his case**
- o Dismissal as the very **last resort**

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Social Media Dismissal - Conclusions

Factors which might shift the balance in Social Media dismissal cases:

- o **Role of employee** – managerial v low level?
- o **Causal link linking employee to employer**
- o **Real Damage** to clientele, sales or reputation
- o **Number of friends or followers – reach**
- o **Severity** of actions;
- o **'Contributory Negligence'** – present in UK unfair dismissal cases (1051 Civil Code)
- o **Employment and disciplinary history**
- o **Apology/remorse**

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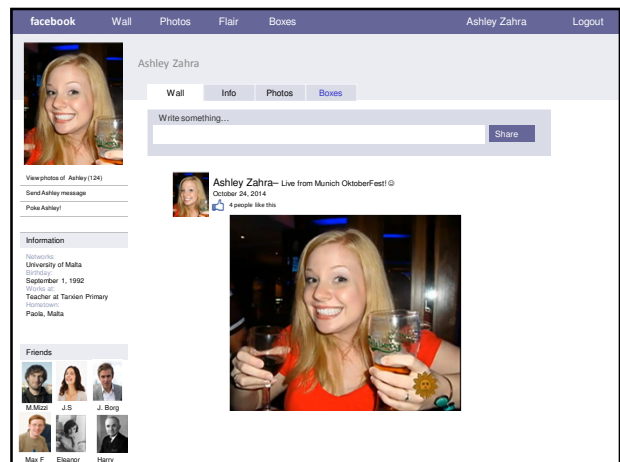
Social Media Dismissal – Human Rights Considerations

Human Rights in Malta are protected in terms of:

- The European Convention of Human Rights (ECHR)
- The European Convention Act, Chapter 319
- EU Charter of Fundamental Rights

- o The main issues in this regard are:
 - Article 8: "The right to respect for private and family life"**
 - Article 9: "Freedom of Thought, Conscience and Religion"**
 - Article 10: "Freedom of expression"**

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Article 8 – Right to Private and Family Life

SM destroys the boundary between working time and private life

Questions:

a) *Isn't a personal profile/account part of a person's private life?*

b) *Does the employer have a say in what an employee does after working hours?*

a) **Privacy related to public social media accounts**

- o What is posted online – is **public forever**
- o **Foreign case law** – when Profile is public there can be **no serious expectation of privacy** – even if privacy settings might have been restricted
- o Difficult to argue to the contrary

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Article 8 – Right to Private and Family Life

b) **Right to private life after working hours?**

- **Different approaches in European Jurisdictions** e.g. French legal system advocates strict approach between working time and private life
- **Niemitz v Germany (ECtHR)** 'Right to private and family life' also exists at workplace (Niemitz v Germany)(ECHR)
- **ECtHR Judgments – Spatial element (location of private life)**
 - **Pay v UK** - (Probation Office – public website) (special nature of employment)
 - **X v Y** – (sex offender in public)

No private life in public = no private life on Facebook – debatable?

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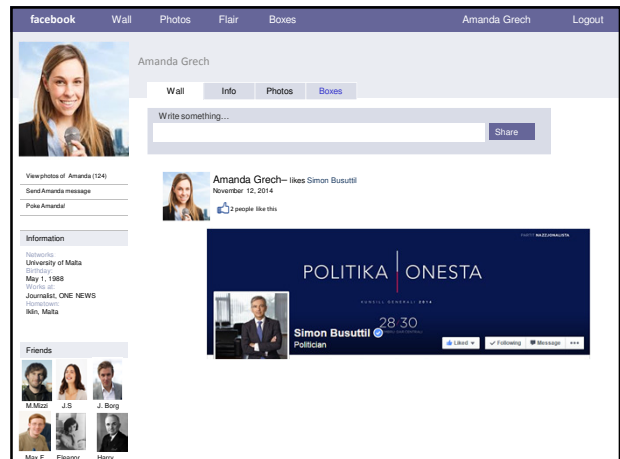
Teachers and their Private Life

S.L 327.02 – Teachers (Code of Ethics and Practice) (Education Act)

teachers shall:

- act with honesty, integrity and fairness
- uphold public trust and confidence in the teaching profession

2.1 maintain professional boundaries whilst in school and out of school, avoid improper physical contact, avoid inappropriate communication via any form of media and avoid inappropriate relationships with students. The members of the teaching profession are duty bound and are ultimately responsible to maintain a professional distance;

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Article 10 – Freedom of Expression – at work?

Article 10 of the ECHR provides:

'Everyone has the right to freedom of expression' subject to the restrictions or penalties ...necessary in a democratic society for the protection of the reputation and rights of others'

Crisp v Apple Retail (US) –

Crisp was fired by Apple after he made a series of Facebook posts insulting and damaging the 'Apple' brand – Court ruled that freedom of expression was not breached since Apple had a right to expect the protection of its reputation from one of its employees.




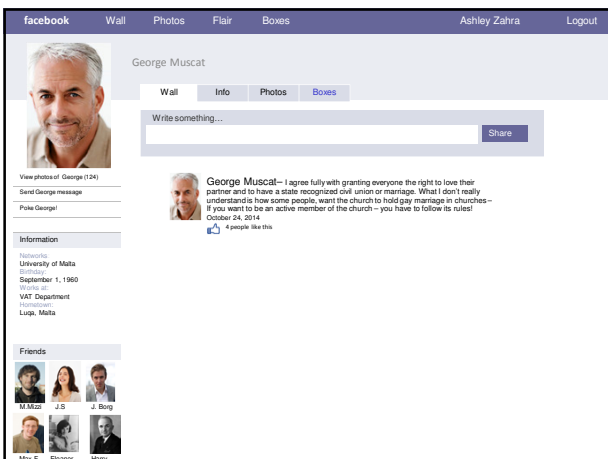
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Article 10 – Freedom to talk politically at work?

Dorothea Vogt v Germany (ECHR) decided that freedom of speech (political opinion) should also be covered in a work context (some exceptions e.g. police, civil servants)

Freedom to like Facebook Pages?

Bland v Roberts (US Supreme Court) - 'A like is the internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held as substantive protective speech'

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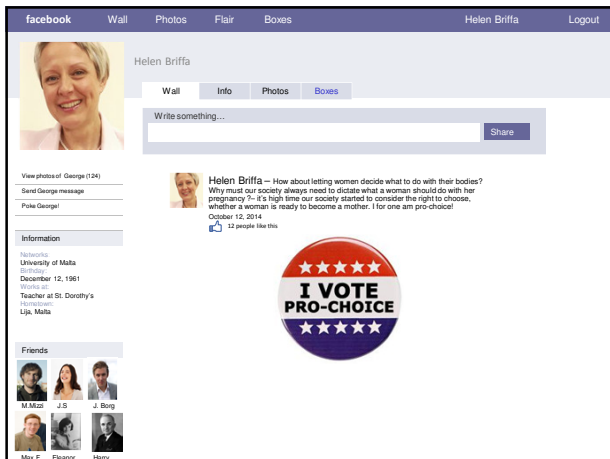
Limitations to the Freedom of Expression?

Smith v Trafford Housing Trust (UK) – internal policies cannot restrict freedom of speech when speech is expressed sensitively and politely without such speech being aggressive, offensive or insulting. Court said that Smith had expressed views on non-work related issues which anybody could express " in a "pub, club, a sports ground or any physical or virtual place where individuals meet and converse.

To justify dismissal – **expression should be directly and inherently contrary to company policy**

Van der Heijden v Netherlands (ECHR) – freedom of expression is protected but cannot be incompatible with the nature of the employment – person working in immigration foundation cannot be a member and speak in favour of a far-right anti-immigrant party





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Freedom of expression – working with religious institutions?

Equal Treatment in Employment Regulations:

4(2) *“employers whose ethos is based on religion or religious belief, shall have the right to require individuals working for them to act in good faith and with loyalty to the organisations’ ethos.”*

Therefore:

- Can church school teachers speak openly on Social media on matter such as abortion, gay rights, euthanasia, religion?
- Countries such as Spain, UK only enforce this on strictly ideological employees e.g. catechism teacher
- Position under Maltese law remains unclear and untested
- **Rommelfanger case**

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Social Media Policies – Self Regulation as the way forward

Social Media Policies help:

- Clarify grey areas and bones of contention
- provide guidance to employees
- clarify what is acceptable and what is NOT
- Help mitigate risks of misuse and misconduct

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Social Media Policies – Self Regulation as the way forward

Social Media Policies should :

- o Contain guidance on acceptable and unacceptable use on work PC and tools
- o Include clear rules on excessive use and use during working hours(also applicable to personal devices)
- o Clearly notify employees of any Data Processing and Social Media Monitoring and justify this in terms of applicable DP law
- o Regulate employee use of Twitter and whether they are allowed to use the employer’s name and trademarks

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Social Media Policies - continued

- o Include editorial policy (e.g. in case of media houses) and what views are acceptable or unacceptable
- o Could consider suggesting the use of a disclaimer:
 - o “the views I express are mine alone and do not reflect my employer’s views”
- o Can impose strict separation between Twitter work accounts and private twitter accounts
- o Make reference to the company’s anti-harassment and bullying policy
- o Reasonably define ownership of accounts, followers, contacts

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Social Media Policies - DO’s and DON’Ts

DO’s

- Ensure that prohibitions are as narrow and specific as possible. Give practical examples
- Require employees working on social media on behalf of the company to sign a specific agreement transferring IP rights and ownership to the company
- Provide employees with guidance and tools to maximize beneficial social media use
- Deal with disciplinary matters reasonably and proportionately
- Seek legal advice to ensure compliance with the law



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Social Media Policies - DO's and DON'Ts



DON'T's

- Impose blanket bans or draconian measures
- Accept anything which is rude, crass, insulting or offensive –these should always be out of bounds
- Hamper employee use of Social Media – guide employees in better use
- Over-regulate areas which might have Human Rights implications



Thank you!

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