Email and Internet Use by Employees

Louise Harrison advises on the best practice when implementing a workplace policy on email and internet usage.

Employers are increasingly being confronted with problems arising out of employees’ use of email and internet systems.

Productivity, reputational and other issues can arise out of employees’ use of email, internet and/or social networking sites. An employer may even find itself liable for defamation arising out of material disseminated by an employee via email or blogging in the course of work. Further, an employer’s interests can be adversely affected by material sent or posted outside working hours, and/or via home or personal systems.

What Can an Employer Do?

A block on non-work related email/internet use and/or social networking in the workplace is an option but is simply not realistic. A more pragmatic approach is the implementation of a workplace policy clearly outlining the parameters of acceptable use and prescribing transparent disciplinary procedures to apply when the policy is breached. Enforcement of the policy must be proportionate and an employer should have a legitimate business basis to underpin its disciplinary processes and to justify any sanction imposed.

The Employment Appeals Tribunal (the “EAT”) has considered these issues on many occasions in the course of determining employee dismissal claims. It has focussed more on the employers’ procedures and sanctions imposed for ‘e-misconduct’, than on the misconduct itself. We can extract a number of key lessons from the cautionary tales discussed below.

Cautionary Tales

PWC ‘Top Ten’

Email is an invaluable tool, but given its spontaneous nature, its content tends to be relatively unguarded. Email is a common forum for workplace banter, which is an unavoidable reality and is perceived by employees to be harmless. However, email banter, though intended for a closed audience, can assume a starkly different complexion if it is seen by an unintended recipient or, as can all-too-easily happen, it becomes ‘viral’.

PWC suffered adverse publicity late in 2010 when an email chain circulated among a group of male trainee accountants, in which they ‘rated’ their female trainee colleagues, was forwarded outside the initial addressee list and eventually reached the inbox of a journalist and in turn the world’s media. The controversial email chain, which included photographs of its female subjects which had been copied from the company intranet, was widely published. The consequences for PWC and for all individuals concerned were serious.

An incident such as this can throw up a multitude of issues for an employer including privacy, data protection, equality and harassment in the workplace. Having solid policies in place may have a deterrent effect and will assist in managing the fallout from an incident such as this.

Mehigan v Dyflin Publications

An employee, who had disseminated pornographic material from his work PC, was dismissed on the basis that this was gross misconduct. Despite the gravity of what he had done, the EAT found that the dismissal was unfair and he was awarded compensation. The basis for the EAT’s conclusion was that no guidance had been given to employees on the acceptable use of email facilities.

Notably, the EAT said that:

“…the use of the internet for unauthorised purposes will (likely not) amount to a sufficient reason justifying an employer from dismissing an employee in the absence of a clear written policy statement to this effect…”

A number of other cases illustrate that disciplinary action for misuse of email or internet is unsound unless the employee in question has been made aware of the consequences of his or her actions.

Another principle which is given weight by the EAT in assessing employers’ handling of email and/or internet misuse is that of proportionality.

A-wear/Bebo Case

An illustrative case on proportionality is that of Emma Kiernan – v- A Wear Limited. An employee posted profane comments about her branch manager on the social networking site, Bebo, outside work. The remarks were brought to management’s attention by a customer and a disciplinary meeting followed. The employee, who had a previously clean disciplinary record, was suspended pending a disciplinary hearing. Ultimately, the employee’s actions were deemed to be gross misconduct and she was dismissed.

The EAT decided that while A-wear’s disciplinary procedures (the investigation processes) were fair, dismissal was a disproportionate sanction and the employee was awarded €4,000 as compensation for unfair dismissal. Of note is that the EAT accepted that an employee’s online activities outside work can constitute misconduct.
**Bausch & Lomb Intranet Hacking**

A further example of the EAT’s emphasis on proportionality is Walker v Bausch & Lomb Limited. This case highlights that workplace rules and procedures must be brought to the attention of employees; otherwise they will be futile.

The employee in this case had altered the Company’s intranet welcoming page with the following message:

“500 jobs to be gone at Waterford plant before end of first quarter 2008”

Inevitably, this had serious implications in terms of publicity and workplace industrial relations. The unauthorised posting on the intranet was a breach of the Company’s internet policy and therefore constituted misconduct. The employee was suspended with pay while an investigation took place and was ultimately dismissed.

The EAT found that the employer’s investigation was thorough and fair. However, it determined that the employee had been unfairly dismissed, opining that “…The disciplinary sanction must be proportionate and within the band of sanctions which would be imposed by a reasonable employer…”

The EAT decided that the employer fell foul of this requirement.

A weighty factor for the EAT was that there was no proof that the employee had ever received and reviewed the company’s intranet policy.

In large companies with staff turnover it can be an administrative burden to ensure that all employees have ‘received and understood’ workplace policies. Bausch and Lomb demonstrates the implications of failing to do so.

**Detection of Misuse of Email and Internet**

An employer must ensure that monitoring of employees’ use of company systems does not infringe data protection or privacy law. A business interest must underlie monitoring, employees must be aware that monitoring may be undertaken, and monitoring must be proportionate, never systematic.

A prudent employer will notify staff that there can be no expectation of complete privacy but that monitoring will be undertaken only with ‘good cause’. ‘Good cause’ can be defined in the policy to include matters such as the investigation of suspected misconduct, policy breaches, unexplained poor performance, or consistent productivity issues.

**Lessons learned!**

**A good policy on employees’ use of email and internet will:**

- Define the parameters of acceptable use of email and internet (and give examples of misuse);
- State that personal use must be minimal;
- Remind employees that sending an email is in effect sending a postcard to, potentially, the world;
- In defining ‘misuse’, express that any communication which could have the effect of bringing the employer into disrepute is misuse and therefore misconduct;
- Encompass employees’ activities outside of working hours where such activities bring the employer into disrepute;
- Encompass social networking, blogging, online shopping, internet gaming and gambling;
- Remind employees that deleting an email does not make it untraceable;
- Cross-refer to policies on bullying and harassment, equality and data protection;
- Notify employees that if they receive offensive material, HR or IT should be notified, the material must be deleted and should in no circumstances be forwarded or retained; and
- Outline the consequences of misuse, which should include dismissal, and cross-refer to the disciplinary policy.

**Effectively Communicating the Policy**

- Cross-refer to the email and internet policy in employment contracts;
- Make it clear in the contracts that a breach of policy will be a disciplinary matter (up to and including dismissal);
- Provide copy policy (or access to policy) upon commencement;
- Include an acknowledgement slip of ‘receipt and understanding’;
- Allow a period of time for employees to get acquainted with the policy and ensure prompt return of signed acknowledgement slip.

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