



## Social Media outside work: can employers take action?

**Philip Cameron** - 14 July 2021

Everyone has the right to a private life, this includes a right to post messages on their personal social media, but what if employees post offensive or inappropriate comments? When can you take disciplinary action and what do you need to know?

### Can personal social media posts amount to misconduct?

Even though a post is on an employee's personal social media, this can potentially amount to misconduct in some circumstances. Types of conduct that could amount to misconduct include things such as using social media to:

- Make offensive or discriminatory comments;
- Make comments that bring the employer into disrepute;
- Make negative comments about their employer;
- Disclose the employer's confidential business information.

Typically, social media posts that amount to racial harassment when it is clear from the individual's post who the employer is will bring the employer into disrepute.

### What can employers do?

First it is key to investigate so you are clear on the facts and if there is evidence the employee has committed misconduct.

If you ultimately find that misconduct has occurred you can take disciplinary action up to and including dismissal. Note that employees who have been employed for at least two years have the right not to be unfairly dismissed (see our [note here](#) for further information on unfair dismissal).

### Factors before you take action

Whether a dismissal in this situation is fair or not can only ultimately be decided by an Employment Tribunal, but there are various factors which it would take into account that provide helpful guidance for employers when assessing what action to take. Some of these factors include:

- Do you have a social media policy? If so, whether it has been breached;
- Severity of the comments;
- Any (actual or potential) damage to customer relationships or impact on your business;
- The employee's position and role;
- Whether your business, or names of customers or colleagues are mentioned or identifiable; and
- What the employee has said in mitigation.

Employers should take advice and guidance on these factors before taking disciplinary action.

### **Your social media policy**

You should keep your social media policy under regular review to ensure it reflects your business needs. For example, does it make clear that certain behaviour is unacceptable even if it is outside of work? As well as this, following any investigation you should check whether your social media policy is still appropriate and if any changes are needed.

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This note is for information only and is not legal advice. It reflects the position as at 13 July 2021. For any questions, please get in touch with [philip.cameron@gqlittler.com](mailto:philip.cameron@gqlittler.com) or your normal GQ|Littler contact.