Revealed: the stuff of life on SCREEN now

In the previous edition of Tribunals, *Barry Clarke* discussed the increasing prominence of social media in daily lives. In this follow-up, he considers how such sites can produce evidence relevant to judgments.

In preparing this article, I have assumed that the reader does not use social media. The focus will be on Facebook and, to a lesser extent, on Twitter, because these are the two most popular social media sites in the UK. I will be drawing on my experience of the sorts of dispute typically heard by the Employment Tribunal, although my observations should be relevant to other members of the tribunals family. I will also adopt the device of an imaginary person called John.

Signing up

Neither Facebook nor Twitter charges a joining or membership fee. Facebook users must be aged 13 or over (although no proof of age or identity is demanded). John is 40 years old – the average age of a Facebook user – so this presents no problem. John only needs to supply a user name (real or a pseudonym), an e-mail address, date of birth and gender. Of these, only the e-mail address is subject to any process of verification. He also sets an account password. Signing up to Twitter is just as straightforward: he provides his name and e-mail address, chooses a user name, agrees to certain terms and conditions, and selects a password. Twitter does not stipulate a minimum age.

Creating a profile

Now that he has signed up for a digital life, John may choose to create a profile, which he presents to the world at large or, if he is shrewd enough to modify the default privacy settings, to a smaller group of friends. Like many engaging in social media, John is not very guarded about his privacy, perhaps because he wants to be easily located by friends or because he is just not technically savvy. On both sites, he therefore uses his real name and a real picture of himself. As John works as a firefighter and is proud of the job he does, he chooses a picture of himself in uniform. John also provides autobiographical information. Being a compliant sort of fellow, he answers without hesitation questions about his date of birth, his home town, his marital status, the school and college he attended, his political and religious views, his favourite books, films, television programmes and sports.

One day, academics may explain why people are willing to impart to the world at large the sort of information they would hesitate to reveal to a stranger in the street. This 'oversharing', a uniquely social media phenomenon, raises many concerns about privacy but, on the plus side, it enhances John's social media experience as it allows him to connect with those who have similar interests and to benefit from highly targeted marketing. He does not change his Facebook default settings, so all of this information is visible to the world at large. On his Twitter biography, also available to the public, John writes that he is a '40-year-old male, fire-fighter, proud Yorkshireman, interested in women, rugby, football, beer and having a laugh'.

Making connections

John starts connecting with people, an easy process as both Facebook and Twitter use software that searches existing contacts stored on John's phone or computer to identify friends, family members and colleagues already using social media. By the end of his first day, John has 'befriended' 50 people on Facebook. (There is a reciprocal element to this process: John's proposed friends must accept his 'friend requests' or he must accept theirs.) Facebook identifies further associations between those John has befriended – and their onward friends – and

suggests others with whom he can connect: former colleagues, acquaintances at his local sports club, old school friends and more distant family members. The list goes on. As he is not especially choosy, John's list of 'friends' grows to 400 within two months.

Robin Dunbar, professor of anthropology at Oxford, has suggested that the maximum number of meaningful friendships a person can maintain at any point in time is about 150, and recent research has validated the application of Dunbar's number to social media sites. John has thus connected on Facebook with an awful lot of people who – in the traditional, stable and secure sense – are not actually his friends.

On Twitter, many celebrities, performers and commentators have a prominent presence and, regardless of the quality of their online musings, garner thousands (and occasionally millions) of 'followers'. (To 'follow' a person on Twitter is not the same as 'befriending' a person on Facebook, since there is no reciprocal element by which the person must follow you back.) John now decides to follow several hundred celebrities and commentators on Twitter.

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Receiving and transmitting

Some users of social media are only 'receivers' – they listen to what others say. But most are 'transmitters' – they are responsible for generating the content that is the lifeblood of social media, which includes the countless millions of texts, photographs and audio updates supplied across the world. On Facebook, John can transmit by writing a 'status update'. This will be a short item of written content in which he may explain what he is doing or thinking at that moment, or which he may link to something interesting he has read (such as a blog or newspaper article) or seen (such as a YouTube video or amusing cartoon). He may use it to support or complain about an issue, either as a social or political observation or simply a comment about a football match. John can also transmit on Facebook by uploading photographs in which he can 'tag' his friends. (i.e. put a name to the picture), or recommending Facebook profile pages for individuals, charities or campaigns. He can also comment on the updates of his friends, or approve of an update or photograph by clicking a link marked 'like', or engage in a conversation thread.

Crucially, John himself selects the visibility of all this content: he can limit it to a group of close friends, or he can show all his friends, or he can show 'friends of friends' (a potentially huge number) or he can even display it to the world at large. It will appear on his profile page and in the 'news feeds' of his friends. A news feed is how a Facebook user receives. Through this feed, John can read the updates shared by all of his friends or, if he wishes, only updates from a limited number.

On Twitter, John can transmit by sending a 'Tweet', a short message of no more than 140 keyboard characters. Again, this can be used to explain what he is doing or thinking or it may link to an article, photograph or video. This tweet will usually be open to the world at large to read, but the global volume of tweets is such that only John's few followers will be likely to see it. Alternatively, John can increase the visibility of his tweet by linking it to a more popular user or by giving it a 'hashtag', which simply involves adding a word or two at the end of the tweet preceded by the # symbol. Hashtags can cover an infinite number of subjects, from the weighty (the employment law hashtag is *#ukemplaw*) to television game shows (e.g. *#xfactor*). They represent the main mechanism by which Twitter's abundant content becomes searchable.John receives on Twitter simply by reading the content posted by bloggers who

interest him or by searching for the hashtags associated with his hobbies.

I hope this brief description of how Facebook and Twitter work will enable readers to understand better how social media content can produce evidence of importance in a legal dispute.

Undermining sworn evidence

Our first example is where social media content wholly undermines the sworn evidence of a party or witness. In one of my own cases, a hairdressing salon dismissed a claimant for doing private work on the side in breach of an express term of her contract. The claimant denied the charge, right up until the point that one of the respondent's witnesses arrived with a copy of a previous Facebook 'status update' showing her doing exactly that – complete with photograph.

Other cases include: a claimant dismissed for choreographing a show at London Fashion Week (revealed through her Facebook page) while on paid sick leave;[1] a claimant dismissed for 'liking' a comment by which a manager was described as being 'as much use as a chocolate teapot';[2] and lewd or offensive comments about colleagues.[3]

For our purposes, the most interesting question is this: how did such evidence come to light? John, our imaginary friend, reveals how: first, by being 'friends' with so many people, above Dunbar's number, who would happily disclose it to the employer; secondly, by being 'friends' with colleagues (who may be witnesses in the dispute) who may feel duty bound to reveal it; and, thirdly, through a lax approach to his privacy settings which exposes such content to 'friends of friends' or even to the world at large.

Damage to employer's reputation

Experience shows that many people make unguarded comments about their colleagues and employers on Facebook,[4] or about the quality of their employer's products,[5] or act in some other way that the employer perceives as damaging to its brand[6] or reputation.[7] As above, such evidence may emerge via colleagues or other Facebook 'friends' who have seen it.

Sometimes the connection is subtler. John is proud of his work as a firefighter and so has chosen a picture of himself in uniform for his Facebook profile. Consequently, every time he expresses an online opinion to 'friends of friends' or to the world at large, that picture appears alongside it. Others may therefore deduce that his views are, in some way, representative of the fire service as a whole or capable of bringing it into disrepute, leading to potential disciplinary action.[8]

Drawing inferences

Because there is rarely direct evidence of discrimination, Employment Tribunals are commonly asked to draw inferences of discrimination from other facts. An example of possible inferential material in a race discrimination claim is that a manager has previously expressed hostile views about immigrants.

In my experience, it is increasingly common for claimants to examine social media content in search of inferential material. If John were accused of unlawful workplace harassment, his short Twitter biography might supply some cross-examination material, but the male stereotype it portrays would, without more, be of limited value. However, coupled with an analysis of those he chooses to 'follow' on Twitter or

Cases

1. ***Gill v SAS Ground Services Ltd*** **(ET/2705021/09).**
2. ***Young v Argos Ltd*** **(ET/1200382/11).**
3. ***Teggert v TeleTech UK Ltd*** **(Northern Ireland, 704/11) and *Dixon v GB Eve Ltd* (ET/2803642/10).**
4. ***Whitham v Club 24 Ltd t/a Ventura*** **(ET/1810462/10).**
5. ***Crisp v Apple Retail (UK) Ltd*** **(ET/1500258/11)**
6. ***Taylor v Somerfield Stores Ltd*** **(Scotland, 187407/07).**
7. ***Smith v Trafford Housing Trust*** **[2012] EWHC 3221 (Ch).**
8. ***Molen v Mid and West Wales Fire and Rescue Service*** **(ET/1601221/12).**

'like' on Facebook, it may be more persuasive. If John has used a term widely perceived as racist in one of his status updates, a claimant would no doubt place heavy reliance on that fact.[9] If he chooses to follow on Twitter a number of commentators with anti-immigration views, that would be a further source of cross-examination.

Practical issues for disclosure

If such evidence is out there, how do the parties obtain it? How does a judge get to see it? In my previous article, I suggested that many legal practitioners were insufficiently aware of the relevance of social media content as evidence. Such content may not be part of a document in the conventional physical sense but, as electronically stored information (sometimes abbreviated to ESI), it would still be subject to the rules governing disclosure. Jackson LJ has referred to this as 'e-disclosure'. He has emphasised the importance of judicial training on this topic in order to assist the effective operation of Practice Direction 31B in the civil courts. The Employment Tribunal has equivalent powers to the county court, and so PD31B will be of use when tribunal judges grapple with such disclosure applications.

However, as Jackson LJ recognised, there is a significant hurdle: the lack of IT understanding among many solicitors, barristers and judges, which can result in poorly drafted disclosure requests or orders, the production of excessive and disproportionate ESI and a failure to carry out a proper search for relevant material.[10] Anecdotal experience suggests that few parties or witnesses are told of the importance of ensuring that social media content is preserved (or, indeed, to resist the temptation to delete it). Further problems arise when trying to conduct an investigation of material on social media sites: the party conducting the search may know nothing of the other party's social media activities, while the other party may in any case be entirely unfamiliar with the way in which privacy or search settings operate.

It is possible, in theory, to obtain disclosure direct from the social media company by means of a *Norwich Pharmacal* order. Recently, for example, a High Court master ordered Facebook (incorporated in Delaware) to disclose the identity and IP addresses of several 'cyberbullies'.[11] The Employment Tribunal's statutory jurisdiction, by contrast, means that such orders can only be made against persons in Great Britain. So, while it may be theoretically possible to obtain a disclosure order through the civil courts against the likes of Facebook, it would be a very expensive exercise beyond the reach of typical litigants in the Employment Tribunal.

The likely result is that social media evidence will continue to become available more by accident than design. It will come to a party's attention as a result of the user's poor privacy settings and/or the intervention of an intermediary 'friend' or 'follower'. As is often the case, it may only emerge on the day of the hearing itself. However, if the relevance of the evidence is such that the balance of prejudice favours the party seeking to rely on it, at least it will eventually have come to the attention of the judge.

Cases

[9] ***Swierczyk v Aldi Stores Ltd and another*** **(ET/1601502/11).**

[10] ***Earles v Barclays Bank plc*** **[2009] EWHC 2500 (Merc).**

[11] ***Applause Store Productions and Firsht v Raphael*** **[2008] EWHC 1781.**

Conclusion

The social media phenomenon is here to stay, in one form or another. Its evidential relevance comes not from its online provenance but from the simple fact that it reflects so many aspects of a person's existence – family, friends, interests and opinions – and which is the stuff of life and, by extension, the stuff of conflict. To judicial readers who already use social media: how much does your online activity reveal about you?

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