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EMPLOYMENT LAW: GDPR, TUPE AND SOCIAL MEDIA

By Ben Dylan Williams

The dreaded GDPR



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Introduction

The problem:

- Processing of personal data ramps up with technology
- 1990s legislation (Directive 95/46/EC and the DPA 1998) was creaking under 21st-century strains

The Solution?

- GDPR 2016/679 passed by EU Parliament

May 2016

Kings Chambers
Manchester Leeds and Birmingham

- Adoption date: 25 May 2018

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Not a clean slate – broad architecture stays in place:

- Data controllers must comply with prescribed principles in respect of all processing of personal data
- Individual have rights of subject access, erasure, rectification, compensation, etc.

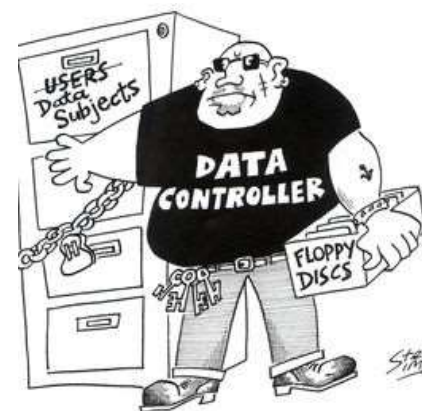


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But there are major new challenges:

- Headline grabbers: consent & transparency more onerous; data breach notifications and potential penalties more painful;
- data controller accountability

sharpened



How will it be implemented?



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- Regulation rather than directive; aims at harmonisation
- But quite a lot is left to member states, e.g. exemptions
- So implementing legislation of some sort is needed

What will happen in the UK?

- Data Protection Bill was put before Parliament 14 Sept 2017
- This will evolve into the Data Protection Act 2018
- Implements and extends the GDPR, and fills in the gaps

The Fundamentals remain



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The building blocks are familiar:

- ‘Personal data’, ‘special categories’ (i.e. sensitive personal data),
- ‘data controller’, ‘processing’ largely intact



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New Data protection principles' – Article 5 GDPR:

- Lawfulness, fairness & transparency
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Integrity & confidentiality
- Accountability: must be able to demonstrate compliance

PRINCIPLES



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- **Consent:** How has it change?
- **Article 4(11) GDPR:**
 - *any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data*



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ICO has issued draft consent guidance (March 2017):

- Don't use pre-ticked boxes/opt-outs/consent by default
- Be 'specific & granular' but also 'clear & concise'
- Explicit consent not much different
- If you can't offer genuine choice, don't rely on consent
- Consent may be difficult for employers & public authorities



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- You should review how you seek, record and manage consent and whether you need to make any changes. Refresh existing consents now if they don't meet the GDPR standard.





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- Consent must be freely given, specific, informed and unambiguous. There must be a positive opt-in – consent cannot be inferred from silence, pre-ticked boxes or inactivity. It must also be separate from other terms and conditions, and you will need to have simple ways for people to withdraw consent. Consent has to be verifiable and individuals generally have more rights where you rely on consent to process their data



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- **Purpose limitation**
 - You must have a specific purpose for collecting and processing data.
 - Specified, explicit and legitimate purpose only.
 - Must not process data in an incompatible way.
- **Data minimisation**
 - Data collected must be adequate, relevant and limited to what is necessary



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- **Accuracy**
 - Data that is collected/processed must be accurate and up-to-date where necessary
- **Storage limitation**
 - Data must be kept in a form which permits identification for no longer than is necessary.
- **Accountability principle**
 - Data controller is responsible for and is able to demonstrate compliance with all of the principles
 - GDPR applies to “Data Controllers” and “Data Processors” alike
 - Data Controllers will be responsible for any breaches/non-compliance by Data Processors who process data on their behalf



"I CAN ASSURE YOU THAT OUR CONCERN FOR
PROTECTING PERSONAL INFORMATION
IS VERY DEEP-SEATED!"



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- **Integrity & confidentiality**

- The new security principle
- Must protect against unauthorised and unlawful processing, loss, destruction and damage
- Must use appropriate technical and organisational measures to achieve this

THEMES – The right to Subject Access

- Subject Access Requests
- Right of the Data Subject to have communicated to him/her, in an way that can be understood by them, the personal data held/processed about them by the Data Controller – subject to any exemptions which permit to the Data Controller to withhold
- Only one month to respond under GDPR (instead of 40 days)
- No longer able to charge £10.00 fee
- Risk of a Tier 2 financial penalty for failure to

- You should review and update your

THEMES – Mandatory Breach reporting



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- Breach of security leading to the destruction, loss, alteration, unauthorised disclosure of or access to personal data
- Must notify the ICO and the individual of a breach where it is likely to result in a risk to the rights and freedoms of individuals
- Significant detrimental effect on the individual data subject? Must self-report breach within 72 hours of discovery
- Risk of a double penalty

SOME PRACTICAL STEPS

- Awareness within your organisation
- Identifying the information you hold
- Communicating privacy information
- Complying with individuals' rights
- Identifying and documenting lawful basis for processing
- Issues relating to consent
- Personal data pertaining to children
- Dealing with data breaches
- Data Protection Impact Assessments
- Data Protection Officers
- Processing data internationally
- Staff training
- Contracts and service agreements with Data Processors
- Policies and procedures



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- **Identify the information you hold**
- If you are going to process data lawfully and comply Accountability Principle, you need to know what holds, where it came from and who you share it with.
- GDPR will require Data Controllers to maintain records activities. Having a complete record of what data you how it is processed will enable you to maintain the in complying with the GDPR principles.
- Conduct an **Information Audit** across your entire personal data your organisation holds, where it came with.



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- **Communicating Privacy Information**
- The GDPR's lawfulness, fairness and transparency principle requires you to provide your customers and employees with adequate Privacy Notices.
- Review your current Privacy Notices and put a plan in place for making any necessary changes in time for GDPR implementation.





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- When you collect personal data you currently have to give people certain information, such as your identity and how you intend to use their information. This is usually done through a Privacy Notice. Under the GDPR there are some additional things you will have to tell people.



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- For example, you will need to explain your lawful basis for processing the data, your data retention periods and that individuals have a right to complain to the ICO if they think there is a problem with the way you are handling their data. The GDPR requires the information to be provided in concise, easy to understand and clear language



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- **Complying with individuals rights**
- You should check your procedures to ensure they cover all the rights individuals have, including how you would delete personal data or provide data electronically and in a commonly used format. The GDPR includes the following rights for individuals:
 - the right to be informed
 - the right of access
 - the right to rectification
 - the right to erasure
 - the right to restrict processing
 - the right to data portability
 - the right to object
 - the right not to be subject to automated decision-making including profiling





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- **Identifying and documenting lawful basis for processing**
- You should identify the lawful basis for your processing activity in the GDPR, document it and update your privacy notice to explain it.
- This is particularly important under the GDPR because some individuals' rights will be modified depending on your lawful basis for processing their personal data.
- For example, people will have a stronger right to have their data deleted where you use **consent** as your lawful basis for processing.
- You will also have to explain your lawful basis for processing personal data in your privacy notice and when you answer a subject access request.
- Review the types of processing activities you carry out and identify your lawful basis for doing so. You should document your lawful bases in order to help you comply with the GDPR's 'accountability' requirements.



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• **Data Protection Impact Assessments**

- Privacy by design approach
- Privacy Impact Assessment (PIA)
- GDPR makes privacy by design an express legal requirement. It also makes PIA's mandatory in certain circumstances such as where data processing is likely to result in high risk to individuals, for example:-
 - where a new technology is being deployed;
 - where a profiling operation is likely to significantly affect individuals; or
 - where there is processing on a large scale of the special categories of data.



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- **Data protection officers**

- You should designate someone to take responsibility for data protection compliance and assess where this role will sit within your organisation's structure and governance arrangements.
- You should consider whether you are required to formally designate a Data Protection Officer (DPO). You must designate a DPO if you are:
 - a public authority (except for courts acting in their judicial capacity);
 - an organisation that carries out the regular and systematic monitoring of individuals on a large scale; or
 - an organisation that carries out the large scale processing of special categories of data, such as health records, or
information about criminal convictions.



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- **Staff Training**

- Crucial to demonstrating compliance (“appropriate technical and organisation measures”)
- Most data breaches caused by human error
- Induction training
- Regular refresher training
- Keeping accurate training records





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Dealing with Data Breaches

- You should make sure you have the right procedures in place to detect, report and investigate a personal data breach.
- The GDPR introduces a duty on all organisations to report certain types of data breach to the ICO, and in some cases, to individuals.
- You may wish to assess the types of personal data you hold and document where you would be required to notify the ICO or affected individuals if a breach occurred. Larger organisations will need to develop policies and procedures for managing data breaches. Failure to report a breach when required to do so could result in a fine, as well as a fine for



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What if it goes wrong?

Stringent enforcement provisions (Ch VIII):

- Effective judicial remedy, including compensation from controller/processor (A79 & 82)
- Regulatory fines: up to £18m (A83; DP Bill cl. 150)

• Increasing trend towards large-scale private compensation claims:

- See Morrisons case (December 2017)
- An increasingly savvy market for claimant work



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GDPR Financial Penalties

- Intended to punish and not just deter
- Current limit £500K
- Tier 1 – up to 2% of annual global turnover or 10 million Euros – whichever is greater
- Tier 2 – up to 4% of annual global turnover or 20 million Euros – whichever is greater



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How can you help?

- Providing specific advice
- Drafting contracts, privacy notices, terms and conditions etc
- Advising on and conducting Privacy Impact Assessments
- Advising on and conducting 'health checks', data audits and risk assessments
- Advising on and drafting policies and procedures
- Providing bespoke Staff training
- Dealing with Subject Access Requests
- Dealing with complaints and ICO investigations
- Dealing with breach management

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The even more dreaded TUPE



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- Regulation 3(1)(b) of TUPE, a service provision change occurs when immediately before the transfer there is an organised grouping of employees which has as its principal purpose the carrying out of the relevant activities on behalf of the client.

Some case analysis: the same activities



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- **Anglo Beef Processors UK v Longland & Anor**
UKEATS/0025/15/JW
- The claimant had been employed by the First Respondent, classifying carcasses in an abattoir since 1997. The Claimant was then dismissed after his employment transferred to the Second Respondent, who had brought in electronic classification of carcasses as opposed to manual classification.
- The issue before the ET was whether the activities carried out were "fundamentally the same" as before the transfer in terms of regulation 3 of the 2006 Regulations as amended. The tribunal concluded that the activities carried out by the Second Respondent were fundamentally the same as had been carried out previously. The activity was classifying carcasses whether manually or electronically. The Second Respondent appealed.



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- Anglo Beef had also relied on the decision of the EAT in *Department for Education v Huke*. In that case the EAT decided that a tribunal ought to consider, in deciding whether activities remained the same, not only the character and type of activities carried out but also the quantity, particularly where the contract post transfer involved a substantially reduced service.
- The ET considered that the issue in *Huke* was that the claimant employee was only carrying out the activities which transferred to the putative transferee for around 45% of his time prior to the transfer.
- The real issue in *Huke* was that there was really no activity to be transferred, since there had prior to the transfer been a considerable downturn in work and long prior to the insourcing there had been little or no work on the activities insourced for the employee to do. But in *Longland* the situation was different. There was no reduction in quantity as far as the activities previously carried out by Mr Longland were concerned. The ET made a specific finding that the processing of carcasses continued as before with the same throughput rate of around 40 to 45 carcasses per hour.
- The EAT dismissed the appeal. The notes of evidence did not support the contention that the Claimant had conceded that there would be a complete change in the level of activity under the new system. The Tribunal had reached a conclusion that was open to it on the evidence and there was no basis for interference on appeal.



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- **What can we learn from this?**
- Trend emerging?
- The Anglo Beef approach mirrors that taken by the EAT in Qlog Limited v O'Brian UKEAT/0301/13/JOJ
- In that case the EAT found there was a service provision change TUPE transfer upon the taking over by a logistics platform company of a service previously carried out by a traditional haulage company. The activities concerned were found to be, principally, the transportation of a client's goods from its premises to its customers. There was, following the change of provider, a very different mode of carrying out the activity in question, but the actual activity remained fundamentally the same.





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- The EAT in Qlog emphasised that it was important not to take so narrow a view of “activity” that the underlying purpose of the legislation was forgotten. In that case, for example, by concentrating on the different mode of operation, an employment tribunal might otherwise have failed to have regard to the substance of the activity concerned.



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- See also Salvation Army Trustee Company v Coventry Cyrenians Limited [2016] UKEAT/0120/16/RN, EAT where the EAT emphasised that the word “activities” in the service provision change definition must be defined in a common sense and pragmatic way. A pedantic and excessively detailed definition of “activities” would risk defeating the purpose of the service provision change rules,



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- Recent case of London care v Henry & Others UKEAT/0219/17/DA & UKEAT/0220/17/DA
- Illustrates the importance of clearly identifying the pre-transfer 'activities' that have transferred in a service provision change under [Reg. 3\(1\)\(b\)](#).
- Supperstone J upholding an appeal against a finding that there had been a TUPE transfer after a home care provider, Sevacare, ended its contract with Haringey Council.
- The EJ erred on the issue of organised grouping. She had made no finding as to whether such a grouping existed, whether it was deliberately formed and if so that was deliberate or conscious.
- "the first task for the employment tribunal is to identify the relevant activities carried out by the original contractor", the tribunal ought to have determined if the activities transferred were fundamentally the same post-transfer, since 'fragmentation' might prevent a transfer from happening if the activities are not fundamentally or essentially the same after a change of contractors.

Some case analysis: organised grouping

- The classic problem: new contractor coming in, outgoing contractor sends a list through of 100's of employees. Say assigned to the organised group and therefore transfer
- Not playing ball / assisting / sour grapes!
- Forced to perform a reasoned assessment – the following may assist



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- Argyll Coastal Services v Sterling and others UKEATS/0012/11/BI, the EAT (Lady Smith) interpreted the phrase 'organised grouping of employees' as connoting 'a number of employees which is less than the whole of the transferor's entire workforce, **deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team**'.
- Eddie Stobart Ltd v Moreman and others UKEAT/0223/11/ZT the Employment Appeal Tribunal held that an organised grouping will only exist where the employees in question are **organised by reference to the provision of services to the relevant client**.



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- Seawell Ltd. v Ceva Freight (UK) and another UKEATS/0034/11/BI, a single employee can be an organised grouping of employees for the purposes of a service provision change under TUPE
- The key is what happens immediately before the transfer: See Amaryllis Limited v McLeod and Others UKEAT/0273/15/RN where the EAT found that the Employment Tribunal (ET) had made errors in approach in relying on the work carried out over a number of years by the department in question of the transferor's business rather than on the work carried out under its contract with the relevant client immediately prior to the transfer



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- Tees Esk & Wear Valleys NHS Foundation Trust v Harland and others, UKEAT/0173/16/DM, [2017] ICR 760
- EAT considered the test for determining the “principal purpose” of an organised grouping for the purposes of Reg 3(3)(a)(i) TUPE 2006
- In this case, a team of 27 carers was put in place by an NHS Trust for the purpose of providing care to a patient with severe learning difficulties. Over time, the patient’s condition gradually improved and he needed fewer carers. Some of the care team also provided care services to other residents in the same residential facility.



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- The contract for the provision of care to the patient was re-tendered and awarded to a new provider, Danshell Healthcare, who took over from the NHS Trust. The Trust identified seven employees whose employment transferred to Danshell under TUPE, on the basis that they had been engaged with caring for the patient for more than 75% of their shifts. The employees argued that no service provision change under TUPE had taken place, meaning their employment remained with the NHS Trust. At a preliminary hearing, the employment tribunal agreed that there had been no service provision change. The NHS Trust appealed.



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- The EAT upheld the tribunal's finding that while an organised grouping of employees had originally been put together for the principal purpose of providing care to the patient in question, the principal purpose had been diluted over time. The requirement for employees to provide care for the patient had diminished, although it continued to be a subsidiary purpose of the grouping. The grouping's dominant purpose by the time the contract transferred was providing care to other service users.

The EAT allowed the appeal on another ground.

Some case analysis: employee information

- *Born London Ltd v Spire Production Services Ltd* UKEAT/255/16 [2017] ICR 998 considered the question of the employee liability information which is to be provided for the purposes of a service provision change. Was the employer required to specify whether the rights and obligations transferred were contractual or non-contractual? It was not (held Eady J).
- In *Born London*, the Respondent, when providing employee liability information, had (wrongly) described a bonus entitlement as “non-contractual”.



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- The Appellant complained that the Respondent had failed to provide the information required by Regulation 11 TUPE (because, of course, it was wrong). But the EAT found that the obligation under Reg 11(2)(b) TUPE was to notify the transferee of the particulars that an employer is obliged to give to an employee pursuant to s 1 of the ERA 1996, i.e. a statement of employment particulars. That is not limited to contractual terms and conditions.

Social Media



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The categories of problem

- Fall into these basic categories:
- Workers expressing their frustrations with work online
- Questionable posts (pictures and comments) during and after work
- Excessive Use during working hours
- LinkedIn and competition (a separate topic in itself!)

Some case analysis

- **Offensive posts**
- Game Retail Ltd v Laws UKEAT/0188/14
- Is it within the range of reasonable responses to dismiss an employee who posts offensive but non-work related tweets from a personal Twitter account?
- Refused to lay down general guidance



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- Mr Laws was employed by Game Retail as a risk and loss prevention investigator, responsible for 100 of its stores in the north of England.
- Game Retail relies upon Twitter for publicity and marketing and each store has its own Twitter account, which is operated by the store manager or deputy manager.
- Mr Laws had set up a private Twitter account, which did not identify him as being connected with Game Retail in any way, but he began to follow the Twitter accounts of the stores for which he was responsible, and 65 Game Retail stores followed his account.



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- One of the store managers notified a regional manager of some tweets posted by Mr Laws which were alleged to be offensive towards a number of groups within society (Newcastle supporters, A&E workers, dentists and “t**** in caravans”). A full investigation was carried out and Mr Laws was summarily dismissed for gross misconduct.
- Unfair dismissal claim brought. The Tribunal found in his favour - whilst potentially shocking and offensive, the tweets were private and there was nothing to reveal that Mr Laws was an employee of Game Retail. Dismissal was outside the range of reasonable responses in this case.





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- EAT overturned it
- disagreed with the Tribunal's conclusion that, contrary to the employer's belief, Mr Law's account was private. It noted that Mr Laws had failed to restrict the privacy settings on his account and that his tweets would be going out to the 65 Game stores who followed him.
- Substitution: what it thought was relevant rather than asking what might be the view taken by the reasonable employer and in answering the latter the Tribunal should have considered the employer's concern that the tweets may have been read by other staff and customers and caused offence. The EAT directed that the case should be passed to a different Tribunal to reconsider this question.





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- See Smith v Trafford Housing Trust [2012] EWHC 3221,
- The High Court decided that an employer could not characterise non-work related views posted by an employee on Facebook as misconduct. The Court found that Mr Smith's Facebook wall was restricted to personal and social use, notwithstanding the fact that it identified him as working for the employer and that he was Facebook friends with many of his colleagues.



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- *Plant v API Microelectronics Ltd* 3401454/2016
- ET rejected the unfair dismissal claim of a long-serving employee with a clean disciplinary record who was dismissed over comments she made on Facebook about her employer.
- 17 years service and no disciplinary issues during that time.
- Employer introduced a social media policy, which gave examples of unacceptable social media activity, including placing comments online that could damage the reputation of the company.
- The policy also reminded employees not to rely on Facebook's privacy settings, as comments can be copied and forwarded on to others without permission



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- policy made clear that breaches of the policy could lead to disciplinary action, including dismissal
- the company made an announcement about a possible premises move.
- *“PMSL [pissing myself laughing] bloody place I need to hurry up and sue them PMSL.”*
- disciplinary hearing – she said she did not realise that her Facebook page was linked to her employer’s technology, and that she did not believe that the comment was aimed at the company.
- *Dismissed.* The decision-maker took into account the derogatory nature of the comment, and the absence of an adequate explanation from her.





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- Mrs Plant accepted that her comment was in breach of the employer's social media policy. She did not review her Facebook profile when the policy was introduced, and there was nothing to stop family and friends from forwarding her comment on to a wider audience.
- ET – Reasonable grounds for believing. She was given the opportunity to provide an adequate explanation, but failed to do so. Harsh but within the band of reasonable responses.



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- **Weeks v Everything Everywhere Ltd**

ET/2503016/2012

Mr Weeks published a number of posts on his Facebook page that compared his workplace to “Dante’s Inferno”. His comments included: “No Dante’s Inferno for this happy fatty today” and “Another day at Dantes [sic], fat lad living the dream, hope you all have a better day than I’m going to have”.

- When confronted by his line manager, he refused to refrain from making these type of posts in the future. He subsequently made similar comments online and was dismissed for breaching the company’s social media policy. Mr Weeks claimed unfair dismissal.
- The tribunal concluded that the comments, which had been made over a long period of time, were “likely” to cause reputational damage if they continued and that the employer’s response had been reasonable.





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- **Creighton v Together Housing Association Ltd
ET/2400978/2016**
- Employee claimed of bullying from Mr Creighton. During investigation it was also stated that he had posted a derogatory comment online (open Twitter account). “just carry on and pick up your wage, this place is f****d. It’s full of absolute b**l e**s who ain’t got any balls”.
- Posted 2/3 years previously, thought they were private and apologised. 30 years’ service. Dismissed for gross misconduct. ET rejected his claim for unfair dismissal





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- Case by case basis
- Personal versus public
- Timing and content etc
- Clear **Policy, Policy, Policy!!**





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