

# How do you lawfully evidence when an employee is taking fraudulent sick leave?

*Can social media evidence be relied upon in cases of fraudulent sick leave?*

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# How do you know?

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- 60% of employers do not believe their staff are sick
- 40% check social media profiles
- Attendance pattern – long term or short term
- Circumstances – an employee is suddenly absent
- Suspicion – something is not quite right
- Tip off – nobody likes someone “pulling a sickie”

# Where do you start?

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- Sick leave policy
  - » Is the leave paid?
  - » Is there a right to consult the company doctor?
  - » Are the days required to be certified?
  - » Is abuse a matter to be dealt with as a disciplinary issue?
  - » Is the sick leave policy relevant at all?
  - » Return to work interview?

# What do you do?

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- Conduct an investigation – prepare the case – involve the employee
- Obtain medical evidence if appropriate
- Apply the disciplinary procedure - this is a conduct matter
- Where appropriate apply a sanction – must be proportionate
  - » What is the history of the employee?
  - » Why did they do it?
  - » Were they on paid sick leave?
  - » Is it appropriate to take a stand?

# Engaging Private Investigators

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- Key consideration: Data protection
- Is it absolutely necessary? - Is there any other way of getting the information
- Use of PI must be balanced against employee privacy rights
- Fair procedures: Employee should be provided with the information and given an opportunity to make submissions
- Make sure PI is licenced by the Private Security Authority

# ***Revenue Protection Officer v Public Transport Provider October 2017***

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- GP had recommended “physical therapy”
- Claimed to have suffered neck and back injuries from a road accident and was on paid sick leave
- Employer hired a PI - observed the employee in the gym, lifting weights <60kg, and running on a treadmill
- Employee was guilty of a “very serious breach concerning honesty and integrity, trust and confidence.” Claimant's role as a ticket inspector was “particularly important and pertinent”
- The dismissal was procedurally fair, and was upheld

# ***Sweeney v Ballinteer Community School* [2011]**

## **IEHC 131**

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- Dispute between Ms Sweeney and BCC alleging that she had been bullied and harassed
- Principal of BCC engaged a PI for four days in early February 2008, to carry out a covert surveillance on Ms Sweeney during college hours
- Court held that this amounted to a most serious harassment of her by the Principal him
- The activities of this private investigator were brought to an end by the intervention of An Garda Síochána and by an Order of the High Court (Laffoy J.)

# What has social media got to do with it?

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- Social media is becoming increasingly used as evidence in Court
- Employees using Snapchat, Facebook, Instagram and Twitter while on sick leave are leaving a trail of evidence of the fact that they aren't really sick
- Private Investigators have broadened their scope from a simple stake out to an online investigation
- Data protection remains an issue – only use material publically available or provided to you legitimately
- Anonymity cannot be guaranteed!

# Digital forensics or a simple click?

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- Many cases involve PIs who uncover truths on Facebook and other social media sites
- Many others however have simply been found by employers using a simple Facebook search
- Employers should be aware of the scope of social media as evidence in relation to sick leave

# What have the Courts to say on this?

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- Social media profiles have been accepted as evidence in Court for many years in Ireland
- In the Northern Irish case of *Martin & Ors Gabriele v Giambrone P/A Giambrone & Law* [2013] N.I.Q.B. 48, Horner J stated:

*“I should say that anyone who uses Facebook does so at his or her peril. There is no guarantee that any comments posted to be viewed by friends will only be seen by those friends. Furthermore it is difficult to see how information can remain confidential if a Facebook user shares it with all his friends and yet no control is placed on the further dissemination of that information by those friends”*

- Plaintiff suing for loss of earnings and damages relating to injuries stemming from a car accident
- Private investigator hired, provided video evidence of the plaintiff walking without much difficulty, hanging out clothes, carrying a laptop
- Also provided “photographs taken from the plaintiff's Facebook page showing her wearing high heels at a social function”
- This evidence led to the conclusion of exaggeration by expert witnesses, nonetheless, damages of €100,000 were awarded

## ***Milinovic v Ferris and O'Dwyer Property Management Ltd - The Circuit Court, December 2015***

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- Claim for personal injuries dismissed
- PI claimed life had dramatically changed by a car accident
- Had to give up work having sustained severe personal injuries
- Facebook page
  - » Photos of her climbing Bray Head
  - » Exercising at a gym
  - » International body building

# Ms Milinovic

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# Takeaways

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- Be vigilant: If you suspect something is wrong with an employee's absence, you are within your right to query
- Don't underestimate the power of a Private Investigator but be careful if you intend to use their services
- The use of social media as evidence is becoming more and more common and perfectly acceptable (within reason)
- Procedure, Procedure, Procedure: Ultimately, if correct and fair procedure is not followed, no amount of evidence will help