

# Social media: balancing an employee's personal life and the employer's reputation

---

# CONDUCT OUTSIDE OF WORK

---

Mishcon de Reya

- Employees can be dismissed for a reason relating to their conduct outside of work.
- Does the relevant conduct *relate* to the employment relationship?
- Social media activity outside of work has the potential to bring the employer into disrepute and damage its public image.

---

# DISMISSAL FOR MISCONDUCT

---

Mishcon de Reya

## **Statutory test (s98(4) ERA)**

Ask whether, having regard to the reason identified by the employer for the dismissal, in the circumstances, the employer acted reasonably in dismissing for that reason.

- Did the employer undertake a fair investigation in reaching the decision to dismiss?
- Did the employer act reasonably in treating the misconduct it identified as a sufficient reason for dismissal?

## **Burchell test**

- Did the employer believe the employee to be guilty of misconduct?
- Did the employer have reasonable grounds for believing that the employee was guilty of that misconduct?
- At the time it held that belief, had it carried out as much investigation as was reasonable?

## **Range of reasonable responses test**

Was the employer's decision to dismiss the employee within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?

---

# EMPLOYEE MONITORING

Mishcon de Reya

---

Employees must be informed that they are being monitored. The more intrusive the monitoring, the greater the detail required to be provided to employees.

**1. Data protection**

- Electronic forms of workplace surveillance are regulated by the GDPR and the DPA 2018.

**2. Statutory regime**

- Investigatory Powers Act 2016
- Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-keeping Purposes) Regulations 2018

**3. Right to respect for private life**

- Article 8 of the European Convention on Human Rights

---

# WHAT ABOUT HUMAN RIGHTS?

Mishcon de Reya

---

The Employment Tribunal should consider whether a dismissal constituted an interference with any of the employee's Convention rights when deciding if the employer acted reasonably.

**Article 8 ECHR:** the right to respect for private life.

- Did the employee have *a reasonable expectation of privacy*?
- If yes, was the interference with that privacy in accordance with the law and proportionate?

**Article 10 ECHR:** the right to freedom of expression.

- The Tribunal has tended to find that interference with Article 10 was justified and proportionate in order to protect the employer's reputation.

# GIBBINS V BRITISH COUNCIL [2017]

Mishcon de Reya

## FACEBOOK'S FURY

**Alex Browne** You look at a smiling child, and this is the kind of stuff you think?

Like - Reply -  41 - 13 hrs

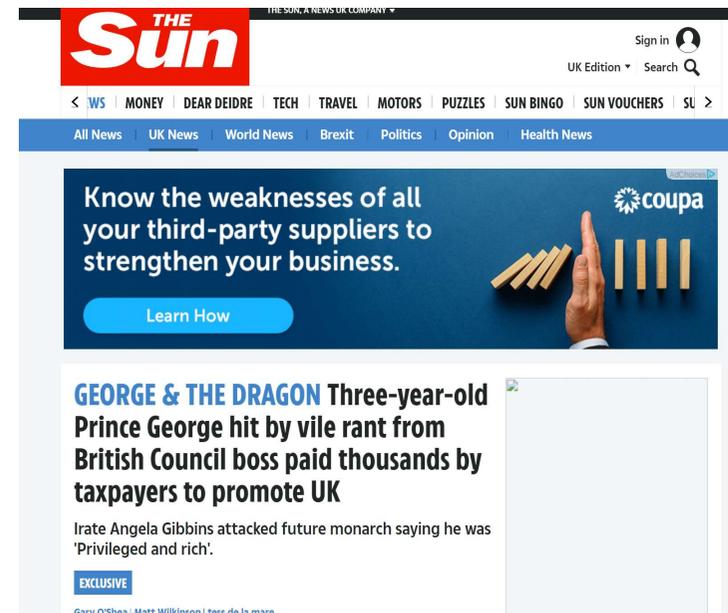
**Jackie Langridge-Cripps** Please...your embarrassing the female race.

Like - Reply -  6 - 13 hrs

## CHARITY EXEC'S POISON

**Angela Theresa Gibbins** White privilege. That cheeky grin is the (already locked-in) innate knowledge that he's Royal, rich, advantaged and will never know \*any\* difficulties or hardships in life. Let's find photos of 3yo Syrian refugee children and see if they look alike, eh?

Like - Reply -  26 - 13 hrs



The screenshot shows the top of the Sun newspaper website. The navigation bar includes sections like 'All News', 'UK News', 'World News', 'Brexit', 'Politics', 'Opinion', and 'Health News'. A featured advertisement for Coupa is visible, with the text 'Know the weaknesses of all your third-party suppliers to strengthen your business.' Below the ad is a news article with the headline 'GEORGE & THE DRAGON Three-year-old Prince George hit by vile rant from British Council boss paid thousands by taxpayers to promote UK'. The article text reads: 'Irate Angela Gibbins attacked future monarch saying he was 'Privileged and rich'.' The article is marked as 'EXCLUSIVE' and is attributed to Gary O'Shea, Matt Wilkinson, and Tess de la Mare.

# TAYLOR V SOMERFIELD STORES LTD [2007]

Mishcon de Reya

**Support The Guardian**  
Available for everyone, funded by readers  
[Contribute →](#) [Subscribe →](#)

Search jobs Sign in Search UK edition

**The Guardian**

[News](#) [Opinion](#) [Sport](#) [Culture](#) [Lifestyle](#) [More](#)

[Business](#) [Economics](#) [Banking](#) [Money](#) [Markets](#) [Project Syndicate](#) [B2B](#) [Retail](#)

**Business**

## Somerfield launches investigation into prank videos



Mon 29 Jan 2007 12:51 GMT

[f](#) [t](#) [e](#)

Somerfield has launched an investigation after videos showing supposed current and former employees engaging in a variety of pranks in the company's stores were posted on video-sharing website YouTube.

---

# PRACTICAL LESSONS

---

Mishcon de Reya

Proactive rather than reactive approach

Reasonable investigation / Fair procedure

Objective assessment of damage to company's reputation

If you are going to dismiss, clearly identify the reason for dismissal and be prepared to justify it



Jennifer Millins  
Partner, Employment  
[jennifer.millins@mishcon.co](mailto:jennifer.millins@mishcon.co.uk)  
[m](#)  
+44 20 3321 7137