

**A&L Goodbody**

# **SOCIAL MEDIA AND THE LAW – THE LIMITS OF MONITORING AN EMPLOYEE’S CONDUCT ONLINE**

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Duncan Inverarity – Partner, A&L Goodbody LLP  
HR Conference – 29 September 2022



# Agenda

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- The Rise of Social Media
- To Monitor or Not to Monitor?
- Employee Monitoring: Article 8 and the GDPR
- The Importance of Maintaining a Social Media Policy
- In the 'course of the employee's employment'?
- Employer Duties and the Safety, Health and Welfare at Work Act 2005

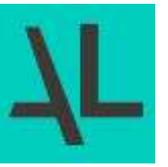
# Introduction



Duncan Inverarity,  
Partner  
Employment Practice  
Group

# The Rise of Social Media

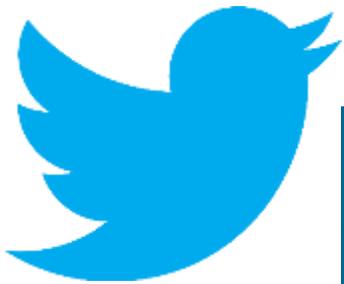
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# The Rise of Social Media

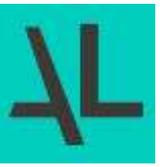
***“3.5 million HR accidents waiting to happen”***

-Britain's Trade Union Congress



# To Monitor or Not to Monitor?

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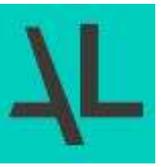


# To Monitor or Not to Monitor?



# Employee Monitoring: Article 8 and the GDPR

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# Article 8 of the ECHR and Employee Monitoring

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## Article 8

*“Everyone has the right to respect for his private and family life, his home and his correspondence”*



## Niemitz v Germany

Employees enjoy a right to privacy in the workplace. This right is not unqualified.

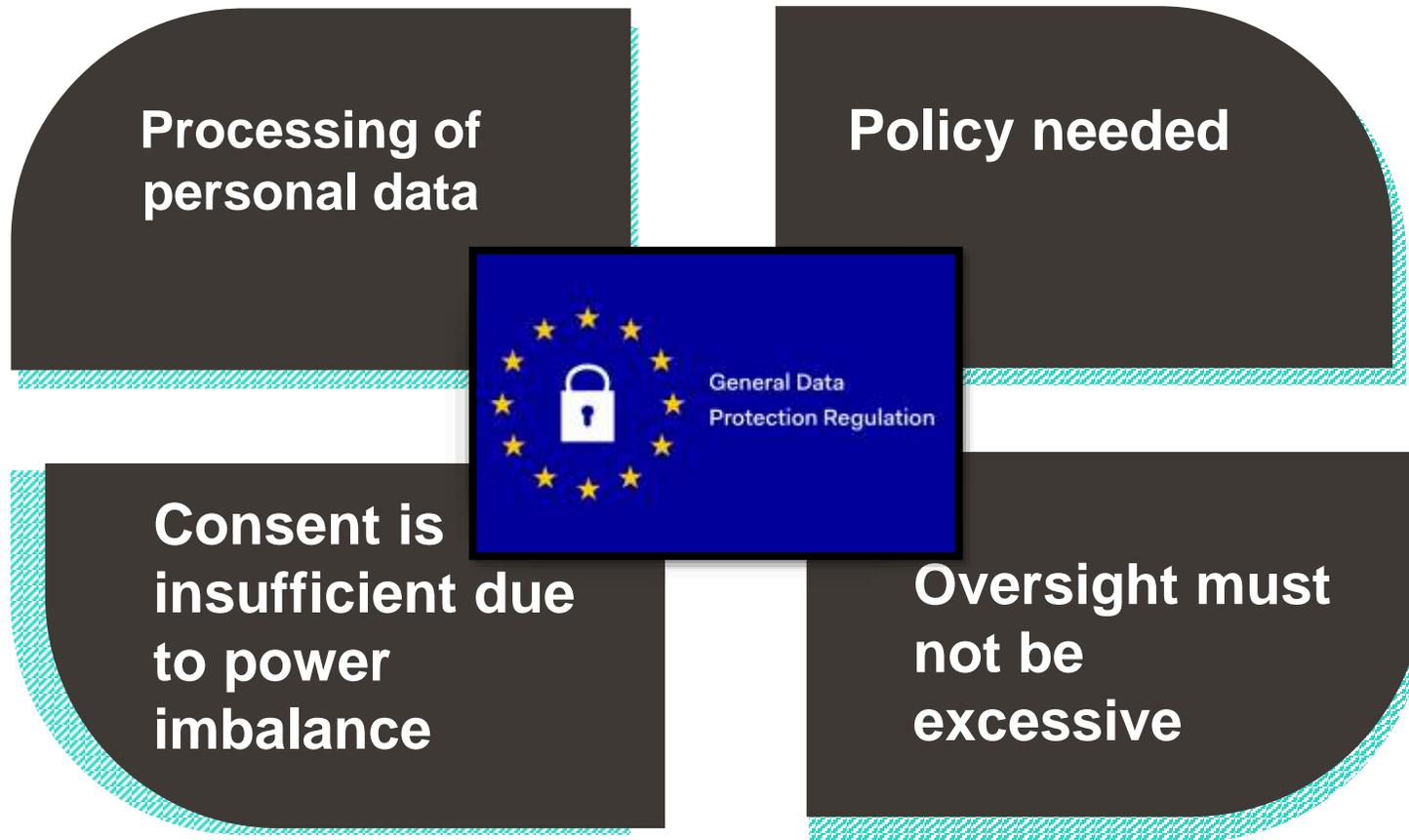
## Barbulescu v Romania

Breach of Article 8 as failure to advise employee monitoring included monitoring online personal communications

## Garamukanwa v UK

**Barbulescu** distinguished. Employee aware of employer monitoring of his online activity.

# Employee Monitoring and the GDPR

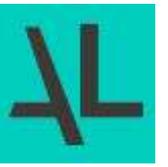


*“...should employees overstep their right to a social life at work, organisations shouldn't have to dig too deep to find evidence of that .”*

Luke Irwin – IT Governance  
European Blog

# The Importance of Maintaining a Social Media Policy

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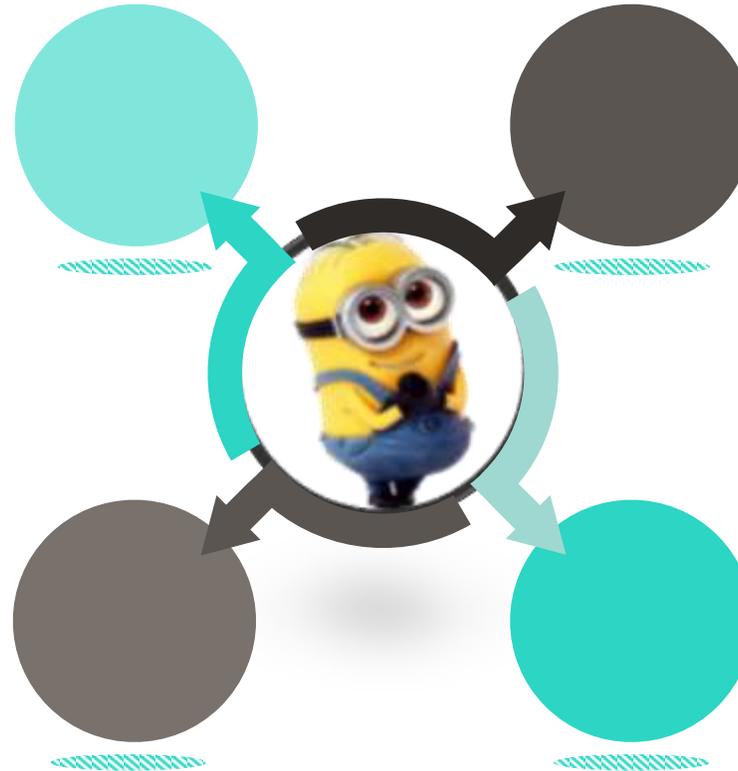


# A School Secretary v A National School ([ADJ-00004802](#)) (2016)

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**Facebook post with image from the film *Despicable Me* captioned “*Every day at work I wonder if this is going to be the day that I scream 'F\*\*\* O\*\* You C\*\*\*' out loud instead of just in my head.*”**

**Reference to ‘work’ and offensive language**



**Generic image and school was not mentioned**

**Sanction to dismiss disproportionate in absence of Social Media Policy**

# A Coach Driver v A Coach Company ([ADJ-00007142](#)) (2017)

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Facebook post about the poor condition of his bus and online comments

Dismissed as caused the Respondent “to lose faith in [his] integrity”



Never provided with a Social and Digital Media Policy

Modest award for Unfair Dismissal as his actions were “misjudged and wrong”

# Advice to Employers

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01

## MAINTAIN

Maintain a comprehensive social media usage policy that is fit for purpose

02

## EXPLAIN

Explain the organisation's expectations

03

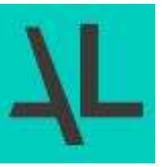
## REVIEW

Undertake a comprehensive 'root and branch' review and update all social media, confidentiality and disciplinary policies to link all.



In the “course of the  
employee’s  
employment”?

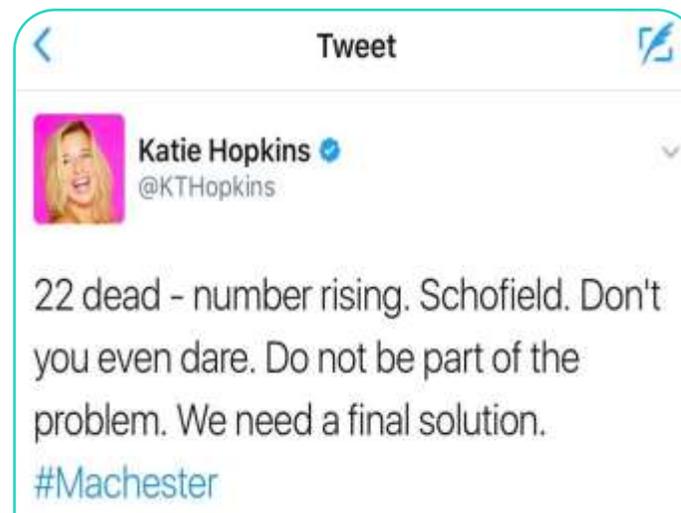
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# Famous *Faux Pas*



Danny Baker



Katie Hopkins



Justine Sacco

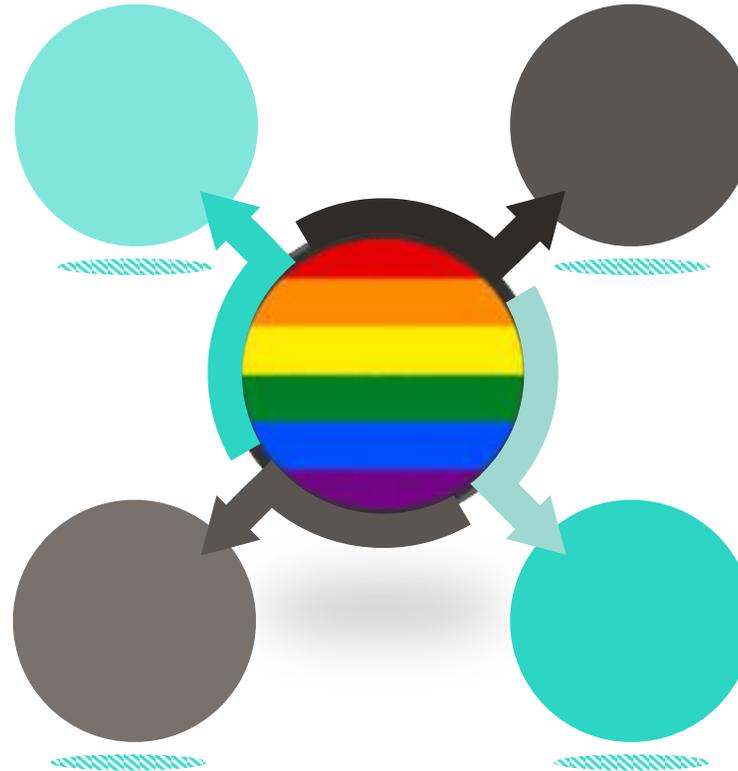


# A Doorman v A Food and Beverage Business ([ADJ-00017100](#)) (2019)

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Prejudicial and discriminatory remarks posted on complainant's social media page where the respondent listed as his employer

Dismissed as homophobic comments during the Gay Pride Festival caused business and relationship damage



Contract and disciplinary procedure silent on acceptable social media usage

Dismissed for gross misconduct

# Dublin Bus v McCamley [2016] 27 ELR 81

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**SIPTU rep had derogatory remarks referring to his religion and race posted on Facebook by a colleague**

**Could the employer be held liable for the acts of its employee?**

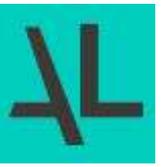


**According to the Labour Court “it matters not that the harasser was off duty or at home when he posted the offending material. It is, however, essential that the victim suffered the harassment in the course of his or her employment”**

**Respondent could avail of the defence under S.14A(2)**

# Employer Duties under the Safety, Health and Welfare at Work Act 2005

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# Creation of a Hostile Working Environment?

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## S.8(1) Safety, Health and Welfare at Work Act 2005 **1**

*'Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees'*

## S.8(2) Safety, Health and Welfare at Work Act 2005 **2**

*'...managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk'*

## Moonsar v Fiveways Express Transport Ltd [2005] IRLR 9, **3**

Downloading of pornographic images by male colleagues, in close proximity to where a female was working amounted to sexual harassment

## Employers Beware **4**

Be wary of the potential for an employee's misconduct via social media channels to cultivate a hostile working environment.



# Questions?

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Thank you

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