Social Media

Update your status, not your CV: how to use social media without getting sacked

Social media has been in the employment bulletins again lately, following the EAT's decision in *British Waterways Board v Smith*. Here, we look at some of the other lessons for employees and employers from the growing bank of social media tribunal decisions. In the *Smith* case, an employee's dismissal for gross misconduct for posting derogatory comments on Facebook about his manager and stating that he had been drinking alcohol while on standby was found to be fair. The fact that the employer had known about the allegations for two years before taking action did not undermine this.

Do: Have a social media policy.

It can be the difference between winning or losing an unfair dismissal claim. For example. In *Crisp v Apple Retail (UK) Limited*, an Apple store employee made a series of derogatory comments about the iPhone on Facebook (including a complaint about his "*jesusPhone*", and a comment about his iPhone alarm malfunctioning). Although his Facebook page was only accessible to his Facebook friends and did not identify him as an Apple employee, Apple decided to dismiss him for gross misconduct. The dismissal was upheld, largely because of Apple's strong emphasis on the protection of its brand and the prohibition on employees posting commentary on Apple products in the Respondent's electronic communication guidelines.

Similarly, Ms Preece was fairly dismissed for posting derogatory comments about customers partly because of Wetherspoons's clear policy prohibiting such conduct (*Preece v JD Wetherspoons plc*). It did not help Ms Preece's case that the exchange was in fact viewed by the customers in question and their daughter, who complained to the employer.

Don't: Assume you're safe if you don't mention your employer.

In *Weeks v Everything Everywhere Limited*, an employee's creative Facebook posts likening his workplace to Dante's portrayal of hell in the Divine Comedy resulted in his dismissal. An example post reads: "*No Dante's Inferno for this happy fatty today*". The employer's case was doubtless strengthened by the employee posting a lightly coded threat against his colleague who had brought the posts in question to the attention of management: "*it saddens me that people request to be your friend and then stab ya in the back...what goes around comes around*" and "*no more words from me, next it's action*". Even without an explicit mention of the employer's name,

the Tribunal found that the dismissal was fair.

A similar conclusion was reached in *Game Retail Ltd v Laws*, where an employee tweeted offensive comments about "*dentists, caravan drivers, golfers, the A&E department, Newcastle supporters, the police and disabled people*", according to the employer. His Twitter profile did not indicate he was a Game employee, and none of his tweets mentioned Game. However, he did follow a lot of the Game stores he covered as part of his role. Although the Tribunal initially sided with the employee and found that his dismissal was unfair, the Employment Appeal Tribunal overturned this decision, describing the Tribunal's focus on the employee's not having posted anything negative about Game or identifying himself as a Game employee as "*perverse*".

Do: Instruct your staff not to take part in office banter about protected characteristics.

Two Carphone Warehouse employees took another employee's phone and updated his Facebook status to read "*Finally came out of the closet. I am gay and proud*". The latter employee succeeded in his claim of sexual orientation harassment, although he was not gay and did not believe that his colleagues thought that he was. Carphone Warehouse was held to be vicariously liable for its employees actions. (*Otomwo v Carphone Warehouse*)

Don't: Panic just because it's a social media case.

Several of the cases emphasise that social media misconduct is no different from other types of employee misbehaviour. But sometimes employers panic when they hear the words Facebook, Twitter or YouTube (or, perhaps in a future decision, Periscope or Meerkat). For example, in *Whitham v Club 24 t/a Ventura* an employee made some fairly mild disparaging comments about her colleagues ("*I think I work in a nursery and I do not mean working with plants*"). The employer decided that these comments were extremely embarrassing, put their reputation at great risk, and even imperilled their most significant client relationship. They concluded all this with no evidence, and no recourse to that client, and dismissed the employee despite her "*grovelling*" apology. The Tribunal found that dismissal unfair.

Similarly, *Taylor v Somerfield* saw an employer come unstuck after dismissing an employee for posting a video on YouTube showing colleagues fighting with plastic bags at work. The argument that the employer had been brought into disrepute was undermined because the video carried no clear association with the employer and, although the clip was freely accessible, in fact it had only been viewed only eight times.

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Overall, employers need to keep a cool head with social media, treating misconduct in a similar manner to other areas by weighing the impact of the employee's behaviour against the sanction applied. As ever, clear and effectively communicated policies will give employers a greater ability to dismiss or discipline in the right circumstances (i.e. where the employee has plainly transgressed an explicit rule set out in a policy). Employees need to read those policies, and tread carefully before posting work-related or offensive posts if they could be identified as working for their employer – even if their profile does not explicitly identify them as such.