

## SUMMARY

# 2016/43 Inappropriate use of Facebook by employee leads to unfair dismissal (IR)

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### **Summary**

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### **Facts**

In this case, the employee, Mr. Daly worked in a supermarket. On the day in question Mr. Daly had a telephone altercation with the store manager (JO). The EAT heard conflicting evidence in relation to the content and tone of the conversation. Mr. Daly alleged that JO had been “hostile and verbally abusive” to him and that she had hung up on him 14 times following the incident when Mr. Daly tried to ring her back. JO denied these allegations and claimed Mr. Daly had “used bad language and had been aggressive” towards her. JO was upset following the altercation and complained to the Respondent as she considered Mr. Daly’s behaviour was a form of bullying.

Initially following the incident, Mr. Daly sent an email to his superior complaining about JO and requesting an apology for JO’s “child-like behaviour from what was supposed to be a manager”. Shortly thereafter Mr. Daly put a “derogatory” post on Facebook about JO. We are not aware of the precise content of the Facebook post.

Mr. Daly was later called into the office and told what he had done could constitute “bullying

behaviour". Mr. Daly offered his resignation, but was told to take time to "cool off". Later that day Mr. Daly sent an apologetic email to JO stating his actions were "rude and demeaning", however she never replied to it.

The Respondent initiated an investigation into the matter, which was followed by a disciplinary hearing. During the disciplinary process although Mr. Daly claimed that JO had spoken to him in a condescending manner and he was not given an opportunity to address her concerns, he accepted his actions were "rude and demeaning" but did not accept it was bullying. It was accepted by the Respondent that Mr. Daly "put his hands up" and provided JO (as well as the owners of the store) with a fulsome apology admitting his actions were 'inappropriate and immature'.

In coming to the decision to dismiss Mr. Daly, although the Respondent accepted that Mr. Daly had a good employment record, the Respondent acknowledged it "did not consider any other sanction as what [Mr. Daly] had done was to put content on Facebook that was a public forum and [the Respondent] considered it was gross misconduct".

No evidence of an appeal was set out in the EAT's determination.

## **Judgment**

Ultimately the EAT determined "there were flaws in the employer's policies and procedures that rendered [Mr. Daly's] dismissal unfair". Unfortunately the EAT's written decision does not go into detail as to the precise nature of the procedural flaws. However, it appears that the finding of 'gross misconduct' was conclusive and the Respondent's failure to consider other, more appropriate, sanctions at any stage throughout the disciplinary procedure was one flaw that weighed heavily against the Respondent in the EAT's decision. That said, the EAT also determined that Mr. Daly had significantly contributed to his own dismissal as his actions were offensive and inappropriate. The EAT awarded Mr. Daly € 5,000.

## **Commentary**

What is clear from the above case is, although Irish law allows employers to take an employee's use of social media into account when disciplining him or her, this right is secondary to the employee's right to fair procedures and the employer must always ensure the punishment fits the behaviour.

There was no mention of freedom of speech in the written decision of the Employment Appeals Tribunal, although that does not necessarily mean the argument was not put forward at the hearing of the matter. That said, I think there is a general acceptance in Ireland that an

employer can take into account posts on social media where it can be clearly established the post is sufficiently connected to the employment. However, as this case points out, notwithstanding the content of the post, fair procedures must be followed at all times.

### **Comments from other jurisdictions**

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): In Finland the courts have taken a more lenient approach towards termination of employment based on an employee's public statements concerning the employer. In one case (TT 2011-17), an employee, while appearing on public television in a game show, had given statements about his employer that were considered detrimental to the employer's image. The employer had the right to terminate the employee's employment with immediate effect.

Another widely acknowledged judgment, though only given on the district court level, concerned an employee's postings on Facebook. In this case the court confirmed that the employee must balance freedom of speech with the duty of loyalty. Even though the Facebook posts about the employer's actions were truthful, the court held that the employee had breached her duty of loyalty when she urged people to boycott her employer and spread negative information about her employer. The court held that the constitutional right to freedom of speech does not prevent liability for damages for posts online. However, the employer could not prove that it had suffered actual loss, so the employee was not ordered to pay damages.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): It can be assumed, that a German Labour court would have been decided the same way, if employer had not taken into account employees' excuse and the behaviour of the defamed colleague before it decided to terminate the employment.

The German Federal Labour court has not explicitly decided yet whether an employer can terminate an employment based on inappropriate use of Facebook by an employee. At all other levels of jurisdiction however, it is generally acknowledged that defamation of the employer or colleagues on Facebook can, in principle, justify termination of an employment relationship.

But this will always depend on the seriousness of the conduct in the individual case and will require a thorough consideration of the circumstances and mutual interests involved. This suggests a balancing of relevant factors, including whether there were prior warnings, prior breaches of duty and excuses for the conduct.

Subject: Dismissal, unfair dismissal

Parties: Barrie Daly – v – Donnybrook Fair Limited (t/a Donnybrook Fair)

Court: Employment Appeals Tribunal

Date: June 2016

Case number: UD334/2015

Publication: [https://www.workplacerelations.ie/en/Cases/2016/June/UD334\\_2015.html](https://www.workplacerelations.ie/en/Cases/2016/June/UD334_2015.html)

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**Creator:** Employment Appeals Tribunal

**Verdict at:** 2016-06-01

**Case number:** UD334/2015