SUMMARY

2011/44 Dismissal for Using Social Media at Work - Is It Fair? (UK)

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Facts

This case concerns Miss Preece who was employed by JD Wetherspoons Plc as a pub manager between 18 May 2009 to 14 June 2010. Preece and a colleague were involved in an incident in which they were threatened by a group of customers, particularly by two customers. As a result, Preece ejected them. She had handled the matter in line with the training given to her by her employer. Reacting to abusive telephone calls received from someone believed to be the daughter of one of the customers, Preece started a Facebook discussion on the incident

whilst she was at work. During the discussion she made abusive comments about the customers and named the customers stating that she 'hoped Sandra would break a hip'. (Sandra being one of the customers.)

The employer's staff handbook included a policy on email, Internet and intranet use. It stated that employees should not make any contribution to online diaries, including Facebook, which lowered the reputation of the company or its customers. The company reserved the right to take disciplinary action and stated that any breach of the policy would amount to gross misconduct.

The customer's daughter complained about the comments to the employer, stating that the comments were offensive and very public. The employer carried out a disciplinary investigation during which Preece admitted that with her actions she breached the company's Internet policy. She thought that the privacy settings prevented all of her 646 'friends' from viewing her entries, and that only between 40 - 50 'close friends' would have been able to see them. In fact, all of her 646 Facebook friends were able to see the entries, including the customer's daughter.

Preece's employer took the view that Preece's Facebook entries breached the company's policy and lowered the reputation of Wetherspoons. As a consequence Preece was dismissed for gross misconduct. Her internal appeal was unsuccessful. This led to her claim for unfair dismissal and another claim for unlawful deduction of wages, at the Employment Tribunal.

Preece argued that her comments did not mention her employer or the pub she worked in by name; therefore she could not have brought her employer into disrepute. And, as the comments were restricted to close friends, they were not in the public domain.

Judgment

The Employment Tribunal considered whether Preece had been fairly dismissed and whether her right to freedom of expression had been infringed. Preece herself did not raise the latter issue, but the Employment Tribunal had to consider the infringement of freedom of expression in accordance with s3 of the Human Rights Act 1998. Under this legislation, tribunals must read and give effect to UK legislation in a way which is compatible with the rights laid down in the European Convention.

The Employment Tribunal dismissed her claim and the claim for unlawful deduction of wages (unpaid bonus). It was held that her comments were in the public domain, in spite of her belief about the privacy settings on her Facebook account. She had a right to freedom of expression under Article 10 ECHR, but the employer's action was justified under Article 10(2)

ECHR, because the comments could damage its reputation.

The Tribunal also found that the employer had conducted a reasonable investigation into the allegation of gross misconduct and had a genuine belief about the nature of the employee's conduct and reasonable grounds to sustain that belief. The decision taken by the employer fell within the range of reasonable responses available. Preece had been using Facebook during her shift, but even if she had used it after work, so the tribunal stated, the employer might still have been entitled to reach the same decision.

Commentary

This decision is a reminder to employers that they need a carefully drafted social media policy, covering all possible circumstances, to successfully defend themselves against unfair dismissal claims. Employees should be given copies of the policy and it should be explained to them.

In my opinion, the Employment Tribunal's decision is correct. JD Wetherspoons had a policy in place and Preece was fully aware of her company's policy. The Employment Tribunal also reasoned that her actions were brought into the public domain; Preece's own thoughts or beliefs about the private nature of the entries did not change this. This reasoning makes sense: Facebook is a public social media tool. Preece's argument that her communications were not public seems weak in this respect. Arguably, even if she had only communicated to 50-60 'close Facebook friends', this also could be interpreted as 'public' entries.

Even though the Tribunal felt that a written warning may have been appropriate, the Tribunal was unwilling to find the dismissal as outside of the range of reasonable responses. In my view, whilst the decision to dismiss might seem harsh, the reputation of the employer was at stake.

The decision may appear to be inconsistent with Stephens v Halfords plc ET/1700796/10. In that case, the employee won his claim for unfair dismissal. Mr Stephens was a manager at Halfords store and was fully aware of the company's policy which prohibited making comments on social networking sites that were not in the best interests of the company or encouraged dissent.

However, the key difference between this case and Preece was that Stephens removed the comment he had made from Facebook, after realising he was in breach of the company policy. The Tribunal held that no reasonable employer would have taken the step to dismiss in these circumstances. The Tribunal's view appears to be that whilst a clear social media policy may be in place, the reaction of employers has to fall within the band of reasonable responses.

The Preece decision is consistent with the Tribunal's decision in Gosden v Lifeline Project Ltd ET/2802731/2009. In this case, the Tribunal held that it was fair to dismiss an employee who sent an offensive racist and sexist email from his home computer to a co-worker's home computer. The email was sent out during working hours and the employee was fully aware of the equal opportunities and Internet Usage policies. The Tribunal concluded that as the decision fell within the band of reasonable responses, it was reasonable for an employer to regard the email as an act that could damage the employer's reputation.

In February 2011, The Court of Horsens, in Denmark, made a similar decision to Preece v Wetherspoons. The Court held that a derogatory comment made on LinkedIn by an employee entitled the employer to summarily dismiss him. The Court held that he had violated his duty of loyalty by making the comment.

The damage to an employer's reputation is a real concern and the cases highlighted provide an insight as to how the Employment Tribunal (and possibly other courts) will judge cases involving the use of social media at work.

Comments from other jurisdictions

Czech Republic (Natasa Randlova): Under the Czech Labour Code, employees are prohibited from using an employer's production equipment and other means necessary for work performance, including computer technology and the employer's telecommunication equipment, for their personal needs without the employer's consent. Therefore, it is not necessary for the employer to issue a policy restricting such usage of its equipment. If the employee spends his or her working time using social media, this is considered to be a breach of the employee's legal obligations related to work performance. However, other factors, such as the circumstances and intensity of the breach, employee's length of service and position will be relevant in determining what action should be taken against the employee, i.e. whether the employee should be summarily dismissed or a notice of termination or warning letter served. Summary dismissal is considered to be the last resort and therefore the employer must give careful consideration to all of the circumstances prior to taking such a decision.

Freedom of expression is a basic constitutional right of every person and is accepted as an element of employment law relationships. In order for such expression to be legitimate it must be appropriate in its content and form and, at the same time, the employee must not breach his or her obligation not to act contrary to the employer's justified interests and not to cause harm to the employer (either moral or material). In my view, in the case described above, these obligations were clearly not fulfilled. In those circumstances, under Czech law, based on an assessment of all relevant factors, there would probably be grounds for at least a notice of

termination, or even summary dismissal.

Ireland (Georgina Kabemba): As judgments in England and Wales hold persuasive authority in Ireland due to our mutual common law systems, this case is an important precedent that Irish adjudicators may refer to in the expanding area of social media in employment case law.

Subject: Unfair dismissal, freedom of expression

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