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Employment and Workforce Survey 2021: Social media employment implications

A look at survey responses on plans to revisit social media policies, including discrimination claims from 2021, as well as some of the issues to consider in social media misconduct cases.

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Social media can be a very useful tool for many businesses and organisations seeking to reach out to their clients or service users. A carefully worded tweet or a seemingly random suggestion - such as the 2021 proposal of adding baked beans to Weetabix – can cause a viral storm and get people talking. Of course, a badly worded tweet or comment or even a controversial “like” can equally get people talking, but for all the wrong reasons.

In the press

2021 saw a spate of largely sports-related inappropriate social media comments ranging from historic social media posts made by high-profile cricketers, to racist abuse posted in the wake of the Euro 2020 England-Italy penalty shoot-out. The former concerned social media comments made 8 or 9 years ago but still resulted in suspensions/reprimands. The latter has resulted in both criminal proceedings – with one such case reported as resulting in a 14-week jail sentence, suspended for 18 months, together with 30 days rehabilitation work on racism and diversity – and employment implications – such as the real estate employee who was dismissed for gross misconduct, despite asserting publicly that his social media had been hacked.

Whilst the pandemic may have increased the amount of time spent at home in front of screens, and resulted in many polarising points of view being argued on social media, the issue of how social media comments made in an employee’s own time can impact on their employment is not a new one. There have been a number of high-profile individuals over recent years who have felt the consequences of historic social media posts – including a 2017 withdrawal from I’m a Celebrity…. Get Me Out Of Here!, following the publication of a number of tweets from 2011 to 2013 in a newspaper; and the dismissal of an editor of Gay Times in 2017 within a few weeks of him taking up the position, due to social media posts from 2010 to 2015.

Related to employment

Employers – and Tribunals – have for a number of years been grappling with where the line is drawn. With a third of our survey responders having reviewed or planning to review their social media policies, we take a look below at some of the issues to consider.

Social media-related misconduct can cover both conduct in and outside of the workplace. The former could include misuse of the employer’s IT equipment or an inappropriate use of working time (assuming that social media posts are not part of the employee’s normal working duties). Where conduct occurs outside of the workplace and/or working hours, then issues may still arise where that conduct reflects poorly on the employer, indicates that the employee may be unsuitable for their role, and/or concerns the bullying or harassment of other employees. The key issue is whether there is enough to make the employee’s actions related to their employment, and this will vary from case to case.

Reputational damage

Employers seeking to dismiss employees due to concerns that their social media comments reflect badly on the employer will need to carefully consider the risk of damage and not simply assume the same will result, particularly in borderline cases.

In Whitham v Club 24 Ltd t/a Ventura, the Claimant, after apparently having had a difficult day at work posted on Facebook “I think I work in a nursery and I do not mean working with plants”. In response to a message from one of her team members, the Claimant wrote: “Don't worry, takes a lot for the b*****ds to grind me down. LOL”. During subsequent disciplinary proceedings, it was accepted by the dismissing officer (but not by the appeal officer) that that comment did not relate to the Claimant's workplace, but to her personal circumstances. The Tribunal held that the dismissal was unfair; there was nothing to suggest that these comments had harmed or jeopardised any relationship that the employer had with key clients. The decision to dismiss was therefore outside the band of reasonable responses open to the employer.

By contrast, in Weeks v Everything Everywhere Ltd, the Tribunal accepted that repeated social media references by the Claimant to his workplace as “Dante’s”, “Dante’s Inferno” or “The Inferno” were likely to cause damage to the employer’s reputation. In this case, the employer had specifically informed the Claimant that such comments were perceived to be negative and instructed him to cease making them before any disciplinary action was taken. The Claimant made it clear that he did not believe his employer could stop him making such comments, and that he had no intention of stopping.

Discrimination

Comments made on social media posts can also raise issues of discrimination.

In February 2021, in the case of Omooba v Michael Garret Associates Ltd, trading as Global Artists, and Leicester Theatre Trust Ltd, the Tribunal considered claims of discrimination, harassment and breach of contract. The Claimant had been engaged in January 2019 to play the lead role of Celie in a production of The Color Purple. Shortly after the cast was announced in March 2019, another actor tweeted that the Claimant was a hypocrite, publishing a Facebook post made by the Claimant some years before saying that homosexuality was sinful. There then ensued a “storm” of comments about someone with the Claimant’s views taking the lead in a play about a same sex relationship between women. Shortly thereafter, the Second Respondent terminated the Claimant’s contract as a result of the controversy. The First Respondent (an agency) also subsequently terminated their contract with the Claimant.

Although the Claimant’s beliefs were held to be “protected beliefs”, the Tribunal did not find that the Claimant had been discriminated against as a result. Although the situation would not have arisen but for the expression of her belief, “it was the effect of the adverse publicity from its retweet, without modification or explanation, on the cohesion of the cast, the audience’s reception, the reputation of the producers and “the good standing and commercial success” of the production, that were the reasons why she was dismissed.”

In respect of the First Respondent, “he terminated the contract because he thought a continued association would damage the business. The contract was not terminated because of her religious belief, but because in his mind the publicity storm about her part in The Color Purple threatened the agency’s survival.”

The Tribunal also held that there was no harassment and no breach of contract – the Tribunal was satisfied by the evidence given that the Claimant would not have played the part in any event.

In June 2021, the decision in the widely publicised (particularly on social media!) case of Forstater v CGD Europe, Centre for Global Development and Masood Ahmed was handed down by the Employment Appeal Tribunal. This case too concerned the expression of opinions on social media – this time, “gender critical” opinions expressed on Twitter – albeit that the “law” in the case related to whether the beliefs relied on by the Claimant were protected beliefs.

The Claimant had been a Visiting Fellow and had entered into consultancy agreements with CGD Europe and/or the Centre for Global Development since January 2015. The last consultancy agreement ended on 31 December 2018 and the Claimant argued that it had come to an end (or there had been a refusal to continue it) because of the comments expressed by the Claimant on Twitter.

There was some discussion within the Tribunal’s judgment as to what constituted the Claimant’s belief, and what was instead an expression of that belief. The core belief identified by the Tribunal was that there are only two sexes – male and female – and it is impossible to change sex. It is sex that is fundamentally important, rather than gender, gender identity or gender expression.

The Claimant was initially unsuccessful in her Tribunal claims with the Tribunal finding that the beliefs relied upon were not protected. The beliefs relied upon were held by the Tribunal to be incompatible with human dignity and that they conflicted with the fundamental rights of others. The refusal to use an individual’s preferred pronoun, or insisting on their sex assigned at birth, was held to be likely to cause offence (and in fact the Claimant accepted their comments or approach could be hurtful or offensive to others) and have the effect of violating their dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment (the very definition of harassment) – and such an approach was not worthy of respect in a democratic society.

The EAT disagreed with the Tribunal's findings. Only those beliefs which would be caught by Article 17 of the Convention – which prohibits the abuse of Convention rights to engage in any activity aimed at the destruction of the rights and freedoms of others – would fail to qualify as a belief worthy of respect in a democratic society. In practice, this would be very limited such as excluding the gravest forms of hate speech, the pursuit of totalitarianism or Nazism. Beliefs which are shocking, disturbing or offensive to others can still be protected.

The EAT made clear that it was not expressing any view on the merits of either side of the transgender debate. The judgment did not mean that those with gender-critical beliefs can "misgender" trans persons with impunity; it did not mean that trans persons do not have protections against discrimination and harassment conferred by the EqA 2010; and it did not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers continue to be liable (subject to any "reasonable steps" defence under section 109(4) of the EqA 2010) for acts of harassment and discrimination against trans persons committed in the course of employment.

This case will return to the Tribunal for consideration as to whether the Respondent's actions amounted to discrimination against the Claimant – and this will in part depend upon how much the Respondent can rely on the Claimant's actions in manifesting her beliefs as distinct from the fact of the belief itself.

Social media policies

Lastly, with technology and social media developing all the time, it is important to make sure that social media policies are kept up to date and remain fit for purpose.

In Walters v Asda Stores Limited, a comment by a manager on Facebook ("I work at a csm in sutton ASDA all though i started off in sunny skelmersdale on the rotisserie and even though i'm suppost to love our customers hitting them in the back of the head with a pic axe would make me feel far more happier heheh" (sic)) was held by a Tribunal to fall within the employer's classification of "misconduct" within its policy, rather than gross misconduct. Her dismissal for gross misconduct was therefore unfair.

By contrast, the dismissal in Crisp v Apple Retail (UK) Limited (in which the employee had made Facebook posts critical of work in general, and some which criticised Apple products) was held to be fair as the employer had made clear in its policies that making derogatory comments on social media was likely to constitute gross misconduct.

For the two thirds of the survey responders having no current plans to review their policies, it may be something that they wish to consider – even if is a quick once-over to make sure that it still covers everything that it should!

If you would like discuss the impact of any of the issues raised above on your organisation, please feel free to contact Kerren Daly.

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