June 2011

Review

Employment

"One of our employees has posted a comment on his Facebook site saying that if he was a potential customer he wouldn't touch us with a bargepole. What can we do?"

This is just the latest in a line of queries we have received from clients recently concerning employees who have perhaps lost sight of the difference between social media posts and a real conversation in their remarks about their company, boss or colleagues.

Facebook now claims over 500 million members and that it is now used by 1 in every 13 people in the world, with the ratio higher still in developed nations. The chances are therefore that a significant percentage of your workforce uses it and/or other social networking and blog sites such as Twitter, MySpace, LinkedIn, etc. At some stage somebody in almost every business is inevitably going to say something on such a site which they might regret in the morning. How confident are you that you have the practical ability to take action in response?

In this month's Review we discuss a recent Tribunal decision (***Preece v JD Wetherspoons Plc***) in which it was held that a pub manager had been fairly dismissed for gross misconduct after she made inappropriate comments about customers on her Facebook page. This case is interesting, not because it establishes any new legal principles (it is after all only a Tribunal decision), but because it is one of the first cases dealing with a dismissal for misuse of social media and therefore gives us an idea of how Tribunals will approach such matters.

In May 2010 Ms Preece was subjected to verbal abuse and physical threats by two customers. Later that day, but while still on duty, P let off some steam about the incident on her Facebook page, posting rude and negative comments about the customers in question. Needless to say the two customers got to hear about this and contacted Wetherspoons. P admitted making the comments, but said that she thought her privacy settings meant that only her work and school friends could see them. All that meant in reality, of course, is that she was guilty not just of making the comments but also of not having the nous to check her access rights first, so that was a bit of a mixed blessing as defences go. Unimpressed, Wetherspoons dismissed her for gross misconduct and P brought an unfair dismissal claim.

Wetherspoons had policies and procedures in place which made it clear what would happen if employees made inappropriate postings on social media sites. For example, its IT policy said that it would take disciplinary action if the content of any post or blog, including pages on social sites such as Facebook, was found to lower the reputation of the company, its staff or customers and/or contravened its equal opportunities policy. Its disciplinary policy also made it clear that a failure to comply with the IT policy would amount to gross misconduct. Wetherspoons was able to point to these at the Tribunal hearing, thus demonstrating that it had set out clear guidelines for employees about what would happen if they stepped out of line. P did not dispute that her actions constituted a breach of Wetherspoons' policies but contended that in all the circumstances, the gross provocation in particular, the decision to dismiss was unreasonable. Ultimately the Tribunal held that dismissal just about fell within the range of reasonable responses open to an employer in those circumstances. It did say that it would have been minded to give P a final written warning instead, but acknowledged that it was not entitled to substitute its own decision for that of the employer. Had Wetherspoons not had those policies it could easily have gone the other way. It would have been easy for the Tribunal to take the comments as ill-advised but as costing it the goodwill only of customers it should (by the sound of it) have barred going forwards anyway, or as excused to some extent by the provocation, or as just not serious enough to go straight to dismissal.

What if P had made the comments outside working hours – could Wetherspoons still have dismissed her? In this case, absolutely, as its policy made it clear that it covered comments

made on social media sites outside working hours. In any event, it is well established that employers can dismiss for conduct outside work so long as it affects an employee's work in some respect. In this case, P's comments about those customers could still have brought Wetherspoons into disrepute or jeopardised its relationship with its clients, even if she had made them outside working hours.

Did P have any right to privacy or to freedom of expression? In terms of privacy, there is case law which suggests that once an employee puts information in the public domain he loses any right to privacy he may have. This approach was adopted in another recent Tribunal decision (***Gosden v Lifeline Project Ltd***) involving an employee who sent an offensive email from his personal computer outside working hours to a colleague's home computer. The Tribunal said that the employee's email had lost any privacy that was attached to it because it was a chain email inviting the recipient to pass it on to others. His employer was therefore entitled to dismiss him for breaching its equal opportunities policy and potentially damaging its reputation and integrity. It did not matter that he had sent the email from his home computer to another home computer outside working hours. The content was still unacceptable and by its addressee and subsequent circulation it clearly affected his work. As to "freedom of expression" this certainly does not give an employee the right to make offensive or defamatory comments without fear of recourse. All the Human Rights Act freedoms are conditional upon their exercise not infringing the rights and freedoms of others, here not to be publically slated (even though perhaps with total justification) by the staff of your local.

These cases are likely to be just the tip of the iceberg. With employees increasingly using social media sites for work as well as pleasure but seemingly not showing any correspondingly greater ability to understand where the boundaries between them lie, employers need to ensure they have a robust social media policy in place (or at least amend their existing IT/email policy) to make it clear what constitutes appropriate use, whether inside or outside the work context.

At our July Employment Workshops we will be exploring the issues that employers need to know when handling disciplinary proceedings and dismissals over alleged misuse of social media sites, including:

- should you have a social media policy and, if so, what should it say?
- misuse of social media outside the workplace – can you do anything?
- protecting your business contacts - what precautions should you take?

To find out more, please email employment.events@ssd.com

FURTHER INFORMATION

For more information relating to this newsletter, please contact:

Caroline Noblet
Partner
E: caroline.noblet@ssd.com

David Whincup
Partner
E: david.whincup@ssd.com

Matthew Lewis
Partner
E: matthew.lewis@ssd.com

Charles Frost
Partner
E: charles.frost@ssd.com

Nick Jones
Partner
E: nick.jones@ssd.com

5341/06/11