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Anti-social media - but when is it work related?

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13 September 2019

As the use of social media continues to increase, its overlap with working life is becoming more and more prevalent. In the recent case of Forbes v LHR Airport Ltd, the Employment Appeal Tribunal (EAT) explored whether or not an offensive Facebook post had been shared in the course of employment, causing the employer to potentially be vicariously liable for its employee's actions.

In this case, S, an employee of the Respondent, LHR, shared an offensive image on Facebook. The offensive post only came to light when it was shown to the Claimant (S' colleague) by another of her colleagues. The Claimant raised a complaint with LHR, stating that racist posts were being circulated in the workplace. LHR investigated the matter, and S received a disciplinary warning for sharing the post. The Claimant was later asked to work alongside S, and after he complaining about this, he went off sick and subsequently brought claims against LHR for harassment (amongst other things). In order for the Claimant's claims to succeed, and for LHR to be vicariously liable for S' actions, the act of sharing the offensive image had to fall 'in the course of employment'.

The Tribunal (and EAT) said that it wasn't.

The key factors in the EAT's decision were:

- the post was not shared publically, and only came to light when the Claimant was shown the post by a colleague;
- at the time the image was posted, the employee (S) was not at work;
- the sharing of the image made no reference to the employer;
- S made no reference to any colleagues when sharing the post, and the majority of her friends were not colleagues; and
- the device used to share the image was a personal device, and not a device issued to S by her employer.

The EAT therefore dismissed the Claimant's appeal.

This case highlights the difficulties in deciding whether a specific act was done 'in the course of employment' and this is particularly problematic to determine in cases involving social media, where the lines between work and home life can often be blurred. The EAT did not give any definitive guidance setting out when acts will fall within the definition of 'in the course of employment', confirming that each case will be determined on its facts.

Employers' must therefore remain alive to the evolving risks relating to social media, ensuring that relevant and robust policies, procedures and training are in place and regularly reviewed to ensure that their employees' are fully aware of risks and implications of social media posts. Taking these preventative steps will help employers to defend a tribunal claim later down the line, as they can seek to rely on "reasonable steps" defence (i.e. that it had taken reasonable steps to prevent the alleged discriminatory act occurring).

It is also important that the employer's taken appropriate action to address potential misconduct involving social media when it arises. Even though the case against LHR was dismissed in the Tribunal and the EAT, the fact that LHR had followed its internal disciplinary procedure and S was given a final written warning in respect of sharing the post was taken into account by the Tribunal. This action by LHR demonstrated that it had taken the conduct seriously, and had taken reasonable steps in respect of her addressing her conduct. This would certainly be important for an employer in defending a subsequent tribunal claim.

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