Beware of the web

Tensions in the law arising out of social media usage are rising: employers need to get their policies in order, say Chris Bryden & Michael Salter

The right of freedom of expression (Art 10) does not entitle someone to make comments which damage the reputation or infringe the rights of another.

Someone who places their comments on Facebook, loses the right to consider their comments private and they therefore cannot seek to rely on Art 8.

The protection of beliefs under Art 9 does not cover comment about another’s promiscuity.

The issue of social media use in the workplace context is one which is likely only to become more relevant as individuals increasingly operate their social lives online and merge the boundaries of professional and personal. In a recent article we considered the present position relating to disciplinary steps for comments posted on social media fora. (“Damage limitation”, NLJ, 22 February 2013, p 191) Smith v Trafford Housing Association [2012] EWHC 3221 illustrated the approach of the courts in upholding a claim for breach of contract, following the demotion of Smith for commenting on Facebook that gay marriage was “a step too far”. However, other cases referred to in that article demonstrated that an employer could fairly dismiss for derogatory postings, or those which brought the company into disrepute, particularly where a clear policy in this regard was in place. This area of law bears further consideration following a number of recent cases.

In Teggart v TeleTech UK Limited [2012] NIIT 00704_11IT, a case in the Northern Ireland Industrial Tribunal, the claimant, in his free time and from his home computer, made scurrilous comments about the sexual promiscuity of a work colleague. That colleague was excluded from the ensuing Facebook discussion, but became aware of it. A complaint by the colleague’s friend to the respondent led to suspension and disciplinary proceedings. In the course of the disciplinary meeting, the claimant defended himself by claiming that his posts were in his free time, and he could make such comments as he pleased; he did not mean to offend; and he did not consider the comments to be bullying or harassment. He also denied bringing the company into disrepute.

Teggart was dismissed, a decision upheld on appeal. At the appeal hearing, Teggart contended further that his rights under Arts 8, 9 and 10 of the European Convention on Human Rights (Convention) had been violated. He relied upon Art 8 as the comments had been made in his own time and his rights had been violated by the investigation into his correspondence; Art 9 as he had had his beliefs violated; and Art 10 as he was entitled to freedom of expression.

Convention principles The tribunal considered the applicable law and referred to X v Y [2004] EWCA Civ 662, [2004] IRLR 625, in which Mummery LJ gave guidance as to the applicability of Convention principles in employment tribunal cases. In dealing with the submissions of Teggart, the tribunal found as follows:

- Article 8: When the claimant put his comments on his Facebook pages, to which members of the public could have access, he abandoned any right to consider his comments as being private and therefore he cannot seek to rely on Art 8 to protect his right to make those comments.
- Article 9: The tribunal was satisfied that the “belief” referred to in Art 9 does not extend to a comment about the promiscuity of another person. In the tribunal’s view, belief, in keeping with the remainder of Art 9, is intended to refer to a philosophy, set of values, principles, or mores to which an individual gives his intellectual assent or which guides his conduct or behaviour. “The limits to this concept lie in a requirement of a serious ideology, having some cogency and cohesion...” (Employment Law and Human Rights, 2nd Edition, Robin Allen QC, Rachel Crasnow and Anna Beale).
- Article 10: The right to freedom of expression, as set out in Art 10, brings with it the responsibility to exercise that right in a way that is necessary for the protection of the reputation and rights of others. The right of freedom of expression does not entitle the claimant to make comments which damage the reputation or infringe the rights of A. The claimant does not assert that A’s reputation has been harmed on the basis of a joke or fun. Furthermore A has the right not to suffer harassment.

Comment The tribunal’s conclusions bear further comment. In respect of Art 8, the tribunal determined that the act of placing comments into the public domain, even though the circle privy to those comments was limited, obviated Teggart’s ability to rely upon a reasonable expectation of privacy. This reasoning is, with respect, dubious, particularly given the Information Commissioners’ Office Employment Practices Code guidance that there is a reasonable expectation that such personal information is private. There appears to be a distinction here with Smith, where the High
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Court commented that the offended party had chosen to be his friend on Facebook; the victim of Teggart was not privy to the discussions about her, but merely found out about them. That, it seems, is the difference between the two situations (though Smith was not expressly an Art 8 case), and demonstrates a different attitude towards reasonable expectation of privacy between situations where a person who has chosen to “connect” is offended and where the offence is caused to a non-involved person.

The tribunal’s decision in relation to Art 10 is also of interest. As we have previously considered (see previous article cited above) the courts will give significant weight to Art 10 arguments in claims brought against the media. It may be that Teggart is on the other side of the “private person” line from that of Trimingham; however, the tribunal did not appear to engage in a similar consideration of this balance, rather simply determining that the Art 10 right is qualified to protect the reputation and rights of others.

In Preece v JD Wetherspoons plc ET/2104806/10, a pub manager was dismissed for writing derogatory comments about abusive customers after a torrent of verbal abuse and physical threats from the customers. The claimant’s belief that her comments were private, owing to her mistaken belief over her Facebook privacy settings, was irrelevant. The policy of employer expressly dealt with the use of social media. The tribunal found that the claimant’s actions, whatever her belief about the privacy of the communications or otherwise, were in the public domain. Under Art 10 the claimant has the right to freedom of expression, but the tribunal took the view that the respondent’s action had been justified under Art 10(2), in view of the risk of damage to its reputation, because it was clear from the communications, when read as a whole, that the claimant was discussing work and the customers.

Teggart is not a new case, but its facts do clearly illustrate the tensions in the law arising out of social media usage. Employers need to ensure that they have a clear and up-to-date policy covering social media usage and what can and cannot be used against them in disciplinary hearings. Given the rise in the use of social media and the attendant risks of cyberbullying, staff training is essential. There is also the risk that an employer could be found to be vicariously liable for harassment or bullying committed by an employee against another employee, which could be costly and cause vast reputational damage. It is likely that few employers’ handbooks contain adequate policies and procedures relating to social media, and while at present the approach of employment tribunals is on a case-by-case basis, it will not be long before a case is before the EAT; it is likely that guidance will be given in this fraught and difficult area.

Practice points
It is an area in which guidance is required; and we venture to propose a number of principles:

i. Postings on personal social media sites in free time from personal equipment are not generally covered by a reasonable expectation of privacy and Art 8 arguments in this regard will rarely succeed.

ii. However, this will apply only where a complaint has been made; a tawd of social media for disciplinary purposes will fall foul of Art 8, unless there is a very clear policy in place.

iii. A failure to bring to the attention of an employer such material when a complaint has been made will be very dangerous for an employee.

iv. Article 10 freedom of expression defences are not likely to succeed when personal comments are made against an individual; however general expressions of view, however offensive, will be protected to a significant extent.

v. A company is not likely to be brought into disrepute by personal expressions of view, especially if the audience is small and exclusive.

vi. Companies are responsible for the content of their social media feeds, even where postings are by disgruntled employees.

vii. An employer may be vicariously liable for campaign of harassment, even in personal time, if it knows or ought to have known that such campaign is being waged against an employee by a colleague.

It remains to be seen which, if any, of these principles will be adopted, but we suggest that employers assume that they may be, and act accordingly, by way of best practice.

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