

Preece vs Wetherspoons

The case of the email and internet policy and now the social media policy whether or not the individual is at home or at work and an appeal after an employment tribunal.

Before you get settled here's a small but interesting case. Gosden vs Lifeline Project.

LifelineProject

Mr Gosden was employed by a charity that worked with drug-users in prisons. In October 2008, Mr Gosden sent an offensive email from his home computer to a colleague, who worked for HM Prison Service which was racist and sexist in content and encouraged the recipient to pass it on to others. A colleague forwarded the e-mail on to the work computer of a colleague and HMPS then became aware of the email.

Mr Gosden was suspended from work and following various delays, formal disciplinary proceedings were commenced against him for gross misconduct. Mr Gosden was found guilty of potentially damaging Lifeline's reputation and breaching its equal opportunities policy. As a result, he was summarily dismissed. Mr Gosden appealed, arguing that the conduct concerned took place outside work time. He also felt that the investigation was incomplete. Having failed to succeed in his internal appeal, Mr Gosden brought claims in the Employment Tribunal for unfair and wrongful dismissal.

Now read on...

A recent case however looks at whether an employee's inappropriate use of Facebook after an incident at work led to her dismissal.

Miss Preece was employed by JD Wetherspoons plc as a shift manager at the Ferry Boat. She was aware of the company's policies which said that employees should not write or contribute to a blog, including Facebook, where the content lowers the reputation of the company or its customers, and the company reserved the right to take disciplinary action where this occurred. Miss Preece was aware that she could ring an emergency number for support of a manager at any time.

In May 2010, Miss Preece and a colleague were subjected to "a shocking torrent of verbal abuse and physical threats" by a group of people, particularly two customers known as Brian and Sandra. Miss Preece was threatened with a cane and, as a result of their

behaviour, asked them to leave. The tribunal hearing decided that Miss Preece dealt with the situation correctly.



In the early evening several phone calls were received from someone said to be Brian and Sandra's daughter:

- In the first call, Miss Preece was told: "Get your ****ing P45 ready because you're out of here".
- In the second call, Mr Ainsworth was asked to "put that slag of a manager on the phone". After Miss Preece took the call, she was called a "snide bitch" and abused further.

- In the third call, Miss Preece was called a "whore" and to "get her P45 ready".
- In the fourth call, the woman was threatening, stating: "Tell that fat ****ing slag of a manager I know where she works, what car she drives and tell her to watch her back the snide ****ing bitch".

Around 6.30pm, Miss Preece began a Facebook discussion by making an entry that consisted of the words "**** off, **** off, **** off". A conversation between her and work colleagues that included a discussion of the events with Brian and Sandra earlier that day. At one point, Miss Preece wrote, in reference to Sandra: "****ing hag! Hope her hip breaks". She later named the customers by posting, "Sandra and Brian barred ha ha ha!" At this point, the two customers had not been barred, merely asked to leave the pub. Miss Preece was on duty throughout the entire Facebook discussion.

On 7 June 2010, the company received a complaint from Leslie Roach (Sandra and Brian's daughter) about Miss Preece's Facebook entries of 24 May 2010. Ms Roach was concerned about the "offensive comments", which had been made public, and that Miss Preece hoped that her mother's hip would break. The company began an investigation, during which Miss Preece admitted that her actions were in breach of company policy. However, she argued that her privacy settings meant that her Facebook messages would have been seen only by between close friends, rather than all her friends. She also stated, in mitigation, that she had been subjected to abusive telephone calls

A disciplinary hearing was held in respect of allegations that Miss Preece had failed to comply with company policy and had lowered the reputation of the organisation, and that her actions had led to a fundamental breakdown in trust and confidence. Miss Preece conceded that her actions were not acceptable, and she was dismissed for gross misconduct. She appealed on the basis that the mitigating factors she had put forward, namely that she had been under "severe pressure and provocation" were not given consideration, and that she had not mentioned the company or the name of the pub in her entries. The appeal officer upheld the original decision. He was clear that the Facebook

comments were identifiable as being about work, and that they were not as secure as Miss Preece claimed, given that they had been picked up by a customer. Miss Preece claimed unfair dismissal.

The tribunal found that the company believed that Miss Preece had committed an act of gross misconduct, and that it had reasonable grounds. It also found that the company had carried out as much investigation into the matter as was reasonable in all the circumstances.

The tribunal found that Miss Preece's Facebook activities were, regardless of her belief about the privacy of her communications, in the public domain. The tribunal stated that, under the European Convention on Human Rights, Miss Preece has the right to freedom of expression, but the company's actions were justified in view of the risk of damage to its reputation.



The tribunal also found that the disciplinary and appeal officers had taken Miss Preece's mitigation arguments into account, and that her Facebook entries did not reflect her upset and anger at the situation, citing the fact that the discussion took place over a lengthy period of time and well after matters had calmed down.

The tribunal stated that, although this was a case where it may have been more inclined to award a final written warning to Miss Preece than dismiss her, that opinion was irrelevant for the purposes of deciding her unfair dismissal claim. It found that Miss Preece had been fairly dismissed.

LTT of this case are that mitigating factors are no justification or excuse for an employees misconduct. Secondly a robust policy on use of social media will go a long way towards safeguarding an employer's position over misuse of social networks.

This case highlights the importance for an employer of having a robust social media policy as the use of Facebook and other social media sites continues to increase. Ensuring that a robust social media policy is incorporated into an employee's employment contract is essential as a new generation of employees are using social networks both at home and at work.

The Tribunal found the company had passed each stage of the test laid down in the previous case of **British Home Stores Ltd. v. Burchell**

The employer (BHS) suspected, but could not prove at the time of the dismissal, theft (essentially shoplifting) by staff in a B.H.S. store. The tribunal held that the dismissal was fair. The test for whether the dismissal was fair was

1. That the employer held the belief that the employee was guilty.
2. That he had reasonable grounds on which to sustain belief.
3. That he had carried out as much investigation as reasonable in circumstances.

The test is not objective, and the employer need only be satisfied on balance of probabilities.

What does this mean for you?

Although this is only an Employment Tribunal decision, and therefore it is not binding on other Tribunals, it is a useful insight into the deliberations of one Tribunal on the topical issue of social media and its impact on the workplace.

It is encouraging for employers that the Tribunal was ready to accept that the employee's actions on Facebook were sufficiently close to her employment to justify dismissal. Would the Tribunal's decision would have been different if Miss Preece had posted the comments at home rather than at work. It seems not.

Another key issue is the Tribunal's emphasis on the provisions in the company's Handbook relating to "E-mail, Internet and Intranet", and its finding that Miss Preece had been well aware of the relevant rules prior to the incident. Although the Tribunal did not say so, it seems likely that it would have been less inclined to find the dismissal fair, if there had been grey areas in the company's rules on online conduct or Miss Preece had not been made aware of the rules.

Employers need to look at how social media is covered in their IT & data security policies and that they have a properly drafted social media policy that you can rely on in these type of situations.

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