Regulating the Use of Social Media across Continents

Social media policies attempt to grapple with the impact that employee conduct online may have on the reputation, business interests, and legal obligations of an organization. They do this by guiding employees on appropriate online behavior and prohibiting certain conduct. In a world characterized by constant connection to online devices and the blurring of professional and private lives, striking a balance that respects personal autonomy while protecting legitimate employer interests can be a delicate task.

The adjudication of social media policies often comes up in the context of unfair dismissal claims, where an employee is dismissed for comments or information posted online that the employer regards as unacceptable. The balance struck between employee freedom of association and expression and employer interest in protecting its reputation and confidential information is very different in different jurisdictions. In the UK and Europe an employer's reputation is a legitimate interest that they are entitled to protect, and in doing so they are permitted to restrict individual rights to a certain degree. In the US, by contrast, an individual's right to express opinions about their employer can trump employer concerns in a number of situations. While the differing approaches across continents may primarily be a reflection of the relative fluidity and rigidity of labor markets and the need to compensate accordingly, the resulting line that is drawn also has important implications for individual privacy and autonomy.

UK and Europe: Protecting legitimate business interests at the expense of workers' rights?

Within the legal frameworks of the EU and Council of Europe, there is broad protection against unfair dismissal. In considering whether an employee was unfairly dismissed, an employment tribunal will normally focus on the facts particular to each case, and the reasonableness of employer and employee conduct in light of those facts. A balance is sought between employee freedom of expression, and the legitimate interests of organizations. Those interests include protecting their own reputation and that of others, and preventing the disclosure of confidential information. A social media policy itself is not generally found to unduly restrict employee freedom of expression, and where an employee has been informed of the terms they may be applied, in a reasonable fashion.

Some cases from UK employment tribunals illustrate the European approach. In *Preece v JD Wetherspoons*, for example, a social media policy which prohibited online posts 'where the content lowers the reputation of the company or its customers' was held to justify the dismissal of the employee in question. In *Stephens v Halfords*, a worker started a Facebook page protesting working 3 out of 4 weekends. The employee took down the page as soon as he discovered that the social media policy prohibited public statements about the company that were not in its best interests, or actively

encouraged dissent. While the unfair dismissal claim succeeded because the Tribunal found no reasonable employer could have fired the employee on the basis of his record, his apology and his immediate removal of the page, there was no dispute as to the lawfulness of the policy or its application to a situation directly concerning working conditions.

In Belgium, courts also accept that employers can determine rules for the social media use of their employees both during and after working hours. It is generally accepted that the protection of sensitive business information or the duty of mutual respect trumps freedom of expression. The social media cases in Belgium show that the employer's right to regulate the use of social media is broad: Employers must tolerate some level of criticism, but employees expressing doubtful or indecent comments about their employer will generally not be successful hiding behind freedom of expression or the right to privacy. In this sense the Labor Court of Leuven (Labor Court Leuven, 17 November 2011, A.R. 10/2215A, *unpublished*) deemed the dismissal of a manager for publication of financial results and negative comments regarding the management of the company on Facebook lawful, since the publication of this information adversely affected the employer's interests. Furthermore, the manager's defense that his right to privacy was violated by the employer's use of the information was dismissed by the court since the information was posted on a publicly accessible Facebook "wall". French case law is also of the opinion that employees cannot abuse their right of freedom of expression to justify statements on social media which harm the reputation of the employer (Labor Court Boulogne, 19 November 2010, Juris-Data nr. 2010-021303). Furthermore, the French Supreme Court confirmed that the freedom of expression of trade unions can be restricted to prevent the disclosure of confidential information and to safeguard the legitimate interests of the company (French Supreme Court, 5 March 2008, A.R. 06-18.907, www.courdecassation.fr).

US: Protecting workers' rights at the expense of business?

In the US a very different approach to the issue of social media policies has been taken by the National Labor Relations Board (NLRB), which has come to play an interesting role in delineating acceptable regulation of employee use of social media. On 30 May 2012 the Acting General Counsel of the NLRB issued his third report on social media cases decided by the Board, with a focus on the policies governing social media use. The NLRB is a government agency with authority under the National Labor Relations Act (NLRA) to prevent unfair labor practices (Section 10, NLRA). Its jurisdiction is broad, extending over most private sector organizations with a minimum level of interstate commerce.

Decisions made in relation to social media policies by the NLRB are generally based on Section 7 of the NLRA, which gives employees the right to 'self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*…' (emphasis added). Activities protected under this Section have been found to include any situation where an

employee acts with, or on behalf of, colleagues, seeking improvement of working conditions broadly understood. Under Section 8, an unfair labor practice includes 'to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7'. The broad wording of the Act enables the NLRB to look at the text of a social media policy itself and not just the way it has been applied in any given case. In evaluating the lawfulness a policy the Board looks at whether a provision 'would reasonably tend to chill employees in the exercise of their Section 7 rights' (*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F. 3d 52 (D. C. Cir. 1999)).

The decisions of the NLRB related to social media policies reveal an expansive interpretation of workers' rights when it comes to online communication, leading to successful claims of unlawful discharge and determinations that particular social media policies are unlawfully worded or overly broad. Over the three reports issued by the Acting General Counsel, the Board deals with provisions designed to protect the reputation of the organization, its confidential information, the accuracy of online posts, its logos, brand or product, and identification of employees online. The Board finds that wording that could be interpreted to prohibit Section 7 activity is impermissible, for example:

- A policy specifying that employees are prohibited from making 'any communication or post that constitutes embarrassment, harassment or defamation of the [company] or any employee, officer, board member, representative or staff member';
- An instruction that 'offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline';
- A provision to 'avoid harming the image and integrity of the company';
- An instruction not to 'pick fights' and to avoid 'topics that may be considered objectionable or inflammatory- such as politics and religion'.

The above provisions were found unlawful because they did not sufficiently specify what conduct was prohibited, and could therefore cover protected activities such as criticizing the employer's labor policies or working conditions. To be considered lawful a policy must contain limitations or examples which make it clear that protected activities are allowed. Where the examples are of 'plainly egregious conduct' like malicious, obscene, and threatening posts, or insults on the basis of race, sex, religion, or other status, the policy can be lawful. Similar attempts to limit the disclosure of confidential information, and the accuracy of online posts, have been found to chill Section 7 activities, for example:

- An obligation to ensure that posts are 'completely accurate and not misleading';
- A prohibition on releasing 'confidential guest, team member or company information'.

Policies which prohibit the use of employer logos, or photographs of a store, brand or product online have been held to breach Section 8 because they could cover the hypothetical situation where a photo appears online of employees exercising their right to protest the terms and conditions of employment, for example carrying a picket sign with the employer's name or wearing a t-shirt with

the employer's logo at a demonstration. Any prohibition on employees using the company's name to identify themselves on social media, or even advice to 'think carefully about "friending" coworkers' online, is unlawful because it discourages communication among colleagues and restricts their ability to locate each other online in order to engage in protected activities. Finally, the Board has held that where a policy contains overly broad provisions, it will not be redeemed by a savings clause which states that the policy will not be interpreted or applied so as to interfere with employee rights, even if it specifically mentions Section 7 of the NLRA.

The right balance

Where should the line be drawn in balancing individual freedoms of expression and association with legitimate business interests? This issue will be of ever-increasing relevance in the coming years, as new technology is more widely adopted and views about acceptable conduct evolve and crystallize. Given the dearth of comprehensive protection from unfair dismissal in the US, the NLRB may fill an important gap in employee rights. The linking of social media policies to collective bargaining activities, however, seems to strain the meaning of the law. The UK and European approach, confined to the facts of each case and the conduct of the parties, seems to find a more natural place for this discussion to take place.

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