Published on *The National Law Review* https://natlawreview.com

Termination for Offensive Social Media Posts May Be "Reasonable Response" in UK

Article By:

Daniel Ornstein

Ian F. Plummer

The ***UK Employment Appeal Tribunal (EAT)*** recently considered two unfair dismissal cases in which an employer terminated an employee for inappropriately posting on personal ***Twitter*** or ***Facebook*** accounts. In both cases the EAT overturned the tribunal judge's ruling for the employee; remanding one case for failure to apply the reasonable responses test and declaring the termination in the other case to be a fair and lawful response to the employee's action.

It is well established in the UK that a dismissal will be deemed unfair unless the employer's action falls within the "band of reasonable responses." Simply, for a termination not to be unfair, the tribunal must decide if the action was within the range of reasonable responses that a reasonable employer may have taken in the same situation.

In the first case, ***Game Retail Limited v. Laws*** (UKEAT0188/14/DA, 3 November 2014), the employer terminated the employee for making numerous offensive tweets on his personal Twitter account. The employee, Mr. Laws, was a loss and prevention officer in charge of monitoring fraud at numerous Game stores across the country. In furtherance of his position, Mr. Laws began to follow a number of these stores on Twitter through his personal Twitter account. Despite the fact that Mr. Laws did not identify himself as a Game employee, he was aware that many of the Game store managers knew of his role within the company and became followers of his Twitter account. His account was also publicly available for anyone who chose to follow him on Twitter.

One of the Game store managers reported that Mr. Laws was posting offensive and derogatory tweets about numerous groups including dentists, Newcastle fans, and the disabled. Accordingly, Game dismissed Mr. Laws for gross misconduct. Mr. Laws alleged unfair dismissal, and the Employment Tribunal concurred. However the EAT disagreed, ruling the tribunal judge substituted his own views of reasonableness into the reasonable response test. The EAT also noted the tribunal judge failed to take the public nature of the Twitter account into consideration. In remanding the case to a new tribunal, the EAT made clear that employees' right to freedom of expression must be balanced with the employer's desire to remove or reduce reputational risk from its employees' social media communications.

In the second case, ***British Waterways Board v. Smith*** (UKEATS0014/15/SM, 3 August 2015), Mr. Smith was dismissed for gross misconduct relating to offensive and derogatory Facebook posts about his employer. British Waterways had a policy prohibiting employees in Mr. Smith's position from drinking while they were on standby. It also had a social media policy prohibiting postings which may embarrass the company. Violating both of those provisions, Mr. Smith posted numerous offensive comments on Facebook ranging from the fact that he was drinking while on standby to his severe distaste for his employer and fellow employees. British Waterways terminated Mr. Smith two years later upon discovering these Facebook posts.

Similar to *Game Retail Limited*, the Employment Tribunal found that Mr. Smith had been unfairly dismissed. However, the EAT overturned the decision finding that the tribunal substituted its own views for the reasonable views of the employer. The EAT held that British Waterways was clearly within the band of reasonable responses when it decided to terminate Mr. Smith.

These decisions should provide UK employers with some reassurance that terminating an employee for offensive social media postings is not unfair (and therefore lawful), depending on the facts of the case. Indeed, the *British Waterways Board* decision indicates that termination may still be reasonable despite the offensive postings occurring many years in the past. The *Game Retail Limited* decision also demonstrates that an employee does not have to identify herself as a company employee in order for the postings to be considered damaging to the company's reputation.

UK employers should continue to enact detailed social media policies and effectively communicate these policies to employees. The violation of a sensible social media policy will only enhance the likelihood that a termination decision based on that violation will be found within the band of reasonable responses.

National Law Review, Volume VI, Number 70