



Welcome to our new resident HR Bulletin Barrister

In October 100+ delegates from our councils will attend WME's annual Employment Law Update. Darren Newman has become synonymous with this event and no doubt his style and expertise helps to secure excellent attendance year after year. We are therefore delighted to welcome Darren as a regular contributor to the HR Bulletin. Darren will offer his commentary on an employment law topic or issue and WME will provide a commentary now and again to ensure relevance to our public sector readership. His first article focuses on social media and the case of *British Waterways Board v Smith*.

We hope that you will benefit from the insight and perspective brought to the Bulletin by our 'resident barrister' and welcome your feedback as well as ideas on issues or subjects you would like us to cover – email hr@wmemployers.org.uk

As part of our commitment to work across regions to reduce our costs and deliver greater value for our membership, Darren's articles will be shared with the East Midlands, North West and Yorkshire and Humber.



Freedom of speech or disciplinary offence?

Social media has revolutionised the way in which we interact and communicate with each other. This poses a challenge for employers. To what extent can the online activities of an employee be something that an employer can impose limits on? When can online comments made be the subject of disciplinary action?

As with any other area of off-duty conduct, the answer depends on the extent to which the employee's activities impact on the legitimate business interests of the employer.

Employees have a duty to render faithful service to the employer and publishing derogatory comments can be a breach of that duty. What an employee says online may also provide evidence that they are not a suitable person to be employed in a particular role

Take the recent case of *The British Waterways Board v Smith*¹. Mr Smith was a manual worker who was required to be on 24-hour standby one week in every five to deal with any emergencies that might occur. The team in which he worked was not a happy one and a number of grievances were raised about alleged bullying. Just before Mr Smith's complaint was due to be heard, however, he was accused of gross misconduct based on comments he had made on Facebook.

The comments had been taken directly from his Facebook page and some of them dated back up to two years.

¹ EAT (0004/15/SM) 3 August 2015

Most of them simply stated that he hated his work and described his supervisors in (very) unflattering terms. More seriously, some of his comments referred to drinking while on standby – something strictly prohibited and regarded by the employer as gross misconduct.

Mr Smith argued that all of his comments – including those about drinking while on standby – were ‘banter’. He hadn’t intended them for public consumption, but his Facebook account had been hacked and the privacy settings changed so that anyone could read them. The employer didn’t believe him and decided that he must have been drinking while on stand-by, so he was sacked for gross misconduct.

Mr Smith argued that all of his comments – including those about drinking while on standby – were ‘banter’. He hadn’t intended them for public consumption, but his Facebook account had been hacked and the privacy settings changed so that anyone could read them. The employer didn’t believe him and decided that he must have been drinking while on stand-by, so he was sacked for gross misconduct.

The Tribunal

The Tribunal found that the dismissal was unfair. Mr Smith had 8 years of unblemished service and consistently good performance reviews. The employer had actually known about the comments for some period of time before deciding to act and the Tribunal took this to show that the matter was less serious than the employer subsequently claimed. The Tribunal also noted that the comments were made on a social media site used for ‘chat’ and which ‘frequently involves people making claims which are either exaggerated or simply not in fact true’.

The EAT

The EAT overturned the decision, however. The Tribunal had fallen into the trap of substituting its own view for that of a reasonable employer.

Given that a fair procedure had been followed and the employer honestly believed that Mr Smith had been drinking while on standby the only option open to the Tribunal was to find that the dismissal was fair.

Final thought

Frankly I think the employer had a lucky escape here. It does seem quite harsh to take everything someone says on their Facebook page - aimed solely at their own circle of friends - as the literal truth. I can certainly imagine that someone would boast about drinking while on standby in order to seem cool and rebellious while staying scrupulously sober - and the employer had no other evidence that the employee had been drinking when he shouldn’t. But even if we take this case as being a close-run thing, there are still lessons that we can learn from it.

In the first place, it is clear that the fact that an employee makes comments on his or her own personal Facebook page does not place them ‘out of bounds’ when it came to disciplinary proceedings. If the employer actually hacks into an employee’s account and obtains information illegally, then that is a different matter. But, in general, any evidence that an employer can lawfully access online is fair game.

I also think it was significant that some of the comments could be used as evidence of specific misconduct – drinking while on standby – as opposed to the employer’s concern that Mr Smith’s other comments had risked bringing the employer into disrepute. We all moan about our work – don’t we? Requiring employees to be positive and engaged while writing about their day on Facebook or Twitter is surely taking things too far. Employers may worry that when negative comments are published online they can be seen by the whole world. However the reality is that most comments on social media are seen by almost no-one. It is important to keep a sense of perspective and think carefully about how much harm has actually been done.

Where there is a more specific concern, however, then the employer is justified in taking a much harder line. In the Smith case the issue was drinking on stand-by. In a lot of local authority work the concern will be over information regarding children or vulnerable people.

Making an online comment – even in jest - that could lead to a vulnerable person being identified, or which might give the impression that appropriate care was not being given, is the sort of thing that an employer will be entitled to have no sense of humour about.

Policy Considerations

One of the key questions in an unfair dismissal case is often whether the employee should have understood that the conduct in question could lead to dismissal. Where employees work with vulnerable groups – or where the employer has some other specific reason to be concerned about what might be said on social media - then it is worth making this clear, either in a general code of conduct or a specific social media policy.

It is best not to get carried away. A policy that is too restrictive will be widely ignored and will do more harm than good. Employers should appreciate that employees will say things online that they wouldn't say in the workplace. However, where an employee's role causes a particular risk of harm if comments are misjudged or taken out of context then a strict policy is justified – and also helps protect the employee. One misplaced comment about a care home or school could erupt into a Twitter storm that can be a nightmare for the individual concerned as well as causing damage to the employer. If employees are given clear boundaries about referring to work on social media then most will be grateful to be given good practical advice.

Keep in touch

Twitter - @DazNewman

Blog – darrennewman.wordpress.com
'a Range of Reasonable Responses'



Getting commercially savvy!

There is no denying the growing need in the public sector to turn services into business opportunities as a means of ensuring these services into successful commercial activities is an exciting option but comes with its own challenges; it requires careful consideration of how to balance profits with social conscience.

At WME we have teamed up with our colleagues at North West Employers (NWE) to offer a **'Master Class in Turning a service into a business'** using an easy 6 step model. This workshop will be **presented by Yvonne Castle and Gillian Bishop**, Associate Consultants with a wealth of knowledge and hands on experience of refocusing services to deliver greater commerciality. It will cover balancing profit and social conscience; identifying competitive advantage and USP; marketing services; and skills to drive business change.

To find out more or book your place:

<http://www.wmemployers.org.uk/newfor2015-16>

Honing our commercial skills

We are also launching a number of commercial skills training opportunities, with something for everyone:

- Commercialism in Local Government
- Business development and entrepreneurialism
- Understanding and developing your offering
- Marketing and Branding
- Transactional Skills
- Negotiation Skills including Financial Language
- Strategic Commercial Skills

To find out more: <http://bit.ly/1UXn0tg>



What kind of cake are you?

It is that time of year when 'Strictly' and 'X Factor' return to our screens but the more culinary amongst you may prefer 'The Great British Bake Off'. The WME team have read some bizarre features and numerous approaches to psychometrics, but the following article by HRville of HR Professionals making comparisons to types of cake really took the biscuit (sorry couldn't resist that one!).

Petit Four



Photo: CC

Not just one, obviously. You're all things to all people as you preside over employee relations crises, while still managing to smooth out compliance niggles like making a glossy ganache. Infinite different flavour possibilities (in this cake metaphor, flavours means skills Duh) mean you have a lot of weapons in your arsenal, ready to cater to any problem).

Apple Strudel



Photo: CC

A perfectionist aware of the importance of getting every little thing just right. As you would expect from precision engineered German baking, there is a lot squeezed into a small package. Coming with a variety of different fillings, both tart and sweet, these cakes are experts in baking law. They can also pair well with many drinks, from teas and coffees through to beers and wines. Or, they know the value of developing relationships with key stakeholders at all levels of the business.

Victoria Sponge



Photo: Carwyn Lloyd-Jones

Not everyone can be a refined French patisserie product or an artisanal loaf. Reports, payrolls, schedules, and everything in between — somebody has to be on top of these things, and they are your bread and butter (pudding).

The older people get, the more they appreciate you. Damn it, sometimes the simple things in life are the best.

Croissant



Photo: CC

Hard not to like, but with a narrow skillset (breakfast only). Rarely seen without a cup of coffee in the vicinity. Expected to deliver on specialties, whether that be interviews, training, or specific projects. Often expected to be on the move.

Works well alone, but works well too with almost any area of the workforce including jam, butter, cheese and ham, the four key business departments.

Fruitcake



Photo: Bongo Vongo

Not necessarily insane, but a sweet icing exterior hides a dark and dense filling. Often soused in rum (and coke). Not to everyone's taste, but a vital stalwart of cake-kind. Lasts forever, never goes off, and certainly dependable.

A senior variety of HR cake taking tough decisions — who are the real cakes and who are merely biscuits? Who are too flaky? Who will crumble under the pressure?

Rumours abound that the last person who tried to guess the weight of the fruitcake was beaten to death by a single rock hard slice.

WME declines to comment on the HRville article but there is probably a couple of strudels and a fruitcake in our mix.