Social Media & The Contract of Employment

Rights & Obligations

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Contents

Introduction

- Most of the material in the presentation is based on US materials, principally because the regional jurisdictions have not yet dealt either judicially or legislatively with employment or industrial relations disputes concerning social media. It will be agreed, however, that the issues treated here are indeed relevant to our current condition. The US response may therefore provide some assistance.

Social Media

- *"Modes of online communication in which individuals shift fluidly and flexibly between the roles of audience/readership and author…"* –Heather Morgan and Felicia Davis (2013)
- **Facebook** (2014) –over 1.06b users per month
- **LinkedIn** (2003) –over 200m users
- **Twitter** (2006)-over 288m users per month
- **'Blogs** (1997) –over 181m exist
- **You Tube** (2005) –over 4b hours of video content watched per month
- **Whatsapp** (2014) - user base of 1.5b
- **Instagram** (2010) – over 800 m users

II The hiring process

- Largely unregulated in Barbados.

- But see
- **St Lucia** –Equality of Opportunity and Treatment in Employment and Occupation Act 2000
- **4.(2)** *It is unlawful for any person who is an employer or any person acting or purporting to act on behalf of a person who is an employer,* ***in relation to recruitment, selection*** *or employment of any other person for purposes of training, apprenticeship or employment, to discriminate against that other person on the grounds specified under section 3(2)—*

II The hiring process

- **Barbados-**
- Criminal Records (Rehabilitation of Offenders) Act 1997; s.23
- *Subject to the provisions of this Act, any person who dismisses or excludes any other person from any office, profession, occupation or employment because of a spent or expunged conviction which he knows or has reasonable cause to suspect is a spent or expunged conviction and which is not required to be disclosed under any law is guilty of an offence.*

- Similar legislation exists in **Antigua & Barbuda**, **Jamaica** and **The Bahamas**

II The hiring process

- **Trinidad & Tobago -**Equal Opportunity Act, 20002.s. 8

- *An employer or a prospective employer shall not discriminate against a person—*
- *(a)* ***in the arrangements he makes for the purpose of determining who should be offered employment****;*
- *(b) in the terms or conditions on which employment is offered; or*
- *(c) by refusing or deliberately omitting to offer employment.*

II The hiring process

- **Grenada –** Employment Act 1998, section 26(1)-

- *No person shall discriminate against any employee on the grounds of race, colour, national extraction, social origin, religion, political opinion, sex, marital status, family responsibilities, age or disability, in respect of* ***recruitment,*** *training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship.*

II The hiring process

- Social media offers the prospective employer a free, easily accessible opportunity to "cybervet" an applicant for employment. Employer must however take care not to infringe anti-discrimination protection
- in *Gaskell v. Univ. of Kentucky,* WL (E.D. Ky. Nov. 3, 2010) the plaintiff was rejected for employment as a scientist after another employee circulated an email detailing the plaintiff's religious views – which were visible on the plaintiff's personal website – to members of the hiring committee. The Court denied the University's motion for summary judgment on plaintiff's Title VII claims of religious discrimination, finding that the plaintiff raised a triable issue of fact as to whether his religious beliefs were a motivating factor in the University's decision not to hire him.

II The hiring process

- In the US, some states have enacted legislation limiting employers asking for social media account information.
- For example-
- In December 2012, Michigan Gov. Rick Snyder signed legislation that limits employer and educational institution access to the social media accounts of employees, job applicants, students and prospective students. Violations of the law can result in a misdemeanor fine and allows aggrieved individuals to bring a lawsuit seeking damages, attorneys' fees and costs.

II The hiring process

- At the federal level, the Social Networking Online Protection Act, introduced in the U.S. House of Representatives in March 2012 and reintroduced in February 2013, would prohibit employers, schools and universities from requesting candidates' social media usernames and passwords, or denying employment or penalizing candidates for refusing to divulge such information.
- **In the absence of similar legislation, regional employers are not precluded from requesting access to an applicant's social media accounts.**

Social Media and Misconduct

- Proof of misconduct may be mined from social media posts. Is the employee using the employer's time to post materials in breach of the duty of fidelity? Is he or she divulging confidential information?
- In the US there is the **Stored Communications Act 18 U.S.C. § 2701 (2011)** that imposes criminal and civil liability against whomever *"intentionally accesses without authorization a facility through which an electronic communication service is provided" or "intentionally exceeds an authorization to access that facility," and by doing so, "obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."*

Regulating social media use

- Employers may seek to restrict or limit employees' use of social media as it relates to their employment. For example, the employer may decide to prohibit totally employees' use of social media on company-issued mobile or desktop devices, or it may decide instead to allow such use but to limit social media activity during working hours. Beyond these use determinations, what about limitations on the content of the employee's social media activity? What can an employer prohibit its employees from posting, "liking," and "tweeting?"
- **The absence of legislation in the region entails that the employer is free to regulate social media use at the workplace during working hours. However, in the US, the National Labor Relations Board has**
- **deemed certain policies unlawful as infringing the employee's organizational rights-**

Regulating social media use

- prohibiting employee statements that "damage the company, defame any individual or damage any person's reputation";
- prohibiting employees from making "disparaging or defamatory comments about [employer], its employees, officers, directors, vendors, customers, partners, affiliates, or ... their products/services";
- prohibiting "disrespectful" conduct and language that might injure the "image or reputation" of the employer;
-
- limiting employee discussions of terms and conditions of employment to discussions conducted in an "appropriate" manner.
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Discipline for social media use

- There should be no problem if the employee's use of social media violates the employer's workplace policy on social media to the extent this is incorporated in the contract of employment and is otherwise valid. The more difficult question is whether an employer may discipline an employee for off-duty social media conduct that does relate to the employment relationship.

Discipline

- In the US, the NLRA protects concerted activity on behalf of the workforce to engage in group action for the purpose of collective bargaining to improve conditions at work. For example, protected conduct under this head included posts such as-
- *"…tomorrow I'm bringing a California workers [sic] rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that's going on that's in violation".*

- Again there is no equivalent legislation in the region although an employee must not be prejudiced for having reported an infringement of safety legislation by the employer or for having sued or having given evidence against an employer.

Discipline

- **T&T** –Occupational Health & Safety Act 2004, s. 20A
- *No discipline, dismissal, reprisal by employer*
- 20A. *No employer or person acting on behalf of an employer shall— (a) dismiss or threaten to dismiss a worker; (b) discipline or suspend or threaten to discipline or suspend a worker; (c) impose any penalty upon a worker, or intimidate or coerce a worker,*
- *because the worker has acted in compliance with this Act or the Regulations or an order made thereunder, has sought the enforcement of this Act or the regulations, has observed the procedures established by the employer or has given evidence in a proceeding in respect of the enforcement of this Act or the Regulations.*

Discipline

- **Barbados** –Safety & Health at Work Act 2005 –s.102
- *No employee shall be dismissed or disciplined in any manner by reason only of his requesting an inspection of his workplace by an inspector*.

- **Barbados** –Employment Rights Act 2012, s.30 (1)(c) (iv)
- *…that the employee made a complaint or participated in proceeding, being a complaint or proceedingswhich involved an alleged violation of a law, contract of employment or practice by an employer...*
- An ***automatically unfair reason*** for dismissal

Discipline

- **Examples of non-protected social media activity**-
- An employee's posts complaining that he had not received a raise in five years and that he was doing the waitresses' work without tips, calling customers "rednecks," and stating that he hoped the customers choked on glass as they drove home drunk, were not protected concerted activity because the employee did not share the posts with co-workers, no co-workers responded to the posts, and there had been no employee meeting or any attempt to initiate group action concerning the tipping policy or raises;

- "F--- [Employer]" was merely an expression of an individual gripe and thus not protected concerted activity.

Vicarious Liability

- An employer has a duty to redress complaints of harassment or discrimination known to the employer if the harassment is related to the workplace. In some situations, it is conceivable that the employer's obligation may extend to alleged harassment and discrimination that occur via social media use. If an employer is aware of allegedly harassing or discriminatory social media conduct made by or to an employee and does nothing in response, the employee could be liable for failing to remedy the situation, just as it would be for other complaints of workplace harassment or discrimination

Vicarious Liability

- *Guardian Civic League v. Philadelphia Police Dep't.* (2009) (alleging the employer police department created a hostile work environment under 42 U.S.C. section 1983 by allowing white police officers to operate a racist website and to post racially offensive comments while on and off duty; the case against the police department settled for $152,000 plus injunctive relief);

Sexual harassment

- **Determination of complaint by employer**
- **9.**(1) Where after the investigation is conducted under section 8 the employer finds that sexual harassment has been committed, the employer shall
- *(a)* in the case of the employee, take such disciplinary action as is appropriate; and
- *(b)* in the case of the client, take such action as he considers appropriate in the circumstances to remedy the situation.
- **Barbados**–Employment (Prevention of Sexual Harassment) Act 2017

Vicarious Liability

- An employer may be liable for a wrongful act of an employee using social media so long as it was fair, just and reasonable to impose such liability.
- See ***Otomewo v Carphone Warehouse Ltd.*** [2012]
- *"…the test for whether an employer can be found liable in these circumstances is whether the employment relationship and workplace of the parties gave them the opportunity to do what they did..."*
- See also more recent UK decisions imposing vicarious liability where it is fair just and reasonable to do so-
- ***Various Claimants v Barclay's Bank plc***
- ***Cox v Ministry of Justice***

Social Media and the duty of fidelity

- The increasing transaction of business through social media means that content engendered thereby may come to be regarded as personal property. Who owns this property, whether business contacts or customer lists? Is such material a trade secret worthy of protection or information in the public domain?
- ***Eagle v. Morgan*** (2011) (finding LinkedIn connections were not trade secrets because the employer's customers were listed on its website and thus either were "generally known in the wider business community or capable of being easily derived from public information")
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Fidelity

- **The duty defined**
- An employee owes an obligation not to compete with his or her employer during the subsistence of the contract. This includes the duty not to disclose confidential information but does not preclude the employee from doing other work on his or her own time so long as this does not adversely affect the employer's business in a significant way.

Fidelity

- Once the employee has left the employment, the obligation of fidelity will still exist in the duty not to release trade secrets or confidential information acquired during the course of employment. This obligation may be further reinforced by a clause in the contract limiting the post-employment activity of the employee. This implicates the issue of ***"restraint of trade"***

Fidelity

- **What amounts to solicitation?**
- ***NDSL. Inc. v. Patnoude*** (2012) (after leaving for a competitor, employee sent a generic LinkedIn invitation request to a former customer; denying employer-plaintiff's request for preliminary injunction because, *inter alia*, the court found the standard LinkedIn invitation was not sufficient to establish solicitation in violation of the employee's non-solicitation agreement)
- ***Pre-Paid Legal Services v. Cahill*** (2013) (former employee-defendant did not solicit former employer's workers with general posts to his Facebook page about his new employer and invitations to former coworkers to join Twitter).
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"Bring your own device…"

- More employers are moving towards permitting employees to bring personally owned mobile devices (laptops, tablets, smart phones, etc.) to the workplace and to use those devices to access company information and applications, a phenomenon commonly referred to as BYOD (Bring Your Own Device). While many companies permit employee BYOD, only a few have BYOD policies in place to address security and compliance concerns. Because employees who use a personal device for work purposes oftentimes use the same device to access and contribute to social media, any employer permitting employees to BYOD should ensure their policies cover both areas of emerging technology – BYOD and social media.

"Bring your own device…"

- In *Sitton v. Print Direction, Inc.*, a salesperson for a commercial printing business used his personal laptop connected to his employer's network for business and personal use. His "personal use" included brokering print jobs for his wife's company, a competing printer. When the employer learned about these activities, the CEO entered the employee's office, moved the computer's mouse, and printed certain emails confirming the employee's actions. After the employee was discharged he sued the employer for computer theft, computer trespass, and computer invasion of privacy under the Georgia Computer Systems Protection Act. Affirming the trial court's judgment in favor of the employer, the court agreed that despite the fact that the computer belonged to the employee and not the employer**, the employer was authorized to inspect the computer pursuant to the computer usage policy contained in the Employee Manual.**

Freedom of expression

- Public employers face unique constitutional issues when their employees use social media to voice opinions or concerns.

- While the **Barbados** Constitution guarantees freedom of expression-
- S. 20. (1) *Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions without interference, , freedom to receive ideas and information without interference, and freedom from interference with his correspondence or other means of communication.*
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- And see **Trinidad & Tobago** Constitution, s.4 (i) that enshrines
- *(i) freedom of thought and expression…*

Freedom of expression

- It may also be limited in respect of public officers-
- *(2)Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-*
- *(c) that imposes restrictions upon public officers or members of a disciplined force…*

- **Quaere -**Is clicking "Like" on a post a form of expression?

- **Barbados**- Public Service Act, 2007-41-
- The Code of Conduct & Ethics(SECOND SCHEDULE)
- *Officers shall not…*
- *(b) contribute to any newspapers in Barbados or elsewhere on questions that can properly be called political or administrative, but may furnish articles upon subjects of general interest…*
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- **T&T** –Civil Service Regulations, Chap. 23:01
- **139.** (1) An officer shall not respond to questions of public policy, in a manner that could reasonably be construed as criticism and which may call into question his ability to impartially implement, administer or advise on Government policy.
- (2) Sub-regulation(1)shall not apply to an officer acting in his capacity as a representative of a recognised association.
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Freedom of expression

- And **see** ***De Freitas v The Permanent Secretary, Ministry of Agriculture (Antigua& Barbuda)***

- The interdiction contravened the appellant's constitutional rights . In determining whether a limitation is proportionate arbitrary or excessive, the court should ask itself whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accommodate the objective."

Conclusion

- This area presents a number of emerging justiciable issues, given the high concentration of social media participation in the region. It is urgent therefore that jurisdictions contemplate legislation that balances and pays due regard to the employee's fundamental freedoms of expression, of association for trade union purposes, his or her right to reasonable expectations of privacy and the employer's managerial prerogative.
- This last may be manifested in a workplace social media policy that respects the dignity and autonomy of the individual employee, the mutual duty of trust and confidence and the commercial interests of the enterprise.