Harassment: Are employers liable for employees' offensive Facebook posts?

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THE FACTS

Mr Forbes worked at London Heathrow Airport. One of his colleagues, Ms Stevens, posted an image of a golliwog on her private Facebook page with the caption "Let's see how far he can travel before Facebook takes him off". The image was shared with her Facebook list of friends, which included a work colleague. This colleague showed the Facebook image to Mr Forbes who was shocked and appalled by the fact that Ms Stevens had posted this image. He complained to his line manager that racist images were being circulated at work. Mr Forbes was not satisfied with his line manager's actions and he raised a formal grievance. His grievance was upheld and Ms Stevens was given a final written warning for her conduct which was considered to be in breach of the dignity at work policy.

Mr Forbes was subsequently posted to work alongside Ms Stevens. He raised a concern with his union representative and he was moved to another location without an explanation. This upset him as he felt that he was being victimised and discriminated against because he had complained about the image. He was signed off sick. Shortly before his return to work, he issued proceedings in the tribunal, alleging harassment, victimisation and discrimination.

The employment tribunal held that Ms Stevens had not been acting in the "course of her employment" when she posted the image on Facebook and that the airport was not therefore vicariously liable for her actions. When she posted the Facebook image, Ms Stevens was not at work. The post was shared privately among her friends' list, the post made no reference at all to the airport or any of its employees, and she had not used any of her employer's equipment in sharing the post.

The tribunal concluded that, in any event, the sharing of the image did not have the purpose or the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Forbes. The majority of the tribunal felt that, while the image was offensive and it did cause offence to Mr Forbes, this was not Ms Stevens'purpose and, taking into account her willingness to apologise, it was not reasonable for her conduct to have this effect on him. She had not therefore harassed Mr Forbes.

The tribunal also held that that the airport had taken reasonable steps to prevent Ms Stevens doing the discriminatory act, and it was not vicariously liable for her actions.

Mr Forbes's claim of victimisation was also dismissed.

Mr Forbes appealed to the EAT, which upheld the tribunal's decision.

The EAT considered that the tribunal had taken the correct factors into account in considering whether Ms Stevens had acted in the "course of employment". Whether actions have been done in the course of employment will depend on the facts of each case, and there is no clear dividing line between conduct that is in the course of employment and that which is not. The test is what a lay person would consider to be in the course of employment. In this case, a lay person would not consider that the sharing of an image on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was an act done in the course of employment.

The EAT commented on the "course of employment" test in the context of online actions. It may be harder to apply the relevant factors to be taken into account when dealing with the virtual landscape than a physical workplace – for example, it may be very difficult to ascertain whether there is a sufficient connection between an activity carried out on a personal social media account and their employment. The EAT did not consider that it was possible or desirable to lay down any hard and fast guidance on this. Just as with physical work environments, it will be a question of fact for the tribunal to decide in light of all the circumstances in each case.

The EAT also held that the tribunal had not been wrong in taking Ms Stevens' apology into account when deciding whether Mr Forbes had been harassed, and that it had followed the correct test in considering whether the airport had taken "all reasonable steps" to prevent the discriminatory action.

WHAT DOES THIS MEAN FOR EMPLOYERS?

- While the EAT did not lay down any hard and fast guidance on the test for employer's vicarious liability in the context of social media, this case is still useful outlining that.

- There will be many circumstances where the posting of an image on social media sites would be considered to be done in the course of employment. However, there has to be a sufficient connection between the post and work.
- Situations where this would be the case include situations where the page is maintained mainly for communicating with work colleagues or for raising work related matters.
- Where employers use social media sites for this purpose, they should have well publicised guidelines on what is, and is not, acceptable.
- If an employee shares posts with a friends' list that includes several work colleagues, the risk that the employer will be vicariously liable may increase: the greater the number of colleagues, the greater the risk may be.
- Employers can take action against employees who have acted inappropriately towards colleagues outside the course of employment without necessarily becoming vicariously liable by doing so.

Forbes v LHR Airport Ltd (RACE DISCRIMINATION - Direct : HARASSMENT) [2019] UKEAT 0174_18_2802

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