

HR Essentials

1. Social Media - a cautionary tale

Social media has huge advantages for many employers, but it can of course cause problems.

An Employment Tribunal has recently held that the dismissal of an employee for making derogatory comments about her workplace on Facebook was unfair. Factors taken into account by the Employment Tribunal included:

- the fact that the comments were 'relatively minor';
- the lack of evidence that the employer's relationship with a key client had been damaged as a result of the comments; and
- the failure by the employer to take into account the employee's previous exemplary employment record and mitigating circumstances.

There have been some reported cases recently supporting robust responses by employers to employees' conduct on social networking sites. However, this case reinforces the need for employers to avoid a knee jerk reaction and to have a clear and detailed policy, setting out appropriate parameters for use and acceptable conduct.

ACAS has recently published guidance on managing social networking in the context of performance, recruitment, bullying, disciplinary and grievance issues, defamation and data protection. The guidance also includes some very helpful pointers on the what to include in a social networking policy. Access the guidance by clicking on this link: [Guidance Notes on Social Networking](#)

2. Objective justification of direct age discrimination - an increasingly difficult hurdle to overcome?

The ECJ has held that compulsory retirement at age 60 of pilots flying for Lufthansa, in accordance with a collective agreement, was contrary to the age discrimination provisions of the Equal Treatment Framework Directive.

German and international law sets a retirement age of 65 for airline pilots. The ECJ held that retirement at 60 was not therefore necessary for *'the protection of health'*, nor was it a *'genuine and determining occupational requirement'* (as provided for in the Directive). In addition, the ECJ did not consider air safety to be a legitimate aim for the purposes of objectively justifying direct age discrimination, as it was not a social policy objective.

The Essentials:

Social media -
ACAS guidance on
social networking
published

Objective
justification of
compulsary
retirement requires
social policy
objective as
legitimate aim

Summary dismissal
during notice period
brings forward
effective date of
termination

The case serves as a warning to any employers retaining a fixed retirement age. It reinforces the fact that employers will need a social policy aim (e.g. employment policy, the labour market or vocational training) and robust evidence in support of that aim when seeking to objectively justify compulsory retirement.

3. When is a dismissal not a dismissal?

The EAT has confirmed that summary dismissal of an employee during their notice period will supersede the original dismissal on notice. An employee, who had been dismissed with notice, submitted a claim for ordinary unfair dismissal whilst the notice period was running (relying on when the notice was due to expire, which would have given her one year's service). The employer then dismissed the employee immediately without notice, before she gained the year's service required to bring a claim of ordinary unfair dismissal.

A clever move by the employer? Possibly not - the employer will not necessarily escape liability for unfair dismissal. Whilst the employee does not now have the required service to claim ordinary unfair dismissal, the case has been sent back to the Tribunal to determine whether the dismissal was automatically unfair as a dismissal for "asserting a statutory right". The reason for the summary dismissal was the fact that she had brought a claim of unfair dismissal against her employer. If this is found to be a dismissal for asserting a statutory right, the employee will succeed in her alternative claim for automatic unfair dismissal, for which a year's qualifying service is not required.

The caution in this tale is to ensure that where an employee is dismissed who is approaching a year's service, ensure that the notice is given in good time to expire before the one year point or pay in lieu (allowing for the statutory one week's notice which will be added when determining the effective date of termination).

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