Written evidence from the Employment Lawyers Association (FOE0076)

INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. Accordingly, we have only provided responses to some of the questions in the inquiry. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party, co-chaired by Felicia Epstein (Brent Legal Services) and Clare Fletcher (Slaughter and May) was set up by the Legislative and Policy Committee of ELA to respond to this freedom of expression inquiry. Members of the Working Party are listed at the end of this paper.

EXECUTIVE SUMMARY

3. The law on freedom of expression in an employment context is still developing. Many cases are fact specific, which makes it difficult for employers and employees to know where the boundaries are between an individual's freedom to express their personal views and their obligations as an employee. Employees in the UK don't have an explicit right to free speech at work, but other rights – such as not to be unfairly dismissed, and around discrimination and whistleblowing – bring the concept of free speech into play. Freedom of expression to some extent depends on the nature of the views being expressed as well as the nature of the employment. Although this would make it difficult to formulate comprehensive guidance, ELA believes that there is a need for guidance to inform employers and employees of the legal framework, outline best practice principles, and set out the relevant factors which would need to be considered in each case.

QUESTION 4

What obligations does an employee have to their employer when expressing views on social media, and to what extent can, and should, employers respond to what their employees say on these platforms?

Employee obligations

4. There is no specific legal framework governing an employee's use of social media. An employee's obligations to their employer derive primarily from their contract of employment. These obligations may apply in the context of an employee expressing their views on social media.

5. Express contractual terms which are notable in this context include the employee's role/duties (for example, the use of best endeavours to protect the employer's business and to avoid bringing it into disrepute) and the protection of confidential information.

6. Implied terms include the employee's duty of fidelity and the implied term of mutual trust and confidence. Senior employees and directors may also owe additional fiduciary duties to their employer.

7. Employee handbooks often contain policies which purport to govern employees' use of social media, including:

    7.1. a social media policy;
    7.2. an employer's code of conduct or values;
    7.3. a prohibition on:
        7.3.1. bullying and unlawful discrimination or harassment;
        7.3.2. damaging the employer's business or reputation; and
        7.3.3. expressing opinions on the employer's behalf, without authorisation.

To what extent can, and should, employers respond

8. Once an employer is aware of an employee's expressions on social media, there are avenues open to the employer to respond through investigation and disciplinary procedures.

9. Where the employee's expression on social media is clearly contrary to the employer's written policies, the employee could be dealt with in accordance with those policies. In other cases, the employer may still believe the expression is worthy of disciplinary sanction because it brings the employer into disrepute and/or breaches the implied term of trust and confidence.[1]

10. However, an employer's ability to place enforceable obligations on its employees is constrained by the application of fundamental human rights, including the right to freedom of expression.[2] For example, moderately expressed religious/political views that are unconnected to the employee's work and, when considered objectively, are not offensive and are unlikely to justify interference by an employer.[3]

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[1] In the case of *Game Retail Ltd v Laws* UKEAT/0188/14/DA, Laws was dismissed for perceived damage to his employer's reputation by derogatory comments on his personal Twitter account.
[2] Article 10 of the European Convention on Human Rights (ECHR); *Game Retail Limited v Laws* EAT 0188/14
[3] *Smith v Trafford Housing Trust* [2013] IRLR 86, ChD

11. Employers should also be conscious that expressions of religious or philosophical belief may be protected by the Equality Act 2010.[4] In these circumstances, action taken against employees for such expressions could constitute unlawful discrimination.

12. Ultimately, whether employers should respond is a matter for each employer. Expecting employers to routinely monitor employees' private social media activity is unrealistic and, in most cases, would require disproportionate resource. It also gives rise to the question of whether an individual's privacy rights have been infringed.

QUESTION 5

Is greater clarity required to ensure the law is understood and fair?

13. Given the fact-specific nature of issues which arise in this area, ELA's view is that guidance cannot provide a 'one size fits all' prescriptive framework. Nevertheless, our view is that all parties would benefit from guidance on how an employee's use of social media may impact on their employment. The guidance could outline the legal framework and include for example:

    13.1. the acceptable parameters of an employer's social media policy;
    13.2. what responsibilities and legal protections employees have when expressing their views online;
    13.3. practical worked examples, identifying a series of proportionate and reasonable investigative steps through which an employer should progress before taking disciplinary action; and
    13.4. a list of relevant factors which could determine when it may be considered fair and reasonable for an employer to take formal disciplinary action. These may include the offensiveness of the comments, how widely accessible the comments are, the medium used for communication, whether it was recent or historic, the duties/responsibilities of the worker, and the nature of the business/employer, the fairness of the investigation and disciplinary processes and the content of a social media policy.

14. One area which can cause difficulty is where an employee expresses views on social media which may constitute a protected religious or philosophical belief, but which cause offence to other colleagues, who may also have beliefs or characteristics which are protected under discrimination laws.

15. For example, in the case of *Smith -v- Trafford Housing Trust* [2013] IRLR 86 (Ch.), the High Court held that a Christian employee was entitled to express his views about gay marriage on his Facebook page, and that doing so did not constitute misconduct, even if his comments had caused particular offence to another employee who considered them to be homophobic.

[4] Equality Act 2010, section 10.

16. It would therefore be helpful to have guidance for employers on the appropriate steps to take if a protected belief causes offence or there is a clash of rights of this kind.

QUESTION 7

Does everyone have equal protection of their right to freedom of expression?

17. The right to freedom of expression under Article 10 ECHR is qualified, and can be limited on specified grounds, the most relevant being the "protection of the reputation or rights of others".[5] Accordingly, an employer may legitimately restrict an employee's social media activities in a work-related context.

18. As examples, in decided cases employers have been held to have legitimate grounds for imposing limitations on an employee's right to freedom of expression where:

    18.1. the employee made negative comments about their employer and its products, where the importance of protecting the company's image had been clearly communicated through policies and training;[6]
    18.2. the employee had made a significant number of social media connections for work-related purposes[7]; and
    18.3. the employee was found to have harassed a colleague by making vulgar comments on social media.[8]

19. The nature of certain employments, particularly in the public sector, often make it reasonable for employers to impose limitations on a person's freedom of expression – particularly where those reading or hearing such views expressed might reasonably attribute those views to the employer/organisation. Some jobs also have more limitations than others, including for example a professional duty of confidentiality to clients.

20. Further, recent cases have held that expression of gender-critical views and a lack of belief in transgenderism conflicted with the fundamental rights of others, and so were not protected beliefs under the Equality Act 2010. Both of these cases are ongoing however, subject to appeal and further guidance may yet be provided by the EAT.

21. Even where certain religious or philosophical views are protected, this does not necessarily give employees an unlimited right to manifest or express those beliefs.

Members of ELA Working Party

Felicia	Epstein	Brent Legal Services	Co-chair
Clare	Fletcher	Slaughter and May	Co-chair
James	England	Eversheds Sutherland	
Tessa	Fry	Grower Freeman	

[5] Article 10(2) ECHR
[6] *Crisp v Apple Retail Ltd* ET Case No. 1500258/11
[7] *Game Retail Limited v Laws* EAT 0188/14
[8] *Teggart v TeleTech UK Ltd* NIIT 704/11

Hannah	Mathews	Doyle Clayton
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