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Practice Group(s):

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Employee Fairly Dismissed for Facebook Comments Posted Two Years Earlier

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What happened?

In *Smith v British Waterways Board* the Employment Appeal Tribunal ("**EAT**") decided that an employee was fairly dismissed for posting derogatory and disparaging comments on Facebook despite the comments being made in 2011.

Mr Smith ("**S**") worked for the British Waterways Board ("**BW**") as part of a team who were responsible for the maintenance of canals and reservoirs. BW operated a rota system, which required employees to be on *"standby"* one week in every five, during which employees were not permitted to drink alcohol.

S raised a number of complaints and grievances about his working conditions and colleagues, resulting in a mediation being arranged in May 2013. In preparation for the mediation, S's manager provided BW with a number of derogatory and disparaging comments that S had made about his colleagues and BW on his Facebook page in 2011. One of S's comments also suggested that he had been drinking whilst on standby.

As a consequence, BW commenced disciplinary proceedings and S was dismissed for gross misconduct. BW's social media policy stated that it did not permit *"any action on the internet which might embarrass or discredit BW (including defamation of third parties for example, by posting on bulletin boards or chatrooms)."* BW stated that the comments made by S were a clear breach of its social media policy and also undermined the trust and confidence it had in S and left BW open to public criticism. S brought a claim for unfair dismissal.

The Tribunal found that S's dismissal was unfair on the grounds that BW had failed to take into account a number of mitigating factors, such as S's unblemished employment record, and the fact that BW's HR team had been aware of the comments since 2012 but had been too busy to investigate. The Tribunal also found that there had been no emergency whilst S had been on standby and therefore there had been no risk to life or property as a result.

BW appealed and the EAT upheld the appeal, finding that S's dismissal was fair. The EAT stated that BW had followed a fair procedure and that the decision to dismiss was in the band of reasonable responses open to it. In light of this, BW had been entitled to summarily dismiss despite the fact that the misconduct had taken place some years earlier. The EAT noted that it was not the Tribunal's place to come up with its own list of potentially mitigating factors and that it had incorrectly imposed its own findings when it inferred that drinking whilst on standby did not pose a risk.

What does this mean?

This case highlights the importance of having in place an effective social media policy, which clearly sets out the standards expected of employees in and outside of the workplace. The case also highlights that an employer does not lose the right to take

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disciplinary action if it fails to do so when it first becomes aware of the misconduct. It is always advisable, however, that misconduct be addressed promptly.

What should we do?

Employers should ensure that they have a well drafted social media policy in place that is relevant to the business, which is kept under review. Employees should also be made aware of the potential repercussions if they breach the policy.

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