Israel-Gaza conflict: what rights do employees have to express their views on social media and what can employers do to manage risk?

In this briefing, we consider why the discussion of the Israel-Gaza conflict by employees is potentially a problem for employers, the rights of employees to express their political views and what measures employers can take in practice to manage the objectionable expression of views by employees.

Why is discussion of the Israel-Gaza conflict by employees potentially a problem?

There are a range of strong views held on the Israel-Gaza conflict, with the risk that the expression of those views may be emotive. When expressed on social media, the stakes are raised even further. The tone of political debate on social media is often robust, with users emboldened to speak in a more provocative way than they would in person. Added to which, there is the scope for social media posts to reach a large audience.

It is easy to see how this presents a risk for employers. Views on the conflict could be expressed in ways which run contrary to the values and aims of the organisation, bring the organisation into disrepute, amount to the harassment of other employees or third parties or give rise to

a range of criminal offences, civil causes of actions and/or breaches of regulatory obligations. Employers faced with this are unlikely to sit by and do nothing. Indeed, we have already seen people facing disciplinary action, and even losing their jobs, because of social media posts about the conflict.

- In the US, Ryan Workman, a law student had a job offer rescinded after she wrote in a student e-newsletter that Israel was solely to blame for the conflict and it had *"created the conditions that made resistance necessary".* The message was circulated on social media and users alerted her prospective employer, Winston & Strawn, who rescinded the offer on the basis that the comments were in *"profound conflict"* with the firm's values.

- Also in the US, Citibank fired 25-year old banker Nozima Husainova after she commented on an Instagram post about the Gaza hospital bombing, stating *"No wonder why Hitler wanted to get rid of all of them",* followed by a smiley face emoji. A screenshot of the post was shared to X (formerly Twitter) and users asked Citibank whether it condoned her comments. Citibank promptly fired Ms Husainova and released a statement that it condemned *"anti-Semitism and all hate speech and do not tolerate it in our bank."*

- In Canada, Mostafa Ezzo, an Air Canada pilot lost his job after he posted photos of himself on Instagram dressed in Palestinian colours, holding banners saying

that Israel was a *"terrorist state"*, that it should *"burn in hell"*. Again, social media users reported him to his employer, and he was fired shortly afterwards.

- In the UK, Fadzai Madzingira, the Online Safety Director at the media and communications watchdog, Ofcom, was suspended for posts made on a private Instagram account, which were screen grabbed and posted online. One post described Israel as an *"apartheid state"* and she also appeared to "like" another post calling the UK and Israel a *"vile colonial alliance".* Ofcom's Code of Practice on public statements states that expressions of opinion on matters of political controversy which could compromise Ofcom's reputation for impartiality or otherwise harm their reputation should be avoided.

- Also in the UK, an unnamed tube driver was suspended by Transport for London (TfL) for apparently leading a chant of *"free Palestine"* on a tube train filled with passengers. Video footage was posted on social media which appeared to show the chant being led by the driver over the train's speaker system. The footage came to TfL's attention and the driver has been suspended while an investigation takes place.

Employers in the UK are entitled to take steps to manage the objectionable expression of views by their employees about the conflict. However, this must be handled with great

care. What should be kept front and centre, is that freedom of expression is foundational in a democracy, and the expression of political views is of particularly special importance. Interference with free expression is permitted, but it will be scrutinised carefully, and any misstep could leave employers exposed to legal claims.

What rights do employees have in connection with the expression of their political views?

Rights under the European Convention of Human Rights

UK citizens have the right to freedom of thought, conscience and religion under Article 9 of the Convention. This includes the right to manifest such religion or belief, for example, by posting about it on social media. To qualify for protection the belief must be compatible with human dignity and attain a certain level of cogency, seriousness, cohesion and importance – in other words it must be more than a mere view or opinion. Yet if the employee cannot jump these hurdles, the expression of views may still be protected under Article 10 of the Convention, which enshrines the right to freedom of expression more generally. This includes the freedom to hold opinions and to receive and impart information and ideas.

However, neither of these rights are engaged where the views expressed are aimed at the destruction of the rights and freedoms of others. However, this is a high threshold and means things like advocating totalitarianism or Nazism, or espousing violence and hatred in the gravest of forms. Beliefs which are offensive, shocking or disturbing to others may still be protected.

Therefore, in the majority of cases, Article 10 will be engaged, and possibly Article 9 as well. Yet these rights are not absolute rights. In certain circumstances, employers may interfere with them by introducing rules regulating staff behaviour. Broadly speaking, this is permitted where the interference is lawful, necessary and aimed at protecting the rights or reputation of others.

Although private sector employees cannot rely on the Convention rights directly (e.g. to bring a claim against their employer for an alleged infringement), the Courts and Tribunals must interpret UK law in a way which is compatible with these rights. This means that relevant discrimination and unfair dismissal claims must be viewed through the prism of these Convention rights.

Protection from religion or belief discrimination

The Equality Act 2010 protects employees and workers from discriminatory treatment in connection with their religion or belief. This does not mean that all views expressed about the Israel-Gaza conflict will be protected from discrimination. In Grainger plc v Nicholson, the EAT set out the criteria for a philosophical belief (as opposed to a religious belief) to qualify for protection – the belief must:

- be genuinely held;
- be a belief, not a mere opinion or viewpoint;
- concern a weighty and substantial aspect of human life

and behaviour;

- attain a certain level of cogency, seriousness, cohesion and importance; and

- be worthy of respect in a democratic society, and not be incompatible with human dignity or conflict with the fundamental rights of others.

If a belief is protected, then the employee will be protected from discriminatory treatment because of the belief, including indirect discrimination, which tends to be the battleground in disputes related to the expression of protected beliefs. For example, the employee may complain that sanctions for social media posts cause particular disadvantage to those with political beliefs. However, an employer can avoid liability if it can show that the rule was a proportionate way to achieve a legitimate aim, such as protecting its reputation or protecting others from harassment.

Helpfully, in the recent case of Higgs v Farmor's School, the EAT gave some guidance on how to assess the proportionality of any disciplinary action for the expression of religious or political views. In all cases, employers should ask whether their objective is important enough to justify the action and, if it is, whether there is a less intrusive way of achieving that objective. Employers should also go on to consider the following factors before taking action:

- what was said;

- the tone used;
- the employee’s understanding of the likely audience;
- the extent and nature of the intrusion on the rights of others and any consequential impact on the employer’s business;
- whether it was clear that the views were personal;
- whether there was a potential power imbalance between the employee and those whose rights are being intruded upon; and
- the nature of the employer’s business and whether the views could impact vulnerable service users or clients.

The key take-away is that each situation is going to fact-specific, and a careful assessment is needed in each case before sanctioning an employee.

Protection from unfair dismissal

Even where an employee cannot rely on discrimination law, they retain the right not to be unfairly dismissed. Ordinarily, employees need two years’ service to bring this claim. However, where the sole or principal reason for the dismissal is, or relates to, the employee’s political opinions or affiliations, the two-year service requirement is dispensed

with, and it becomes a “Day 1” right (although it is not treated as an automatically unfair dismissal). There is very little case law guidance on how this exception works in practice and so, in relevant cases, it is better to err on the side of caution and assume that employees will have the right regardless of length of service.

In order to dismiss fairly, employers will need to demonstrate that the employee understood that their actions would be treated as misconduct and that they were aware of the potential consequences. In Weller v First MTR South Western Trains Ltd, the Tribunal highlighted that if an employer wishes to sanction an employee for social media activity, especially where it is conducted on a personal device during personal time, they must *“provide clarity or some degree or education or awareness training”.*

A fair dismissal for misconduct also requires a fair procedure, which complies with the requirements of the Acas Code of Practice on Discipline and Grievance. This includes conducting an appropriate level of investigation and considering arguments put forward in defence. In Webb v London Underground Ltd, an employee was dismissed for posting comments on a private Facebook account which had harmed the employer’s reputation and was in breach of the employer’s policies. However, the dismissal was held to be procedurally unfair because the employer had failed to engage with arguments put forward by the employee during her disciplinary hearing regarding her Convention rights. Although these were complex points, the employer ought to have grappled with them.

A Tribunal will also want to see that the interference with the Article 9 and/or Article 10 Convention rights can be justified. If the interference *cannot* be justified, it is

likely this would take the dismissal outside the “band of reasonable responses” and mean the dismissal is unfair.

What measures can employers take to manage the objectionable expression of views by employees?

Where does this complicated landscape leave employers? Defensively, employers should ensure that they have a good suite of policies in place, which are given to staff and understood by them. This could include the following:

- A Code of Conduct which sets out expectations regarding standards of behaviour and is clear about the circumstances in which this extends to time outside work.

- A Social Media Policy which prohibits staff from accessing social media on work devices at any time and also sets out expectations about social media use on personal devices. It would be a good idea to require staff to state on their social media platforms that the views expressed are their own and not those of the organisation.

- Equality and Anti-Harassment Policies should explain accurately what characteristics are protected and also give examples of protected beliefs. Training should also be provided.

- Disciplinary Rules should state that breaches of the Code of Conduct, Social Media, Equality and Anti-Harassment Policies will be treated as misconduct, and serious breaches as gross misconduct.

Where an employee crosses the line, employers need to consider the following:

- As far as possible, assess which legal rights are engaged.

- Focus on precisely why the expression of the belief amounts to misconduct – consider the factors in the Higgscase discussed above.

- If disciplinary action is needed, the disciplinary process needs to be fair and in line with the Acas Code.

- Once disciplinary action has started, be prepared for a grievance to be lodged in response, which will have to be dealt with.

- If the employee is to be sanctioned, remember that this

should always be done in the least intrusive way possible. Is dismissal really necessary? Would a request to take down the post and not repeat with similar posts, together with the provision of training be enough?

- Even where the employee is not dismissed, any disciplinary sanction for the expression of a protected belief may be viewed as an act of discrimination by the employee and used as a basis for constructive dismissal.

- In serious cases, it may be necessary to report the matter to a regulator and/or the police.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.