Making a public stand, privately

You spend the evening tweeting, and the next thing you know your boss is on the phone. But does your manager have a right to censor your opinions, asks **Gareth Naughton**

Carol Sinnott of Sinnott & Company, Rathmines Picture: Feargal Ward

With abortion still a hot topic and a same-sex marriage referendum expected next year, politics will be getting personal in the next 18 months.

The prevalence of social media means that we are now expressing our personal opinions in the most public of forums, but should we reasonably expect that those views go unnoticed by our employers? And do employers have a right to intercede if someone's personal views are likely to have an impact on their business?

Confusingly, the answer in both cases is essentially "yes".

Religious or political opinions are included in the Unfair Dismissals Act. Article 8 of the European Convention on Human Rights (ECHR) contains the right to respect for private and family life, home and communications, and Article 9 gives a right to freedom of thought, conscience and religion, including the right to manifest one's religious beliefs either in public or private.

Article 14 of the ECHR prohibits discrimination against religious, political or other opinions.

The same principles should apply to employees expressing their views on social media, but this is also balanced by any potential damage those views may cause to the company brand, according to Carol Sinnott of Sinnott Solicitors.

"When it comes to expressing personal views and opinions on social media sites such as Facebook, Twitter and LinkedIn, and when deciding whether an employer could dismiss an employee for placing their strong views on social media sites, it is a relatively new area.

"However, the same principles which exist in the context of an employer/employee relationship should still hold good. Take, for example, an employee who wishes to publicly express a view on an upcoming abortion or same sex marriage referendum or other public interest matter.

"The test is really whether the offence or act complained of either damages the employer or the reputation or brand of the employer's business, or the legitimate aims that the employer's organisation wishes to promote or protect as part of their business," she said.

Sinnott cited the hypothetical example of someone with a LinkedIn profile where they were identified as an employee of the Equality Authority.

"If that employee were to post a personal view of a discriminatory nature based on religious beliefs, race, nationality or membership of the Travelling community, then of course, those comments would go against the legitimate aims that the employer is trying to promote and protect," she said.

"Social media policies in the workplace are gaining much more attention, and the reality is that certain publicly posted comments could be perceived to be the view of your employer or damaging to the employer if your profile is connected to the employer in some way."

There is a misconception among employees that their social media communication is purely personal and is, therefore, not their employer's business.

"While employees may see nothing wrong with expressing personal opinions online, it could potentially pose a serious problem for their employer if their reputation is being damaged or if they later become liable for the comments made by their employees," she said.

Policy

At the same time the onus will be on the employer to show that the comments have had an impact on their ability to conduct business.

In a straightforward situation where the employee is not tweeting or posting on behalf of work, they are entitled to freedom of expression as long as they are not saying anything illegal, according to Davnet O'Driscoll, associate at Hayes Solicitors.

"An employer would look at the tweet or post, and they would need to look at their policy to see if they have one that restricts the use of social media at work," she said.

"Presumably in their private time they will be able to use Facebook and voice their opinions, and if it doesn't identify their organisation and doesn't criticise anything to do with the company or their clients, then it doesn't have an impact."

She cited the case of an Australian hairdresser who posted a comment on Facebook criticising her pay including a copy of her pay slip. The hairdresser was dismissed, but when it went to a court, they found that, despite whatever privacy settings were in place, she had made it a public matter.

"However, when they looked at it, they said they did not see that there was any damage to the organisation because the hairdressing company could not prove that any clients had seen it before it was taken down, and they felt that the dismissal was not warranted. There should be a demonstrable impact," said O'Driscoll.

The key here is that employers need to have a clear, defined policy in place around the use of social media and what is considered public and private.

"The employer has to show that there is a policy in place dealing with this specific issue. If an employee tweets something unrelated to work, not identifying themselves in a professional capacity, then it shouldn't have any impact on their work so the employer is not entitled to take action, whether they like it or not.

Davnet O'Driscoll, associate at Hayes Solicitors Tony O'Shea

"Obviously, if someone was employed by the Family Planning Clinic and tweeted on pro-choice, that is something that would potentially come within the remit on the type of employment they have and related comment," O'Driscoll said.

The policy should be explained to employees and clarified so that they are absolutely certain about what is and is not permitted. This places employers on much stronger ground if an issue does arise. Still, they should tread carefully, according to Sinnott.

"Even where a clear policy does not exist, there may well exist an inherent right to dismiss an employee depending on the behaviour complained of, where the employee's conduct impinges upon the work place or damages the reputation of the business," she said.

"Each case will be judged on its own facts whether or not there is a policy in place. However, from an examination of the recent case law in this jurisdiction and in Europe, an employer would do well to remember that, before imposing a blanket ban on employees' rights to express beliefs and opinions, employers should consider whether there is objective and proportionate justification for curtailing an employee's right to express their views."

Disrepute

Many companies include this area in their conduct guidelines, and lurking in the background is a clause that many people – particularly those working for multinationals – will have in their contracts around actions that bring the company into disrepute.

It is suitably broad enough to cover a range of offences and, according to Tommy Cummins, senior consultant in industrial relations with Adare HRM, managers are very aware of that.

"I cannot think of a case in Ireland where that was used to fire somebody, but most managers that I know would be very aware of that clause and they would be astute enough not to offer an opinion in public in relation something to do with religion or politics," he said.

"It would be rare for someone in a senior position to be on a programme and strongly advocate a political view, because it is likely to get them into trouble."

While the law may offer some protections, the reality is that employees are constantly being made aware through in-house campaigns and training initiatives that if they are going to put something in the public domain that may affect the company, they have an obligation to run that past whoever is in charge of public relations.

"If you are a face that is readily associated with your company or your brand, you are probably going to be in breach of some guidelines," he said.

"Even if that is not the case and people don't know you, but you are on television and making a point from the audience; it could certainly have implications when you go back to the office the next day."

Expressing controversial views may not lead to outright dismissal, but it could have an impact on career progression.

"If you get 100 directors or senior managers into a room and you ask them to make a personal comment on a hot topic like abortion, I would be very surprised if you got any of them to go on the public record. They know where their bread is buttered and they are aware of conduct guidelines," said Cummins.

PeopleProblems

The many ways of working

Changes to workplace relations system on the way

Gerald Flynn

Over the past nine months, this column has featured many of the difficulties that can arise in the workplace. Often, where these have been poorly managed, the matter is passed on to one of the official agencies tasked with resolving workplace disputes.

These include the:

- Employment Appeals Tribunal (EAT)
- Rights Commissioner
- Employment Equality Tribunal
- Labour Relations Commission (LRC)
- Labour Court
- National Employment Rights Authority (Nera).

We have also seen civil court actions brought before the Circuit and High Courts and, as it is, the system is a complete maze resulting in hearings being delayed for up to 18 months

The system has developed over the past decade on a piecemeal basis, and often in response to European directives on equality, parental leave, working time or health and safety guidelines.

The Workplace Relations Bill, published last month, has restructured the system to include just two new employment bodies.

These will be a new Workplace Relations Commission (WRC) and an expanded version of the Labour Court.

The WRC will provide an initial hearing body and there will also be an appeals body centred on the Labour Court.

The functions of the LRC, NERA, the Equality Tribunal, and the first-instance functions of the EAT and the Labour Court will be transferred to the WRC.

The WRC will be tasked with adjudicating, or facilitating, a resolution of all employment disputes with the intention of eliminating the need to take multiple claims to alternate workplace relations bodies.

The bill provides for three services for resolving disputes at the WRC. Disputing parties can avail of the services of a case resolution officer or a mediator, or they can instead opt for a full hearing.

This is an upgraded "informal" version of the existing rights commissioner's service, which resolves many disputes behind closed doors.

The Workplace Relations Bill will enhance the powers of workplace inspectors, introducing two new services to help resolve and settle disputes without the need for formal adjudication by a third party.

The WRC will refer disputes to these two services in appropriate circumstances, but participation will not be obligatory. Both parties will have the right to request that the matter instead be handled by an adjudication officer.

The case resolution officer will provide a phone-based advisory service to help employers and employees to settle disputes or advise on best practice.

This scheme has been piloted since May 2012 through the Early Resolution Service.

A mediation officer will host a face-to-face mediation service at the WRC to help parties to reach a settlement.

Adjudication officers will also hear complaints about breaches of employment law and will give a decision on the matter. Complaints will be heard in private, but decisions will, in general, be published.

Existing rights commissioners and equality officers will transfer to the role of adjudication officer, and further appointments will be made.

Existing Nera inspectors will be transferred or appointed to the Workplace Relations Commission and will be granted new powers.

These will include the power to issue fixed payment notice or on-the-spot fines to employers of up to €2,000, where employee wage statements cannot be produced, employees have not received written statement of hourly pay rates for a pay reference period, or the minister has not been notified of proposed collective redundancies.

While most of the changes to the existing workplace relations system are welcome, some are a cause for concern.

All of the WRC hearings will be held in private, unlike many current EAT hearings. This is understandable in a mediation situation, but dilutes public scrutiny and awareness by effectively installing "black-out curtains" at the WRC.

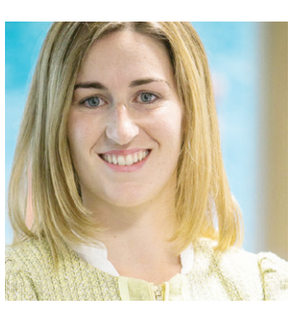
Replacing rights commissioners and employer/labour representatives on hearing panels may also be a backward move, as these people usually bring the benefit of common sense to legal proceedings.

Gerald Flynn is an employment specialist with Align Management Solutions, gflynn@alignmanagement.net

Movers &Shakers

Brought to you by Michael Page
Worldwide leaders in specialist recruitment

MichaelPage



■ **Patricia Fennessy has been appointed marketing manager with Sage Ireland. Fennessy was formerly EMEA programmes marketing manager with Webroot for nine months and before that, marketing manager with 123Send in London for two years.**

■ **Mary McNamee is also joining Sage Ireland in the role of marketing campaign manager. McNamee has been marketing coordinator with Cook Medical for the past six years. She was also formerly marketing and PR executive with the Irish Greyhound Board for 18 months.**

■ **Beatrice Whelan is Sage Ireland's new digital marketing specialist. She has been the company's social media and content manager for the past two-and-a-half years. Before that, she was a website developer with Kildare Web Services for five years.**

■ **Grace Egan is the new marketing manager at Commtech. She joins from Hewlett-Packard, where she worked in channel marketing and communications for four-and-a-half years. She was also formerly area sales manager at Dairygold for four-and-a-half years.**