This booklet concerns the unprecedented change in communications that have been brought about for employees. It places a particular emphasis on workplace relationships and the difficulties that employees can find themselves in as a result of their interaction with social media. The authors note astutely that ‘what used to be an ephemeral “word after work in the pub” has become a remark now set in stone and capable of being copied, pasted, and transmitted to hundreds of thousands of others with a short series of key presses or mouse clicks’. Rather than suggesting that employment law principles have been in any way revolutionised by social media, it is more a case of ‘plus ça change’, ie ‘the more things change, the more they stay the same’. The authors posit that in reality social media offers a raft of opportunities for employees to fall foul of new policies, and therefore face the same employment law challenges as ever, in an arena that is often favorable to employers.

It is reinforced that employers’ reputations reign supreme, and will often trump arguments of unreasonableness, indirect discrimination on the basis of political belief, and freedom of expression arguments. In Game Retail Limited v Laes, which is described by the authors as ‘perhaps the first case of a tweet coming before the Employment Appeal Tribunal’, it was held that offensive tweets from an individual’s personal account, but which may be followed by individual branches and customers of the employer, could result in a fair misconduct dismissal. The fact that the tweets were not critical of the employer was immaterial, and it was sufficient in this case the tweets themselves were offensive. In the case of Forbes v LHR Airport Limited on the other hand, the EAT established that whether something is done in the course of employment is a question of fact for the Tribunal in each case having regard to all the circumstances. This was a case which concerned an image of a well-known children’s toy with racist connotations, being circulated on a personal Facebook group, and it was held not to be in the course of employment.

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The case of Gibbons v British Council, which saw an employee dismissed for republican comments surrounding an offensively captioned photograph of a young Prince George on Facebook. The employee did not make the original offensive comments but went on to express her republican views in the comments section. The Tribunal found that this was not discrimination on the basis of philosophical belief as she has not been dismissed for her beliefs but for her association with the original caption by engaging in the discussion. The Tribunal found that the Claimant had ‘associated herself’ with ‘a distasteful and personal attack on a small child’. The Respondent also had a strict policy on reputation that included specific guidance on the online sphere, and their patrons were senior royals.

On the subject of an individual’s association with posts made by others, there is a discussion of the case of Blue v Food Standards Agency. Here an individual ‘liked’ and commented on an offensive, potentially intimidatory post made by another. The case gave rise to consideration of the use of the Facebook ‘like’ button, which was seen as an ‘ambiguous indicator’ by the Tribunal, and not necessarily an endorsement. The authors conclude that this may now be less ambiguous in that ‘the simple “like” has been
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superseded by Facebook’s “reactions” which can include a like but also “sad” or “heart” or “wow”.

In respect of social media policies, which are increasingly common amongst employers, the authors highlight that it is important for staff to be aware of any such policy, to have been adequately briefed on them and for it to be sufficiently clear for it to then be relied on in disciplinary hearings. Ignorance of a social media policy was deemed ‘powerful mitigation’ in the case of Lake v Amey Service Ltd, for example, where it was found that the employer had not properly briefed employees about its social media policy.

Articles 8 (the right to private and family life) and 10 (freedom of expression) of the European Convention on Human Rights are the main areas that employees can rely on in disputes over social media use. However the authors argue that the right to privacy is usually lost because the nature of the media concerned is public, or at least capable of public distribution. Similarly, the right to freedom of expression is usually superseded by third-party rights, such as reputation. This is the general line taken by courts and tribunals, however the authors note that there have been exceptions, such as the case of Smith v Trafford Housing. In this case, an employee’s religion-inspired comments against gay marriage resulted in his demotion. The High Court found that these posts were personal and did not appear to be related to work, and were also a ‘moderate expression’ of his viewpoint. The judge in this instance concluded the following: ‘The frank but lawful expression of religious and political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views... This is a necessary price to be paid for freedom of speech’. The authors suggest that the salvation for Mr Smith was both the moderation used in his expletive-free language, and that it concerned an area of ongoing tension between equality protections, ie sexual orientation versus religious belief. The latter is a battleground that extends beyond the social media arena, and affects equalities law more broadly.

The case of LUF C v Williams concerned individuals’ historic internet activity. Here, the High Court found that inappropriate emails sent five years previously, unearthed only after dismissal, when uncovered by a IT Expert, still amounted to a repudatory breach of contract. Accordingly the employer was able to rely on them and take steps in relation to them despite no knowledge of them at the time. Similarly the EAT held in the case of British Waterways Board v Smith that dismissal for historical posts was within the band of reasonable responses. The authors suggest that whilst this may be troubling, historical online behaviour can come back to haunt employees.

Overall this publication is a useful, relevant and often fascinating, primer for a fast moving area of the law. It contains lively discussion throughout and will make interesting reading for all individuals, not just lawyers.

The authors also provide a handy checklist of tips for those representing individuals in cases related to social media usage. If you have any interest in how social media usage is being handled in the courts and tribunals then this publication is definitely worth your attention. Liam Welch

The Haldane Feminist Lawyers Reading Group 2020

Hannah Arendt reported on Adolph Eichmann’s trial in an Israeli court in 1961 for the New York Times. Eichmann was an SS-Obersturmbannführer, whose role as one of the major organisers of Hitler’s Final Solution to the Jewish Question was to facilitate the transportation of Jews across Europe to ghettos and extermination camps in eastern Europe.

Arendt herself was a Jew who fled Germany to escape Hitler’s regime. In our sessions, we got to see Eichmann through Arendt’s eyes: as an unintelligent, career-obessed man whose stated lack of hatred for the Jews shocked her.

In our discussions, we explored what Arendt meant by the ‘banality of evil’ of those individuals participating in institutions which together led to some of the most otiose crimes against humanity, which contrast sharply where their individual actions are approached as ‘just doing one’s job’. It was on this basis that Eichmann protested his innocence, stating as paraphrased by Arendt that: ‘[h]e did his “duty”; he not only obeyed the “orders”, he also obeyed the “law”’. Ultimately, however, Eichmann was convicted of 15 counts of crimes against humanity, crimes against the Jewish people and membership in the Gestapo, the SD and the SS; for these crimes, he was sentenced to death by hanging.

Debates were had over our bi-weekly sessions. Was Arendt tricked by Eichmann’s presentation during his trial? Were her comments regarding the Judenräte – the Jewish community leaders organised and forced by Nazis in occupied countries to provide details of their communities and assist in their deportation – and conclusions as to how they made Eichmann’s job easier blaming the victims? Regardless of these...