
EMPLOYMENT LAW ARTICLE: IT'S ALL A MATTER OF OPINION

An examination of the recent employee guidance on impartiality published by the BBC

Suzanne Palmer (1995)

Marcus Aurelius said: *"The happiness of your life depends upon the quality of your thoughts: therefore, guard accordingly, and take care that you entertain no notions unsuitable to virtue and reasonable nature"*.

There has never before been a time when people have shared their thoughts as widely, and in turn had those thoughts scrutinised by others so thoroughly, as in this era of continuously-fed social media. Sometimes this puts people on a potential collision course with their employers, and it seems that Employment Tribunals may have an increasing role in making value judgments about whether and when an employer can restrict an employee from broadcasting their thoughts.

A headline appeared in the *"i"* (published by Associated Newspapers) last week which said that BBC staff had been told that *"attending LGBT pride protests in any capacity can breach new impartiality rules"*. The article was about new guidance issued by the BBC to its employees about impartiality. It reported that the BBC's director of editorial policy and standards had told a meeting of senior executives that the new rules included not attending "political protests" such as Black Lives Matter events and LGBT protests. *"According to sources"* [those sources were not disclosed] there was pressure to extend the ban to pride events, because of concerns that the BBC could be seen to be taking a side in the transgender rights debate.

The article reported that *"Separately, one employee in news and current affairs was informed they could be issued with a formal warning or suspended from their job if they attend LGBT protests. However the BBC told i this is not policy and staff should seek permission before attending events which could be controversial"*. The new policy was said to have *"angered"* some LGBT staff, and one source was said to have told the *i* that the change was *"obviously to please the Daily Mail and to make the BBC less of a target by rowing back"*.

Clearly this made for dramatic reading, and would have been a cause for obvious concern on the part of employees. On the face of it, it would (as reported in this press story, at any rate) potentially involve treating members of staff less favourably, either on grounds of their own sexual orientation, or race, or political beliefs, or on grounds of their perceived association with those groups or beliefs.

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Employment Team

Barristers:

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Gwynn-Price
Rowlands (1985)
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(1987)
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Romana Canneti
(1997)
Chris Bryden (2003)
Keith Webster (2006)
Ben Haseldine (2014)
Tori Adams (2016)
Daniel Wand (2016)
Jennifer Lanigan
(2018)

Clerks:

Jason Roukin
Hilary Foster

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

0207 822 7000
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It appears that some of the guidance may, at least initially, have been couched in some unfortunate language which has been the subject of some drawing back and clarification. It seems that when the new rules were introduced, staff were advised to avoid “*virtue-signalling*”. This was arguably an unfortunate phrase for an employer in the field of communication to use, as it is generally understood to have a pejorative, dismissive connotation of [according to Wikipedia] “*conspicuous and disingenuous expression of moral values with the intent to enhance one's own image*”. More neutrally, it can be defined as “*the action or practice of publicly expressing opinions or sentiments intended to demonstrate one's good character or the moral correctness of one's position on a particular issue*”. This still implies a degree of insincerity or posturing.

According to the i, the director of BBC News made an internal call to staff a day or two after the guidance was published, apologising for the use of the term “*virtue signalling*”, but reiterating the importance of following guidance in order not to be seen as political. Staff were apparently told that attending pride events would be acceptable if the events were “*celebratory*” rather than protests – although where that dividing line is to be drawn may itself be an interesting question. The i reports that the BBC's internal LGBT staff network was not consulted by management on the new rules. Employment law often emphasises the importance of early and meaningful consultation with employees as a matter of good industrial relations practice, and if true, this lack of consultation may be ill-advised.

The tension between competing “rights” is not new territory in the workplace and beyond. One only has to look at some of the appellate employment cases of the past decade, which have explored issues such as a Christian Registrar's decision to refuse to perform civil partnership ceremonies, a Christian Counsellor's refusal to provide psycho-sexual therapy to gay couples or a Belfast bakery's decision to refuse to comply with the decorating requests of a gay customer. These are not easy issues, and the task of the Tribunals has been to balance the competing rights and to consider when it is, or is not, reasonable, for an employer or business to expect an individual to provide services to all customers equally, whatever the views of that individual might be. Concepts such as reasonableness, objective justification and “*a proportionate means of achieving a legitimate aim*” are familiar parlance for employment lawyers and Employment Tribunals.

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(2018)

Clerks:

Jason Roukin
Hilary Foster

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

0207 822 7000
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Let's look, then, at the BBC's new guidance for employees. It is important to bear in mind that the BBC, perhaps more than any other media organisation in the UK, comes under frequent scrutiny of its impartiality, because of its status as a public service broadcaster and, in this respect, the terms of its Charter. Organisations which come under significant public scrutiny, particularly those who are accountable to or funded by the general public rather than private shareholders, tend to set high store by reputational values (whether those reputational values are self-imposed or imposed by legislation or regulatory codes). Their disciplinary policies and conduct guidance will generally reflect that fact, and provided that expectations are clearly set out so that employees are aware of them, Tribunals will generally allow employers to hold their workforces to those high standards.

The stated purpose of the new guidance, according to a Press Gazette report about an email sent by the director-general to employees, is that ***"Trust is the foundation of the BBC's relationship with the public. How employees of the BBC conduct themselves is vital to maintaining trust. The materials published today will help ensure employees uphold and protect the highest standards of BBC impartiality and maintain the trust audiences expect, demand and deserve"***. It would be hard to argue against that being a legitimate aim of the BBC. The employment lawyer's next question would be whether the guidance which follows amounts to a proportionate means of achieving that aim.

In the section of the BBC's Editorial Guidelines there is guidance under the heading "Additional Responsibility of working for the BBC". This effectively sets out the justification for the guidance which follows in relation to campaigns, attendance at marches, and the use of social media. It includes the following:

"The BBC's impartiality requirements do not apply only to broadcast output and published content. An array of social media outlets, for example, present opportunities for the public expression of viewpoints by presenters, reporters and other staff which could jeopardise the BBC's impartiality. Whilst there may be greater freedom for BBC freelance employees who are not engaged in news or current affairs or factual journalism output and who are not primarily identified with the BBC it is essential that those engaged in the production of news and current affairs and factual journalism in particular say nothing publicly which could be interpreted as bias on politics or public policy issues, or controversial issues... Impartiality is a core BBC value so everyone who works for the BBC in any capacity should always consider whether their actions, either professional or personal, might risk causing damage to perceptions of the BBC's impartiality".

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(2018)

Clerks:

Jason Roukin
Hilary Foster

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2nd Floor
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London EC4Y 7DL

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Further guidance appears in the section of the Editorial Guidance entitled "Individual Use of Social Media". This includes a policy statement which contains the assertion that

"The reputation for impartiality is a huge benefit to the BBC, as well as an obligation...". It is stated as an "over-riding principle" of the guidance that: "anyone working for the BBC is a representative of the organisation, both offline and also when online, including on social media; the same standards apply to the behaviour and conduct of staff in both circumstances. Those working for the BBC have an obligation to ensure that the BBC's editorial decisions are not perceived to be influenced by any personal interest or bias... Individuals working in news and current affairs... and factual journalism production, along with all senior leaders have a particular responsibility to uphold the BBC's impartiality through their actions on social media and so must abide by specific rules set out in this Guidance... There are also others who are not journalists or involved in factual programming who nevertheless have an additional responsibility to the BBC because of their profile on the BBC. We expect these individuals to avoid taking sides on party political issues or political controversies and to take care when addressing public policy matters".

There then follow a number of "Rules and expectations of social media use". Those are addressed to all employees, contractors and freelancers working for the organisation, and apply to all social media accounts, whether professional or personal. The rules which are said to apply to everyone are:

Always behave professionally, treating others with respect and courtesy at all times: follow the BBC's values.

Don't bring the BBC into disrepute.

If your work requires you to maintain your impartiality, don't express personal opinion on matters of public policy, politics or 'controversial subjects' [political or industrial controversy is defined by Ofcom's Broadcasting Code as political or industrial issues on which politicians, industry and/or the media are in debate].

Don't criticise your colleagues in public. Respect the privacy of the workplace and the confidentiality of internal announcements".

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(2018)

Clerks:

Jason Roukin
Hilary Foster

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

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There is then a list of “dos and don’ts”, said to be non-definitive guidance on the interpretation of the rules above. That list is divided into guidance aimed at all employees, and further guidance aimed at **“all colleagues working in news and current affairs... and factual journalism production and all senior leaders”**. For ease of reference in this article, I will refer to the latter subset as the “bias-sensitive” category of employees, although this terminology does not appear in the guidance itself.

The guidance for the bias-sensitive employees is significantly more stringent. As a matter of common sense, one can see why. It is much easier to justify imposing stringent restrictions on a reporter involved in factual journalism than, say, someone involved in sport or light entertainment, who is less likely to be seen by a member of the public as providing neutral factual information on a politically contentious subject. For the bias-sensitive group, the guidance states that their personal social media activity must also comply with BBC Editorial Guidelines **“as though it were BBC output”**.

The guidance for bias-sensitive employees includes: **“Do not express a view on any policy which is a matter of current political debate or on a matter of public policy, political or industrial controversy, or any other ‘controversial subject’... Do not support campaigns (eg. by using hashtags) no matter how apparently worthy the cause or how much their message appears to be accepted or uncontroversial... Do not post anything that couldn’t be said on-air or on BBC platforms... Do not link to anything you haven’t read fully...”**.

There is then specific, highlighted, guidance on “expressions of opinion on social media”, saying: **“Rule 3 above requires that you do not express a personal opinion on matters of public policy, politics, or ‘controversial subjects’ if your work requires you to maintain your impartiality, ie. if you are working in news and current affairs (across all Divisions) and factual journalism production or senior management. Nothing should appear on your social media accounts that undermine the perception of the BBC’s integrity or impartiality. Expressions of opinion on social media can take many forms – from straightforward tweets, posts or updates, sharing or liking contents, following particular accounts or using campaigning or political hashtags. You should consider carefully every comment before posting... Be wary of ‘revealed bias’, whether through likes or re-posting other posts, so that a bias becomes evident, and ‘inferred bias’ where a post is impartial but loose wording allows readers to infer a bias where there is none. Following social media accounts which reflect only one point of view on matters of public policy, politics or ‘controversial subjects’ may create a similar impression... Avoid ‘virtue signalling’ – retweets, likes or joining online campaigns to indicate a personal view, no matter how apparently worthy the cause”**.

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Jennifer Lanigan
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Clerks:

Jason Roukin
Hilary Foster

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The guidance goes on to clarify expressly that actors, dramatists, comedians, musicians and pundits who work for the BBC are not subject to the requirements of impartiality on social media. It also states that the extent to which a non-staff member, contributor or presenter is required to comply with the Editorial Guidelines will be set out in their contract with the BBC, and that it is generally expected that irregular or occasional contributors will not be required to apply the full requirements of the Editorial Guidelines to their social media use. However there is a general reminder that ***“Everyone who works for the BBC should ensure their activity on social media platforms does not compromise the perception of or undermine the impartiality and reputation of the BBC, nor their own professional impartiality or reputation and/or otherwise undermine trust in the BBC”.***

In terms of campaigning and attendance at marches, the guidance reminds staff that the BBC ***“is not a campaigning organisation”***, and that its Editorial Guidelines says ***“The BBC must remain independent and distanced from government initiatives, campaigners, charities and their agendas, no matter how apparently worthy the cause or how much their message appears to be accepted or uncontroversial”***. Staff are therefore advised that even if campaigns are advocating for legitimate social or policy change, the BBC must retain its independence in relation to them. The guidance cites as an example ***“the debate about what should be done with statues and street names honouring slave traders and others associated with racism. There are a range of views on such issues, many starting from a position of opposing racism”***.

Like the guidance on social media usage, the guidance on participation in marches and protests varies according to categories of staff. For BBC staff in general, the guidance is that members of staff may attend marches, demonstrations and protests as private individuals, and can participate in some parades, marches, gatherings (including events such as trade union rallies) ***“under the banner of the BBC group to which they belong, but not representing the organisation as a whole”***. However the “bias-sensitive” group referred to above are advised that they ***“should not participate in public demonstrations or gatherings about controversial issues. As with social media activity, judgment is required as to what issues are ‘controversial’ with regard to marches or demonstrations, though it should be assumed that most marches are contentious to some degree or other. If in doubt, advice should be sought before attending”***. All staff, including the bias-sensitive group, are permitted to participate in charity walks, marathons and similar activities ***“as fundraising activity for charitable purposes but not for campaigning or political action. BBC staff should not become the face of a charity. Small local charities should not cause issues but advice may be sought”***.

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(2018)

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Hilary Foster

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Temple
London EC4Y 7DL

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We have now looked in detail at what the guidance for BBC staff says, and the justification which is set out for it being imposed. Where does this leave staff vis-à-vis their employer and in terms of their employment law rights?

The Equality Act 2010 contains a number of different types of discrimination, most of which are unlikely to be engaged here. This guidance cannot be argued to be directly discriminatory, for example, because it applies equally to all BBC staff (the only differentiation between different types of staff being between general staff and those in the “bias-sensitive” category).

However, there is a potential application of indirect discrimination. Indirect discrimination, as defined in the EqA 2010, is when “*a person (A) applies to another (B) a provision, criterion or practice (“PCP”) that is discriminatory in relation to a relevant protected characteristic*”. This will occur if the PCP is also applied to people with whom B does not share the relevant protected characteristic (e.g. B is a woman, but the PCP is also applied to men), the PCP puts, or would put, persons with whom B shares the relevant characteristic at a particular disadvantage compared with those who do not share the characteristic (e.g. the PCP puts women at a particular disadvantage compared with men), and the PCP puts B at that disadvantage. However, even if those criteria are met, it will be a defence for the employer, and will not be discrimination, if A can show that “*the PCP is a proportionate means of achieving a legitimate aim*”.

The stumbling blocks for any BBC employee affected by this guidance are likely to be the “particular disadvantage” and the “proportionate means of achieving a legitimate aim”.

In terms of “particular disadvantage”, the difficulty is that the guidance affects all employees tweeting about, or participating in activity supportive of or linked to any controversial issue across the political or social spectrum, whether at work or in their private lives. It might be that a BBC employee could argue that the guidance restricts them from expressing a view about, commenting on, or participating in activity related to, an issue which is important to a minority community of which they are a part or with which they identify. They could also argue that it prevents them from expressing an opinion about a religious, political or philosophical belief which they hold. However that would arguably apply equally to any other BBC in relation to any other community or belief elsewhere on the social or political spectrum. It appears likely to be difficult to argue successfully that any one group is put at a “particular disadvantage” by this guidance.

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Barristers:

Peter Fortune (1978)
Gwynn-Price
Rowlands (1985)
Brian Kennedy QC
(1987)
Suzanne Palmer (1995)
Piers Martin (1997)
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(1997)
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Jennifer Lanigan
(2018)

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Jason Roukin
Hilary Foster

4 King's Bench Walk
2nd Floor
Temple
London EC4Y 7DL

0207 822 7000
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Even if that was arguable, the next difficulty is the employer's justification point. The BBC has carefully pinned the guidance to its requirement for a public reputation for complete impartiality, which is arguably linked intrinsically to its status as a publicly-owned broadcaster, and which therefore distinguishes it from other providers of factual journalism across a range of broadcast media. It is difficult to see any tribunal finding that this was not a legitimate aim. As for the "proportionate means" part, it is of note that the most restrictive guidance is confined to those for whom the impartiality requirement is likely to be most important: those engaged in factual journalism and news reporting about current political and social affairs, and senior management.

It is right to observe that this guidance imposes restrictions on what these individuals do and say in their private lives outside work, in a manner which would not be considered acceptable in many workplaces. The BBC, in its capacity as a public or quasi-public authority, is duty-bound (for the time being at least) to uphold the principles of both European and national equality and human rights legislation. Those protect the right to a private life (Article 8), freedom of self-expression (Article 10) and non-discrimination (Article 14). However, those are not unqualified rights, and again the test which is applied is that of a "proportionate means of achieving a legitimate aim".

It is also worth pointing out that there is precedent for imposing high standards on individuals in terms of their private lives outside work in the regulatory regimes of many professions. The statutory and voluntary regimes applicable to, for example, doctors, accountants, lawyers and many other professionals require them to abide by codes of professional conduct which often encroach onto their conduct in their personal lives, because of the potential for reputational damage to the profession as a whole. In professional regulatory proceedings, the case of *Bolton v Law Society* [1994] 1 WLR 512 is often cited. In that case, Lord Bingham MR observed that "*The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price*". No doubt the BBC would argue that it is the very reputation for unimpeachable impartiality which means that its journalists enjoy such respect and carry such influence as they do.

Undoubtedly it will seem harsh to many employees of the BBC that they are subject to this new guidance, particularly if reports are correct that there was not workforce consultation before it was issued. It has the potential to cause frustration and resentment on the part of people who would never dream of showing political bias, but are now prevented from commenting (even soberly) on, or marching (even quietly) in support of, issues about which they are passionate, whether at a local or national level, in their private lives.

4 King's Bench Walk Employment Team

Barristers:

Peter Fortune (1978)
Gwynn-Price
Rowlands (1985)
Brian Kennedy QC
(1987)
Suzanne Palmer (1995)
Piers Martin (1997)
Romana Canneti
(1997)
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(2018)

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It is also fair to say that effectively “gagging” intelligent professional journalists from speaking on issues about which they may be able to give informed and articulate opinions may feel to some observers to be instinctively uncomfortable in a society which purports to pride itself on liberal values and freedom of speech. It may also be arguable that the fact that the BBC is feeling compelled to introduce this guidance now is because it may feel under some political pressure, and threat of loss of funding, because of accusations that it is not impartial. It would be an unwelcome development if political pressure expressed through, or fuelled by, the right-wing press resulted in what are undoubtedly intrusive restrictions on the freedom of expression of BBC journalists.

As ever in these situations, the real test will not be the rules themselves (which, as I have said, appear in my opinion to be justifiable), but how they are applied by the employer. A policy is only as good as the way in which it is applied in practice. There are various aspects of the guidance which are subject to interpretation, such as what does or does not count as “controversial”, or where a “celebration” event becomes a “demonstration”. These issues are not black and white, and case law (at least as long as we have a legal system which is independent from the political system) will always be able to test those boundaries and how reasonably they are being applied. That uncertainty is never desirable for employer or employee, but it does allow for legitimate challenge of where the lines should be drawn.

It is perhaps worth bearing in mind that recent political events, even without looking further afield than the UK and the US, have been heavily influenced by social media, and the commentary on those events, from both sides of the political spectrum, has pointed out the extent to which social media brings a danger of people existing in a socio-political “bubble” which isolates them from other viewpoints. It remains to be seen whether preventing the BBC’s factual journalists from participating in that social media snowstorm will result in any real change or clarity. Perhaps it may allow the BBC to adopt a moral high ground, thus preserving its future as a public service broadcaster. Or perhaps it will simply result in a drain of talented journalists to other organisations or careers which impose fewer restrictions on their ability to articulate their views outside the workplace. Only time will tell.

Suzanne Palmer
12 November 2020

4 King's Bench Walk
Employment Team

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Peter Fortune (1978)
Gwynn-Price
Rowlands (1985)
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(1987)
Suzanne Palmer (1995)
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London EC4Y 7DL

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