The Truman Show (1998)

Rethinking Online Privacy in the Chinese Workplace

Employee Dismissals over Social Media Posts

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The increasing popularity of social media usage in the workplace, as well as rapid advancements in workplace surveillance technology, have made it easier for employers in China—as elsewhere—to access a vast quantity of information on employees' social media networks. Considering that Chinese privacy and personal data protection laws have been relatively weak, there have been a growing number of cases brought before courts in China involving employer access to, and use of, employee social media content. This essay examines a number of these cases.

Social media has ushered in an age of unprecedented information sharing in the Chinese workplace. According to the 2017 edition of the WeChat's User Report, 83 percent of respondents are utilising the app for work-related purposes. Furthermore, 57.22 percent of respondents indicated that their new contacts on WeChat were work-related (Penguin Intelligence 2017). The increasing popularity of social media usage in the workplace context, as well as rapid advancements in workplace surveillance technology, have made it easier for employers to access, acquire, and utilise a vast quantity of information on employees' social

media networks. Social media has become a valuable resource for employers to screen job applicants, monitor employee performance, and investigate employee wrongdoings.

Employers, both in China and elsewhere, often justify such actions on the basis of business concerns about reputational risks, leakage of intellectual property and trade secrets, and other legal liabilities that could arise from employees' social media activities. At the same time, employees' privacy interests are clearly at stake. To tackle these risks, in recent years some state legislatures in the United States have introduced specific laws prohibiting employers from requiring job applicants or employees to disclose usernames and passwords for their personal social networking accounts (Park 2014).

In the Chinese context, however, to date, privacy and personal data protection laws have been relatively weak. At the same time, there have been a growing number of cases brought before Chinese courts involving employer access to, and use of, employee social media content, most commonly in employee dismissal cases. This essay examines a number of these cases, which highlight the extant regulatory gaps in China that provide considerable scope for employers to monitor and inquire into their employees' social media activities, to the detriment of their privacy interests.

Legislating Privacy in China

Until recently, in China there has not been a comprehensive law at the national level that regulates privacy and personal data protection. A patchwork of rules and principles in this domain has developed in a piecemeal and fragmented manner. To start with, the Chinese Constitution does not refer to a general right to privacy (*yinsiquan*). Article 34 provides that a citizen's personal dignity is protected as a fundamental right and Article 40 protects the privacy of citizens' correspondence.

Article 101 of the 1986 General Principles of Civil Law sets out the protection of personal name, portrait, reputation or honour as 'personal rights' (*renshenquan*) of a natural person, but does not explicitly mention any right to privacy (NPC 1986). In cases involving the written or oral dissemination of a person's private correspondence, which has the practical effect of damaging that person's reputation, the Supreme People's Court has treated such cases as infringement on the rights of reputation (SPC 1988, par. 140).

It was not until the Tort Liability Law, introduced in 2009, that the right to privacy was recognised as one of the civil rights and interests enjoyed by an individual, the infringement of which constitutes an actionable civil tort (NPC 2009, arts. 2 and 62). The new General Provisions of Civil Law of 2017 (hereafter 'General Provisions') further expands the protection of the right to privacy by listing it alongside other personal rights. Article 110 states: 'A natural person enjoys the rights of life, inviolability and integrity of person, health, name, likeness, reputation, honour, privacy, and marital autonomy, among others' (NPC 2017).

It is significant that the General Provisions expressly articulates a broad protection of personal information as an actionable civil claim that is independent of the right to privacy. Article 111 states that: 'The personal information of a natural person are protected by the law. Any organisation or individual who need to obtain the personal information of other persons shall legally obtain and ensure the security of such information, unlawful collection, use, transmission, trade, or disclosure of others' personal data is prohibited.' However, the definition or scope of 'personal information' (*geren xinxi*) is not found in the General Provisions. There is no further elaboration of what activities would constitute 'unlawful' collection, use, transmission, trade, or disclosure.

A recent legislation, the Cybersecurity Law (CSL), is a major step taken by Chinese lawmakers toward establishing a

comprehensive framework for regulating online privacy and security issues (NPC 2016). The CSL defines the protected scope of personal information collected, stored, or transmitted electronically. 'Personal information' refers to 'all types of information recorded by electronic or other means that can identify an individual either in itself or in combination with other information, including but not limited to a citizen's name, date of birth, ID card number, personal biometric information, address, and telephone number' (NPC 2016, art. 76). The CSL imposes obligations on 'network operators' (*wangluo yunyingzhe*), including obtaining individual consent for handling personal information, and maintaining the security and preventing unauthorised disclosures of personal information (arts. 40–43).

In December 2017, the Standardisation Administration of China issued the Personal Information Security Specification (hereafter 'Specification'; see SAC 2017), which contains a set of recommended standards regarding the protection of personal information in China (although there are no penalties imposed for breach of such standards). The Specification sets out eight basic principles and standards that cover the collection, storage, use, processing, transfer, disclosure, and any other processing activities involving personal information that are undertaken by 'personal data controllers' (*geren xinxi kongzhizhe*).

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Overall, the legal protection of an employee's (online or offline) privacy rights has been relatively weak. Recent developments such as the General Provisions could offer employees a channel for seeking civil damages if their employer has unlawfully collected and disclosed their personal information on social media. If one takes a broad interpretation of the CSL and applies the personal information protection standards under the Specification, employees may indeed enjoy enhanced legal protections where employers fail to obtain their employees' consent in collecting and using their personal information from social media. However, there remains significant ambiguity in how these new regulatory norms will actually apply in practice.

Dismissal Cases Involving Employee Social Media Posts

We now turn to examine a number of cases involving the dismissal of employees based on their social media posts. The cases discussed below represent a 'snapshot' of the common types of such cases that have been brought before local people's courts in China. Under the Labour Contract Law (art. 39), the employee's misconduct must be *serious* in order for the employer to justify the dismissal for the purpose of *not* paying the required economic compensation to the dismissed employee. These circumstances include where the employee has seriously violated the rules and procedures set up by the employer, caused severe damage to the employer due to serious neglect of duties or pursuit of private benefits, has simultaneously entered into an employment relationship with another employer that seriously affects the current position, or is under investigation for criminal liabilities.

The first type of cases involve information posted by the employee on her/his social media networks that entail actual misconduct

or wrongdoing that led to his or her dismissal. In one exemplifying case—*Chen v. Di Nuo Wei Ya International Freight Forwarders (Shanghai) Co., Ltd.* (Case 1, 2013)—the employer dismissed the employee on the grounds of unauthorised absence from work for over eight days. Where the employee challenged the dismissal and sought economic compensation, the employer submitted as evidence notarised copies of the employee's Weibo posts during the period of absence. The posts, which included a photo of the employee sunbathing, showed that she was undertaking personal travel without approved leave at the time. The court recognised the Weibo posts submitted by the employer as admissible evidence and ultimately dismissed the employee's claim for wrongful termination.

Another category of such cases relate to statements expressed by employees on social media out of frustration and dissatisfaction with the employer, managers, and/or colleagues. The courts have been more cautious in scrutinising the legal basis for employers to dismiss employees in such cases. In *Beijing Bonatongcheng Technology Co., Ltd. v. Li Chennan* (Case 2, 2014 and 2015), the employee (Li) signed an agreement with his employer that upon the dissolution of his labour contract, he would be paid economic compensation if he refrained from making any comments that would damage the employer's reputation. Shortly before he left his job, Li posted a comment on his Weibo account that the employer frequently withheld wages. The employer claimed that Li's comment seriously harmed its reputation, which was the basis for not paying Li economic compensation upon termination. Li argued that he was merely disclosing a fact, which did not cause malicious damage to the employer. The court at the first instance concluded that while Li's post was detrimental to the employer's reputation; there was no lawful basis for the employer's refusal to pay Li the agreed compensation. The court at the second instance reached the same conclusion and held that it was not entirely up to the parties to decide on the required compensation for termination of employment since the law protected the employee's right to such compensation.

In the third type of cases, an employer has used defamation laws against the employee where the latter's social media communications caused damage to the former's reputation. For example, in *Xi'an Mou Gong Ye Xuexiao v. Tang* (Case 3, 2016), the employer successfully sued a former employee for infringing its right to reputation under Article 101 of the General Principles of Civil Law. The plaintiff was a vocational school and employed the defendant as a teacher. Following his termination based on incompetence, the defendant posted disparaging comments about the school in his WeChat groups—some of these (closed) groups included his students. His comments consisted of accusations that the plaintiff did not offer proper qualifications, issued fake diplomas, and took a large 'cut' of students' internship wages. In court, the plaintiff argued that the defendant's claims were false and resulted in several students withdrawing their enrolment at the school and many more students were contemplating similar actions. The court ruled for the plaintiff and ordered the defendant to publish a written public apology and pay damages of 2,000 yuan for the plaintiff's loss resulting from reputational damage (which was much less than what the plaintiff sought).

Collective Disputes and Social Media Posts

In some cases, employee dismissals have been based on social media speech relating to the organisation of collective industrial activities. In *Pei Shihai v. Shunfeng Express Group (Shanghai) Express Co., Ltd* (Case 4, 2016), the plaintiff worked as a driver for the defendant, a large courier and logistics company. The defendant dismissed the plaintiff for serious violations of company rules because the plaintiff had sent messages to a WeChat group of coworkers regarding potential workplace

disturbances (including strike action). The plaintiff brought a claim seeking economic compensation for his dismissal. He contended that he did not instigate any strike activity and was merely discussing with his coworkers about defending their rights. His messages to the WeChat group were aimed at resolving the conflict via lawful means. The plaintiff also argued that the WeChat discussions were private speech that occurred outside working hours and it was unreasonable for the defendant to regulate such speech. Moreover, the plaintiff argued that no strike did actually occur and the defendant's evidence before the court was insufficient to prove that the strike would have happened.

In this case, the defendant argued that the plaintiff's WeChat messages showed that he had intended to instigate a strike and rallied his coworkers to participate, including the communication of specific action plans that would have severely threatened the defendant's operations. The strike did not happen because the defendant took action accordingly. The court of first instance ruled that based on the WeChat records furnished by the defendant, the plaintiff's speech was provocative and he should have known the potential consequences. The court was of the view that employees should comply with workplace rules and professional ethics, which the plaintiff did not. The plaintiff appealed to the Shanghai Intermediate People's Court, arguing that he was merely discussing with coworkers how to protect their rights. He asserted that the defendant's records only showed some parts of the WeChat discussions and did not show the messages he had sent to the group seeking to dissuade a potential strike. Upholding the first instance court's ruling, the court decided that the plaintiff's speech was made within a WeChat group consisting of coworkers and, as such, it exceeded the scope of personal freedom of speech. Even though such speech was made outside working hours, it was still inappropriate and unreasonable since the content was likely to cause dire consequences for the defendant.

In a related case involving the same labour dispute—*Sun Liang v. Shunfeng Express Group (Shanghai) Express Co., Ltd.*—the plaintiff sought economic compensation for his dismissal by the defendant. The plaintiff was dismissed on the basis of violating company rules by posting comments in a WeChat group consisting of 117 coworkers that sought to incite participation in industrial action over wage issues (Case 5, 2016). His claim for compensation failed before the labour arbitration committee and court of first instance. He appealed to the Shanghai Intermediate People's Court. Similar to his coworker in the above case (Pei Shihai), the plaintiff claimed that the WeChat record provided to the court by the defendant was incomplete and that he was merely complaining about their wages with his coworkers. The defendant's evidence showed WeChat logs with some of the plaintiff's messages, which proposed plans for work stoppages and road blockages at certain times and places. The plaintiff also claimed that he was inebriated when he posted the comments during non-working time and the comments were of a private nature.

The Shanghai Intermediate Court ruled that the employer was justified in dismissing the plaintiff without compensation. The plaintiff had made provocative speech on WeChat that attempted to instigate collective disruptions in the workplace. The court was of the opinion that the employer had an implied legitimate expectation based on the employment relationship that employees should carry out their duties in good faith, voluntarily maintain the order of the company, and comply with the company's regulations. Even if such duties were not explicitly written in the labour contract and/or employee handbook, they were 'self-evident'. If there is a dispute regarding work arrangements, employees may exercise their 'right to dissent' (*yiyiquan*) but still had the responsibility to observe proper procedures, that is, not disturb the daily operation and the lawful rights and interests of the company. Adopting the same reasoning as the abovementioned case, the court decided

that the plaintiff's comments were outside the scope of his personal freedom of speech since they were posted to a WeChat group consisting of coworkers. Even though there were no actual damages caused to the company, his speech was still 'inappropriate and unreasonable'. The plaintiff's actions violated the employer's legitimate expectations arising from the employment relationship and infringed basic professional ethics.

Some comparative insights may be useful here. In the US, a notable area of protection for collective employee speech has been carved out from Section 7 of the National Labour Relations Act. Section 7 specifically protects workers' rights to self-organise, bargain collectively, and 'engage in other concerted activity… for mutual aid or protection'. In recent years, there have been numerous cases before the National Labour Relations Board (NLRB) that involved challenging employers' policies and disciplinary actions relating to employee social media postings. The NLRB has increased its scrutiny of employer policies that impose overly broad restrictions that prohibit employees from posting negative comments about the employer.

Legal Uncertainties

Recent regulatory developments such as the General Provisions and CSL, as well as the recommended standards under the new Specification, offer some potential for strengthening the protection of employee privacy interests by requiring employers to obtain employee consent for collecting, using, and handling personal information. At the time of writing, it remains to be seen how both laws and the Specification will be implemented in practice, especially in cases brought before the courts. This legal uncertainty will continue to leave employers with substantial room for manoeuvre when it comes to monitoring, accessing, and using their employees' social media communications.

The cases brought before Chinese local courts to date highlight the extensive reach of employers' actions in this realm. Power asymmetries in the employment relationship also mean that employees do not readily challenge their employers' social media policies and other interferences with social media activities, including cases where employees are using social media to organise collective industrial activities. Furthermore, employers can use defamation laws against employees for reputational damage from the latter's social media activities, which can result in the chilling of various forms of employee speech. In future cases, the courts are likely to grapple with difficult questions related to if and how the new privacy and personal information protection laws would apply, and how conflicting interests of employers and employees (and, potentially, the state) arising from the use of social media technologies in the workplace ought to be balanced. ■