The effect of social media *faux pas* on employment relationships

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Given the inappropriate, insensitive and racist content posted by social media users over the past few weeks, it has become quickly apparent that these comments may have an impact on the continuation of the employment relationship.

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Even when an individual posts on a public forum in his personal capacity, outside of his employer's working hours and uses private devices to post, the employer has an intrinsic interest in the publication.

Primarily, the basis for the possibility of an employee's conduct on social media being actionable by the employer is founded on the following two principles, which have a longstanding history of application in non-social media abuse contexts. One is that an employee's conduct outside of the workplace can have an impact on the working relationship and the other that such conduct can cause the trust relationship to break down.

Conduct outside of work

That an employee has left the workplace, or is acting in his or her private capacity, outside of working hours, is no defence to the employer being interested in such conduct. This is a recognised principle of South African labour relations which was acknowledged even under previous iterations of the Labour Relations Act, and applied by the Industrial Court historically.

In the case of Nyembezi v NEHAWU in 1997, an employee of NEHAWU was found to have misconducted himself by consuming alcohol after hours, while at a union congress. In this case, the adjudicator found that 'employees are considered to be employees 24 hours out of 24 hours at a congress' and therefore, after hours consumption was as good as consumption during working hours. In the even earlier case of Van Zyl v Duvha Open Cast Services in 1995, the Industrial Court found that a fight between colleagues, outside of working hours, resulted in a strained working relationship and the inability of a continued employment relationship.

Breakdown of trust

The employment relationship is based on an inherent basis of trust and good faith. Any action by an employee, which causes that trust relationship to break down, may justify the dismissal of the employee. As stated by in 'Labour Relations Law - A comprehensive Guide', "The cardinal test is whether the employee's conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable."

On the basis of the aforegoing principles, where any employee posts content on social media (even if this is not done using the employer's network or systems and even if done from the privacy of the employee's own home, or mobile device) and it can be said to destroy the trust relationship, the employer can validly discipline the employee. At all times, however, the employer must still ensure that it affords the employee the right to make representations as to whether he or she is guilty or not and what the appropriate disciplinary sanction should be, before the employer makes or imposes any findings in this regard.

It should also be noted that any action taken by an employer against an employee, based on the above principles does not need to be grounded in an existing social media or other policy, which prevents the employee from making posts. The fact that the employment relationship is based on trust has the result that the employee's conduct may potentially break that trust relationship. As such, the charge brought against the employee does not need to be breach of company policy and can instead be based on the broader category of conduct having the intention or effect of breaking the trust relationship between the employer and employee.

Direct breakdown

Where an employee makes direct reference to his employer or colleagues in social media posts, it will be easy to demonstrate that the day-to-day working relationship is affected and may have been irretrievably broken down.

In the Duvha case above, the fight outside of working hours between co-workers had the effect that their working relationship and ability to work co-operatively during normal working hours was affected. This was sufficient to justify dismissal.

The following cases are examples of the content of the social media publication having a direct impact on the employment relationship.

- National Union of Metalworkers of South Africa obo Zulu/GUD Holdings, in which the employee posted a Facebook message expressing his wish to "bomb and burn" the employer.
- SACCAWU obo Haliwell / Holiday Inn Sandton (2012); Fredericks / Jo Barkett Fashions (2011); Sedick & another / Krisray in which all, the employee posted derogatory and defamatory statements about her direct superior on Facebook.

Indirect breakdown

What is the case however, where an employee does not post content, which has anything to do with his employer or colleagues but is objectionable to a third party or segment of society, for political, religious, racial or other reasons?

The recent media coverage has shown that employers who are either identified explicitly by the commentator on the social media platform as his/her employer, or who can be identified through a quick Google search by the person offended by the content, are quick to both distance themselves from the individual and to take disciplinary action against the individual if he/she is in fact their employee. In what sense, however, has there been a breach of the trust relationship where an employee expresses a contrary or unpopular view? Is it really a breach of trust, or just an offence, or just damaging to the good name and reputation of the employer in exposing the employer to risk because of being associated with the employee?

In the case of racist commentary, the link is straightforward; it is a subset of the duty of good faith implicit in the employment relationship that an employee should not do anything to bring his employer into disrepute. Other instances of how the social media content leads to a breakdown is more tenuous but relevant.

In Salstaff obo Magubane v South African Airways (2002), an employee was dismissed after being found guilty of bringing the employer into disrepute by being drunk while on a flight. The Commissioner summarised the issue as follows, "The applicant, being a flight attendant, should have known better than anyone else that her behaviour would damage the company's image. She not only caused an embarrassment in the business class section but also in the economy class. She never denied the commotion she caused but only argued that it did not bring the company's name into disrepute. I fail to see why her behaviour as flight attendant, wearing a crew tracksuit, could not have affected the opinions of passengers about the company. If the person who is responsible for their safety and well-being behaves in an unbecoming manner, there is no way this could not have changed their perspective about the company."

Where an employee, identified as being connected to an employer, behaves in such a way so as to reasonably lead the employer to believe that a third party may change his perspective about the company, the conduct would be relevant.

The case of Dewoonarain / Hyundai Ladysmith (2014) is instructive; in this case the employee was dismissed for posting racist commentaries on Indian people on Facebook. The post was "Working for and with Indians is pits; they treat their own as dirt." Interestingly, the employee attempted to avail herself of the defence that she was entitled to make such post and was protected from sanction due to her constitutional right to freedom of expression.

Any employee seeking to justify their actions on this basis should note the arbitrator's response, which is supported: "[the constitutional right to freedom of expression] is not absolute; it is limited by section 36 of the Constitution. It is important that when a person exercises the said right she does not encroach on other person's rights. The respondent is operating a business with the purpose to make profit. The very same profit pays the salaries of the employees including that of the applicant when she was still employed by the respondent. Therefore making unjustifiable and irresponsible remarks on social media had in my view the potential for harm to the business of the respondent as [counsel] correctly argued."

The arbitrator also properly considered that, unlike in a civil damages claim, it was not necessary to prove the actual damage or loss.

Conclusion

Employers may face a backlash from customers, prospective customers and any stakeholders in the very wide sense of that term, because of their direct or indirect association through the employment relationship, with the social media content of employees. As such, employers are entitled to be concerned about and to take action for inappropriate content posted by employees, as this has a potential to harm the business of the employer. Equally, employees should realise that in the digital age, regarding the employment relationship, nothing posted publically is private or irrelevant.

Employers would benefit by making provision in their policies for social media usage, and the highlighting to employees the impact, which their improper usage of these platforms might have on the workplace and the employment relationship.

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