

NEWSLETTER

Use of Social Media OUTSIDE the workplace.

Not only has the advent of social media become a great part of our lives, it has also impacted greatly on the workplace environment. However, can the use of social media after hours be linked to an employer or organization and accordingly warrant disciplinary action? The use of social media after hours involving and/or referencing the employer can be regulated contractually under "off duty conduct" or by means of a social media policy which would make reference to same. The extent to which the use of the social media after hours affected the Company would need to be considered and regulated accordingly.

"As a general rule an employer has no right to institute disciplinary proceedings unless it can be demonstrated that it has some interest in the conduct of the employee. An interest would normally exist where some nexus exists between the employee's conduct and the employer's business. In the absence of such nexus, the employee's conduct is likely to be non work-related conduct, or as it is sometimes termed, 'off-the-job' conduct.'

In *Cantamessa v Edcon Group* [2017] 4 BALR 359 (CCMA) an employee was dismissed, following a disciplinary inquiry, for posting an inappropriate racial comment on Facebook. The employer asserted that the comment placed its reputation at risk and therefore breached the employment trust relationship.

The inappropriate racial remark referred to President Zuma and the Government as "monkeys". The employee had been on leave at the time, using her own electronic device to access social media on December 2015, when posting the comment on Facebook. Same was seen by a customer who emailed the employer and attached a copy of the employee's Facebook comment. The comment was published in the Sowetan newspaper and led to numerous complaints and threats by the public to stop doing business with the company, however the dismissal was found to be unfair as the social media policy relied on by the company didn't make provision for off-duty conduct.

It's is therefore critical that the employer must implement and have in place specific policies relating to their employees' use of social media in which they stress the importance of keeping within the parameters of acceptable standards of online behaviour at all times and that any derogatory and discriminatory comments targeted at the employer or any of its employees may be considerable grounds for disciplinary action. Misconduct resulting from social media needs to be treated as any other misconduct and disciplinary action should be taken accordingly in terms of Schedule 8 of the Labour Relations Act and depending on the circumstances, employees can be fairly dismissed for misconduct committed outside the workplace which does not specifically relate to the employee's employment but has a negative impact on the employment trust relationship.

So ultimately a Company can take action against an employee for untoward remarks made on social media if:

- 1) The employer has to establish that it has a legitimate interest in the matter in the sense that the misconduct is disruptive to business or affects the company's reputation.
- 2) The guiding principle in cases involving misconduct outside the workplace is that the employer must be able to show a connection between the misconduct and its operational requirements. In those circumstances the employer can fairly discipline the employee for off-premises or off-duty misconduct.

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