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EMPLOYMENT ALERT

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In November 2003 the employer gave notice of contemplated retrenchment of 350 employees. A CCMA facilitator was appointed in terms of s189(A)(3) of the Labour Relations Act, No 66 of 1995 (LRA). On 31 March 2004, 72 employees were retrenched and on 30 June 2004, an additional 95 employees were retrenched.

During the course of 2004 and 2007 the union brought two applications to the Labour Court challenging the dismissals. Both applications were withdrawn.

Conciliation

In 2008 the union referred the dispute to a bargaining council for conciliation based on the unfair dismissal of 105 employees (from the 2004 dismissals) and the employer's failure to re-employ the retrenched employees.

Section 191(1)(b)(ii) of the LRA dictates that an employee has 90 days after the act or omission in which to refer a unfair labour practice dispute to a council or the commission. At the conciliation the employer claimed that the union had not referred the dispute timeously. No ruling was made on this and the commissioner issued a certificate that the dispute remained unresolved.

Arbitration

The union referred the dispute to arbitration. In April 2009 a pre-arbitration meeting was held. During this meeting, the union alleged, for the first time that in January 2004 and March 2004 there had been an agreement (referred to as the recall agreement) reached between the employer and the union stating that the retrenched employees would be granted preferential re-employment.

During the arbitration proceedings the employer again raised the jurisdictional issue as a *point in limine*.

The commissioner in the arbitration proceedings stated that she was not entitled to consider the jurisdiction issue as a certificate had been issued and this decision had not been set aside by the Labour Court. The commissioner in any event found that the union had not proven the existence of the recall agreement and dismissed the referral.

Rehearing

The union took this arbitration award on review to the Labour Court. The application was, however, not decided because there was no record of the proceedings and the dispute was thus referred back to the bargaining council to be reheard.

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CONTINUED

The Labour Court had to determine whether the bargaining council had jurisdiction to hear the matter, and whether the certificate of outcome indeed cures all defects regarding jurisdictional issues.

At the re-hearing the employer once again raised the issue of jurisdiction. The employer stated that the alleged unfair labour practices had taken place in 2004, and was only referred in 2008 The commissioner ruled that an important consequence of the issuing of an outcome certificate is that it cures all defects of jurisdiction.

Labour Court

The employer then brought an application to the Labour Court to review and set aside the certificate of outcome on the basis that in the union's referral it deliberately misinterpreted the date of the breach of the alleged agreement, claiming it occurred in 2008 when, on a different version, it happened in 2004. Thus the 90 day period had lapsed and the bargaining council lacked jurisdiction.

The Labour Court had to determine whether the bargaining council had jurisdiction to hear the matter, and whether the certificate of outcome indeed cures all defects regarding jurisdictional issues.

The Labour Court found that both commissioners incorrectly relied on *Fidelity Guards Holdings v Epstein* [2000] 12 BLLR 274 (LAC). This case stated that in the event that a certificate of outcome has been issued, it cures any jurisdictional defect that may have existed on account of a late referral without an application for condonation.

The Labour Court relied on the decision in *Bambardier Transportation (Pty) ltd v Mtiya* [2010] 8 BLLR 840 (LC) where the court found that a certificate of outcome is nothing more than a document issued by a commissioner, and that such a certificate cannot confer jurisdiction on the CCMA. This approach was followed in numerous cases since then - the most recent being *SAMWU v Ngwathe Local Municipalities* [2015] 9 BLLR 894 (LAC). In *SAMWU* the court found that previous courts misinterpreted the *Epstein* judgment to mean that the issuing of a certificate of outcome prevents a dispute regarding a jurisdictional issue.

The court found that the union's referral was outside the 90 day period to refer the unfair labour practice dispute. Since the referral was made with no application for condonation, the bargaining council did not have jurisdiction to hear the matter.

The Labour Court set aside the arbitration reward and the referral by the union was dismissed based on lack of jurisdiction.

Conclusion

This case clears up the uncertainty that the *Epstein* case created surrounding the effect of a certificate of outcome issued by a commissioner. A certificate of outcome does not have the power to cure a defect in a dispute regarding jurisdiction.

Furthermore, the case illustrates that an application for condonation is crucial if the 90 day period in which to refer the dispute has lapsed.

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DOES THE RIGHT TO PRIVACY PROTECT EMPLOYEES FROM THEIR DUPLICITOUS CONDUCT ON SOCIAL MEDIA?

A central issue before the court was whether the unlawfully obtained Facebook communications could be admitted as evidence of Niland's breach of fiduciary duties.

The courts have been called upon to reconsider employees' fundamental right to privacy in the context of social media in the workplace. Does an employee's right to privacy make their actions on personal social media immune to an employer's scrutiny, particularly where the company's reputation and clientele is at stake? When used injudiciously, social media can expose a company's public brand, employees and clients to risk.

The High Court recently dealt with such issues in *Harvey v Niland and Others* (5021/2015) [2015] ZAECGHC 149 (3 December 2015). In this case, the applicant, Mr Harvey, and the first respondent, Mr Niland, were the only members of a close corporation, Huntershill Safaris CC (Huntershill) which offers professional hunting services to its clients. Niland was employed by Huntershill as a professional hunter and safari guide until mid-2015. Around that time, Harvey and Niland parted ways on bad terms and Niland took up employment with Thaba Thala Safaris (Thaba Thala), while remaining a member of Huntershill. Thaba Thala also provides safaris and professional hunting services.

Harvey suspected Niland of breaching his fiduciary duties to Huntershill by acting in competition with Huntershill, and soliciting and diverting its clientele to Thaba Thala. As Niland remained a member of Huntershill, he was still in a fiduciary relationship with the close corporation and therefore was in breach of his fiduciary duties through his activities with Thaba Thala. Harvey brought an urgent application to interdict Niland from these activities which allegedly caused financial and reputational damage to Huntershill.

Harvey initially only suspected, but had no evidence, of Niland's breach of fiduciary duties. That changed when a colleague provided Harvey with Niland's Facebook login details. Harvey accessed Niland's Facebook account without permission and downloaded Niland's Facebook communications which proved he had been actively soliciting Huntershill's clientele and diverted them to Thaba Thala.

A central issue before the court was whether the unlawfully obtained Facebook communications could be admitted as evidence of Niland's breach of fiduciary duties. Without the Facebook communications, Harvey had no real evidence to corroborate his suspicions. According to Plasket J, the common law rule preventing admission of unlawfully obtained evidence is not absolute, but subject to a judge's discretion.

Plasket J examined Niland's constitutional right to privacy which includes the right not to have "the privacy of their communications infringed". In addition, s86(1) of the Electronic and Communication Transactions Act, No 25 of 2002 provides that "a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence". That being said, however, Plasket J stated that all factors relevant to the context must nevertheless be considered. Such factors include: the extent to which, and the manner in which, the party's right to privacy was infringed; the nature and content of the evidence obtained; whether the party seeking to

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rely on the unlawfully obtained evidence attempted to obtain it by lawful means; and that the end does not necessarily justify the means.

Plasket J ruled that Harvey had indeed acted unlawfully in violation of Niland's right to privacy. However, the Plasket J referred to *Gaertner & others v Minister of Finance & others* 2014 (1) BCLR 38 (CC) where it was held that:

"privacy, like other rights is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks... what it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home".

In this case, Niland's behaviour played a decisive role in attenuating his own right to privacy. Plasket J stated that, "Niland had been conducting himself in a duplicitous manner contrary to the fiduciary duties he owed to Huntershill. That duplicity was compounded by the fact that he had denied that he was acting in this way and had also undertaken not to do so. In these circumstances, his claim to privacy rings rather hollow". In light of Niland's actions, members of society would expect that he "ought not to be allowed to hide behind his expectation of privacy," which had only been raised to conceal his own conduct.

Returning to the initial question – to what extent can employees obscure their social media communications behind their constitutional right to privacy at the expense of their employer and its reputation? The answer put forward in the Harvey case is that it will depend on the context and facts of each incident. Employees should not place too much confidence in the shield of privacy, particularly where duplicitous conduct is involved.

In order to avoid such incidents, it is advisable for a company to have a substantial, all-encompassing social media policy and to ensure that their employees read, understand and bind themselves to the policy and its guidelines. This should protect employers, to some extent, from accusations of 'unfair dismissal' for social media related misconduct.

Fiona Leppan and Nicole Brand

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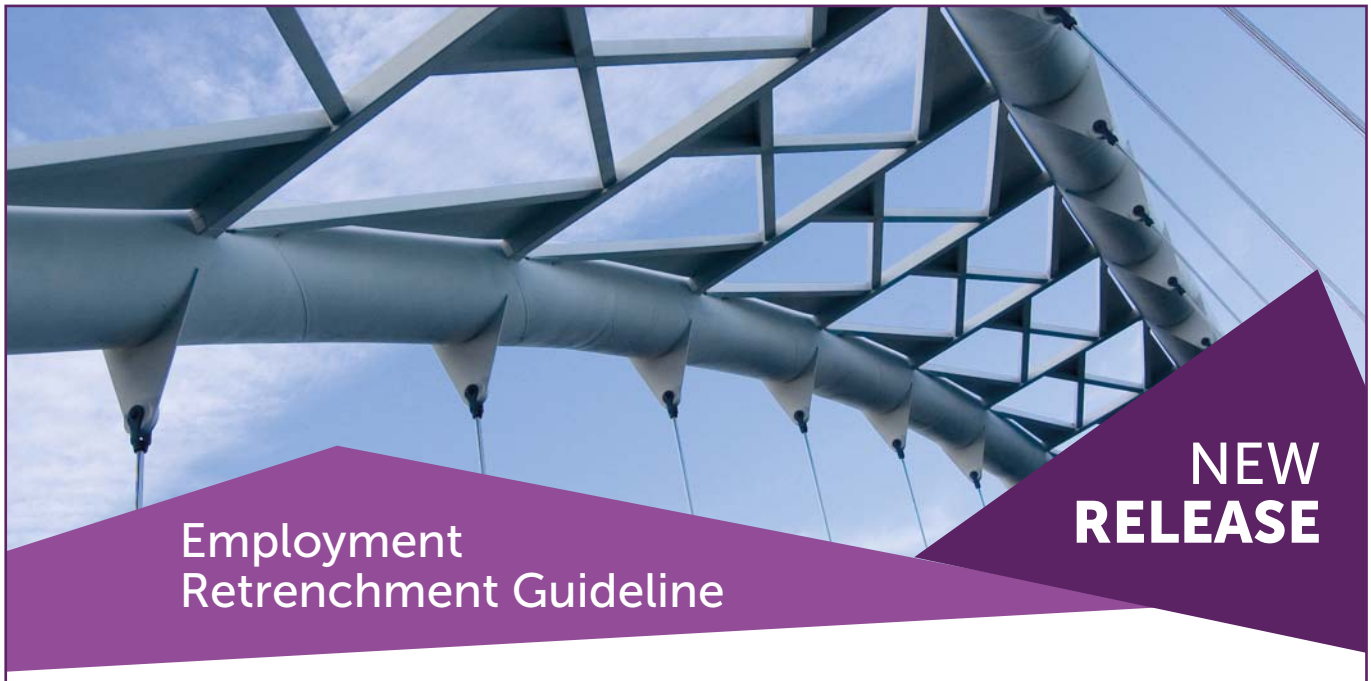

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