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EMPLOYMENT ALERT

IN THIS **ISSUE**

THINK TWICE BEFORE YOU TWEET

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CONSTITUTIONAL COURT REVIEWS AND SETS ASIDE AN ARBITRATION AWARD IN THE ABSENCE OF A 'RECORD'

The recent Constitutional Court (CC) judgment of *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others* (CCT227/14) [2015] ZACC 39 (2015) deals with the situation where the Labour Court is called on to review an arbitration award when the record of the arbitration proceedings has gone missing and there has been no proper attempt to reconstruct the record.

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THINK TWICE BEFORE YOU TWEET

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Can inappropriate conduct on social media, which is not related to the employment of the author, constitute misconduct outside the workplace?

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In the employment context, while there are several cases which confirmed the fairness of dismissals of employees who made disparaging comments about their employers or colleagues on social media, the recent events raise the question as to whether an employee can be appropriately disciplined and possibly dismissed for making inappropriate remarks on social media even if the remark is not related to his or her employment.

Can inappropriate conduct on social media, which is not related to the employment of the author, constitute misconduct outside the workplace?

While it may not be the conventional nature of an act of misconduct, the age of social media and technological advancement has changed the way in which we communicate and engage with other individuals and with the public. In his *South African Social Media Landscape Report, 2014*, Arthur Goldstuck, states that:

> *"Employees active in social media are becoming brand ambassadors for their respective brands, often outperforming the brands themselves on social media..."*

It is important to note that the 'brand ambassadors' of a company are not confined to a list of the marketing and public relations employees of the company but every employee of the company becomes a brand ambassador as they in some way or the other publicly display their association with the company. For instance, employees who update their Facebook or LinkedIn profiles to indicate their employment with the company, display their association with and are brand ambassadors of the company much in the same manner as employees who deal directly with customers and the public as outlined in the course and scope of their employment.

Accordingly, while employees should ensure that they positively influence public perspective in order to take the brand of their employer forward, employers must take proactive steps to ensure that they are protected from any actual or potential reputational damage caused by inappropriate or unsavoury remarks made by their brand ambassadors. The moment that a comment or remark is posted online, there is no turning back. Posts can be shared instantaneously and screen shots of posts are generally saved for future use. Therefore the ability to delete unsavoury posts and even the author's account, does not create a guarantee that the actual post will be deleted from virtual or actual reality.

According to many of the UK Judgments relating to social media misconduct, the Courts have held that it is not necessary to prove actual damage to the reputation of the company, but that it will be sufficient to show that certain remarks have the potential to cause reputational damage.

THINK TWICE BEFORE YOU TWEET

CONTINUED

Employers are advised to implement stringent social media policies which deal with all eventualities relating to online behaviour and to ensure protection against potential or actual reputational damage to the company.

There are no reported Labour Court judgments in South Africa which deal with the dismissals related to online misconduct outside the workplace. Our Courts will therefore look to the precedent set by the tribunals and Courts in the UK and the decisions by the UK courts will set the trend on how our Courts deal with this new but rapidly advancing issue.

In the case of *Weeks v Everything Everywhere Ltd* ET/2503016/2012, the UK Employment Tribunal was required to deal with an unfair dismissal dispute which arose out of the employee's misconduct on social media. While the misconduct related to comments about the employee's workplace and colleagues (these similar cases have already been dealt with by the CCMA in South Africa), the Judge made an important comment about privacy and online misconduct as follows:

> *"many individuals using social networking sites fail to appreciate, or underestimate, the potential ramifications of their 'private' online conduct. Employers now frequently have 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.* ***There is no reason why an employer should treat misconduct arising from the misuse of social media in any way different to any other form of misconduct****."*

It is therefore highly likely that our Labour Courts, in addition to following the UK case law on social media misconduct, will follow our own case law in respect of misconduct committed outside the workplace. In the matter of *City of Cape Town v SA Local Government Bargaining Council & Others* (2011) 32 ILJ 1333 (LC), the Labour Court upheld the dismissal of a senior employee who was found to be party to the fraudulent issuing of a drivers licence. The Labour Court found that the dishonest conduct of the employee went to the heart of the employment relationship and was essentially destructive of the employment relationship.

Employers are advised to implement stringent social media policies which deal with all eventualities relating to online behaviour and to ensure protection against potential or actual reputational damage to the company.

Samiksha Singh

CONSTITUTIONAL COURT REVIEWS AND SETS ASIDE AN ARBITRATION AWARD IN THE ABSENCE OF A 'RECORD'

Baloyi was dismissed after it was discovered that he was involved in arranging the servicing of incinerators without approval. The essence of Baloyi's defence was that he had been instructed by a medical superintendent to perform this task of servicing the incinerators.

The recent Constitutional Court (CC) judgment of Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others (CCT227/14) [2015] ZACC 39 (2015) deals with the situation where the Labour Court is called on to review an arbitration award when the record of the arbitration proceedings has gone missing and there has been no proper attempt to reconstruct the record.

In the present case, the employee (Baloyi) was dismissed for misconduct in 2004. Baloyi was dismissed after it was discovered that he was involved in arranging the servicing of incinerators without approval. The essence of Baloyi's defence was that he had been instructed by a medical superintendent to perform this task of servicing the incinerators. A contentious point raised by Baloyi during his disciplinary hearing, and the subsequent arbitration proceedings, was that two key witnesses (which could either confirm or refute his defence) were not called by the Department so Baloyi's defence was not properly ventilated during the arbitration proceedings.

The arbitrator found in favour of the employer, (the Department on the reasoning that Baloyi had acted outside the parameters set by the Department). The arbitrator found, that Boloyi should have reasonably known, taking into account his years of service, that he should have investigated whether such machines actually required servicing before executing the instruction.

Due to the adverse arbitration award, Baloyi elected to take the matter on review to the Labour Court. After close of pleadings and at the hearing of the matter, it became evident that the record of the arbitration proceedings had gone missing. It is also noted that the parties' attempt to construct the record had failed. The Labour Court considered the matter and dismissed Baloyi's review.

The CC found that the Labour Court did not take into consideration an affidavit filed by the Bargaining Council which stated that the Bargaining Council and the arbitrator had no objection to the matter being remitted for an arbitration hearing afresh.

The matter proceeded to the CC which found it sufficient to restrict its focus on the Labour Court's decision to determine the review application in the absence of obtaining a proper record of the arbitration proceedings. The CC found that the Labour Court did not take into consideration an affidavit filed by the Bargaining Council which stated that the Bargaining Council and the arbitrator had no objection to the matter being remitted for an arbitration hearing afresh. In the majority judgment, the CC criticised the Labour Court and found that it should have remitted the matter for hearing de novo before a different arbitrator. This was also supported by the fact that the Department had withdrawn its opposition to the review application.

- the CC found in favour of Baloyi and ordered that the arbitration award should be reviewed and set aside. As a consequence, Baloyi was reinstated to his former position of employment with effect from the date of his dismissal. In reaching its decision, the CC took cognisance of the following:Baloyi had worked for the Department for approximately 19 (nineteen) years;
- he had no previous record of misconduct; and
- remitting the matter to the Bargaining Council would be grievously unjust in light of the Department's inertia and unresponsiveness and the amount of time that has lapsed since the date of Baloyi's dismissal.

CONSTITUTIONAL COURT REVIEWS AND SETS ASIDE AN ARBITRATION AWARD IN THE ABSENCE OF A 'RECORD'

CONTINUED

The CC held that it is possible, in exceptional circumstances, to determine the merits of such a case by scrutinising the arbitration award as well as the accompanying documentary evidence.

The CC found that it was justifiable to afford Baloyi an effective remedy, despite it deciding the merits of the case in the absence of a full record of the arbitration proceedings.

With regard to a court pronouncing a decision in the absence of a complete record the dissenting judgments of Froneman J and Cameron J applied a far stricter approach as both judges were of the view that the matter should have been remitted to the Bargaining Council for a hearing *de novo*.

This judgment attempts to give effect to the expeditious resolution of disputes in the absence of a complete record. The CC held that it is possible, in exceptional circumstances, to determine the merits of such a case by scrutinising the arbitration award as well as the accompanying documentary evidence.

Fiona Leppan and Thandeka Nhleko

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