

SOCIAL MEDIA & THE WORKPLACE GUIDELINE



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WHY SHOULD EMPLOYERS CARE ABOUT WHAT THEIR EMPLOYEES DO ON SOCIAL MEDIA?

Individuals and companies are increasingly turning to and relying on social media for entertainment, news, advertising, marketing, jobs and recruitment.

Such widespread engagement can be leveraged to a company's advantage to promote and build a brand identity. However, these same platforms are used by employees and their conduct on platforms such as Facebook, Twitter and LinkedIn can have negative consequences for a company's reputation. Employers should take active steps to mitigate such risk.

What is one of the best ways to mitigate an employer's risk?

Throughout this guide, we stress the importance of a clear and thorough social media policy. But merely creating a social media policy is only half the job. It is important that employees are aware of the policy and understand what constitutes inappropriate behaviour on social media, as well as the consequences of engaging in such behaviour.

When it comes to social media, why is prevention much better than cure?

The moment a comment or remark is posted online, there is no turning back. 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. Shares, screenshots and saved pages make it impossible to permanently delete unsavoury comments. The fact that what is done can't be undone creates the need to educate employees about the potential ramifications and widespread damage that their posts can have on them personally and the company in general. It is therefore important to implement a social media policy and educate employees on the policy in order to effectively protect the reputational interests of the company.

What are some of the ways employees have defended their inappropriate posts on social media?

-  The right to privacy
-  The right to freedom of expression
-  The Protected Disclosures Act
-  "I didn't mean what I typed."
-  "I'm not techno savvy."
-  "My account was hacked."



THE RIGHT TO PRIVACY

Our constitution ensures the right to privacy. Does that mean that an employee is entitled to post whatever they want on their social media?

No. The right of privacy is not absolute. The Constitutional Court, in the case of *Gaertner & Others v Minister of Finance & Others* 2014 (1) BCLR 38 (CC), made this clear when it stated that “as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks”.

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?

This depends on the context and facts of each incident.

WE UNPACK EACH OF THESE DEFENCES USING CASE LAW EXAMPLES

Case example

Harvey v Niland and Others (ECG) 5021/2015 (unreported)

A former employee remained a member of the close corporation (CC) of the employer and therefore continued to owe a fiduciary duty to the CC, despite his resignation from employment. The former employee took up employment with a competing company and then shared posts on his Facebook account which effectively advised several of the CC's clients that he had moved onto "bigger thinking" and would be operating close by.



Name Surname

1 hr Johannesburg

Moving on to bigger thinking – will be operating close by.



Like



Comment



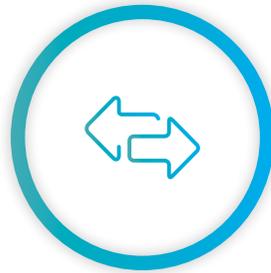
Share

The remaining member of the CC obtained the password for the employee's Facebook account and printed and submitted the posts as part of the application to the High Court to interdict the former employee from continuing his activities which caused financial harm and reputational damage to the CC.

The former employee objected to the use of his Facebook posts, arguing that such evidence was inadmissible as it was unlawfully obtained and violated his fundamental right to privacy.

Exercising its discretion, the High Court held that in these particular circumstances there were no other practical and lawful means available for obtaining access to the Facebook communication and that without such information, the CC would have no platform to enforce its rights against the former employee.

The *Harvey* case is important as it illustrates that the right to privacy is not absolute and employers may be entitled to use information, which cannot be obtained in any other manner, in order to protect its interests and reputation. Employees should not place too much confidence in the shield of privacy, particularly where duplicitous conduct is involved. Employers must however be careful in the manner of obtaining information as the admissibility of unlawfully obtained information is subject to the discretion of the court and in certain circumstances can amount to a violation of the right to privacy.



DOUBLE WHAMMY!!

In a twist of fate, the parties were also embroiled in litigation pertaining to an alleged constructive dismissal dispute [*Niland v Ntabeni NO and others PR33/16* (Labour Court)]. The former employee, Niland commenced working for the employer as a professional hunter in 2003. In 2013, Niland discovered that his wife was having an affair with his employer, Harvey. Despite being made aware of this, the employee reconciled with his employer and continued with the employment relationship. However, in April 2015, a verbal altercation took place between the employer and employee during which the employer taunted the employee with details of the affair. Despite this, the employment relationship once again continued.

On 14 July 2015, the employee informed the employer that he was resigning. He made no mention of the affair. The employee took up employment with a competitor shortly after his resignation.

The employee then referred a constructive dismissal dispute to the CCMA. He was unsuccessful and applied to the Labour Court to review and set aside the award.

The Labour Court held that Niland was unsuccessful in a constructive dismissal claim as he failed to bring the intolerable conditions to the attention of the employer. Instead, as the Labour Court observed, it was Niland's Facebook posts "*Moving on to bigger thinking – will be operating close by.*" which demonstrated that his reason for leaving was the desire to pursue another more lucrative employment opportunity and not an alleged intolerable working environment.

In the end, the Facebook posts were disastrous for the employee in two separate court applications.



The moment a comment or remark is posted online there is no turning back.

This Social Media & the Workplace Guideline answers employers' frequently asked questions regarding their employees' use of social media in and outside of office hours.

Every company engaging in Social Media should have the following in place





FREEDOM OF EXPRESSION

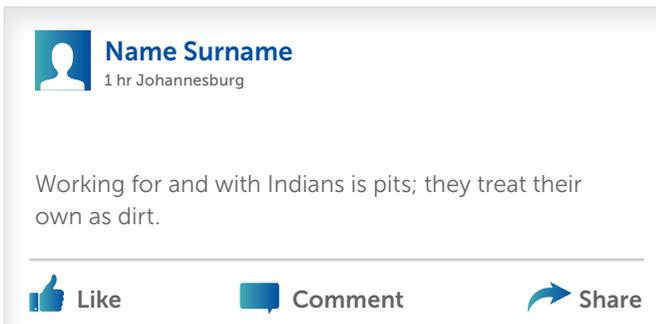
Surely employees are protected by their right to freedom of expression?

To some extent employees are protected by this right but, like the right to privacy, the right to freedom of expression is not absolute.

Case example

Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith (2014) [MIBC]

An employee posted a racist comment on Facebook:



The employer considered the remark on Facebook to be directed at it because its directors and many of its employees are Indian. The following charge was brought against the employee: Bringing the company's name into disrepute in that the employee posted derogatory remarks on a Facebook page. The employee challenged the

procedural fairness of her dismissal, claiming that she was not provided with further particulars as to what was meant by the phrase "bringing the company's name into disrepute" and was also not permitted to provide submissions in mitigation. She also argued that her post was protected due to her constitutional right to freedom of expression.

The employee's reliance on her right to freedom of expression failed as the arbitrator pointed out that the right is not absolute and went on to state that, "making unjustifiable and irresponsible remarks on social media had ... the potential for harm to the business" of the employer.

Where the employer faulted, however, was in not following its own internal procedure which permitted employees to submit mitigating factors during the enquiry. The employer did not grant the employee this chance and in light of this, the arbitrator found the dismissal was substantially fair but procedurally unfair.



PROTECTED DISCLOSURE ACT

What if an employee claims he is a whistle-blower and his facebook post is protected under the protected disclosures act?

Employers should take comfort that our courts have taken the view that the internet is not a suitable forum for disclosures of this nature. Employers should also bear in mind the value of addressing an employee's unreasonable allegations at the first available opportunity and thereby depriving an aspiring whistle-blower of the vaunted "reasonableness" element.



Case example

Beaurain v Martin N.O. and Others (C16/2012) [2014] ZALCCT 16
(16 April 2014)

Background

An employee employed by a hospital was dismissed for gross insubordination. The employee had taken it upon himself to publicise on Facebook the details of what he erroneously believed were health hazards in the hospital and had disobeyed management's instructions to desist.

Employee's defence

His actions constituted disclosures under the Protected Disclosures Act, No 26 of 2000 (PDA).

The Labour Court found against the employee for three principal reasons:

- **The publication of the information was not reasonable.**
After the employee first publicised the information, the hospital's management explained to him that there was no medical basis for his allegations and instructed him to desist. The court found that the employee's persistence in the face of the explanations rendered his actions unreasonable.
- **The information was notorious.**
The court held that the information was notorious in that the hospital's employees were all aware of the unsanitary toilets. The court held that notorious information could not form the subject of a protected disclosure.
- **Failure to follow the correct procedure.**
Section 9(2)(c) of the PDA requires that the employee making the disclosure must previously have made the same disclosure and that no action had been taken to address the previous disclosure. The employer had, unbeknownst to the employee, already taken action regarding the subject of the "whistle-blowing".



I DIDN'T MEAN WHAT I TYPED

Is context important in determining how an employer should react to a social media post?

Yes.

Case example

National Union of Metalworkers of South Africa obo Zulu v GUD Holdings (Pty) Ltd (2015) 24 DRC

Background

The employee commenced employment with GUD Holdings (Pty) Ltd in December 2009 as a machine operator and continued as such until his dismissal in September 2014. The employee was initially a member of NUMSA but later joined a rival union, the Industrial Commercial and Allied Workers Union (ICAWU), in 2012. In September 2014, 11 members of ICAWU, excluding the employee, were dismissed for participating in an unprotected strike.

An employee posted a racist comment on Facebook:

Name Surname
1 hr Johannesburg

Fck GUD FILTERS cos they hiding sumthing to the employers [sic] poor management & shop steward.

Like Comment Share

In response, the employee's facebook post on 6 september 2014:

Name Surname
1 hr Johannesburg

In this company, employees are taken for granted. I wish I could bomb and burn the Company including management.

Like Comment Share

Employer's response

The employee was handed a notice to attend a disciplinary enquiry in respect of allegations of gross misconduct pertaining to the insolence and threatening behaviour. The employee was dismissed for gross misconduct.

The question before the Commissioner of the Metal and Engineering Industries Bargaining Council:

Was the Facebook post sufficiently serious to justify dismissal?

Employee's defence

The employee claimed the post should not be taken literally and that the post did not reflect something that he would do as he had no access to a bomb. He further argued that he thought that the post would only be read by his friends as *"it just came out of the blue without me thinking about it"* and he did not realise that the comment would be perceived as a threat.

Employer's argument

The employee's dismissal was warranted as the employer was dealing with a tense and threatening situation after the dismissal of 11 strikers and the employee's post was taken in a very serious light.

Commissioner's finding

The employee's defence for his actions – that he did not think before posting – was improbable and the more probable interpretation was that the employee felt so strongly about the issue that if he had the means, he would *"burn and bomb"* the employer. The Commissioner therefore upheld the dismissal.



I'M NOT TECHNO SAVVY

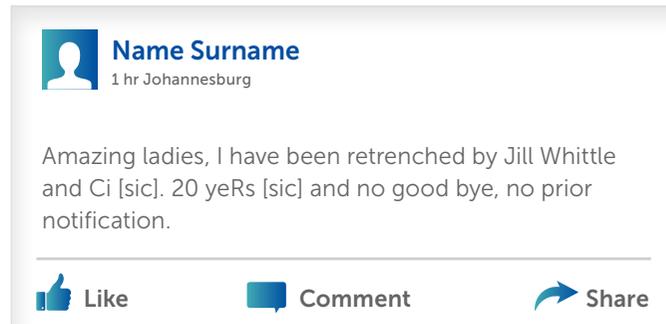
What if an employee claims to not understand the ramifications and reach of their social media post?

This is why implementing social media policies and making employees aware of these policies is so important. If an employer makes it clear from the outset that inappropriate posts on social media platforms will not be tolerated, then an employee who claims not to understand the reach or potential ramifications of their social media activity will have less of a leg to stand on. An example of this defence and the possible consequences of not having such a social media policy in place is discussed below.

Case example

Robertson v Value Logistics (2016) 37 ILJ 286 (BCA)

Employee's Facebook post:



Background

The employer was undertaking a retrenchment process but the process was not finalised. The employee and employer were continuing with consultations and according to the employer, the decision to retrench the employee had not been made. The employee was later notified of a disciplinary hearing to answer to allegations of gross misconduct pertaining to her Facebook post. The employer found the employee guilty of the allegations and she was subsequently dismissed.

Gist of employee's defence

The employee claimed she was not techno savvy; she saw other employees posting comments on Facebook and thought that she was only talking to those employees.

Arbitrator's reasoning and finding

- The employer failed to link the Facebook post to the code of conduct. Thus the question was whether the employee could reasonably have been aware that posting the comments would constitute serious misconduct and that dismissal could follow.
- The employee's belief that the employer had for all intents and purposes made its decision regarding her retrenchment was not surprising under the circumstances.
- The post was more an expression of hurt than an attack on the intergrity of the company.

In light of the above, the arbitrator found the dismissal to be substantially unfair.

The lesson to be taken from this case

Though the arbitrator's reasoning and conclusion may be criticised for seemingly seeking to justify the employee's behaviour, there is an important lesson to be taken from this case:

Employers need to implement rules and policies which regulate employees' conduct on social media. This will ensure that in cases similar to this one, an employer's interests are better protected.



MY ACCOUNT WAS HACKED

The employee employed as a warrant officer was dismissed after he posted racist remarks on the Facebook page of the leader of the Economic Freedom Fighters.

Case example

Dagane v SSSBC and others (JR2219/14) [2018]
ZALCJHB 114

Background

The employee employed as a warrant officer was dismissed after he posted racist remarks on the Facebook page of the leader of the Economic Freedom Fighters. His post stated that:

*"[F**k] this white racist [s**t!] We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA."*

"When the Black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on them. I hate whites."

The comments were picked up by a reporter and published in an article entitled "*Ek haat wittes, sê polisielid op Facebook.*" The comments came to the attention of the employee's employer, the South African Police Service (SAPS).

The employer's response

The employee was found guilty of misconduct and dismissed. After he successfully challenged his dismissal at the bargaining council, the employer took the award on review to the Labour Court.

The employee's defence

The employee argued, among others, that he did not make the comments on Facebook. His defence was that someone created an account using his name or that his account was hacked. The commissioner found that on a balance of probabilities, the employee had made the comments on Facebook. In relation to his argument that someone created an account using his name, the commissioner considered that the employee closed the Facebook account and no motive was provided as to why another person would use the employee's account to indicate hatred for white people. In relation to the allegation that the employee's account was hacked, the commissioner considered that, if that were true the employee would have distanced himself from the comments which he did not do.

The employer had relied on print-outs from google that incorporated the employee's remarks. Although the commissioner found the print-outs amounted to hearsay evidence, she exercised her discretion and admitted such evidence.

The Labour Court's finding

It found that the dismissal was fair. It held that the employee, who was a SAPS officer, had unfairly and openly discriminated against others based on their race and that such remarks amounted to hate speech.



CAN AN EMPLOYEE BE DISCIPLINED AND POSSIBLY DISMISSED FOR CONDUCT ON SOCIAL MEDIA EVEN IF THE REMARK IS NOT RELATED TO THEIR EMPLOYMENT?

There are no reported Labour Court judgments in South Africa which deal with the dismissals related to online misconduct outside the workplace. Our courts are likely to 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.

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.

UK courts will set the trend on how our courts deal with this new but rapidly advancing issue.

Case example

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.

Note: It is 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. There is authority in our case law that, 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.



HOW DO YOU REGULATE EMPLOYEES' CONDUCT ON SOCIAL MEDIA?

It is becoming increasingly difficult to implement rules and discipline employees for online misconduct where the line between work and play has blurred. When drafting a Social Media policy, employers should be wary of restricting their ability to adequately discipline employees for online misconduct.

Case example

Cantamessa v Edcon Group [2017] 4 BALR 359 (CCMA)

In this case, the employer dismissed an employee, following a disciplinary enquiry, for posting an inappropriate racial comment on Facebook. The employer also alleged 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*". It was common cause that the employee took to social media whilst on leave in December 2015 and utilised her own electronic equipment when posting the comment on Facebook.

The timing of the employee's Facebook post coincided with the infamous Penny Sparrow post which caused uproar and brought racial posts on social media to the forefront. Even though the employee's comment was posted a week before the Penny Sparrow post, it gained significant traction in print and electronic media. During January 2016, a customer emailed the employer and attached a copy of the employee's Facebook comment. It is this complaint that notified the employer of the Facebook comment. Shortly thereafter, the incident was published in the Sowetan newspaper followed by disgruntled customers taking to Twitter complaining about the Facebook post and threatening to stop doing business with the employer.

The employer argued the employee's conduct on Facebook was destructive of the employment relationship and sought to rely on, inter alia, its social media policy. The social media policy in place at the time, according to the Commissioner, had glaring loopholes and failed to cater for incidents which take place after working hours.

Whilst the evidence suggests that the employee's conduct resulted in a public relations disaster for the employer, the Commissioner found that other factors existed which could not reasonably justify the summary dismissal of the employee.

It therefore becomes critical to take legal advice when drafting a Social Media policy and imposing discipline for "*online misconduct*" in these rapidly changing times.



SOCIAL MEDIA HAS TURNED ALMOST EVERY EMPLOYEE INTO A BRAND AMBASSADOR, HOW DO WE CONTROL THIS POTENTIAL REPUTATIONAL DAMAGE?

Brand ambassadors are not confined to a list of the marketing and public relations employees of the company. Every employee of the company becomes a brand ambassador as they in some way or another 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.

Stringent social media policies which deal with all eventualities relating to online behaviour and ensure protection against potential or actual reputational damage to the company must be implemented.

In addition, Employers must exercise caution when taking steps to discipline employees for social media misconduct. Often Employers have difficulty with the formulation of the allegations presented to employees notwithstanding the glaring misconduct which is destructive of the employment relationship, thereby resulting in unjustified dismissals.

Employees should ensure that they positively influence public perspective in order to take the brand of their employer forward.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from 2012–2020.

The Legal 500 EMEA 2021–2024 recommended **Anli Bezuidenhout** for employment.

Chambers Global 2018–2024 ranked **Fiona Leppan** in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from 2012–2018.

Chambers Global 2021–2024 ranked **Imraan Mahomed** in Band 2 for employment and in Band 3 from 2014–2020. *The Legal 500 EMEA 2020–2024* recommended him for employment.

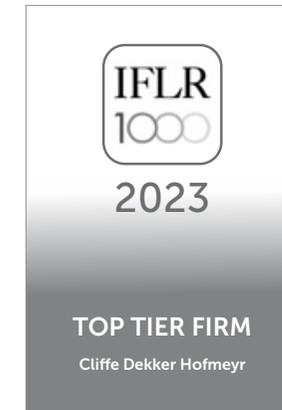
The Legal 500 EMEA 2023–2024 recommended **Phetheni Nkuna** for employment.

The Legal 500 EMEA 2022–2024 recommended **Desmond Odhiambo** for dispute resolution.

The Legal 500 EMEA 2023 recommended **Thabang Rapuleng** for employment.

Chambers Global 2024 ranked **Njeri Wagacha** in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment.

The Legal 500 EMEA 2023–2024 recommends her for corporate, commercial/M&A.



BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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