Employment Law

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EMPLOYMENT LAW ALERT

The right to disconnect from work-related communications outside of working hours

In today's modern workplace – driven by technology and the increasing prevalence of remote work – employees frequently find themselves entangled in work-related responsibilities outside of working hours.

Within the dynamic landscape of South Africa's labour market, employers ought to recognise recent international developments regarding the right to disconnect.

Defined by the European Industrial Relations Dictionary, the evolving concept of the right to disconnect grants workers the freedom to disengage from work-related communications, such as emails or messages, outside of working hours. Recognising and implementing this right can safeguard employees' physical and mental well-being, ultimately fostering more productive and sustainable employment relationships.

International approach

The right to disconnect first emerged during a decision by the French Supreme Court on 2 October 2001 that affirmed that employees are not obligated to work from home outside of working hours. France further solidified this right in early 2013, with a national cross-sectional agreement on equality of life at work, encouraging businesses to avoid intruding on employees' private lives by specifying periods when devices should be switched off, as regulated by Article L.2242-17 of the French Labour Code.

Following France's lead, a wave of legislative action has swept through numerous countries. Belgium, Portugal, Chile, Italy, Spain, Luxembourg, Slovakia, the Philippines and Kenya, among others, have all taken steps to enact or implement measures aimed at safeguarding employees' right to disconnect.

In Kenya, for instance, the Employment (Amendment) Bill of 2021 (Bill) proposes amendments to Kenya's Employment Act, requiring employers to establish policies outlining the circumstances under which an employer may contact an employee outside of working hours, regulating the use of electronic devices for work-related communication, specifying conditions under which the right to disconnect may be waived, and defining the nature of compensation for employees who work outside of working hours.

Most recently, Australia's Fair Work Legislative Amendment (Closing Loopholes No. 2) Bill of 2023 enshrined the right to disconnect in Australia's law, which empowers employees to refuse to engage in work-related communications outside of working hours and provides avenues for dispute resolution through the Fair Work Commission.

What does this mean for South Africa?

While South Africa's Basic Conditions of Employment Act 75 of 1997 (BCEA) and Labour Relations Act 66 of 1995 do not provide for the right to disconnect, it is evident that international trends and developments may soon necessitate its integration into South Africa's legal framework.

The right to disconnect from work-related communications outside of working hours

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In anticipation of this shift, South African employers can take proactive steps implement policies that delineate expectations regarding communication outside of working hours, including contact by third parties such as customers.

It is important to note that Section 9 of the BCEA does, however, stipulate that an employer may not require an employee to work more than 45 hours in any week: nine hours in any day if an employee works for five days in a week or eight hours in any day in an employee works more than five days in a week. This section, however, only applies to employees earning under the ministerial earnings threshold.

By clarifying conditions for contact outside of working hours and establishing mechanisms for compensation, employers can lay the groundwork for effectively integrating the right to disconnect into their organisational practices.

However, numerous challenges may arise concerning the application of the right to disconnect, for example, the challenge in affording the right to those employees who earn above the earnings threshold, and employees who do not work during ordinary work hours.

Clarification and adaptation of existing regulations will be essential to ensure the well-being of employees.

Conclusion

In conclusion, as South Africa navigates the complexities of the modern workplace, embracing the right to disconnect represents a crucial step towards promoting employee well-being, enhancing productivity, and fostering sustainable employment relationships in the digital age.

Nadeem Mahomed

Weeding out the fraudsters: Misrepresentation of qualifications

The South African employment landscape is littered with employees who have misrepresented their qualifications to achieve a higher status or make more money by being appointed to positions for which they would not have been eligible without those qualifications.

Stories of fake qualifications are unfortunately too common. In January this year, *Business Day* broke the story of a well-regarded economist, who sat on the boards of a number of blue-chip companies and on the Presidential Advisory Council, who falsely claimed under oath that she had a PhD from the London School of Economics.

A councillor in Cape Town has had to stand down after it was exposed that he had misrepresented that he had an MBChB degree. A Cabinet Minister has been called out for *"obtaining"* honour's and master's degrees without an undergraduate bachelor's degree.

To make matters worse, an illicit industry has built up around this type of fraud. An employee from the Department of Higher Education and Training has recently been arrested for issuing diploma certificates in exchange for cash. Certain unscrupulous online *"educational institutions"* offer degrees and certificates for a fee.

The adverse consequences of these types of appointments can be severe, not only to an employer but also the public. The SABC was hollowed out over a number of years, during a certain CEO's tenure. PRASA misspent hundreds of millions of rand buying trains that were too high for the local rail network. What these institutions had in common was the appointment of individuals who falsely claimed to have qualifications that they did not.

Umgeni Water case

Previously we wrote about the High Court judgment in *Umgeni Water v Sheldon Naidoo and Another* (11489/2017P) [2022] ZAKZPHC 80 (15 December 2022). The employee in that matter applied for a position at Umgeni Water which required, as a minimum, a chemical engineering degree. After a few years he applied for a more senior position. By this time Umgeni Water had appointed an external company to verify all qualifications. It was then found that the employee did not have an engineering degree at all. The employee resigned to avoid disciplinary proceedings. Undeterred, Umgeni Water sued the employee for repayment of all the monies that it had paid to him as a result of his fraudulent misrepresentation. The court held that the employee should not benefit from his fraudulent behaviour and granted Umgeni Water the relief it sought. It allowed Umgeni Water to execute the judgment against the employee's pension fund in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956. As a sign of its displeasure with the employee's conduct the court also ordered punitive costs against him on an attorney and client scale.

The ease with which these unscrupulous fraudsters get through the appointment process is worrying. The harsh reality is that most companies do not conduct a proper due diligence of candidates when appointing employees. Most employers simply take a candidate's purported qualifications at face value and do not use any sort of verification process.

Weeding out the fraudsters: Misrepresentation of qualifications

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Legislative obligation to authenticate qualifications

The National Qualifications Framework Act 67 of 2008 (NQF Act) seeks to regulate, amongst other things, the verification and evaluation of qualifications. In 2019 a number of material amendments were introduced to the NQF Act. One of these is section 32A(1), which places a legislative obligation on all employers, prior to an appointment, to authenticate that the applicant's qualifications are registered on the national learners' records database, and if not, to refer the matter to the South African Qualifications Agency (SAQA) for verification. Where a qualification is found to be inauthentic, misrepresented or fraudulent, the SAQA must refer this finding to the relevant professional body.

Section 32B(1)(c) makes it an offence to knowingly provide false or misleading information in any circumstances which the NQF Act requires the person to provide information or give notice to another person. The penalties for such an offence are a fine and/or imprisonment for a period not exceeding five years.

Section 32A(1) still needs to be proclaimed by the President in the Government Gazette. However, it will go a long way to weeding out the fraudsters from legitimate jobseekers through the pre-employment authentication of qualifications.

Reviewing recruitment processes

Notwithstanding the proclamation of section 32A, employers should seriously consider their recruitment processes with a mind to introducing a formal verification process. As a starting point, employers should ensure that the people responsible for recruitment are properly trained and understand the importance of verifying qualifications and experience.

Jobseekers should provide written consent to the company to conduct background checks and to verify qualifications before any appointment is made. Employment must be made contingent on the verification process.

There are a number of accredited verification agencies through which qualifications can be checked. Employers should be especially cautious when foreign qualifications are presented, or qualifications from unknown institutions. Verifications should also be done to check that these institutions are accredited to provide the qualifications claimed.

Potential employers should focus on competency-based questions in the recruitment interviews. These are questions that will test a candidate's knowledge and experience. For more technical or specialised positions, employers may consider having candidates take some form of practical assessment.

Finally, employers should make it clear to employees in their contracts of employment and in their policies that the misrepresentation of qualifications will not be tolerated, and the consequences of such misconduct should be clearly stated.

For more information on the Umgeni Water case, refer to our previous alert here.

Jose Jorge, Alex van Greuning and Caitlin Freddy

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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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