Dismissals for social media misconduct

Law firm Bowman Gilfillan recently held a seminar on social media and the law at its Sandton offices.

In a presentation, director Rosalind Davey spoke on international trends in social media, social media usage in Africa and social media and employment law.
Ms Davey said that there had been an increase in the number of dismissals for social media misconduct and, further, the use of social media was rapidly conflating 'work life and private life'. She said that although social media was an untapped source of business and marketing for companies, as employees constitute the face of a company and often its voice as well, employers may be exposed to various risks as a result of the use of social media platforms.

Ms Davey said that the use of social media was increasingly being taken more seriously and was growing rapidly internationally. However, as its use in South Africa is still relatively new, 'predictably' the law in this area is underdeveloped. 'This does not, however, mean that steps need not be taken to anticipate and mitigate the risks,' she said.

Ms Davey discussed the laws applicable to social media conduct. She said that there was no legislation explicitly dealing with social media in South Africa and employers therefore needed to look to other statutes and the common law to determine social media law. Ms Davey added that applicable law included the Constitution, employment law, consumer protection law and intellectual property law. She said that use of social media increased the threat to an employee's right to privacy, adding that in the United States many employers had been asking for their employees' login details for social networking website Facebook. Certain United States state laws have however since been promulgated to prohibit this practice. Ms Davey added that in South Africa there is no direct law confirming whether or not one can demand passwords and access and employers should be cautious in this regard.

Ms Davey said that the reasonable expectation of privacy was rapidly changing due to social media usage, adding that the right to privacy may be relevant to discipline and dismissals for social media misconduct.

She also spoke on employees' rights to freedom of speech versus the right to dignity. In this regard, she said that the common law right to a good name and reputation fell within the broader right to dignity, which generally 'holds sway over freedom of expression'.

Case law

Bowman Gilfillan associate Lenja Dahms-Jansen discussed cases decided by the Commission for Conciliation, Mediation and Arbitration (CCMA) that have dealt with social media misconduct, including:

• *Sedick and Another v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA); and
• *Fredericks v Jo Barkett Fashions* [2011] JOL 27923 (CCMA):
The employees in these two matters were dismissed as a result of derogatory Facebook status updates. They challenged the fairness of the dismissals at the CCMA. In both cases the CCMA found that the employees were fairly dismissed as their privacy had not been infringed when their employers accessed their Facebook posts. The employees had not restricted their Facebook privacy settings and the updates could be viewed by anyone, even those with whom they were not 'friends' on the website. The CCMA took the view that the employers were entitled to intercept the posts in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA). The commission decided that the employer was entitled to access the wall posts as the employees had 'open' Facebook profiles.
• *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA):
In this case a radio station employee criticised the organisation's board and claimed its station manager was a criminal. The CCMA found that the employee was fairly dismissed as he had posted unfounded allegations on Facebook without having addressed these internally first.
• *Smith v Partners in Sexual Health (non-profit)* (2011) 32 ILJ 1470 (CCMA):
In this case an organisation's chief executive officer accessed an employee's private Gmail e-mail account while she was on leave and found e-mails between her and former employees, as well as persons outside the organisation, which made reference to internal matters. The employer initially gained access to the employee's account accidentally but subsequent access was intentional. The employee was charged with a number of offences, including bringing the employer's name into disrepute.
In her defence at a disciplinary inquiry, the employee contended that the e-mails were accessed in violation of her right to privacy and in contravention of RICA. The CCMA found that the intentional access on the second occasion contravened RICA and the evidence obtained through this access was inadmissible on the basis of an infringement of the constitutional right to privacy. The CCMA held that the employee's dismissal was procedurally and substantively unfair.

Ms Davey said that it was evident from such cases that the CCMA is taking the issue of social media misconduct seriously and is not falling for 'the fable of special privilege, privacy and anonymity of employees online'. However, she added that while dismissals relating to social media misconduct are generally being confirmed, employers cannot use employees' online conduct to execute a pre-meditated house cleaning and that normal rules of fairness and equity apply equally to virtual labour relations.
Ms Davey said that the CCMA has accepted that what an employee says on his Facebook profile may be fair reason for dismissal and that the United Kingdom and the United States had adopted similar approaches.

Ms Davey said that the United States' National Labor Relations Board's view on social media policies was that they may stop an employee's right to engage in concerted activity on social media to improve working conditions.

Other risks

Ms Davey said that companies run the risk of vicarious liability for discrimination, harassment and defamation on social media where an employee's conduct occurs 'during the course and scope of employment'. She discussed the United Kingdom case of *Otomewo v Carphone Warehouse Ltd* [2012] EqLR 724 in which employees had posted the following status update on a colleague's Facebook page using his smartphone without his permission: 'Finally came out of the closet. I am gay and proud of it'. The status was posted at work during office hours and involved dealings between staff and a manager. Ms Davey said that the employer was found to be vicariously liable for conduct that amounted to sexual harassment on the grounds of sexual orientation. She added that the risk of vicarious liability applied equally in South Africa.

Ms Davey said that another risk that employers should be aware of is copyright and trade mark infringements by a company and its employees. She said that companies should comply with general principles of advertising, namely honesty, decency and truthful presentation, with the aim of consumer protection and fair play, adding that they cannot ascribe qualities to products that do not exist.

Ms Davey said that any company engaging in social media should have a social media strategy, a social media policy and staff training and enforcement mechanisms in place. She added that training should include the responsible use of social media and should refer to applicable consumer protection law, employment law, advertising standards, privacy and data protection, as well as copyright and trade mark law, and rules of the social media platforms being used.

In conclusion, Ms Davey said that social media was an underdeveloped area of law and it was still largely uncertain how South African courts would deal with issues arising out of social media usage. She added that taking into account what was happening abroad was useful as it gave South African lawyers an idea of the types of risks their clients were likely to face in this regard. She also warned employers to take pre-emptive measures to guard against such risks.

Nomfundo Manyathi, nomfundo@derebus.org.za