

SOCIAL MEDIA AND IN THE CONTEXT OF EMPLOYMENT LAW

Introduction

Social media are computer-mediated technologies that facilitate the creation and sharing of information, ideas, career interests and other forms of expression via virtual communities and networks.¹ Social Media differs from traditional forms of communication in many ways including:

- Reach
- Immediacy
- Permanence
- Access
- Frequency

Social Media represents one of the most significant developments in human communication in recent times. In a short span of time the way we interact and share information has changed dramatically. Social media has increasingly become a prevailing presence in our lives, including the workplace.

Our courts have recognised this trend and in the decision of Braithwaite v McKenzie², Judge Chetty commented that *"in today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet". The Judge commented further that "the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to reputational integrity of individuals."* The impact of social media on the workplace is equally significant as are the potential risks of social media misconduct.

¹ https://en.wikipedia.org/w/index.php?title=Social_media&oldid=780246747

² 2015 (1) SA 270 (KZP),

RISKS TO THE EMPLOYER

In the recent survey conducted by Deloitte on strategic risk management in South Africa³, reputation was cited as the highest impact risk area in a business. In line with international trends, companies viewed social technologies as the main factor causing concern about reputation. The risks presented by social technologies include:

- Damage to reputation;
- Associated financial risk;
- Confidentiality and protection of intellectual property;
- Defamation;
- Time wasting; and
- Vicarious liability.

From an employment perspective, social media misconduct by employees can present the following risks to the employer:

- Reputational damage;
- Delictual or contractual claims for damages;
- Unfair dismissal claims;
- Harassment or discrimination claims;
- IT system and software damage;
- Loafing;
- Poaching;
- Loss of intellectual property;
- Ineffective enforcement of restraint of trade provisions;
- Company protests/boycotts; etc.

³ <https://www2.deloitte.com/za/en/pages/risk/articles/strategic-risk-survey.html>

BALANCING OF RIGHTS

Because social media can impact on issues of fundamental rights like the right to privacy and the right to freedom of association, employers are placed in a difficult position when it comes to regulating how their employees use social media. Whilst the rights to privacy and to freedom of expression are enshrined in our Constitution, it is important to understand that these are not absolute rights and can be limited.

This was confirmed in the Constitutional Court decision of Gaertner & Others v Minister of Finance & Others⁴. The Constitutional Court held that *"as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks"*.

The Constitutional Court has also confirmed that freedom of expression is not a superior right in South Africa. This was highlighted by Judge O' Regan in Le Roux and others v Dey⁵ when she stated *"with us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression... What is clear though and must be stated is that freedom of expressions does not enjoy superior status in our law."*

Employees do not have carte blanche to say and post what they want to with impunity and employers are well within their rights to regulate social media in so far as it could affect the workplace.

MANAGING RISK AND PROTECTING YOUR BUSINESS

Social media use is growing rapidly in South Africa and it is necessary for employers to manage social media in the workplace particular considering the various risks that misuse could present to the employer.

⁴ 2014 (1) BCLR 38 (CC)

⁵ 2011 (3) SA 274 (CC)

So, how do you manage social media in the workplace? More is needed than just a social media policy and we advise that employers should implement the following:

- A social media policy;
- Social media literacy;
- Social media monitoring;
- A social media strategy;

THE SOCIAL MEDIA POLICY

The social media policy is a document designed to educate and assist employees to make responsible choices about the use of social media in so far as it affects the workplace. It is introduced as a human resource policy and should be designed to provide practical, reasonable and enforceable guidelines to employees on the use of social media.

The policy should educate employees about the use of social media, the impact of social media and the consequences of social media misconduct. Importantly, the employer must establish, in clear and unequivocal terms, the consequences of non-compliance with the social media policy.

The policy should provide clear guidelines and rules. It is important that the social media policy make provision for the different capacities in which employees use social media. These include:

- Authorised social media use – professional use;
- Private social media use during working hours and/or using the employer's infrastructure; and
- Off-duty social media use, outside working hours and using a private infrastructure.

The social media policy should have clear guidelines and clear rules and should also address issues of privacy, confidentiality and security, the management of grievances and monitoring of social media by the employer.

In the recent decision of Cantamessa v Edcon Group [2017] 4 BALR 359 (CCMA) an employee was dismissed, following a disciplinary inquiry, for posting an inappropriate racial comment on Facebook. The post was made by the employee outside whilst she was on annual leave and using her own equipment. The employee's Facebook page stated the name of her employer.

The comment was brought to the attention of the employer by a client and there was a backlash and the employer asserted that the comment placed its reputation at risk and therefore breached the employment trust relationship.

The employer had a social media policy and the employee admitted that she was aware of and understood the policy. However, the policy was basic and did not regulate social media misconduct outside working hours or using private tools. As a result of this, the CCMA held that the employer failed to prove that the employee breached a rule and the summary termination was unreasonable and unfair.

Social Media Literacy

Considering the pace at which social media is growing and the change of impetus of social media engagement in the workplace including possible employee advocacy, employers need more than a social media policy or social media guidelines to manage social media in the workplace.

In an article on the Social Media Skills Gap, the author notes that "*The contemporary workforce is woefully underprepared for the challenges...A social media skills gap of epic proportions has opened up, as social media surges forward while formal training and education programs lag seriously behind.*"⁶ The article cites William Ward,

⁶ R Holmes, The social media skills gap in the workplace has fast become a perilous chasm, February 2017 National Post – <http://business.financialpost.com/entrepreneur/the-social-media-skills-gap-in-the-workplace-has-fast-become-a-perilous-chasm>

professor of Social Media Studies at Syracuse University, who states that *"The real problem is that we expect people to know these skills without providing any training ... Social media know-how isn't something you pick up as a casual user, and it isn't just older employees who are in the dark-millennial hires need training, too."*

One of the key tools available to an Employer to ensure compliance with its social media policy and to prepare its workforce for the changes and opportunities that social media will present is appropriate training, development and engagement, commonly termed Social Media Literacy.

Social Media Literacy is understood as having the proficiency to communicate appropriately, responsibly, and to evaluate conversations critically within the realm of socially-based technologies.⁷

All employees should receive basic social media literacy and policy training. Almost all employees are using social media in their personal lives and should be given the skills and education to do this without risk to the business or themselves. This type of training could cover social network best practices such as:

- Understanding the social media policy or guidelines of the Company;
- Guidance on discussing the company and competitors;
- Guidance on confidential information and the protection of intellectual property;
- Referencing to broader policies on conduct and security;
- Ways to set up and optimize social profiles and management of employee advocacy;
- Guidelines for privacy settings; and
- Identifying repercussions for social media misconduct.

More advanced social media training for specialized groups of employees could be delivered on an as-needed basis. For example, Human Resources could be trained

⁷ Katlen Tillman. Do Media Literacy, Digital Literacy, and Social Media Literacy Intersect? - <http://www.edelmandigital.com/2010/04/01/do-media-literacy-digital-literacy-and-socialmedia-literacy-intersect/> April 1, 2010

on best practices for using social media to find and attract candidates while sales teams should receive training on tactics for networking effectively and professionally on social media. These active teams need to think carefully about how their profiles and communications are perceived by both clients and prospects and be conscious of the ways their online presence impacts perceptions of the brand. Anyone communicating on behalf of the company through official social channels should have more robust training requirements.

- **Build a Training Plan** – Begin the steps to build a training program for your organization. In building a plan, it is important to consider what you want to achieve. If you believe (as over 80% of companies do) that social media can benefit your business, it is vital to understand your employees can help and to build a plan to achieve it.
- **Provide Training** – Regardless of the size of your business some sort of training should be on the agenda. It may involve sending a few people to targeted programs, or training for your entire organization. Either way, given the proliferation of social media, training is vital.
- **Reinforce** - Once these training needs and tools are identified and developed, create a plan to ensure the training is adaptable and ongoing. Don't just set it and forget it—make training stick by consistently communicating, updating, and testing the knowledge of your employees.
- **Induction** - Make social media education a part of your business's induction process so that employees become aware of the rules of your business and conduct that is acceptable. This in turn sets the tone of Employee social media engagement in your organisation.

When it comes to social media management, the bottom line is that it's less about "micro-managing" employees and more about giving employees the tools needed to successfully represent themselves and your business, within the rules set by you and in compliance with the law.

Employment Contracts

It is important that employers include specific provisions in the contract of employment that regulate the use of social media in the workplace. This makes the employee aware that responsible social media use is an important condition of employment. Provisions should also be included to manage social media on termination of employment. These provisions will serve to fortify an employer's case in the event of disputes in the future.

Code of Conduct, Policies and Procedures

Employers must ensure that their Codes of Conduct and other relevant policies and procedures, such as a recruitment policy, include relevant provisions to manage social media conduct in the workplace. These provisions must be in line with what is set out in the social media policy and the contracts of employment.

To illustrate the value of aligning policies and procedures we consider the case of Robertson and Value Logistics (2016) 37 ILJ 286 (BCA). In this case, the employee posted on social media that she had been retrenched, prior to the finalisation of the employer's retrenchment process. She was subjected to a disciplinary enquiry and dismissed.

The employee referred the dismissal to the bargaining council and sought to defend her actions by arguing that she was not "technologically savvy". The commissioner concluded that the employer had failed to link the Facebook post to the code of conduct raising the question of whether the employee could reasonably have been expected to be aware that posting the comment would constitute misconduct.

The commissioner rationalised the employee's actions in light of the circumstances of the retrenchment exercise finding it to have been an expression of hurt rather than a critical attack on the employer. The employee was reinstated with back pay.

Exiting Employees

As part of the process to exit employees from the organisation, a social media audit should be included to ensure that social media content that links the individual to the organisation e.g. a LinkedIn profile is managed.

In a recent South African case in the High Court an individual left the employ of his employer but did not update his LinkedIn profile to reflect this. The employer did not wish for the individual's name to be associated with its brand and made several requests asking the individual to update his details accordingly, which the individual refused to do. The High Court ordered the ex-employee to update his online employment profile to show that he no longer works for his former employer. This judgement has set the first precedent for the management of online employment profiles.

Where employees are social media advocates for the organisation, the ownership of social media sites e.g. blogs should also be managed on exit from the organisation.

Social Media Audits

Employers could consider conducting comprehensive annual or bi-annual social media audits to evaluate the use of social media by employees in the workplace. These audits are pro-active steps that can be used to evaluate risk as well as determine social media trends which in turn can assist employers to put the necessary steps in place to manage social media in the workplace.

SOCIAL MEDIA STRATEGY

Due to the real time and proliferating nature of social media, an immediate response is usually required to negative social media events in an attempt to address the event before it spirals out of control. Whilst this is valid requirement, an ill-considered, "knee-jerk" reaction can actually cause more harm.

It is therefore advisable to have a strategy in place so the employer is prepared to manage potential negative social media events. Such a strategy must take account of:-

- the perceptions of the public;
- the reputation of the employer;
- the existence of a legal employment relationship between the parties.

A proactive approach places the employer in the best position to neutralise the potential risk of a negative social media event.

TRENDS THAT MAY IMPACT ON SOCIAL MEDIA MANAGEMENT IN THE WORKPLACE

There are trends developing internationally that will influence social media use and management in the workplace. It is important that businesses have regard to these trends and the impact that they will have on their businesses and the management of social media in the workplace.

Using Social Media for Recruitment

Instead of traditional recruitment methods, companies and recruitment agencies are filling openings faster by relying on new tools that scour social networks and target workers – some of whom aren't even looking for jobs.

In 2016 Kelly issued a report on Recruitment and Workforce Trends. According to this report⁸ *"Social media is now one of the best platforms for identifying, sourcing and retaining top talent, with both quality and quantity of candidates proven to improve when a social recruiting strategy is put in place."* The report states further that, *"It is expected that by 2016, innovative tools which utilise social media, big data and other technologies, which provide job-seeker insights, will be a primary*

⁸ 2016 Kelly, A Report on Recruitment and Workforce Trends: 2016 and beyond

screening method in future. Looking at the current landscape regarding the uptake of these platforms and developments, this is likely to be the case moving forward.”

Based on these trends it is necessary for the recruitment policies and procedures of companies to be updated to regulate for social media recruitment.

One of the primary risks associated with conducting online background checks is that whilst looking for insights into the applicant’s job performance, the background check might also reveal details about their private lives creating the potential risk of discrimination. As with traditional screening methods where you cannot ask questions relating to certain subjects (race, colour, religion, sex, national origin, age, disability, and genetic information), you cannot rely on the information gathered from social media either.

Another possible area of risk is that of mistaken identity. A case in point is that which occurred in the US where an individual accepted an offer of employment only to have the employer retract it, following an online search where the employer found a “mug shot” of someone with the same name as the individual. It subsequently transpired that the mug shot was of someone else, but by then the position had already been filled.

Employers are increasingly relying on social media to recruit and vet prospective employees and must ensure that proper procedures are engaged with due consideration that the information obtained as a result of a search may be inaccurate, misleading and may result in unintended discrimination.

A Sign of the Times – the Use of Emoji’s

A study has found that emoji’s and emoticons have replaced non-verbal cues like facial movements, voice pitch and other gestures to clarify messages on social

media. More than 90 per cent of the online population uses emoji's and emoticons into their texts and emails.⁹

With more social media apps shifting to be either mobile-exclusive, or designed specifically for a mobile device, and with the millennial generation constantly demanding more content and faster experiences it is expected that users will strive for even more concise communication. Emoji's are about as concise as you can get, communicating entire sentences with just a symbol or two. Facebook started the trend with the release of emoji "reactions" similar to "likes." Similar nonverbal reactions may also appear on competing platforms as a way to encourage faster communication, the difficulty is that the faster the communication, the less thoughtful it can be.

While South African courts have not yet been called upon to pronounce on the use of emoji's as evidence, internationally, courts are increasingly being called upon to evaluate the meaning of emoticons and emoji's that are included in material entered into evidence.

In a US sexual harassment case brought by the female co-CEO of a Delaware corporation against her partner, the Delaware Chancery Court held that a "smiley-face emoticon at the end of [the defendant's] text message suggests he was amused by yet another opportunity to harass" the plaintiff.¹⁰

In the trial of a Californian man accused of operating a black market called Silk Road over the Internet, the judge instructed the jury members that they should take into account the emoji included in the social media posts and other electronic communications submitted into evidence, stating that the emoji's are "*part of the evidence of the document.*"¹¹

⁹ Linda K. Kaye; Stephanie A. Malone; Helen J. Wall ;Trends in Cognitive Sciences Emojis: Insights, Affordances, and Possibilities for Psychological Science February 2017 - <https://doi.org/10.1016/j.tics.2016.10.007>

¹⁰ © 2016 Morrison & Foerster LLP - Socially Aware – social media law update Volume 7, Issue 4, July 2016

¹¹ © 2016 Morrison & Foerster LLP - Socially Aware – social media law update Volume 7, Issue 4, July 2016

A further example is that of an upmarket restaurant that rejected a candidate for a waitress role via text. The candidate received a text message which told her that she was unsuccessful in her interview and used a laughing face emoji. Following a media uproar, the restaurant apologised for the unprofessional conduct and undertook to ensure that its recruitment team would strive to be professional and would give constructive feedback to all applicants.

The Electronic Communications and Transactions Act 25 of 2002 (“ECTA”) regulates the admissibility of documents from an electronic source, whether e-mails, fax, SMS, or social media posts and it is probable that the use of emoji’s will be admissible as evidence in South Africa.

In the employment context, evidence of emoji use may be relevant to assist in determining the intention and/or state of mind of an employee who commits misconduct. Employers should consider this in their social media strategy.

The Hate Speech Bill

Following recent highly-publicised incidents of hate speech published on social media and elsewhere, including the Penny Sparrow debacle, Government sought to introduce laws to regulate hate speech. In October 2016 the Prevention and Combatting of Hate Crime and Hate Speech Bill was promulgated.

This Bill seeks to create protection for groups that are vulnerable to targeted crimes because of their race, sexual orientation or gender, national origin, occupation and disability and further seeks to make such conduct a criminal offence. The Bill recommends hate speech, in the case of a first offence, lead to a fine or imprisonment for a period not exceeding three years, or to both a fine and prison.

This highly controversial bill has not been finalised and is still the subject of debate. However it appears that some form of legislation to regulate hate speech is

forthcoming and employers will have to revise their social media policies to accommodate the provisions of this law. In addition, employers must prohibit hate speech and must include provisions to manage hate speech in the disciplinary policy and procedure.

Employee Advocacy and Online Collaborations

“Employee advocacy” is a term used to describe the exposure that employees generate for brands using their own online assets. Looking ahead there is a definite international trend to use employees as social media advocates of the employer’s brand.

Consider these statistics

- Brand messages are re-shared 24 times more frequently when distributed by employees’ vs the brand (*Source: MSLGroup*);
- Leads developed through employee social marketing convert 7x more frequently than other leads (*Source: IBM*).
- 98% of employees use at least one social media site for personal use, of which 50% are already posting about their company (*Source: Weber Shandwick*).
- Customers referred by advocates have a 37% higher retention rate (*Source: Deloitte*).
- Nearly 31% of high-growth firms have a formal employee advocacy program, (*Source: Hinge Research Institute and Social Media Today*).
- These statistics highlight that employees could be one of the most valuable and untapped marketing assets of a business today. This is particularly relevant for small to medium businesses that do not have large marketing budgets. Whilst these are international statistics, it is only a matter of time before South African businesses adopt similar strategies.

Embracing employee advocacy changes the nature of social media management in the workplace from an approach favouring limited engagement to one of

encouraging engagement. Businesses must start thinking about employee advocacy and how this will change the application and use of social media in the workplace. A new approach is needed.

Internationally there is also a trend towards online employee collaboration. New software systems are making it easier for teams to collaborate on work, communicate with one another, and manage projects e.g. Microsoft 365 Collaborate. These products encourage and require online engagement and are indicative of a future trend in the way we work. Employers will need to manage this.

CASE LAW

Cliff v Electronic Media Network (Pty) Ltd¹²

Whilst this case ultimately was concerned with whether there was a tacit contract between radio and television personality, Gareth Cliff ("Cliff") and the television channel, M-Net, it highlights the implications of negative social media interactions as well as the risks to an employer of ill-considered reactions to negative social media events;

This case was as a result of the Penny Sparrow ("Sparrow") incident, when a white female posted a statement on her Facebook page that was viewed as racist and derogatory. Shortly after Sparrow's post, Cliff tweeted that "People don't understand free speech at all";

Both Sparrow and Cliff's statements were met with widespread public anger and outrage on social media. It was this negative public attention that allegedly led to M-Net's decision to fire Cliff as a judge on Idols;

Nicholls J was not so concerned with whether Cliff's tweet amounted to the advocacy of hate speech, but rather whether a contractual relationship existed between Cliff and M-Net and if so, whether that contractual relationship should be reinstated. The judge

¹² (1368/2016) [2016] ZAGPJHC 2 (29 January 2016)

held that Cliff had met all the requirements for interim relief as he had shown "...a prima facie right that he had a contract with M-Net which was terminated without due process..." (my emphasis).

During the course of this case, M-Net suffered significant backlash from the public in respect of both the comments made by Cliff as well as the treatment of Cliff.

Herholdt v Wills¹³

The Judge granted an interdict in respect of defamatory statements made on Facebook. Heroldt sought an interdict against Wills for posting a message on Facebook which was defamatory in nature. The comments made by Wills in respect of Herhold's responsibilities as a father were found by the Court to be unlawful, unfair and not in the public interest. The Court ordered Wills to remove all postings and ordered him to pay for Heroldt's legal costs.

Civil cases of defamation for comments made on social media are becoming more prevalent and employees should be advised of the possible risks of being held personally liable for the comments that they make in respect of claims for damages.

Isparta v Richter & another¹⁴

The High Court rules that a Facebook user was guilty of defamation because a defamatory post appeared on his Facebook wall and was not removed by him, even though he was not the author of the post. The court ruled that because he knew of the post and "allowed his name to be coupled" with the author, he was as liable as the author.

It is important to understand that associating yourself or knowingly allowing yourself to be associated with an unacceptable social media post could invite liability.

¹³ 2013 (2) SA 530 (GSJ)

¹⁴ 2013 (6) SA 529 (GNP)

NUMSA & Another v Rafee N.O [2016] ZALCJHB 512

The Labour Court upheld the ruling by the CCMA that the dismissal of an employee for failing to hand over his mobile phone to the employer, upon request, was valid as it constituted a failure to obey a reasonable instruction.

The employer received a report that the employee had taken photographs on his mobile phone of some of the production areas at the plant. Cautious to protect its confidentiality and security, the employer instructed the employee to delete the photographs and requested confirmation from the employee that this had been done. When such confirmation was not forthcoming, the employer requested the employee to hand over his phone for inspection, which the employee refused to do so, relying on his right to privacy.

The Labour Court confirmed that the employee had a right to protect the confidential information on his phone but also recognised the right of the employer to protect the confidential information of its operations. In balancing these rights, the Court held that by taking the photographs, the employee diminished his right to privacy and could no longer rely on this right.

The constitutional right to privacy is not absolute and employees should be educated to understand that by their own actions they may undermine this right and therefore caution should be exercised.

Chemical, Energy, Paper, Printing, Wood And Allied Workers Union obo Van Wyk v Atlantic Oil (Pty) Ltd¹⁵

The CCMA was called upon to determine the fairness of the dismissal of an employee who used the company cell phone to transmit racist comments and further used profane language in the communications. The dismissal was upheld.

¹⁵ [2017] 9 BALR 960 (CCMA)

Robertson Winery (Pty) Ltd v CSAAWU and Others¹⁶

Following an interdict in respect of strike action an agreement was reached with the Union which *inter alia* included an agreement to comply with the picketing rules which required a peaceful and lawful protest. Shortly thereafter the union posted pictures to its Facebook profile of the striking workers brandishing various dangerous instruments. The strikers also engaged in other aggressive behaviour.

The behaviour of the union as evidenced by the photographs posted to Facebook illustrated a breach of the Court Order and the employer approached the Labour Court to have the union held in contempt.

The Court *inter alia* held that uploading the photographs of the strikers brandishing weapons on to Facebook constituted a breach of the Court Order and the picketing rules. The union was held to be in contempt of court.

Gordon / National Oilwell Varco¹⁷

An employee posted a message on Facebook that included racial expletives following the injury of his mother who was in an ambulance hijacking. The employer charged the employee with inciting racial hatred and bringing its name into disrepute. The employees defence was that he reacted out of despair following a terrible incident.

Whilst acknowledging that the incident and the impact on the employee at the time, the BC had due regard to the right of protection against discrimination. The BC considered that the post was made on a public space which was widely accessible and on this basis found the dismissal to be fair.

¹⁶ (2017) 38 ILJ 1171 (LC)

¹⁷ [2017] 9 BALR 935 (MEIBC)

Sedick and Another v Krisray (Pty) Ltd¹⁸; and Fredericks v Jo Barkett Fashions¹⁹

The employees were dismissed for 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 by those who 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 CCMA decided that the employer was entitled to access the wall posts as the employees had 'open' Facebook profiles.

Understanding the privacy settings of the various social media platforms is important.

Media Workers Association of SA obo Mvemve v Kathorus Community Radio²⁰

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.

Where employees are aggrieved, they should be educated and encouraged to resolve such grievances internally and should not take to social media to "air" them out.

Mnyandu v Padayachi²¹

The High Court considered an appeal against a decision by the Magistrates Court, which had found that a single email sent by Ms Mnyandu to a group of fellow

¹⁸ (2011) 8 BALR 879 (CCMA)

¹⁹ [2011] JOL 27923 (CCMA)

²⁰ (2010) 31 ILJ 2217 (CCMA)

²¹ 2017 (1) SA 151 (KZP)

employees in which she had made some false accusations against a fellow employee, Mr Padayachi, constituted harassment for the purposes of the Protection from Harassment Act 17 of 2011 (“the Harassment Act”).

Whilst the High Court found that the conduct did not constitute harassment for the purposes of the Harassment Act, the judgment is important because it confirms that employees are not restricted to bringing claims for harassment under the Employment Equity Act, but may also do so in terms of the Harassment Act.

Beurain v Martin N.O. and Others²²

This case addressed social media engagement and protected disclosures. The employee claimed that he was a “whistle-blower” and therefore his social media content was protected. The Labour Court reviewed the requirements of the Protected Disclosures Act 26 of 2000 (“the PDA”) and found that his post did not amount to a protected disclosure.

Where the requirements of the PDA are met then social media posting could enjoy protection.

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²² (C16/2012) [2014] ZALCCT 16