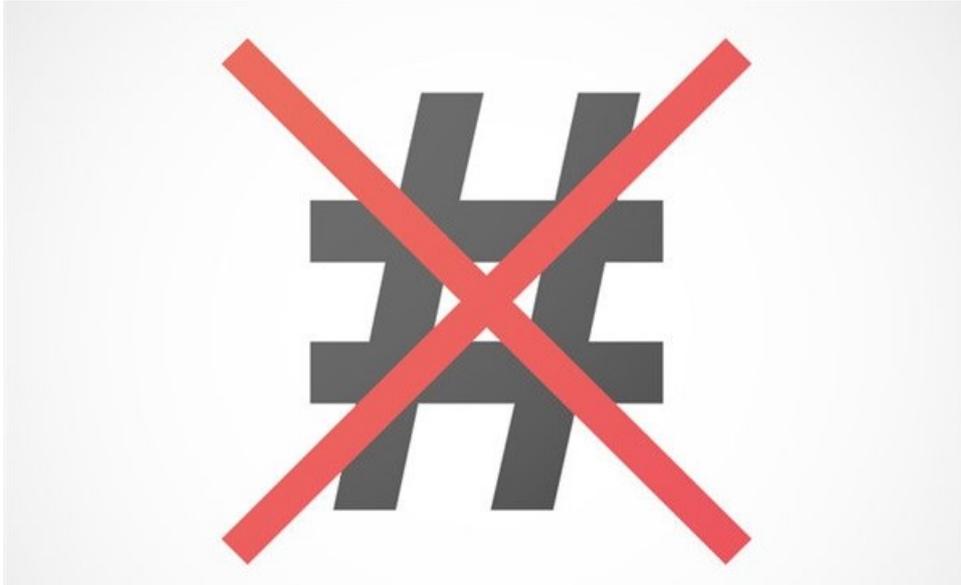


Disciplining employees for off duty misconduct

By  Rosalind Davey

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While many employers have social media policies in place, the extent to which these policies can be relied upon to justify disciplinary action taken against an employee will depend largely on, among other things, whether the employee knew or ought reasonably to have known about the policy. This begs the question as to whether such policies are accessible to employees and whether employees have received training on them. The adage that prevention is better than cure is apt in the circumstances.



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Due to the prevalence of social media use both in and out of the workplace; the scope of what constitutes conduct for which an employee may be disciplined has become alarmingly blurred.

Employers need to take heed of the risk posed to their businesses by employees who do not receive adequate training on their social media policies and who do not understand the implications of their online blunders. Likewise, employees need to be cautioned that certain conduct on social media, depending on the circumstances, may warrant dismissal.

Dismissal may be deemed to be appropriate when a social media post contains derogatory, derisive or disparaging remarks about the employer and brings or could bring the employer's name into disrepute; and if the employee directs derogatory and offensive comments at his or her employer or co-employees and these comments negatively impact on the working environment and render the work relationship intolerable.

Another scenario, which has recently come to the fore, is where the online posts are not aimed at or derisive of the company or employees of the company but are generally offensive remarks that may or may not be racist or amount to hate speech. Such conduct, at best, amounts to off-duty misconduct.

What an employee does after work generally falls outside the scope of the employment relationship and accordingly the employer has no right to discipline an employee for this conduct. However, if it can be shown that there is a link between this conduct and the employer's business, an employer may be entitled to discipline the employee.

Off-duty misconduct at a new level

Misconduct on social media takes 'off-duty' misconduct to a new level. Social media posts are both written and, more often than not, published to a wide or potentially wide audience. Therefore, the potential for brand damage or workplace tension is significantly higher.

The inevitable question is whether an unsavoury post or tweet constitutes a fair reason to dismiss an employee. To answer this it must be determined if the conduct of the employee on social media caused damage or had the potential to cause damage to the employer's good name and reputation and if the conduct of the employee impacted negatively or had the potential to impact negatively on the workplace. Where this is found to be the case, an employer may be entitled to take disciplinary action against the offending employee.

Other considerations may also play a role in a decision to discipline employees for their online misconduct, such as: whether there was a public outcry over the post and whether this outcry was reasonable; whether the employee was at fault in making the statement; whether the employee's conduct had irreparably damaged the employment relationship; whether dismissal was a reasonable response to an operational risk; or whether the employee's conduct was so morally reprehensible that the employer was entitled to dismiss him or her.

The High Court has recently held that the cancellation of a contract by M-Net in the face of public outcry against social media posts by Gareth Cliff, was unlawful. Although the facts of this case fell outside the realm of employment law, it has significant implications for the workplace. Employers ought to be mindful that while dismissing an employee for conduct on social media may be lawful and fair, it is not always the appropriate response. It is equally important for employees to bear in mind that they do not have carte blanche to say what they choose on social media.

Thus, in order for a dismissal for conduct on social media to be fair, there must have been misconduct by the employee that renders the continued employment intolerable and the employer must have followed a fair procedure.

ABOUT ROSALIND DAVEY

Rosalind Davey is a partner at corporate law firm Bowmans and obtained BA and LLB degrees from the University of Natal and was admitted as an attorney in 2002.

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