

CAN AN EMPLOYEE DO AS THEY PLEASE WHILST ON LEAVE?

We just had the festive season shut-down which presented an opportunity to recharge our batteries and we are ready for the New Year challenges. Not forgetting that you spent the entire year working sincerely and enthusiastically for the Department: KwaZulu-Natal Provincial Treasury as your contribution to building a better life for all. Let us welcome the New Year 2020 with great happiness and enthusiasm.

In the Second Quarter employee relations article, we covered the 'importance of sound employee relations in the workplace'. We concluded by promising to cover this topic more in the Third Quarter. However, we have decided to cover it in the Fourth Quarter article as we needed to cover the current topic otherwise we might be overtaken by the events.

Deale Attorneys posted us this article titled "Holiday Rant: What can an employer do if an employee posts a racist rant while on annual leave?" An Edcon employee who was angry about former President's decision to replace former Finance Minister took to Facebook **while she was on leave** in December 2015. She expressed her anger using foul language against the President with racist remarks whilst calling him names in the process. The employee's Facebook profile said she was employed as a Fashion Buyer by Edcon. The post sparked a flurry of protests on twitter about the racist contents of the post. Their fury was aimed not only at the offending employee, but also Edcon as her employer.

An example of one of the 351 Tweets which mentioned the Facebook post included: "*@EdgarsSA what are your thoughts on the degrading racist remarks made by one of your buyers?? We demand answers ... RacismMustFall*". According to Deale Attorneys, the outrage quickly spread into the mainline media with the Sowetan publishing an article about the employee's post under the banner – "*Racist Monkey slur strikes again*". Twitter users demanded answers from Edcon and some threatened not to do business with Edcon.

Consequently, Edcon held a disciplinary enquiry and dismissed the employee. The employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA Commissioner found that the dismissal was substantively unfair and ordered Edcon to pay the maximum compensation of 12 month's salary to the employee. The reasons for the Commissioner's decisions were that the employee was not at work but on leave at the time she posted the offending comment – and that her post made no mention of Edcon.

Edcon was not satisfied and took the award on review to the Labour Court (LC). The LC disagreed with the CCMA's decision and found that the dismissal was fair. It said **an employer can take disciplinary action for misconduct committed while an employee is on leave provided it establishes the necessary connection between the misconduct and its business (i.e. employer's business)**. The "necessary connection" in this case was the employee's status on her Facebook profile as an Edcon employee. **The LC noted that an employee must avoid attracting attention as a controversial employee in the eyes of the public where he or she can be associated with the employer.**

The post was considered to be highly offensive – and it was associated with Edcon by virtue of the employee's status as an employee of Edcon. **This entitled Edcon to take disciplinary action to protect its good name and reputation from falling into disrepute for tolerating racism.**

TIP: *Employers should be ever vigilant about reminding their employees that unbecoming behaviour and conduct can reflect badly on their employer regardless whether they occur at work or outside the workplace in personal time. This is especially true of posting comments on social media in which there are no boundaries and the dividing line between work and personal time is paper thin.*

The most important lesson learned is that annual leave is a condition of employment. It is intended to afford the employee an opportunity to rest and get ready to resume their duties and responsibilities when they return to work. Similarly, sick leave is for the employee's recovery from illness. As such, an employee cannot do as they please whilst on leave as their actions might have far reaching repercussions/implications for/on the employer's name or business. Furthermore, appropriate measures can be instituted by the employer should they be deemed warranted. After all, Schedule 8 of the Labour Relations Act at item 1(3) stipulates that employers and employees should treat one another with mutual respect characterized by employment justice.

***(An opinion from the labour desk
3rd Quarter employee relations article for 2019/20 Financial Year)
MH Ngcobo***

Thanks to Deale Attorneys. *Source: Worklaw Newsflash October 2019.*

[1] *EDCON Limited v Cantamessa and Others (JR30/17) [2019] ZALCJHB 273 (11 October 2019).*