Misuse of the Internet at the Workplace

1 Introduction

Five female employees are dismissed for misuse of e-mail at the workplace. One is dismissed on the ground of abusing her employer's e-mail policy by distributing religious and motivational material and the other four are dismissed for sending out pornographic material on the first day of spring, in the form of a bouquet of penises. This is only one example of the numerous sensational incidents that have been reported of late in the media relating to the misuse of e-mail and the internet at the workplace (Herman "Misbruik jou Personeel Internet en E-pos?" *Finansies en Tegniek* 2000-6-23 30, Business Editor "Cyber Loafing new Employee Problem" *Eastern Province Herald* 2000-10-9 6, Ord "Could you be a Cyber Loafer?" *Daily News* 2000-10-12 10, Anstey "Women fired for e-mailing 'porn'" *Sunday Times* 2001-01-21 25, Swanepoel and Van der Westhuizen "Kuberpret kan Werkgewers Miljoene Kos" *Beeld* 2001-01-25 13, Rickard and Anstey "'Naughty' e-mail now a hot legal Issue" *Sunday Times* 2001-01-28 30).

The purpose of this contribution is to review the relevant legal principles regarding the use of the internet at the workplace and to discuss the first three case that were heard by the Commission for Conciliation, Mediation and Arbitration (hereafter "the CCMA") in this regard.

2 The Legal Framework

2 1 *The Constitution*

The Constitution Act 108 of 1996 embodies a number of provisions that could be relevant in any investigation regarding the misuse of the internet at the workplace. Section 23(1) protects every employee's broad right to fair labour practices. Apart from entrenching this broad principle, the constitutional text does not specify what actions will constitute fair or unfair labour practices. The Labour Relations Act 66 of 1995 (hereafter the LRA) provides details of the circumstances under which employees may be disciplined at the workplace and also lays down guidelines regarding procedures that have to be followed prior to the dismissal of an employee (see the discussion in par 2 2).

The second provision that may have a direct influence on any investigation in relation to the misuse of the internet at the workplace is section 14 that protects every person's right to privacy. This right includes everyone's right not to have their person or home searched (s 14(a)), not to have their property searched (s 14(b)), not to have their possessions seized (s 14(c)), and the right to the privacy of their communications (s 14(d)). Section 14 may become relevant in the following scenarios: An employee may be accessing or sending material of a personal nature from the workplace on the employers' computer. The communications could include personal correspondence such as love letters or explicit photographic material. Apart from personal information, certain communications could

also infringe on the duty of good faith inherent to the employment relationship. An example of such infringement is where private work is done during working hours. Does an employer have the right to monitor an employee without his or her knowledge notwithstanding the fundamental right to privacy?

The third relevant constitutional provision relates to the right to freedom of expression. Section 16(1) stipulates that every person's right to freedom of expression includes freedom of the press (s 16(1)(a)), the freedom to receive or impart information or ideas (s 16(1)(b)); the freedom of artistic creativity (s 16(1)(c)) and the right to academic freedom and freedom of scientific research (s 16(1)(d)). It is, however, important to note that section 16 contains its own limitation clauses. The right to freedom of expression does not extend to propaganda for war (s 16(2)(a)), incitement of imminent violence (s 16(2)(b)), or advocacy of hatred that is based on race, ethnicity, gender or religion (s 16(2)(c)). From this it is clear that an employee will not be able to rely on the right to freedom of expression in relation to material that may be racially offensive and that may foster hatred. However, this limitation does not cover pornographic material and the question remains to be answered whether an employee has any constitutional protection in this regard.

Apart from the limitation on the right to freedom of expression contained in section 16(2), the Bill of Rights' general limitation clause must be borne in mind as well. Section 36 provides that the human rights protected in the Constitution may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based, amongst others, on human dignity. From this it follows that an employee who has made him or herself guilty of the misuse of the internet, would not necessarily have an absolute defence against the employer on the basis of the right to privacy. An employer could under the appropriate circumstances argue that the reading of an employee's private e-mail is justifiable in terms of section 26, once the harm and damage that it has caused is taken into account.

3 The Labour Relations Act

If an employee stands to be dismissed on the ground of the misuse of the internet, the LRA and its accompanying Code of Good Practice (Schedule 8 to the LRA, hereafter the Code) will be the most important legislative measures to be taken into account in determining the fairness of such dismissal. The essential issues to be decided by the CCMA would be to determine whether the employee is guilty of misconduct that is serious enough to warrant dismissal and whether a fair procedure was followed (s 188(1) of the LRA).

Item 3(1) of the Code provides that all employers should adopt disciplinary rules at the workplace in order to create certainty and consistency in the application of discipline. It also states that employers have to endorse the concept of progressive discipline as a means for employees to know and understand what standards are required from them (item 3(2)). In addition, it is stipulated that it is not appropriate to dismiss an employee for a first offence, except if it is so serious that it makes the continued

employment relationship intolerable. Examples of such misconduct are gross dishonesty, wilful damage to the employer's property, wilful endangering of the safety of others, physical assault and gross insubordination (item 3(4)). Depending on the nature of the misuse, it may be difficult for an employer to prove that unauthorised use of the internet falls within this category of serious offences.

Mischke ("Disciplinary Action and the Internet" 1999 *CLL* vol 9 no 5 41 43) states that employers should ideally implement an "acceptable internet use policy" coupled with clear disciplinary measures should the policy be breached. He suggests that the following topics have to be portrayed in such a policy document: All computer resources remain the property of the employer, computers are to be utilised for work-related activities only, description of limits on personal use of computer equipment, the right of the employer to access all information on its computers, the right of the employer to discontinue or restrict the employee's access to the internet at any time and a prohibition on the transmission of sexually explicit or racially based material. These measures have to be communicated to employees properly and it could even be expected of employees to return a message stating that the policy was read and that it will be adhered to.

The Code lays down further guidelines that have to be considered by an employer before deciding to dismiss an employee. In terms of item 5 the employer has to consider whether: the employee has contravened a valid or reasonable rule regulating conduct at the workplace; the employee was aware of the rule or standard; the rule had been consistently applied; and dismissal will be the appropriate sanction for the contravention of the rule.

4 Three Cases

4 1 *Introduction*

The first three cases considered by the CCMA regarding misuse of the internet is starting to shed some light on the development of boundaries regarding the use of modern technology at the workplace. The most important questions that arose through these cases are the following: Does the mere usage of the employer's internet facilities justify dismissal? What is the content of material that may or may not be distributed on an employer's computers? Is the accessing of another person's e-mail a sound reason for dismissal?

4 2 *The* Volkswagen SA *Case*

In *Warren Thomas Griffiths v VWSA* (case EC16174 of 2000-06-22) the facts before the CCMA were briefly as follows: Griffiths (G) was employed as senior engineer in the manufacturing division of Volkswagen South Africa. It was discovered by the company that G had excessively used the company telephone in that he had made calls to his girlfriend amounting to R10 000 over a period of seven months. The company issued an instruction to G to use the telephone within reason and bounds. At more or less the same time the company became aware of the fact that the internet was misused at the workplace in that "undesirable" sites, such as pornographic sites, had been accessed. It transpired that, although he was

not the only one, the sites had been visited mainly from G's computer. G was once again warned and his internet access was revoked. Three weeks later one of the company managers observed that G was surfing the internet on a fellow employee's computer. Records indicated that G had visited sites titled "adult", "sex", "Josephine's" and "Pretoria sex escorts" Applicant was charged and dismissed for wilful disobedience in that he had disobeyed instructions and on the ground of abuse of the telephone and the internet.

G argued that the company had no policy on the use of telephones or the internet and that he was not given any indication of how many private calls were acceptable. It was also his submission that the company's code of conduct does not specify that wilful disobedience is a disciplinary offence. The company countered G's arguments by contending that he had continued to make private calls and had abused the internet by visiting undesirable sites after being warned not to do so. Added to this, G had displayed dishonesty by making use of a fellow employee's computer after his own access to the internet had been denied.

In its finding the CCMA confirmed the principle that it is permissible to charge an employee with a disciplinary offence even if it is not expressly contained in the employer's disciplinary code (*Verwey v Volkswagen of SA (Pty) Ltd* [1996] 9 BLLR 1198 (IC) and *Nyembezi v NEHAWU* [1997] 1 BLLR 94 (IC)). It was held that a person with G's intelligence and experience undoubtedly knows that the wilful disregard of a warning constitutes misconduct and that it will lead to disciplinary action. Although the CCMA took note of the fact that the word "undesirable" had not been defined by the employer, it accepted that any ordinary person would understand this term to include pornographic material. It was also held that it is unacceptable for an employee to visit any non-work related websites during working hours, even if they were not undesirable. In conclusion, the dismissal was held to be substantively fair.

4 3 *The* Toyota *Case*

The much publicised *Cronje v Toyota Manufacturing* [2001] 3 BALR 213 (CCMA) did not so much focus on the excessive use of the internet, but rather on the unacceptable nature of what was being distributed via electronic mail. Cronje (C) was dismissed on the ground of "distributing racist and/or inflammatory material, violation of the company's internal policy and behaviour unbecoming of a manager" (214E–F). The facts were as follows: C had received a petition, requesting President Mbeki to intervene in the Zimbabwe crisis. Attached to the e-mail was a graphic cartoon containing a gorilla with the head of Zimbabwean president Robert Mugabe superimposed upon it. The picture was captioned with the words: "Mugabe and his right-hand man. We want the farms to grow more bananas" (215J–216A). C added his name to the petition and sent it to a number of colleagues. He also made a printout of the cartoon and took it to a meeting where some of his colleagues viewed it.

The company's human resources manager testified that race related matters were extremely important and sensitive issues at the factory floor and that a number of incidents with racial overtones had manifested

themselves at the workplace. On one occasion a number of black employees had stormed into the office of a white administrative staff member and verbally abused her. Four of the employees were dismissed and three were given final warnings. On another occasion two white artisans were dismissed for making derogatory and racially abusive remarks about black people. He also testified that the trade union knew about the cartoon that C had distributed and they had threatened to take industrial action if steps were not taken against him.

The human resources manager also testified that all employees knew that Toyota viewed racially offensive remarks in a serious light. The employer's e-mail usage code specifically states that "the display and/or transmission of any offensive racial, sexual, religious or political images, documents or messages on any company system is a serious violation of company policy and may result in severe disciplinary action" (215E–G).

On behalf of C it was argued that there was no racial connotation to the cartoon but that it had only played on the fact that Zimbabwe was a banana republic where law and order had broken down. President Mugabe was merely depicted as the president of such a republic and there was no further racial connotation to the e-mail. The human resources manager disagreed with this. He testified that a black person had been depicted as an ape. He said that the severity of the sanction depended on the merits and substance of the incident. If it had only been a joke with no racial or pornographic connotations, it may not have led to dismissal. He also said that another employee who had indeed been distributing pornographic material had only received a final warning. The reason the company had not dismissed this employee was that there had been an element of entrapment on the side of the company.

The commissioner followed the guidelines set out in Code of the LRA in order to determine whether the reason for dismissal was fair. The CCMA considered whether a rule had been contravened, whether the rule was valid and reasonable, whether the employee was aware of the rule, whether the rule had been applied consistently, and whether dismissal was the appropriate sanction. Having considered these questions, the commissioner held that the nub of the case was really if the cartoon was racist and inflammatory or not. On his evaluation of the content of the cartoon, the commissioner stated that it squarely falls "into the crude; offensive; racist stereotype developed over centuries; by white people; that associates black people with primates; beings of lesser intelligence and low morality" (222F–G). Having reached this conclusion the commissioner held that the company had a fair reason for dismissal and that the dismissal was substantively fair. Although C's dismissal was upheld, he was nevertheless awarded the salary he would have received between the date of his dismissal and the last date of the arbitration award due to the fact that there were certain procedural irregularities in the disciplinary action against him.

4 4 *The* Champions Casino *Case*

In *MWU (obo Coetzer) v Champions Casino* (case MP16821 of 2000-08-15) the CCMA had to consider a matter where applicant was dismissed on the ground of accessing the electronic mail of her superiors without their consent. Coetzer fell under the company's investigative spotlight during a

disciplinary enquiry against one of its other employees. Duvenhage, one of Coetzer's subordinates in the information technology division, was being investigated for allegedly forging a meal ticket. This forgery took place in full view of Coetzer and she failed to report the incident. During the investigation of the alleged forgery, it came to the knowledge of the company that Coetzer had accessed the e-mail messages of her superiors without their consent.

The company's executive director responsible for information technology testified that no employee has permission to access mail boxes belonging to other members of staff. Coetzer also confirmed that she was the only one who had access to the passwords of the other members of staff in her division. Coetzer initially testified that she wanted to empty the mailboxes of her superiors. After the CCMA had heard evidence that e-mails could only be cleared by employees themselves after being specifically instructed to do so, Coetzer changed her testimony to say that she could not remember the reason for accessing the e-mails.

The CCMA accepted the arguments of the company, which on a balance of probabilities indicated that she had conspired in the fraud involving a meal ticket and that she may have accessed the mailboxes of her superiors in order to ascertain what information they had on the whole issue. The commissioner unfortunately did not refer to relevant legal principles that could be of assistance to lay down guidelines regarding the use and misuse of electronic mail. No reference was made to the constitutional right to privacy in relation to e-mail or any of the provisions of the LRA. The decision was based purely on the facts before the CCMA upon which it was held that the dismissal of Coetzer was both procedurally and substantively fair.

5 Final Comments

It is foreseen that many developments will still take place in this particular field of labour law. The three cases under discussion are only the beginning of an emerging body of case law that will spell out the rules in relation to the appropriate use of electronic media at the workplace. From this discussion it is clear that there are a number of legal issues that have not yet been touched upon. In none of the cases have the relevant constitutional principles been argued to protect the rights of either the employee or the employer. However, it is clear that misuse of the internet is a modern phenomenon and that employers will have to position themselves to manage it properly in future. It is submitted that there are many employers who until now have not given sufficient attention to adapting their employment policies and procedures to cater for misuse of electronic media at the workplace. Such employers may find that, although an employee may be guilty of misconduct, they do not have the rules of the specific workplace spelt out clearly enough in order to fend off an allegation of procedural unfairness in the event of a dismissal. Another point that has become clear, is that the accessing or transmission of racial and pornographic material will not be tolerated by employers and may well be deemed to be a sufficient reason for dismissal by the CCMA.

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