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Social sense

K&L Gates' Simon Casinader and Maria Downie discuss legalities of using influencers.



SOCIAL MEDIA INFLUENCERS are an everyday part of modern advertising. What seemed like a hobby less than a decade ago has evolved into an increasingly popular 'side hustle' business or full time career choice for young entrepreneurs.

Influencers can be used as a powerful marketing tool to increase engagement and trust with a brand's target audience. Influencers can also direct foot traffic to a brand's website and social media accounts. On Instagram, influencers can earn up to six figures per promotional post, depending on factors like the size of the client, project scope and the influencer's follower count.

However, a recent Victorian Civil and Administrative Tribunal decision highlights the importance of having a written agreement with an influencer used to promote your brand.

Instagram influencer dispute – what went wrong?

The case involved a dispute between Australian social media influencer, Chloe Roberts, and popular Melbourne café, Legacy Camberwell. Roberts was approached by Legacy Camberwell to create Instagram content promoting the café to be posted on her account. Roberts had around 80,000 followers and the café had 34,000 followers at the time of the initial discussions between the parties. At the time of the Tribunal dispute, Roberts' following had grown to 123,000.

There was no written contract in place describing the terms of the arrangement, only an oral contract that the café would pay Roberts \$200 for each post on her Instagram page that promoted Legacy Camberwell. As Roberts' following grew, the café agreed to pay an increased fee of \$300 per post.

During the course of the arrangement, Roberts archived a number of posts so that they were no longer visible to the public. This was so that her Instagram page remained attractive for followers (by re-

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moving old content) which she claimed was in both parties' interests. However, the relationship between Roberts and the café broke down because of their disagreement over Roberts' entitlement to archive old posts. In addition, an invoice issued by Ms Roberts for \$2,100 remained outstanding.

To determine the remuneration Roberts was entitled to in the absence of a written agreement, the Tribunal implied a number of terms, including that:

1. Roberts was to create a "reasonable number of posts"
2. Roberts retained creative control of her Instagram page
3. Roberts' fee could be varied by agreement
4. The duration of the agreement was not fixed, and
5. The fees were to be paid within a reasonable time.

Although the Tribunal considered there was merit in Roberts' claim that new images are more valuable than old posts, absent an express agreement, it did not agree that Roberts was entitled to delete posts at any time.

The Tribunal ordered that the café pay Roberts \$1,400, an amount reflecting the "fair value" of the promotional services provided by Roberts (being two-thirds of the outstanding invoiced amount).

Written agreements and key terms

This case highlights the importance of having a written agreement to clearly document the rights and obligations of all parties in a commercial transaction in the event of a dispute. This is particularly the case when fashion brands get into business with social media stars. As the Roberts case demonstrates, relationships can turn sour, and it is important to have a written agreement in place should this happen so that the parties are clear on their rights and obligations.

Key terms of any influencer agreement that need to be agreed upon in writing include:

- The number of posts and whether they need to be approved by the brand
- The quality and creative style of the posts
- The fee for each post (and whether this is fixed or subject to review)

- The minimum time frame that posts remain visible on the influencer's account, and
- The duration of the arrangement.

This case highlights the importance of a written agreement when entering into a commercial relationship. ■

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For more information about issues relating to social media agreements please contact Simon Casinader, Senior Associate at K&L Gates (simon.casinader@klgates.com). This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.