



**UNIVERSITY OF <sup>TM</sup>  
KWAZULU-NATAL**

---

**INYUVESI  
YAKWAZULU-NATALI**

**COLLEGE OF LAW AND MANAGEMENT STUDIES**

**SCHOOL OF LAW**

**Title: An examination of the employee's conduct on Social Media and the effect on the  
Employment Relationship**

**SURAKSHA CHANDRAMOHAN**

**209505661**

**Submitted in partial fulfilment of the requirements**

**for the degree of LLM in Business Law**

**in the University of KwaZulu-Natal**

**Supervisor: Adv. Darren Cavell Subramanien**

2017

## **DECLARATION**

I, **Suraksha Chandramohan**, do hereby declare that this dissertation is my own work, unless indicated otherwise. To my knowledge, neither the substance of this dissertation, nor any part thereof, has been submitted to any other University in full or partial completion for any other degree or qualification.

---

S CHANDRAMOHAN

209505661

DECEMBER 2017

## **ACKNOWLEDGEMENTS**

To God, thank you for giving me the strength and perseverance to complete this dissertation.

Special thanks to my family and friends for their continued support and tolerance of my rants during the completion of this dissertation.

Lastly to Darren Subramanien, my supervisor, thank you for all the time and effort you sacrificed to guide me in this academic process.

## **ABSTRACT**

In the past decade we have seen a significant increase in the availability and usage of social media across the globe. It has proven to be very advantageous to all businesses; however the exposure to social media has led to high business risks. The most important risk is when employees post negative information on social media to millions of users which can lead to the damage of the employer's economic interest, brand image and reputation.

We are living in an era where employees need to be mindful of their words on social media platforms in or out of the workplace. It is therefore important for companies and businesses to revisit or draft new policies to enforce a good management approach to developing a good social media strategy.

## TABLE OF CONTENTS

### CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND	P7
1.2. SOCIAL NETWORKING SITES	P7
1.2.1. Facebook	P8
1.2.2. Twitter	P8
1.2.3. LinkedIn	P9
1.2.4. You-Tube	P9
1.2.5. Pinterest	P9
1.3. ADVANTAGES OF SOCIAL MEDIA	P9
1.4. DISADVANTAGES OF SOCIAL MEDIA	P10
1.5. STRUCTURE OF THE DISSERTATION	P10
1.6. STATEMENT OF PURPOSE	P11
1.7. RESEARCH QUESTIONS	P11
1.8. RESEARCH METHODOLOGY	P11

### CHAPTER TWO: INTERNATIONAL LAW

2.1. INTRODUCTION	P12
2.2. THE UNITED STATES OF AMERICA (US)	P13
2.2.1. <i>Costco Wholesale Corp</i>	P14
2.2.2. <i>American Medical Response of Connecticut, Inc.</i>	P15
2.2.3. <i>Rain City Contractors, Inc.</i>	P16
2.2.4. <i>Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker</i>	P17
2.2.5. <i>Blakey v Continental Airlines Inc.</i>	P18
2.3. THE UNITED KINGDOM (UK)	P19
2.3.1. <i>Whitham v Club 24 t/a Ventura</i>	P20
2.3.2. <i>Weeks v Everything Everywhere Ltd</i>	P20
2.3.3. <i>Teggart v TeleTech UK Ltd</i>	P22
2.3.4. <i>Crisp v Apple Retail (UK) Ltd</i>	P23
2.3.5. <i>Trasler v B &amp; Q Ltd</i>	P24
2.3.6. <i>Stephens v Halfords plc</i>	P25
2.3.7. <i>Otomewo v Carphone Warehouse Ltd</i>	P26
2.4. CONCLUSION	P26

### **CHAPTER 3: SOUTH AFRICAN LAW**

3.1. INTRODUCTION	P28
3.2. COMMON LAW	P29
3.3. THE CONSTITUTION	P30
3.3.1. The Right to dignity	P30
3.3.2. The Right to Freedom of Expression	P30
3.3.3. The Right to privacy	P32
3.3.4. The Limitations Clause	P34
3.4. VICARIOUS LIABILITY	P34
3.5. THE EMPLOYMENT EQUITY ACT (EEA)	P36
3.6. THE LABOUR RELATIONS ACT (LRA)	P36
3.7. REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT (RICA)	P37
3.8. THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT (ECTA)	P38
3.9. THE PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)	P38
3.10. THE PROTECTION OF PERSONAL INFORMATION ACT (POPI)	P39
3.11. CASE LAW	P39
3.11.1. <i>Sedick v Another v Krisray</i>	P39
3.11.2. <i>SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton</i>	P40
3.11.3. <i>Smith and Partners in Sexual Health</i>	P41
3.11.4. <i>National Union of Food, Beverage, Wine, Spirits and Allied Workers Union</i>	P42
3.11.5. <i>Heroldt v Wills</i>	P43
3.11.6. <i>H v B</i>	P43
3.11.7. <i>R v L</i>	P44
3.12. CONCLUSION	P45

### **CHAPTER 4: RECOMMENDATIONS**

4.1. INTRODUCTION	P47
4.2. SOCIAL MEDIA STRATEGY	P48
4.3. LAYOUT OF A SOCIAL MEDIA POLICY	P49
4.4. TRAINING	P51
4.5. IMPLEMENTATION	P52
4.6. ALTERNATE OPTIONS	P52
4.7. CONCLUSION	P54

### **CHAPTER 5: CONCLUSION**

P55

## **CHAPTER ONE: INTRODUCTION**

### **1.1. BACKGROUND**

Social Media has revolutionised the way in which people connect and share information between family, friends, acquaintances, professionals, and colleagues around the world by making use of telephonic-type links, instant messaging, and posting of pictures or videos.<sup>1</sup> In this thesis the terms ‘Social Media’ and ‘Social Networking Sites (SNSs)’ will be used interchangeably, although their meanings vary to some extent. Social media has been interpreted as a collective term which is used to describe an internet-based network of users who fulfil the basic psychological need of people to interact, share information and communicate with multiple similarly connected users.<sup>2</sup> In essence social media refers to the manner in which communication is transmitted, whilst SNSs refers to functional tools for information sharing.<sup>3</sup> SNSs allow a user to create a public or semi-public profile consisting of personal information. The users can add contacts, share interests and activities, as well as communicate with other specific users by sharing information, as well as audio-visual material.<sup>4</sup> By permitting someone to be a contact on social media, users authorise that contact to have access to their personal profile and information.<sup>5</sup> Social media platforms include blogs (corporate and personal blogs); SNSs (Facebook, Pinterest, LinkedIn, Whatsapp, BBM, Orkut, Mixit, Bebo); microblogging sites (Twitter, SinaWeibo), video and photo sharing websites (Flickr, YouTube, Vimeo); forums and discussion boards (Google and Yahoo! Groups) and online encyclopaedias (Wikipedia and Sidewiki).<sup>6</sup>

### **1.2. SOCIAL NETWORKING SITES**

In the past decade we have seen a significant increase in the availability and usage of social media across the globe. The most commonly used social networking sites used by employers and their employees are: Facebook, Twitter, LinkedIn, YouTube, and Pinterest.<sup>7</sup>

---

<sup>1</sup> G, Mushwana & H, Bezuidenhout. ‘Social media policy in South Africa’ (2014) Vol 16. *Southern African Journal of Accountability and Auditing Research*, 63-74. Available at <http://www.repository.up.ac.za/handle/2263/45395>, accessed 15 February 2016.

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> A, Roos. ‘Privacy In The Facebook Era: A South African Legal Perspective’ (2012) Vol 129(2) *SALJ* 375 – 402.

<sup>5</sup> Ibid

<sup>6</sup> M, Potgieter. *Social Media and Employment Law*. Cape Town: Juta, (2014).

<sup>7</sup> Ibid

### **1.2.1. Facebook**

Facebook was initially created in 2003 and was launched as Facemash.<sup>8</sup> Harvard University shut down the site but in 2004, Harvard student, Mark Zuckerberg, created Facebook as an in-house social networking site. Thereafter it extended to become the world's largest social networking platform.<sup>9</sup> Facebook entails registering and constructing a social profile which consists of your personal information.<sup>10</sup> Once a profile is constructed, users can add and view other users' profiles; interact with friends and exchange messages; follow common interest groups, events, and pages; and upload photographs or videos.<sup>11</sup> Users get notifications when other users update their profiles or status. Users can restrict their privacy settings to allow access to 'everyone' or they are able to limit access to their profile to 'friends only'.<sup>12</sup> South Africa is one of ten countries with the greatest Facebook usage; with majority of the users accessing the platform on mobile devices and smartphones.<sup>13</sup>

### **1.2.2. Twitter**

Twitter launched in 2006 and is a microblogging service that makes use of quick and frequent messaging. Users are able to create profiles which enable them to post short messages, referred to as "tweets". These tweets are text-based posts that are usually 140 characters or less which are uploaded onto the user's profile.<sup>14</sup> These tweets can be viewed by your followers and by unregistered users. Followers are users who have chosen to follow your profile updates.<sup>15</sup> Most users use Twitter to follow their favourite celebrities and get instant updates about: their likes; dislikes; how they feel about other people or events; their thoughts, opinions and beliefs.<sup>16</sup> Twitter has been described as "*a real time information network that connects you to the latest information about what you find interesting.*"<sup>17</sup>

---

<sup>8</sup> S.D, Davis. 'Social Media Activity & the Workplace: Updating the status of Social Media' (2012) Vol.39 *Ohio Northern University Review*, 360.

<sup>9</sup> (note 6 above; 13)

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> Labour Relations Agency 'Advice on Social Media and the Employment Relationship' (September 2013),2 available at:

[https://www.lra.org.uk/images/publications/copy\\_of\\_advisoryguide\\_social\\_media\\_september\\_2013\\_\\_2\\_.pdf](https://www.lra.org.uk/images/publications/copy_of_advisoryguide_social_media_september_2013__2_.pdf), accessed on 30/08/2017

<sup>13</sup> (note 6 above; 17-18)

<sup>14</sup> (note 12 above)

<sup>15</sup> (note 6 above; 15)

<sup>16</sup> J.F, Cavico... et al 'Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations' (2013) Vol 11 *New Media and Mass Communication*, 27.

<sup>17</sup> (note 8 above; 361)

### **1.2.3. LinkedIn**

LinkedIn was created in 2003 and it is the largest professional social networking site.<sup>18</sup> Users have access to a list of contact details of other users called connections. Any user can search for another user and there is no password requirement.<sup>19</sup> The list of connections are utilised to construct a contact network that allows users to advertise and market their companies, reconnect with past contacts, follow other companies, gain advice from industry experts,<sup>20</sup> search for jobs and business opportunities,<sup>21</sup> as well as build professional, career orientated relationships.<sup>22</sup>

### **1.2.4. You-Tube**

You-Tube was created in 2005 by three former PayPal employees. It is a website where users can upload, share and view other videos. There are a variety of videos that are available including film, series, TV clips and amateur video blogs. Users are also allowed to comment on the videos.<sup>23</sup>

### **1.2.5. Pinterest**

Pinterest is an online virtual pinboard whereby people can upload pictures and graphics of events, hobbies and interests.<sup>24</sup>

## **1.3. ADVANTAGES OF SOCIAL MEDIA**

Besides companies across the globe, a recent study (entitled South African Social Media Landscapes 2014 World Wide Worx) highlighted that there are approximately 93% of major brand companies in South Africa who are using social media.<sup>25</sup> Social media is used as a marketing tool to improve: customer support; employee and customer communication; employment relationships; brand image and reputation; feedback; employee motivation and innovation; product development; and knowledge management.<sup>26</sup> Social media also facilitates discussion forums, blogs, staff recruitment, skills retention, crowdsourcing of ideas,

---

<sup>18</sup> (note 6 above;14)

<sup>19</sup> (note 16 above;27)

<sup>20</sup> D, Baker ... et al 'Social Networking and Its Effects on Companies and their Employers' (2011). Neumann University, Astan p5

<sup>21</sup> (note 12 above;2)

<sup>22</sup> (note 20 above; 5)

<sup>23</sup> (note 12 above;2)

<sup>24</sup> (note 6 above; 16)

<sup>25</sup> (note 1 above; 65)

<sup>26</sup> (note 6 above)

generating social leads, managing projects, identifying expertise,<sup>27</sup> crossing geographical barriers, providing updated news alerts, and it is cost-effective or free to most users.<sup>28</sup>

#### **1.4. DISADVANTAGES OF SOCIAL MEDIA**

Despite the vast advantages offered, the exposure to social media poses huge risks to the workplace including a decrease in productivity when employees spend their working hours sending personal e-mails, updating social media profiles and engaging in online shopping.<sup>29</sup> There will also be an increase in the number of mistakes made by the employees due to employees being distracted with downloading videos and other software.<sup>30</sup> The employer will also be more susceptible to ‘spear phishing’ which comprises of malicious software which is embedded in certain files or web links to steal confidential information or trade secrets of the employer.<sup>31</sup> Expenses of the employer will increase due to the greater usage of bandwidth by the employees’ use of company equipment for their personal use. Computer servers will also be slower if there is increased use of e-mails for personal use and use of the internet for social media networking or live streaming.<sup>32</sup> Most importantly, social media provides opportunities for potential abuse by employees who can respond destructively by posting defamatory comments, grievances or confidential information to millions of users in response to challenging circumstances that arise at work.<sup>33</sup> American journalist Couric correctly stated that: “*the great thing about social media is that it gives everyone a voice, the bad thing about social media is it gives everyone a voice.*”<sup>34</sup>

#### **1.5. STRUCTURE OF THE DISSERTATION**

In South Africa, there is no specific legislation or rules regulating this area of social media misconduct but the courts can make reference to other applicable statutes and our common law. Chapter 2 explores international law and cases which give an insight as to how social media misconduct has been dealt with by the judicial systems in the United States of America and the United Kingdom. Chapter 3 is devoted to examining the applicable constitutional values and legislation which are available in South Africa. All types of businesses are

---

<sup>27</sup>(note 6 above; 9)

<sup>28</sup> N, Manyathi. ‘Dismissals for social media misconduct’ (December 2012) *De Rebus*, 80.

<sup>29</sup> (note 20 above; 10)

<sup>30</sup> (note 1 above; 63)

<sup>31</sup> D, Subramanien & N, Whitear-Nel. ‘A fresh perspective on South African law relating to the risks posed to employers when employees abuse the internet’ (2013) Vol. 37 *South African Journal of Labour Relations*, 11.

<sup>32</sup> (note 20 above; 4)

<sup>33</sup> (note 1 above; 63)

<sup>34</sup> (note 28 above)

encouraged to have proper policies and procedures developed and implemented to protect the economic interest, brand image and reputation of the business. Such recommendations are further discussed in Chapter 4. Chapter 5 sets out the conclusions herein.

#### **1.6. STATEMENT OF PURPOSE**

The purpose of this dissertation is to examine the effects of social media misconduct and the applicable constitutional values which are allegedly infringed. The employee's right to freedom of expression and the right to dignity will be examined against the employer's right to dignity and the right to fair labour practices. The topic will explore the duty of good faith of the employee to the employer, the likelihood of the employer being held vicariously liable for the employee's misconduct and recommendations on the way forward. The legislation surrounding dismissal law will not be the focal point of the dissertation.

#### **1.7. RESEARCH QUESTIONS**

The question that this dissertation aims to address is whether the employee's right to freedom of expression can be balanced against the employer's right to dignity. The research will focus on how social media misconduct has been treated by decision makers within South Africa and in the international spectrum. There will also be a chapter on what can be done to minimise the negative effects resulting from social media misuse in order to protect the interests of both the employer and employee.

#### **1.8. RESEARCH METHODOLOGY**

The research methodology for the dissertation is desk-top research which involves critically analysing and reviewing books, journal articles, and case law to provide an understanding of constitutional rights and their applicability when faced with social media misconduct surrounding the workplace. This basically entails a non-empirical study using existing data and involving conceptual analysis. The main databases used in this research included Sabinet, LexisNexis, Juta, Heinonline, Westlaw, Ebscohost, Google Scholar and SAFLII.

## **CHAPTER TWO: INTERNATIONAL LAW**

### **2.1. INTRODUCTION**

In 2016, Penny Sparrow; a former estate agent in Kwazulu-Natal; became famous for her post on her Facebook page which stated:

*“These monkeys that are allowed to be released on New Years Eve and New Years day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I’m sorry to say I was amongst the revellers and all I saw were black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don’t want to even try. But think they can voice opinions about statute and get their way dear oh dear. From now I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter.”<sup>35</sup>*

This post was a classic example of a case which highlighted various areas of our law that are affected by social media misconduct.<sup>36</sup> In most cases like this, the uploaded comments by employees are defamatory; affect the reputational harm of the employer; and could amount to racism, hate speech, bullying, or harassment. Regardless of her intentions, the employee in this case was fined R150 000,00 by the Equality court for her post which created an irate public outcry. The negative press and attention she received had highly impacted on the reputation of her former employer.<sup>37</sup>

This type of conduct, which frequently occurs outside of the normal working hours, is referred to as ‘off duty misconduct’.<sup>38</sup> Dismissal is the most common consequence arising from an employee’s misconduct on social media and usually follows if the misconduct adversely affects the good reputation of the employer and/or results in the working relationship becoming intolerable. Interestingly the employer need not be directly identified in the uploaded posts but the employee can still be disciplined or dismissed depending on the

---

<sup>35</sup> J, Wicks. “‘It’s just the facts” – Penny Sparrow breaks her silence’ (4/01/2016) available at <http://www.news24.com/SouthAfrica/News/its-just-the-facts-penny-sparrow-breaks-her-silence-20160104>, accessed 8 August 2017.

<sup>36</sup>(note 6 above;33-34)

<sup>37</sup>News24. ‘Racism: Penny Sparrow fined R150K, community service for Theunissen’ (10/06/2016) available at <http://city-press.news24.com/News/racism-penny-sparrow-fined-r150k-community-service-for-theunissen-20160610>, accessed 8 August 2017.

<sup>38</sup> R, Davey. ‘Off Duty Misconduct In the Age of Social Media’ *GOLegal* available at <http://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media>, accessed 19 July 2016.

facts of each case.<sup>39</sup> As mentioned earlier in Chapter One, South Africa has no specific legislation which regulates social media misconduct. Therefore, our legal system will make reference to our common law and other applicable statutes for commentary and guidance.<sup>40</sup> Reference will also be made to foreign law and international law for the development of our law as provided for in Section 39 of our Constitution.<sup>41</sup> This chapter will highlight some of the available legislation and case law from the United States of America (US) as well as the United Kingdom (UK) which have dealt with this area of law.

## **2.2. THE UNITED STATES OF AMERICA (US)**

Most of the States in the US, except the State of Montana, adopt an ‘at will dismissal’ system which offers little to no protection to employees against unfair dismissals.<sup>42</sup> This means that employers can dismiss their employees with or without a valid reason, notice or explanation; provided that the employee does not have any contractual provisions which limit the circumstances under which the employee can be dismissed.<sup>43</sup> Many of the employees are protected in terms of The National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB).

The NLRA was originally enacted in 1935 and it protects employees and employer rights, encourages collective bargaining and curtails certain practises in the private sector which affects the employment relationship and the U.S. economy.<sup>44</sup> Provisions of the NLRA ensure that employees’ rights are not infringed by the employer and encourage collective bargaining between the employees. Two of the most important and commonly referred to sections are Section 7 and Section 8(a)(1) of the NLRA.<sup>45</sup> Section 7 states that:

*“employees shall have the right to self-organization. To form, join, or assist labor organisations, to bargain, collectively..., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection... .”<sup>46</sup>*

---

<sup>39</sup> Ibid

<sup>40</sup> (note 6 above; 37)

<sup>41</sup> Constitution of the Republic of South Africa, 1996

<sup>42</sup> (note 6 above; 66)

<sup>43</sup> (note 16 above; 30)

<sup>44</sup> (note 8 above; 365)

<sup>45</sup> Ibid

<sup>46</sup> (note 6 above; 67)

This principle also includes activities or comments using social media.<sup>47</sup> Section 8(a)(1) states that “*it shall be unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7... .*”<sup>48</sup>

The NLRB is the entity which ensures that employees’ rights to improve their compensation and working conditions with or without a union are respected by the employers. Should the employer fire, suspend or penalize employees for such conduct then the NLRB will act to restore their rights.<sup>49</sup> Therefore, employees are protected even where they identify their employer and openly criticise their unfair or poor working conditions on social media. However, a point to note is that in order to avoid dismissal, fellow colleagues and/or workers must act together and also support the activity or comment on social media. An employee will not be protected where he acts alone and acts maliciously to sabotage or defame the company.<sup>50</sup> In recent decisions the NLRB assisted to restore the rights of transgressed employees where their conduct was perceived as ‘protected concerted activity’ and did not protect employers if the employers’ social media policies were too broad.<sup>51</sup>

### **2.2.1. Costco Wholesale Corp**

In 2012, in the case involving *Costco Wholesale Corp*<sup>52</sup>, the NLRB deemed that the company’s policy on electronic posts were too broad and restricted the employee’s rights to deliberate their working conditions. The policy stated that:

*“any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee agreement, may be subject to discipline, up to and including termination of employment.”*<sup>53</sup>

The NLRB found that this provision affected the right to engage in protected concerted activities as set out in Section 7 of the NLRA, even if it was not clearly

---

<sup>47</sup> F Q Culliers. ‘The Role and Effect of Social Media in the Workplace’ (2013) *Northern Kentucky Law Review* 163  
<sup>48</sup> (note 8 above; 365)

<sup>49</sup> (note 6 above; 66-67)

<sup>50</sup> S, Nel. ‘Social media and employee speech: the risk of overstepping the boundaries into the firing line’ (2016) Vol. 49 (2) *CILSA* 218

<sup>51</sup> (note 6 above; 67)

<sup>52</sup> *Costco Wholesale Corp* No. 34-CA-012421 (NLRB)

<sup>53</sup> *Costco Wholesale Corp* supra

expressed. The provision was described by the NLRB as ‘chilling employees’ rights’ and employees would see this as a prohibition on contesting any of their working conditions.<sup>54</sup> The NLRB instructed the company to withdraw all the conflicting paragraphs and to stop maintaining such a policy. The order was to be posted in a public forum in the company and printed in English as well as Spanish.<sup>55</sup>

### **2.2.2. American Medical Response of Connecticut, Inc.**

Similarly in *American Medical Response of Connecticut*,<sup>56</sup> the policy of the employer was under scrutiny. The employee, Dawnmarie Souza, was employed as an emergency medical technician with American Medical Response of Connecticut.<sup>57</sup> Her supervisor, Frank Filardo, had required her to complete an incident report when a customer complaint was being investigated. He refused to allow her union representation to assist with the report which resulted in her posting rude comments about her supervisor on her Facebook page.<sup>58</sup> She posted: “*looks like I’m getting some time off. Love how the company allows a 17 (a term used as slang in their workplace that referred to a mental patient) to become a supervisor*”. She also referred to her supervisor as “*being a d### and a scum###*”.<sup>59</sup>

Although her posts did not express the name of her company, she was suspended the next day and later dismissed.<sup>60</sup> The NLRB then lodged a complaint against the company for refusing her request for representation, dismissing her as a result of the posts and queried the content of their social media policy.<sup>61</sup> It was alleged that her dismissal violated sections 7, 8(a)(1) and 8(a)(3) of the NLRA.<sup>62</sup> The employer contended that the dismissal was not related to the post but was as a result of two other complaints from patients and other hospital staff prior to her dismissal.<sup>63</sup> The NLRB alleged that the employer’s blogging and Internet policy prohibited its

---

<sup>54</sup>Ibid

<sup>55</sup>Ibid

<sup>56</sup>*American Medical Response of Connecticut, Inc.* No. 34-CA-12576 (NLRB)

<sup>57</sup>*American Medical Response of Connecticut* supra

<sup>58</sup>Ibid

<sup>59</sup>Ibid

<sup>60</sup>Ibid

<sup>61</sup>Ibid

<sup>62</sup>Ibid. Section 8(a)(3) states that “*it shall be unfair labor practice for an employer... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization... .*”

<sup>63</sup>Ibid

employees from “portraying the organization on social media sites”,<sup>64</sup> without approval from the employer and it prevented them from making “disparaging comments when discussing the company or the employees’ superiors, co-workers and / or competitors.”<sup>65</sup> Therefore the policy was believed to be too broad and was a violation of section 8(a)(1) as it infringed on the employee’s Section 7 right to engage in ‘protected concerted activities’.<sup>66</sup> The case was eventually settled and the company agreed to narrow its Internet and blogging policy. Furthermore, they decided not to limit off-duty employees from deliberating salaries, working environment and hours with their colleagues and others.<sup>67</sup>

This case illustrated the manner in which the NLRB emphasized the importance of employee rights. If there were further employees who agreed and commented on the fairness of the employer’s conduct, then the post would be protected. This is because it would have induced support from other employees and underlined an unfair labour practice in the company.<sup>68</sup>

### **2.2.3. Rain City Contractors, Inc.**

Such was the case involving *Rain City Contractors Inc.*<sup>69</sup> who dismissed five of their employees after three of them raised concerns of hazardous working conditions in a YouTube video in July 2008. The employees were building on a site which they believed had contaminated toxins and arsenic in the soil.<sup>70</sup> They also stated that they had misrepresented that they had received training on hazardous materials by wearing badges owned by other employees, on the instructions of their employer. After the video was brought to the attention of the employer, other employees were questioned and warned about disclosing information about their working environment with others.<sup>71</sup> The NLRB investigated the matter and found that the YouTube video was protected as it raised the actual concerns of the employees’ safety and working conditions which was in line with the NLRA. Furthermore, the NLRB attorneys were ready to submit evidence of the employer’s previous fines for violations regarding the

---

<sup>64</sup> Ibid

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> (note 6 above; 66-67)

<sup>69</sup> *Rain City Contractors Inc.* No-19-CA-31580 (NLRB)

<sup>70</sup> *Rain City Contractors Inc.* supra

<sup>71</sup> Ibid

unease described by the employees.<sup>72</sup> The employees refused reinstatement and the employer settled the case by awarding them full compensation from the date of their dismissal to the settlement date.<sup>73</sup>

#### **2.2.4. Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker**

Another interesting case was that of *Robert Becker*<sup>74</sup>, a salesman employed at Karl Knauz BMW dealership who was dismissed as a result of his posts on his Facebook page. His posts included comments and pictures that were critical of his employer's choice of cheap food at an event which introduced a new car model to potential customers.<sup>75</sup> These foods included hot dogs, small bags of chips, cookies and bottled water. The employee also uploaded pictures and comments about a nearby Land Rover dealership, also owned by the Karl Knauz group, where a customer's thirteen year old son drove one of the vehicles down a small embankment and into a pond on the premises of the dealership.<sup>76</sup> Mr Becker was later fired.

The NLRB alleged that the dealership could not dismiss Mr Becker as the posts were protected concerted activity in terms of Section 7 of the NLRA. This was owing to the fact that at an earlier meeting, other employees had raised their concerns and disappointment about the food and its effect on their sales and commissions.<sup>77</sup> The dealership contended that the dismissal was not as a result of the post regarding the food at the event but was as a result of the post relating to the Land Rover dealership. The judge herein agreed and stated that the first post is protected in terms of Section 7, but not the post about the accident.<sup>78</sup> The court stated that it was "*posted as a lark, without any discussion with any other employee [of the dealership] and had no connection to any of the employees' terms and conditions of employment.*"<sup>79</sup>

---

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> *Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker* No. 13-CA-046452 (NLRB)

<sup>75</sup> *Karl Knauz Motors Inc.* supra

<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid

The dismissal was therefore upheld by the two member majority of the NLRB. Furthermore, the judge noted that the employer's Courtesy policy was too broad and not in line with the law.<sup>80</sup> The Courtesy policy stated that:

*“(b) Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.”<sup>81</sup>*

This was similar to the finding in the *Costco* case whereby the language of the policy could be understood by employees as restricting them from objecting to their working conditions.<sup>82</sup> The minority member of the NLRB believed that the majority decision is over-reaching and “invalidates any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they reasonably would so.”<sup>83</sup> The member argued that the policy complied with the law and that the entire policy should have been reasonably read and not just the provision in isolation.<sup>84</sup>

In some instances employees will also be held vicariously liable for torts employees commit whilst acting within the course and scope of their employment.<sup>85</sup>

#### **2.2.5. Blakey v Continental Airlines Inc.**

In *Blakey v Continental Airlines Inc.*<sup>86</sup>, female pilot Tammy Blakey, claimed she was sexually harassed by fellow pilots who posed defamatory and false statements about her on an electronic bulletin board used by the employer's pilots. The court here stated that employers can be held liable for actions that take place outside of the workplace and working hours if it concerns the employees and the employer.<sup>87</sup> The court emphasised that employers should have clear guidelines on the use of the internet and social media during working hours. It should also be clear what content is

---

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> G, Kaupins & S, Park. 'Legal and Ethical Implications of Corporate Social Networks' (2010) Vol 23(2) *Employee Responsibilities and Rights Journal*, 1-18.

<sup>86</sup> *Blakey v Continental Airlines Inc.* (N.J. 2000).751 A.2d 538

<sup>87</sup> *Blakey v Continental Airlines Inc.* supra

appropriate. In this case the employer had a duty to have clear guidelines to prevent harassment amongst colleagues.<sup>88</sup> Furthermore, the court stated that the employees' use of social media on work-provided equipment and during working hours meant that the employees waived any rights of privacy so monitoring was permitted.<sup>89</sup>

The legal position in the US is different from that of the UK. In the US we can see that freedom of speech is important and employees' rights are protected if the employees' actions are regarded as protected concerted activity. Furthermore, it suggests that the US employers should ensure that their policies include a provision that clearly indicates that none of the provisions in the policy restrict the employees' section 7 rights.<sup>90</sup>

### **2.3. THE UNITED KINGDOM (UK)**

In the UK, the applicable legislation is The Human Rights Act of 1998 which came into force in October 2000.<sup>91</sup> This Act sets out the fundamental rights available to all individuals in the UK. The Act integrates the European Convention on Human Rights (hereinafter referred to as the Convention) into the domestic British law.<sup>92</sup> Each right is from the Convention and is specified in different articles within the Act. If any individual feels their rights are being violated then they can go to court or a tribunal for a remedy.<sup>93</sup>

Articles 8-10 of the Convention are relevant to this chapter because in most of the social media cases heard in the UK, these are the most common articles which are raised.<sup>94</sup> Article 8 states that "*everyone has the right to respect for his private and family life, his home and his correspondence.*" Article 9 states that "*everyone has the right to freedom of thought, conscience and religion.*" Article 10 states that "*everyone has the right to freedom of expression which includes the freedom to hold opinions; and to receive and impart information and ideas.*"<sup>95</sup> These rights are all subject to limitations according to the law and national security. They also carry duties and responsibilities in favour of public safety, public

---

<sup>88</sup> Ibid

<sup>89</sup> Ibid

<sup>90</sup> (note 8 above;384)

<sup>91</sup>The Human Rights Act of 1998. Available at: <http://www.equalityhumanrights.com/en/human-rights/human-rights-act>, accessed on 8 August 2017

<sup>92</sup> Ibid

<sup>93</sup> (note 12 above;3)

<sup>94</sup> Ibid

<sup>95</sup> (note 91 above)

order, economic wellbeing of the country, and the protection of the rights and freedoms of others.<sup>96</sup>

Social media can be used for cyber bullying and harassment of employees. Examples include posting threatening or offensive comments, videos or photographs. Such conduct violates the dignity of employees and creates a hostile working environment.<sup>97</sup>

### **2.3.1. Whitham v Club 24 t/a Ventura**

In *Whitham v Club 24 t/a Ventura*<sup>98</sup>, Mrs Whitham, who was employed as a team leader for an outsourcing company posted comments on her Facebook page stating: “*I think I work in a nursery and I do not mean working with plants.*” Once the employer was made aware of the comments, Mrs Whitham was suspended pending an investigation. She was later dismissed for gross misconduct and breach of confidence.<sup>99</sup> Mrs Whitham took her matter further to the Employment Tribunal and claimed unfair dismissal. The Employment Tribunal found her dismissal to be unfair. Her comments were described as relatively minor and did not identify her employer.<sup>100</sup> The employer also had no social media policy in place.<sup>101</sup> Furthermore, there was no evidence to support the averment that the reputation of her employer was damaged. The response to dismiss the employee was regarded by the tribunal as unreasonable.<sup>102</sup>

### **2.3.2. Weeks v Everything Everywhere Ltd**

In *Weeks v Everything Everywhere Ltd*<sup>103</sup> the employee, Mr Weeks had uploaded numerous remarks on Facebook describing his working environment as ‘*Dante’s inferno*’.<sup>104</sup> When the posts were brought to the attention of his manager by a fellow colleague, Ms Lynn, Mr Weeks reacted by making direct threats to her on his Facebook page:

---

<sup>96</sup> (note 6 above;69)

<sup>97</sup> (note 12 above;14)

<sup>98</sup> *Whitham v Club 24 t/a Ventura* ET/18/0462/10

<sup>99</sup> *Whitham v Club 24 t/a Ventura* supra

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> *Weeks v Everything Everywhere Ltd* ET/2503016/2012

<sup>104</sup> *Weeks v Everything Everywhere Ltd* supra

*“It saddens me that people request to be your friend and then stab ya in the back – I’m a big believer in karma, what goes around comes around... I ain’t changing what I say on my Facebook page so eat cake bitch!  
Well been a long day – 12hours in Dantes... Still reeling from the knife in the back... If you perceive my light and jovial manner as a sign of weakness you may get a very unpleasant surprise. If you come to hurt me I’m f\*\*n ready for ya! No more words from me, next its action.”<sup>105</sup>*

These posts by Mr Weeks unsettled the colleague who refused to go to work. Others who commented, including another of their work colleagues, uploaded a picture which made clear reference to the company they were employed at.<sup>106</sup> The company had a social media policy in place which expressly stated that it applied to all posts made by employees even after working hours and it included a provision which prohibited employees from criticising the company or posting comments indicative of bullying, harassment or discrimination.<sup>107</sup> Despite warnings about breaching company policies, Mr Weeks had refused to stop making the comments and he refused to sign a warning letter. He stated that his employer could not tell him what to do in his personal life.<sup>108</sup> Following this, he was suspended and later dismissed. Thereafter his dismissal was referred to the labour tribunal alleging that the employer’s sanction of his dismissal was an unreasonable response.<sup>109</sup> In determining whether the response by the employer was reasonable, the Tribunal focused on the employer’s Social Media sites’ policy which was explicitly clear on the company’s stance on posts that are understood as harassment, bullying, and discrimination.<sup>110</sup> The Tribunal found his comments to be a serious breach of the policy and he was held guilty of gross misconduct and cyber-bullying. The dismissal was held to be an appropriate sanction. The judge in response to the employee’s defence of privacy stated:

*“Many individuals using social networking sites fail to appreciate, or underestimate, the potential ramifications of their ‘private’ online conduct. Employers now frequently have specific policies relating to their employees’ use of social media in which they stress the importance of keeping within the parameters of acceptable*

---

<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> Ibid

<sup>110</sup> Ibid

*standards of online behaviour at all times and that any derogatory and discriminatory comments targeted at the employer or any of its employees may be considered grounds for disciplinary action. There is no reason why an employer should treat misconduct arising from the misuse of social media in any way different to any other form of misconduct.*”<sup>111</sup>

Interestingly, the tribunal noted that the potential to cause harm to the employer’s reputation was sufficient for a guilty verdict.<sup>112</sup>

### **2.3.3. Teggart v TeleTech UK Ltd**

In *Teggart v TeleTech UK Ltd*<sup>113</sup>, Mr Teggart, an employee of TeleTech UK Ltd uploaded very offensive comments about a fellow female colleague on Facebook. Despite naming his employer, and commenting on the colleague’s promiscuity, he had refused to take out the statements but chose to retaliate with further explicit comments.<sup>114</sup> At his disciplinary he argued privacy as his defence and disputed any reference to the company. He was dismissed for gross misconduct in bringing the company name into disrepute and harassment of a fellow colleague. Mr Teggart claimed unfair dismissal.<sup>115</sup> The industrial tribunal noted that the sanction of dismissal was a reasonable response to the charge of harassment of the colleague as opposed to the reputational harm suffered by the employer. Furthermore, the court dismissed Mr Teggart’s claim of unfair dismissal and his defence of privacy.<sup>116</sup> The court stated that:

*“when the claimant put his comments on his Facebook page, to which members of the public could have access, he abandoned any right to consider his comments as being private and therefore he cannot seek to rely on Article 8 to protect his right to make those comments.”*<sup>117</sup>

---

<sup>111</sup> Ibid

<sup>112</sup> (note 6 above;39-40)

<sup>113</sup> *Teggart v TeleTech Uk Ltd* [2012] NIIT/00704/11

<sup>114</sup> *Teggart v TeleTech Uk Ltd* supra

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> Ibid

Regarding the defence in terms of Article 9, the tribunal stated that “*the ‘belief’ referred to in Article 9 does not extend to a comment about the promiscuity of another person.*”<sup>118</sup> The tribunal’s opinion was that ‘belief’ as mentioned in Article 9 is:

*“intended to refer to a philosophy set of values, principles, mores to which an individual gives his intellectual assent or which guides his conduct or behaviour. The limits to this concept lie in a requirement or serious ideology, having some cogency and cohesion.”*<sup>119</sup>

Lastly the tribunal stated that the right to freedom of expression as stated in Article 10:

*“brings with it the responsibility to exercise that right in a way that is necessary for the protection of the reputation and rights of others. The right of freedom of expression does not entitle the claimant to make comments which damage the reputation or infringe the rights of A. The claimant does not assert that A was promiscuous but states that his comments were a joke or fun. Furthermore she has the right not to suffer harassment.”*<sup>120</sup>

#### **2.3.4. Crisp v Apple Retail (UK) Ltd**

In *Crisp v Apple Retail (UK) Ltd*<sup>121</sup>, Mr Crisp was employed by Apple Retail in the UK and uploaded antagonistic messages on Facebook in response to his Visa being declined by a failure of support from his employer. In his comments he referred to an Apple application and a tag line which was related to an upcoming venture of Apple’s iTunes page.<sup>122</sup> He was later disciplined and dismissed. On appeal the decision was upheld. The matter was then heard by the employment tribunal. The employer advised that the employee was informed and trained on company policies and conduct which included protecting the company image and how to present oneself online and in public.<sup>123</sup> Furthermore, the employee was aware that they should not comment about the employers’ products, services or initiatives online. Mr Crisp raised Article 10

---

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> Ibid

<sup>121</sup> *Crisp v Apple Retail (UK) Ltd* ET/2330554/2011

<sup>122</sup> *Crisp v Apple Retail (UK) Ltd* supra

<sup>123</sup> Ibid

(right to freedom of expression) and 8 (right to privacy) in his defence.<sup>124</sup> He admitted that some of his messages referred to his employer and that other employees had posted similar messages and were not disciplined in the same manner. The tribunal found that once comments are uploaded on Facebook, they are in the public domain and can be easily accessed by others.<sup>125</sup> Therefore privacy could not be a valid defence. The defence of the right to freedom of expression was also not upheld as the comments were not important to free expression and they were harmful to the reputation of Apple.<sup>126</sup>

This case was similar to the *Weeks* and *Teggart* case where the court limited the right to freedom of expression and upheld the potential damage that can or could be caused to the employer's reputation.<sup>127</sup> Furthermore, we see that employers can benefit from training their employees and the implementation of a properly constructed social media policy.<sup>128</sup>

### **2.3.5. *Trasler v B & Q Ltd***

In contrast to this, was the case of *Trasler v B & Q Ltd*<sup>129</sup> Mr Trasler was employed as a customer advisor for B & Q Ltd. He posted derogatory comments about his employer on Facebook describing his workplace as a “f\*\*\*\*\*g joke” and that he will be “doing some busting”.<sup>130</sup> After the posts were brought to the employer's attention by a fellow colleague, he was dismissed. The matter was taken to the employment tribunal who noted that despite having fifty of his work colleagues as Facebook friends, he had not directly identified his employer.<sup>131</sup> Furthermore, despite breaching the company social media policy the comments did not weaken the employment relationship to such an extent that he could not remain employed. The court considered that he was employed for five years with a clean disciplinary record and no one testified that they were threatened by his comments.<sup>132</sup> Therefore the tribunal rejected the allegation that the employee posed a threat to the employer and the

---

<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Ibid

<sup>127</sup> (note 6 above; 47-48)

<sup>128</sup> L, Engelbrecht (Streit) Are Negative or Derogative Postings on Social Media A Valid Ground for Dismissal (unpublished LLM thesis, University of Pretoria, 2017)

<sup>129</sup> *Trasler v B & Q Ltd* ET/1200504/2012

<sup>130</sup> *Trasler v B & Q Ltd* supra

<sup>131</sup> Ibid

<sup>132</sup> Ibid

allegation that the employee could damage the company property. The employee described his comments as letting off steam after a frustrating day.<sup>133</sup> The employment tribunal held that he was dismissed unfairly and awarded him compensation. His compensation was only half the award because of his failure to show any remorse or to understand the consequences of his actions.<sup>134</sup>

### **2.3.6. *Stephens v Halfords plc***

In *Stephens v Halfords plc*,<sup>135</sup> Mr Stephens was employed by Halfords in the UK and was dismissed for uploading information that was confidential on Facebook. The employer was in the process of a proposed restructuring which was brought to the employee's attention at meetings which he attended.<sup>136</sup> The employee was aware that this information was confidential pending the conclusion of the process. Unhappy with decisions regarding the implementation of the restructuring by the employer, Mr Stephens created a page on Facebook for employees to debate their concerns. He posted: "*Halfords workers against working 3 out of 4 weekends.*"<sup>137</sup> He later removed this page when he became aware of the social media policy of the employer which stated that employees who posted any adverse content on any social networking site or posted anything that would encourage dissent with the company would be subject to discipline.<sup>138</sup> However, the employer was aware of the page and he was summarily dismissed for breach of trust. His dismissal was referred to the employment tribunal and his dismissal was found to be unfair and he was awarded compensation. The court noted that the sanction of dismissal was unreasonable as the employee had removed the page once he was aware of the policy.<sup>139</sup> He only created the page after he believed the information was not confidential anymore. Furthermore, the court considered that he had six years of service and a clean disciplinary record. It was also alleged that he was under stress at the time and it may have clouded his judgment.<sup>140</sup>

---

<sup>133</sup> Ibid

<sup>134</sup> Ibid

<sup>135</sup> *Stephens v Halfords plc* ET/1700796/10

<sup>136</sup> *Stephens v Halfords plc* supra

<sup>137</sup> Ibid

<sup>138</sup> Ibid

<sup>139</sup> Ibid

<sup>140</sup> Ibid

### **2.3.7. Otomewo v Carphone Warehouse Ltd**

In the UK, the case of *Otomewo v Carphone Warehouse Ltd*<sup>141</sup>, the employment tribunal held that an employer was vicariously liable for the actions of two employees who used one of the manager's (Mr Otomewo) iPhone's without his permission and updated his Facebook status to: "*Finally came out of the closet. I am gay and proud*".<sup>142</sup> The comments were posted during working hours and the comments were about employees of the same company. Mr Otomewo instituted a claim for sexual orientation harassment with the Employment tribunal which was upheld.<sup>143</sup> He asserted that he was neither gay nor did he believe that any of his other colleagues perceived him to be. The employment tribunal held that it was the duty of the employer to create an environment where acts of this nature did not occur.<sup>144</sup>

## **2.4. CONCLUSION**

There has been a remarkable escalation in the number of dismissals owing to social media misconduct. Companies need to adapt to manage the influence and difficulties resulting thereof which affect modern workplaces.<sup>145</sup> This is evident from the cases mentioned above where we can see that social media misconduct does affect the employment relationship. In the UK, the tribunals take into account certain factors when making a determination of the conduct of the employee. These factors include: the subject matter of the comments that were posted; if there is a connection between the post and the extent of the damage to the reputation of the employer; if the employee breached confidentiality; whether the employer had a social media policy in place; whether the employees were trained on the social media policy and if the comments were made during working hours or using company equipment.<sup>146</sup> The employer need not show actual harm to its reputation as potential harm was sufficient.<sup>147</sup> As we see in the cases of *Mr Stephens* and *Trasler*, an apology, remorse and removal of the offensive comments as well as the employee's disciplinary record and years of service will help as mitigating factors when making a decision regarding the type of disciplinary action to

---

<sup>141</sup> *Otomewo v Carphone Warehouse Ltd* ET 2330554/2011

<sup>142</sup> *Otomewo v Carphone Warehouse Ltd* supra

<sup>143</sup> Ibid

<sup>144</sup> Ibid

<sup>145</sup> (note 47 above)

<sup>146</sup> J, Atefi. 'Facebook remarks that justify dismissal' (24/10/2014) available at:

<http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2014/10/24/facebook-remarks-that-justify-dismissal.aspx>, accessed on 19 July 2016.

<sup>147</sup> (note 50 above;221)

impose.<sup>148</sup> In rare instances, employers could also be held liable if employees commit wrongful acts within the scope of their employment.

Our law in South Africa surrounding this area is underdeveloped and the future cases may be decided following the UK law as opposed to the US.<sup>149</sup> This is because the UK law is similar to ours. UK law is based on the Human Rights Act of 1998 whose articles embody the rights enshrined in the South African Bill of Rights. Furthermore, the procedure in determining the appropriateness and fairness of dismissal as a sanction in the UK cases are akin to Schedule 8 of the Labour Relations Act No. 55 of 1998.

Despite this, we note that Section 7 of the NLRA which is considered as one of the most fundamental rights afforded to employees is similar to the protection afforded to South African employees in terms of Section 78 (1)(b) of the Basic Conditions of Employment Act<sup>150</sup>. Likewise, this provision allows employees to discuss conditions of employment with fellow employees, employers or another person.

The majority of the companies in South Africa also have general policies such as the one in the *Costco case supra*, and it is important for employers to review such policies and give specific examples of what is being addressed eg. Employees are prohibited from disclosing trade secrets.<sup>151</sup> This will be further dealt with in Chapter 4 but the underlying objective is to have a proper social media policy in place.

---

<sup>148</sup> Ibid

<sup>149</sup> (note 6 above;37)

<sup>150</sup> Act 75 of 1997

<sup>151</sup> A, Rubenstein, 'NLRB Takes Down Costco Policy in 1<sup>st</sup> Social Media Ruling' (September 2012) available at: <http://www.law360.com/articles/37927/nlr-takes-down-costco-policy-in-1st-social-media-ruling>, accessed on 30 August 2017.

## CHAPTER 3: SOUTH AFRICAN LAW

### 3.1. INTRODUCTION

Social Media misconduct blurs the lines between freedom of expression of the employee and the right to protect the good name and reputation of a company.<sup>152</sup> As mentioned in chapter 2, South Africa does not have specific legislation which regulates this area and the case law in South Africa pertaining to social media is underdeveloped. The courts are mindful of the fact and this was emphasised in the case of *Heroldt v Wills*<sup>153</sup>, where Judge Nigel Willis stated that:

*“We have ancient, common-law rights both to privacy and to freedom of expression...It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the court, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.”<sup>154</sup>*

Bearing this in mind, reference in such cases, have to be made to the common law and other applicable statutes including: the Constitution of the Republic of South Africa,<sup>155</sup> the Employment Equity Act (EEA),<sup>156</sup> the Labour Relations Act (LRA),<sup>157</sup> the Electronic Communications and Transactions Act (ECTA),<sup>158</sup> Regulation of Interception of Communications and Provision of Communication-related Information Act (RICA),<sup>159</sup> The Protection of Personal Information Act (POPI),<sup>160</sup> and The Promotion of Access to Information Act (PAIA).<sup>161</sup> Each case will be decided dependant on the facts of each case and the social misconduct which could be: copyright and trademark infringement,<sup>162</sup> breach of confidentiality, disclosure constraints in employment contracts,<sup>163</sup> cyber bullying and

---

<sup>152</sup> (note 6 above;83)

<sup>153</sup> *Heroldt v Wills* 2013 (2) SA 530 (GSJ)

<sup>154</sup> *Heroldt supra* at par 7 & 8

<sup>155</sup> Act No. 108 of 1996

<sup>156</sup> Act No. 55 of 1998

<sup>157</sup> Act No. 66 of 1995

<sup>158</sup> Act No. 25 of 2002

<sup>159</sup> Act No. 70 of 2002

<sup>160</sup> Act No. 4 of 2013

<sup>161</sup> Act No. 2 of 2000

<sup>162</sup> (note 28 above)

<sup>163</sup> (note 1 above)

harassment.<sup>164</sup> This chapter will explore some of the legislation which is appropriate to situations involving employers and the employees' free-for-all' negative statements,<sup>165</sup> and case law which has dealt with social media litigation.

### **3.2. COMMON LAW**

The majority of employment relationships are regulated by a contract of employment which indicates the rights and obligations of both the employer and employee.<sup>166</sup> These rights and obligations embody the principles of the common law duties of the employer and employee. The employer has the duty to: accept the employee, to provide him with work, to pay the agreed remuneration, to comply with statutory duties, and most importantly to provide a safe working environment.<sup>167</sup> The employee's duties are: to make his personal services available to the employer, to warrant his competence and reasonable efficiency, to obey the employer, to be subordinate to the employer, to maintain bona fides, to exercise reasonable care when using the employer's property, and to refrain from misconduct.<sup>168</sup>

The cornerstone of the employment relationship is the common law duty of good faith between the employee and employer. This is an agreement that the employee will act honestly, in the best interests of the organisation and show commitment towards the success of the employer, even if this is not expressly mentioned in the employment contract.<sup>169</sup> Therefore discipline will follow if an employee acts in a manner that violates this duty by repudiating the employment contract, violating the integrity of management, injuring the employer's legitimate business interests, contesting the management's prerogatives, or bringing the name of the company into disrepute by expressing a negative view about the employer, client or customer, or any other subject on social media platforms.<sup>170</sup>

---

<sup>164</sup>W, Strachan. 'No such thing as 'private' on social media' available at <http://www.labourguide.co.za/most-recent/2173-no-such-thing-as-private-on-social-media>, accessed on 15 February 2016.

<sup>165</sup> (note 6 above; 83)

<sup>166</sup> (note 50 above;187-188)

<sup>167</sup> Ibid

<sup>168</sup> Ibid

<sup>169</sup> L, Osman. 'Social Media: a menace or benefit in the workplace?' (2013) *SA Pharmaceutical Journal* available at: <http://www.sapj.co.za/index.php/SAPJ/article/view/1496>, accessed on 15 February 2016.

<sup>170</sup> P, MacDonald &P, Thompson. 'Social Media(tion) and the Reshaping of Public / Private Boundaries in Employment Relations. (6 March 2015) *International Journal of Management Reviews*, available from: <http://www.onlinelibrary.wiley.com/doi/10.1111/ijmr.12061/full>, Accessed 15 February 2016.

### **3.3. THE CONSTITUTION**

South Africa is a democratic society which upholds the values and rights enshrined in our Constitution<sup>171</sup> to ensure that all individuals are protected. The final Constitution was promulgated in 1996 and section 2 provides that “*the Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.*”<sup>172</sup>

#### **3.3.1. The Right to dignity**

The right to dignity is an independent personality right within the concept of *dignitas*.<sup>173</sup> An infringement of this right will result from an insult which can include insults on social media.<sup>174</sup> The common law right to dignity and good name was incorporated into the larger context of the right to dignity.<sup>175</sup> Currently the right to dignity is one of the fundamental rights set out in Section 10 of the Constitution<sup>176</sup> which provides that “*everyone has the right to inherent dignity and to have their dignity respected and protected.*”<sup>177</sup> Employers have the right to protect their good name from such slander.<sup>178</sup> Section 10 of the Constitution prohibits such an infringement.<sup>179</sup>

#### **3.3.2. The Right to Freedom of Expression**

The right to freedom of expression is set out in Section 16 of the Constitution which states that:

“(1) Everyone has the right to freedom of expression, which includes:  
(a) freedom of the press and other media;  
(b) freedom to receive or impart information or ideas;  
(c) freedom of artistic creativity; and  
(d) academic freedom and freedom of scientific research.”

Employees are unaware that their right to freedom of expression is not an unfettered right to defame others.<sup>180</sup> This right is limited to exclude *propaganda for war*;

---

<sup>171</sup> Constitution of the Republic of South Africa, 1996.

<sup>172</sup> Ibid

<sup>173</sup> Dignitas serves as a generic term for all personality rights.

<sup>174</sup> J, Neethling & JM Potgieter *Law of Delict 7ed.* (2015) 369

<sup>175</sup> (note 28 above)

<sup>176</sup> Constitution of the Republic of South Africa, 1996.

<sup>177</sup> Ibid

<sup>178</sup> (note 47 above)

<sup>179</sup> (note 6 above;85)

<sup>180</sup> V, Oosthuizen. ‘How far is too far for employees on social media?’ (22 October 2015) available at <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media>, accessed 15 February 2016.

*incitement of imminent violence; and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*<sup>181</sup>

In *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Devine World Ministries*<sup>182</sup> the court held that:

*“Expression may often be robust, angry, vitriolic, and even abusive. One has to test the boundaries of freedom of expression each time. The court must be alive to the issues involved, the context within which the debate takes place, the protagonists to the dispute or disagreement, the language used as well as the content of which is said written and published and about whom it is published.”*<sup>183</sup>

The law of defamation attempts to achieve the balance between the right to freedom of expression and the right to good name and reputation.<sup>184</sup> Defamation involves the wrongful intentional publication of defamatory statements regarding another person and results in the violation of a person’s status, good name or reputation.<sup>185</sup> Defamation also formed part of the *actio injuriarum* which allowed for aggrieved parties to claim for damages when their personality rights were infringed. One of the personality rights is the rights to reputation or *fama*.<sup>186</sup>

In *National Media v Bogoshi*<sup>187</sup> the court held that publication is the act of making a defamatory statement or the act of conveying an imputation by conduct, to a person or persons other than the person who is the subject of the defamatory statement or conduct.<sup>188</sup> Publication in this sense will refer to posts made on social media sites. In order to succeed, an employer will have to prove that a defamatory publication exists, which refers to the company, and that it has been published. This means that the offending post must have come to the knowledge of one other person other than the defamed ‘person’. This may include employees, customers or clients of the company and is usually how the offending post is brought to the attention of the employer.<sup>189</sup>

---

<sup>181</sup> Ibid

<sup>182</sup> *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Devine World Ministries* 2012 (3) All SA 322 (GSJ)

<sup>183</sup> *Dutch Reformed Church Vergesig Johannesburg Congregation* supra at par 23

<sup>184</sup> (note 50 above; 190)

<sup>185</sup> *Khumalo and Others v Holomisa* 2002 (8) BCLR 771 (CC) at par 18

<sup>186</sup> Ibid at par 17

<sup>187</sup> *National Media v Bogoshi* 1998 (4) SA 1995 (SCA)

<sup>188</sup> C, Padayachee. *Employee’s Right to Privacy versus the Employer’s Right to Monitor Electronic Communication in the Workplace*. (unpublished LLM thesis, University of KwaZulu-Natal, 2015)

<sup>189</sup> (note 6 above; 84)

Once the defamatory comments are published, it is presumed that it is unlawful and intentional.<sup>190</sup> Therefore, an employer may be held vicariously liable where an employee sends out a defamatory e-mail with comments about a co-worker during office hours, provided that it has been published.<sup>191</sup>

It is not necessary for the employer to prove that the comments are false. Employees must take note that in *Heroldt v Wills* case the court stated that:

*“In our law, it is not good enough, as a defence to or a ground of justification for defamation, that the published words may be true: it must also be to the public benefit or in the public interest that they be published. A distinction must always be kept between what is interesting to the public’ as opposed to ‘what is in the public interest to make known’... .”*<sup>192</sup>

Interestingly, according to our laws of defamation, all individuals other than the employee who partakes in the publication of the defamatory post could be held liable, as was found in *Isparta v Richter and Another*.<sup>193</sup> In this case the second defendant; the new husband of the first defendant: was held liable for the comments made by the first defendant against the plaintiff on Facebook.<sup>194</sup> The second defendant was only tagged in the offending post. He was not the originator but the court still found that his support aggravated the damage to the plaintiff’s reputation, and he was equally liable.<sup>195</sup> When the court was faced with the determination of the damages, it was stated that an apology or retraction of the defamatory statement may assist in mitigation of the damage. Judge Hiemstra found that the defendants did not apologise for their offending posts and they were held jointly and severally liable for damages amounting to R40 000,00.<sup>196</sup>

### **3.3.3. The Right to privacy**

The right to privacy is often raised as a defence by employees involved in social media misconduct. Prior to the enactment of the Constitution, the right to privacy was recognised as an independent personality right and which was introduced in case law

---

<sup>190</sup> S, Maharaj. ‘Keep your Tweets twibel free’ (May 2015) *De Rebus* 29

<sup>191</sup> (note 50 above; 188)

<sup>192</sup> *Heroldt supra* 27

<sup>193</sup> *Isparta v Richter and Another* 2013 (6) SA 529 (GNP)

<sup>194</sup> *Isparta v Richter and Another supra*

<sup>195</sup> *Ibid*

<sup>196</sup> *Ibid*

in the 1950s.<sup>197</sup> Personality rights included within the concept of *dignitas* consisted of: the right to physical integrity; the right to physical liberty; the right to good name or reputation; the right to dignity or honour; the right to privacy and the right to identity.<sup>198</sup> It was protected under the *actio injuriarum*. From 1970s onwards, there was development in our laws to protect the privacy of personal information of individuals.<sup>199</sup> Currently, the right to privacy is protected by our common law as well as the Constitution. Section 14 of the Constitution “states that *everyone has the right to privacy which includes... the right not to have the privacy of their communications infringed.*”<sup>200</sup>

In *Bernstein v Bester*<sup>201</sup> Judge Ackermann set out the interpretation of the right to privacy which is still upheld today. The Constitutional Court considered the United States of America’s approach to the scope of the right to privacy and stated that it incorporates a two stage test. An employee would have to establish a “*subjective expectation of privacy and that the society has recognized that expectation as objectively reasonable.*”<sup>202</sup> To determine if the right to privacy was infringed the courts will look at the manner in which the information was obtained, the nature of the information, the purpose for which the information was originally collected and the nature and manner of dissemination of the information. Furthermore the judge stated that the right to privacy

“*extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured.*”<sup>203</sup> ... “*Once an individual enters into relationships with persons outside the closest intimate sphere; the individual’s activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.*”<sup>204</sup>

In summary Judge Willis stated that the test to determine defamation was whether a reasonable person of ordinary intelligence might reasonably understand the words

---

<sup>197</sup> (note 188 above)

<sup>198</sup> J Neethling, J.M Pogieter & P.J, Visser *Neethling’s Law of Personality* (2005) Chapter 3.

<sup>199</sup> (note 4 above)

<sup>200</sup> Constitution of the Republic of South Africa, 1996

<sup>201</sup> *Bernstein v Bester No. 1996 (2) SA 751 (CC)*

<sup>202</sup> *Bernstein supra* at 75

<sup>203</sup> *Ibid*

<sup>204</sup> *Bernstein supra* at 77

concerned to convey a meaning that is defamatory of the person concerned.<sup>205</sup> Neethling, avers that an individual must exhibit a will or desire that facts should be kept private. If such a will is absent, then the individual has no interest in the legal protection of privacy.<sup>206</sup> The privacy settings on most social media sites allow the users to determine who has access to their posts.<sup>207</sup> The settings on the majority of sites can be adjusted from ‘public’ or ‘everyone’; to ‘intermediate’ or ‘friends of friends’; and lastly to ‘friends only’.<sup>208</sup> Some users believe that their posts on social media are private due to their user settings and their right to privacy will protect them from third party access, but it is evident that conversations on these platforms are not so private.<sup>209</sup> For example a disclaimer on a Twitter account that the person tweets in his/her personal capacity would not provide adequate protection if the tweet is associated with the employer and the employer is known.<sup>210</sup>

### **3.3.4. The Limitations Clause**

The courts are often faced with situations to balance these afore-mentioned rights. The Bill of Rights also assists in this determination by providing for the limitation of rights in terms of general application.<sup>211</sup> Section 36 of the Constitution provides that none of the rights are absolute and permits the limitation of these rights if it is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*.<sup>212</sup> The factors which are taken into account are: “*the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and if there are less restrictive means to achieve the purpose*”.<sup>213</sup>

## **3.4. VICARIOUS LIABILITY**

Vicarious liability is a principle derived from English Law and is described generally as the strict liability of one person which arises from the wrongful acts of another. This indirect liability usually arises where a particular relationship exists between the two parties such as

---

<sup>205</sup> *Heroldt supra par 26*

<sup>206</sup> (note 198 above)

<sup>207</sup> (note 47 above)

<sup>208</sup> L, Thuynsma and B.O, Latib. ‘Infringement of Privacy’ (April 2013) *Without Prejudice* 94-96.

<sup>209</sup> (note 4 above)

<sup>210</sup> (note 28 above)

<sup>211</sup> (note 6 above)

<sup>212</sup> Constitution of the Republic of South Africa, 1996

<sup>213</sup> (note 188 above)

the relationship between an employee and employer.<sup>214</sup> In *Feldman (Pty) Ltd v Mall*<sup>215</sup> the doctrine of vicarious liability was first explained as follows:

*“...a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy... it follows that if the servant’s acts in doing his master’s work of his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is response for that harm...”*<sup>216</sup>

Therefore, if an employee commits a wrongful act whilst acting within the course and scope of his employment, his employer will be held fully accountable for the damage which results.<sup>217</sup> This strict liability means that fault is not a requisite nor is it relevant whether the act was intentional or negligent. The requirements for vicarious liability are:

- a) *There must be an employment relationship at the time when the act is committed.*
- b) *The employee must commit the act which caused damage.*
- c) *The employee must act within the scope of his employment when the delict is committed.*<sup>218</sup>

An employee acts within the scope of his employment when he fulfils his obligations resulting from the employment agreement entered into by the parties.<sup>219</sup> In *Minister of Police v Rabie*<sup>220</sup> the court expressed the test required to determine if the act committed by the employee is for his own interests and purposes. The subjective test entails making reference to the intention of the employee and if the employee intended to promote his own interests. The objective test entails making a determination if there is a sufficiently close link between the actions of the employee for his own purposes and the business interests of the employer.<sup>221</sup> The employer may only escape liability if the conduct by the employee falls outside the scope of his employment.<sup>222</sup> The employer may even be held liable for unauthorised acts, provided that there is a close connection between the authorised acts.<sup>223</sup> In *Grobler v Naspers Bpk*<sup>224</sup> the employer was held vicariously liable for the acts of sexual

---

<sup>214</sup> (note 174 above;390)

<sup>215</sup> *Feldman (Pty) Ltd v Mall* 1945 AD 733

<sup>216</sup> *Feldman supra* at par 741

<sup>217</sup> (note 174 above; 390)

<sup>218</sup> *Ibid* at 390

<sup>219</sup> *Ibid* at 393

<sup>220</sup> *Minister of Police v Rabie* 1986 1 SA 117 (A)

<sup>221</sup> *ibid*

<sup>222</sup> (note 174 above;394)

<sup>223</sup> *ibid*

<sup>224</sup> *Grobler v Naspers Bpk* 2001 (4) SA 938 (LC)

harassment committed by the trainee manager against his secretary.<sup>225</sup> Interestingly the court here found that the employer may still be held liable even if the employee is engaged in activities other than the duties prescribed by the employer.<sup>226</sup> There are no reported cases in South Africa involving employers being held vicariously liable for social media misconducts of their employees. However, the usual principles which apply to all types of misconduct will apply.

### **3.5. THE EMPLOYMENT EQUITY ACT (EEA)**

The EEA<sup>227</sup> was enacted with the purpose to promote equal opportunity and fair treatment in the employment sector through the elimination of unfair discrimination as expressed in Section 2 of the Act. Section 5 of the EEA<sup>228</sup> requests employers to implement measures to eliminate unfair discrimination in the working environment, which includes harassment. In terms of Section 60 of the EEA, employers will be held liable for any acts of unfair discrimination made by the employees. The employer will only be absolved from liability if the employer can prove that he undertook reasonable measures to prevent these undesired wrongful acts from occurring.<sup>229</sup>

### **3.6. THE LABOUR RELATIONS ACT (LRA)**

The LRA<sup>230</sup> is one of the main statutes which regulate the relationship between an employer and employee.<sup>231</sup> This Act also gives effect to the constitutional right to fair labour practises found in section 23(1) of the Constitution.<sup>232</sup> It affords protection to all employees covered by the LRA from being unfairly dismissed in terms of Section 185.<sup>233</sup> Section 188 states that dismissal will be fair if it is based on the employees conduct, incapacity, or operational requirements of the organisation. Schedule 8 of the Code of Good practice found in the LRA sets out the guidelines to determine if dismissals are substantially and procedurally fair and if due process was followed.<sup>234</sup> Fairness is usually determined by the facts of each case and the

---

<sup>225</sup> (note 31 above; 11)

<sup>226</sup> *Ibid* at p11

<sup>227</sup> Act 55 of 1998

<sup>228</sup> Act 55 of 1998

<sup>229</sup> Act 55 of 1998

<sup>230</sup> Act 66 of 1995

<sup>231</sup> (note 188 above)

<sup>232</sup> GilesFiles. 'Social Media: Valid reason to dismiss' (1/11/2015) available from:

<http://www.gilesfiles.co.za/dispute-resolution-3/social-media-valid-reason-to-dismiss>, accessed on 19 July 2016.

<sup>233</sup> Act 66 of 1995

<sup>234</sup> (note 50 above; 209)

appropriateness of dismissal as a sanction. When making a determination regarding the fairness of the dismissal, Schedule 8 states that the decision maker should consider:

- a) *whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and*
- b) *if a rule or standard was contravened, whether or not-*
  - (i) *the rule was a valid or reasonable rule or standard;*
  - (ii) *the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*
  - (iii) *the rule or standard has been consistently applied by the employer; and*
  - (iv) *dismissal was an appropriate sanction for the contravention of the rule or standard.*<sup>235</sup>

If employees feel that they are dismissed unfairly, they can refer their case to the CCMA or the relevant Bargaining Council.<sup>236</sup>

### **3.7. REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT (RICA)**

RICA<sup>237</sup> was assented to on 30 December 2002 and applies to all forms of electronic communication, assisting in the regulation of e-mail and internet use in working environments.<sup>238</sup> In terms of Section 5 of RICA<sup>239</sup>, consent in writing has to be given for the interception of communication, unless permitted by law. If any of these sections are contravened, the individual would be persecuted criminally and could be sanctioned with a fine of R2 million or 10 years imprisonment.<sup>240</sup> At the time RICA was adopted into our law, the right to privacy concerning online ‘friends’ was not yet predicted.<sup>241</sup>

One can infer that employees cannot raise the right to privacy in their defence where: the employee accepts friend requests on social media from individuals outside of their family sphere which include work colleagues, or if they fail to limit the public access to their social media site by adjusting the security settings.<sup>242</sup> By accepting the friend requests from

---

<sup>235</sup> Act 66 of 1995

<sup>236</sup> (note 128 above; 62)

<sup>237</sup> Act No. 70 of 2002

<sup>238</sup> (note 6 above;1)

<sup>239</sup> Act No. 70 of 2002

<sup>240</sup> (note 188 above; 54)

<sup>241</sup> (note 6 above;74)

<sup>242</sup> (note 6 above;71-74)

colleagues and others on a social media site, the employees' give consent to the interception of communications in terms of Section 5 of RICA and accept the risk that the posts may be brought to their employee's attention.<sup>243</sup> In certain rare instances where the employee has limited the privacy settings on the social media site to a limited number of individuals or the negative post came to the attention of the employer via a colleague who saw a 'shared' post on the social media page, the employee may have a realistic expectation of privacy. However, this may be limited depending on the facts of the case and the potential or actual reputational harm to the employer.<sup>244</sup>

### **3.8. THE ELECTRONIC COMMUNICATIONS AND TRANSACTIONS ACT (ECTA)**

ECTA<sup>245</sup> was enacted on 30 August 2002 to remove the barriers to electronic communications and ensure that electronic transactions conform to international standards.<sup>246</sup> Section 51 of the ECTA provides that the employer (data controller) must have the express written permission of the employee (data subject) to collect, collate, process or disclose personal information, unless the employer is permitted or required by law to do so.<sup>247</sup> Furthermore, the employer may only access information which is reasonably necessary for lawful purpose and cannot disclose this information to others without permission of the employee or permission by law.<sup>248</sup> Section 86 of the ECTA also does not allow the unlawful interception and monitoring of communications unless there is written consent or is permission by law.<sup>249</sup> These provisions are similar to RICA and the interception of employee's communications only become difficult and almost impossible for employers' when employees use their own electronic devices.<sup>250</sup>

### **3.9. THE PROMOTION OF ACCESS TO INFORMATION ACT (PAIA)**

PAIA<sup>251</sup> was enacted on 09 March 2001. In terms of PAIA employers can request and gain access to personal information of employees which are held by a public entity, if it is required

---

<sup>243</sup> (note 6 above;71)

<sup>244</sup> (note 6 above;72)

<sup>245</sup> Act No. 25 of 2002

<sup>246</sup> (note 188 above)

<sup>247</sup> Act No. 25 of 2002

<sup>248</sup> (note 47 above)

<sup>249</sup> Act No. 25 of 2002

<sup>250</sup> S.S.K, Mtuza 'Social Media –reasonable use and legal risks' (July 2016) *Without Prejudice* 18-20

<sup>251</sup> Act No.2 of 2000

for the exercise of the employer's rights.<sup>252</sup> Access will be denied if it infringes on the employee's rights and employees will be protected in terms of PAIA.<sup>253</sup>

### **3.10. THE PROTECTION OF PERSONAL INFORMATION ACT (POPI)**

POPI<sup>254</sup> was signed into law on 19 November 2013. This Act intends to safeguard the right to privacy by introducing measures to protect the personal information of employees managed by public and private employers. This will apply whenever information is collected, stored or used. Employees will have to consent to their personal information being processed by employers.<sup>255</sup> This is similar to the provisions of RICA.<sup>256</sup>

The difficulty arises with communication on social media which renders the applicability of the above laws and the right to privacy to be uncertain. This is because these comments are published on social media platforms that can be accessed easily by the public at large, unless the privacy settings are adjusted to restrict access to certain people.<sup>257</sup>

### **3.11. CASE LAW**

Recently there have been cases heard before the Conciliation, Mediation and Arbitration (CCMA), bargaining councils, and in-house disciplinary enquiries subsequent to dismissals of employees who have posted defamatory comments on a public forum about their employers, clients or colleagues online.<sup>258</sup> In majority of the cases dismissals were held to be fair if it brought the employer's name into disrepute.

#### **3.11.1. *Sedick v Another v Krisray***

In *Sedick v Another v Krisray (Pty) Ltd*<sup>259</sup>, the operations manager and the bookkeeper were dismissed for posting derogatory comments on Facebook about their senior manager and the staff.<sup>260</sup> Both employees raised the right to privacy in their defence and that their comments did not identify their employer nor was there any reference and / or link to the employer. The commissioner found that Facebook is a public

---

<sup>252</sup> Act No.2 of 2000

<sup>253</sup> (note 47 above)

<sup>254</sup> Act No. 4 of 2013

<sup>255</sup> Act No. 4 of 2013

<sup>256</sup> (note 188 above; 67-68)

<sup>257</sup> (note 47 above)

<sup>258</sup> (note 1 above)

<sup>259</sup> *Sedick v Another v Krisray (Pty) Ltd* 2011 8 BALR 879 CCMA

<sup>260</sup> *Sedick v Another v Krisray (Pty) Ltd* supra

domain.<sup>261</sup> RICA did not apply as this was not a private communication and the employer was entitled to lawfully use the posts as evidence.<sup>262</sup> He found that neither of the employees' Facebook privacy settings was restricted and their posts could be viewed by everyone and not just their friends on Facebook. He noted that their behaviour could be seen as gross insolence and they had abandoned their right to privacy.<sup>263</sup> The commissioner noted that:

*“the internet is a public domain and its content is, for the most part, open to anyone who has the time and inclination to search it out. If employees wish their opinions to remain private, they should refrain from posting them on the internet.”*<sup>264</sup>

Furthermore, although the employees did not name their employer, the commissioner found that previous and current employees would be able to identify the individual whom they referred to in the post and subsequently make the link to the employer.<sup>265</sup> The CCMA found that they were fairly dismissed. There was also a junior employee who had responded on their post, but she was only given a final written warning.<sup>266</sup> The commissioner's ruling was similar to the United Kingdom cases as discussed in Chapter 2 (see general discussion of *Weeks*, *Trasler & Crisp* cases), whereby it was found that the potential damage to the employer's reputation was sufficient for the dismissals to be upheld.

### **3.11.2. SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton**

In *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton*,<sup>267</sup> Ms Haliwell, a personal assistant posted rude comments about her general manager on Facebook and sent an offending e-mail. The Facebook posts were brought to the attention of the company by a fellow work colleague and Facebook 'friend'. She was later dismissed for gross insubordination and grossly disrespectful behaviour.<sup>268</sup> The matter was referred to the CCMA, whereby Ms Haliwell alleged she was dismissed unfairly. In her defence she raised the right to privacy and stated that the work colleague was not

---

<sup>261</sup> Ibid

<sup>262</sup> Ibid

<sup>263</sup> Ibid

<sup>264</sup> Ibid par 64

<sup>265</sup> Ibid

<sup>266</sup> Ibid

<sup>267</sup> *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton* 2012 3 BALR 286 (CCMA)

<sup>268</sup> *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton* supra

here friend and should not have read her messages. Furthermore, she alleged that her response was as a result of provocation from her boss's actions.<sup>269</sup> The company in response thereto stated that Ms Haliwell had accepted the friend request of the work colleague and therefore he was her Facebook friend. This meant that the friend had access to her posts. Furthermore, she had many other employees as Facebook friends and the post would have been brought to the attention of many individuals and would continue to be passed on.<sup>270</sup> The arbitrator did not specifically discuss the manner in which the posts were brought to the attention of the company but found her dismissal to be fair.<sup>271</sup> The privacy and provocation defence was refuted as the CCMA found that the company had tried to resolve the situation by transferring the employee and it was her unhappiness which ignited her response and not provocation from the company. Her referral to the CCMA was found to be vexatious and frivolous and costs were awarded against her.<sup>272</sup>

### **3.11.3. Smith and Partners in Sexual Health**

In *Smith and Partners in Sexual Health*,<sup>273</sup> an employee's private Gmail e-mail account was accessed by the chief executive officer while the employee was on leave. The CEO found e-mails between the employee and ex-employees'; and the employee and other people, which discussed internal company issues. The employee was thereafter charged with bringing the employer's name into disrepute.<sup>274</sup> At her disciplinary enquiry the employee, in her defence, raised that the e-mails were accessed in violation of her right to privacy and RICA. The CCMA found that the employee had stored her e-mails on her private mail box and not on company equipment.<sup>275</sup> Thus, the initial access of the employee's account was accidental, but the subsequent access was intentional. The CCMA held that RICA applied and the intentional access contravened RICA and the employee's right to privacy.<sup>276</sup> The employer could not use the e-mails as evidence even though it contained negative

---

<sup>269</sup> Ibid

<sup>270</sup> Ibid

<sup>271</sup> Ibid

<sup>272</sup> Ibid

<sup>273</sup> *Smith and Partners in Sexual Health* 2011 32( ILJ) 1470

<sup>274</sup> *Smith and Partners in Sexual Health* supra

<sup>275</sup> (note 28 above)

<sup>276</sup> *Smith and Partners in Sexual Health* supra

comments about the employer. The employee's dismissal was held to be procedurally and substantively unfair by the CCMA.<sup>277</sup>

#### **3.11.4. National Union of Food, Beverage, Wine, Spirits and Allied Workers Union**

In *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union*<sup>278</sup> the applicant, a machine operator, was dismissed for committing acts of gross misconduct for making derogatory comments on Facebook about the employer company and the management thereof.<sup>279</sup> The applicant argued that the posts were not related to the employer but related to a reunion which he was organising as well as the union's bank account.<sup>280</sup> The commissioner stated that the employee has an obligation to promote the good name of the company. The employer also had an Information and Communication Technology General User Policy in place which reiterated that employees should be mindful of the use of the equipment.<sup>281</sup> The commissioner noted that although there is a right to freedom of speech, but there are boundaries to it. The commissioner found that the applicant made no mention of a reunion or union bank account and that all the comments were part of the same conversation which related to the employer.<sup>282</sup> He also rejected the applicant's contention that the comments were cut and pasted from other conversations. The commissioner found that the applicant could not raise the defence that his communications were private and could not be intercepted.<sup>283</sup> The applicant had no privacy settings in place and the comments were on a public domain which everyone had access to.<sup>284</sup> The applicant was also requested several times to refrain from making comments on Facebook but he continued to do so, and showed no remorse.<sup>285</sup> The applicant was found guilty of the misconduct and the dismissal was held to be substantively fair. The commissioner stated that in light of other CCMA cases, dismissal for comments made on Facebook was fair where an employee fails to restrict access to the site; where the posting brings the employer into

---

<sup>277</sup> Ibid

<sup>278</sup> *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union* 2014 (7) BALR 716 (CCMA)

<sup>279</sup> *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union* supra

<sup>280</sup> Ibid

<sup>281</sup> Ibid

<sup>282</sup> Ibid

<sup>283</sup> Ibid

<sup>284</sup> Ibid

<sup>285</sup> Ibid

disrepute; and where the posting leads to the working relationship becoming intolerable.<sup>286</sup>

### **3.11.5. Heroldt v Wills**

In *Heroldt v Wills*,<sup>287</sup> the applicant sought an order to restrain the respondent from posting comments on Facebook relating to the applicant. The posts which were made on Facebook, portrayed the applicant as an unfit father who had problems with drugs, alcohol and church. Judge Willis emphasised that our law needs development when he stated:

*“...The law has to take into account changing realities not only technology but also socially or else it will lose credibility in the eyes of people... It is imperative that the courts respond appropriately to changing times acting cautiously and with wisdom.”*<sup>288</sup>

The learned judge found the posts were not in the public interest and it was defamatory. He also refuted the defence that the posts were made for the public benefit.<sup>289</sup> The respondent was ordered to remove the offending posts on Facebook and any other posts made on any other social media site.<sup>290</sup> The judge did not grant the interdict restricting the respondent from making future comments as circumstances in the future may justify the posting.<sup>291</sup> The respondent was ordered to pay the applicant’s costs.<sup>292</sup>

### **3.11.6. H v B**

In the unreported case of *H v B*<sup>293</sup>, B uploaded negative comments on his Facebook page his neighbour, H. The comments resulted from several complaints about the animals kept on H’s property. H obtained an interdict which ordered B to remove the post from Facebook which later was retracted.<sup>294</sup> H later claimed damages for the defamation of his dignity and reputation as an estate resident and businessman. H was

---

<sup>286</sup> Ibid

<sup>287</sup> *Heroldt v Wills* supra

<sup>288</sup> Ibid par 31

<sup>289</sup> Ibid

<sup>290</sup> Ibid

<sup>291</sup> Ibid

<sup>292</sup> Ibid

<sup>293</sup> *H v B (ZAGPPHC)* unreported case no. 20595/2016 of 5 December 2016

<sup>294</sup> *H v B* supra

also forced to relocate due to threats he received.<sup>295</sup> The learned Judge Khumalo found that the statements were defamatory and awarded damages to H for R350 000,00.<sup>296</sup> This is the highest quantum of damages awarded in South Africa in relation to defamation on Facebook.<sup>297</sup>

### **3.11.7. R v L**

An interesting case that differed from the norm was the case of *R v L*,<sup>298</sup> where an employee challenged the fairness of her dismissal when her employment was terminated for gross misconduct on the basis of a post that she had written on Facebook where she alleged that she had been retrenched by a senior employee of the company after 20 years of service without any prior notification.<sup>299</sup> The employer dismissed her on the basis that the post was factually incorrect, the named employee had not been involved in the retrenchment at all and had been defamed on a public forum and the post had caused disruption in the workplace. Furthermore the name of the company had been brought into disrepute based on information that was misleading.<sup>300</sup> It was common cause that the dismissed employee removed the post from Facebook the next day. Her evidence was that she had not been aware that “*others would see her message*” and she regretted the posting.<sup>301</sup>

She stated that she had attempted to apologise to the impugned person and she was not aware of any negative consequences that had arisen as a result of it.<sup>302</sup> In analysing the evidence and arguments the commissioner stated that the central issue was whether the postings that the employee had made on Facebook constituted serious misconduct and justified dismissal.<sup>303</sup> In his ruling he stated that one had to consider the context in which the comments were made.<sup>304</sup> He then examined the retrenchment procedure that the company had undergone with her in detail. According to the commissioner the post was an expression of hurt that the applicant felt rather

---

<sup>295</sup> Ibid

<sup>296</sup> Ibid

<sup>297</sup> E, Van den Berg & C, Stark ‘The cost of a defamatory Facebook post’ (May 2017) *Without Prejudice* 50-51

<sup>298</sup> *R v L* (NBCRFI Bargaining Council) Case No. RFBC 35099 of 31 August 2015.

<sup>299</sup> *R v L* supra

<sup>300</sup> Ibid

<sup>301</sup> Ibid

<sup>302</sup> Ibid

<sup>303</sup> Ibid

<sup>304</sup> Ibid

than a broadside attack on the integrity of the respondent.<sup>305</sup> He also stated that the inaccuracy of the statement was of little or no relevance and that there was no evidence that the company had suffered any reputational damage.<sup>306</sup> He went on further to state that retrenchment is a traumatic event in the working life of any individual and support from friends and family is most needed at these times. He regarded the applicant's posting on Facebook as an attempt at receiving support and it did not matter that the company had requested that the employee keep her retrenchment confidential. The commissioner found in favour of the employee and reinstated her.<sup>307</sup>

### **3.12. CONCLUSION**

Although the afore-mentioned has not been adjudicated by our judicial system, the approach adopted in most of the cases dealt with by the CCMA have held that employees were found to have waived their right to privacy once posts have been made on a public domain. Even if actual harm was not shown, the potential harm to the employer's right to dignity and reputation of the employer is found to be more important, than the employee's right to privacy and to let off steam in public.<sup>308</sup>

Nothing said on social media forums is private, regardless of the whether it is stored on the employee's private electronic equipment. This is because the uploaded posts on social media have been described as having an eternal life.<sup>309</sup> They are open to public scrutiny through the employer, colleagues, employees, clients and customers who are able to access, share the post or store it, even if the original is deleted.<sup>310</sup> The offending posts are always traceable as it cannot be completely deleted from memory- information on the internet remains stored.<sup>311</sup> Employers can always retrieve it and use it as evidence. The courts look at the circumstances of each case and do not focus mainly on whether the comments made by the employee are justified. Employees can be disciplined for their social media misconduct even if they have

---

<sup>305</sup> *Ibid*

<sup>306</sup> *Ibid*

<sup>307</sup> (note 180 above)

<sup>308</sup> (note 6 above;66)

<sup>309</sup> *Ibid* at 2

<sup>310</sup> *Ibid* at 65-66,77

<sup>311</sup> *Ibid* 2

not expressly identified their employer.<sup>312</sup> Individuals who ‘share’; repeat or are tagged in offending posts can also be held jointly liable for another individuals defamatory posts.<sup>313</sup> Individuals can also be liable when they permit other individuals to post unlawful content on their social media profile.<sup>314</sup> The Equality Court has recently dealt with the case of Sunette Bridges who was taken to task by the South African Human Rights Commission (SAHRC) for comments that were uploaded by other users on her Facebook page. These comments were allegedly regarded as hate speech. The matter was settled with Ms Bridges agreeing to monitor her Facebook page and remove and any content which incited violence or amounts to hate speech or harassment. Furthermore, she agreed to warn other users that such comments will not be tolerated.<sup>315</sup>

The law on social media is most likely to develop in the future to keep up with technology and its effect on the employment sphere.<sup>316</sup> Employers need to be pro-active in implementing measures to safeguard their interests whilst employees need to be cautious of their behaviour. Employers must not let their personal dislikes of employees comments cloud their judgments but should only concern themselves if their business interests will be compromised by the employee’s actions.<sup>317</sup>

---

<sup>312</sup> A, Brown. ‘Employees need to know comments on Twitter are not personal’ (10/02/2015) available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/02/10/employees-need-to-know-comments-on-twitter-are-not-personal.aspx>, available from 19 July 2016.

<sup>313</sup> A, Hofmeyer & G Howard ‘South African court limits the protection of human dignity’ (October 2015) *Without Prejudice* 55

<sup>314</sup> O, Ampofo-Anti & P, Marques. ‘Taking Responsibility on Social Media’ (October 2015) *Without Prejudice* 43-44.

<sup>315</sup> Ibid

<sup>316</sup> (note 180 above)

<sup>317</sup> (note 312 above)

## CHAPTER 4: RECOMMENDATIONS

### 4.1. INTRODUCTION

Prior to the introduction of smartphones, internet access was restricted in most workplaces. Now, there are millions of people who carry the internet in their pocket and use social media platforms daily.<sup>318</sup> A recent example is Tweeting from South African courts which has become so popular as it enables members of the public to follow on-going cases of interest as if they were present.<sup>319</sup> Thus, employees need to be mindful of their words on social media platforms in and out of the workplace. A recent study conducted by two lecturers employed in the Department of Auditing at the Pretoria University examined the perceptions of Chief Audit Executives on social media policies in companies in South Africa. It was surprising to note that only 44% of the respondents in the private sector and 27% of the respondents in the public sector have social media policies in place.<sup>320</sup> This might be as a result of a misconception that social media activity is a low priority risk.<sup>321</sup> However, employees are vital components of all businesses and they have the power to easily publish negative comments on social media to millions of people around the world about their fellow employees, management, suppliers, customers, and / or even the company itself which can cause harm to the employer's economic interest, brand image and the reputation of an organisation which is recognised as its most valued asset. In a recent example, the effect of such behaviour was described as follows: *“a thought which is shared with a 100 friends who like the post, results in their 100 friends being able to see it and then a further 100 of their friends can see it. Soon a million people saw the private thought which is not so private anymore.”*<sup>322</sup>

Their opinions, whether intentional or not, can make or break a business because their actions will be measured against the business values that the public perceive to be true.<sup>323</sup> These new risks make it increasingly difficult for employers to manage and control social media use. This chapter will focus on revisiting or drafting social media policies in businesses and will advise on the manner in which a good management approach may be adopted in order to develop and implement a good social media strategy.<sup>324</sup>

---

<sup>318</sup> (note 169 above)

<sup>319</sup> (note 28 above)

<sup>320</sup> (note 1 above;69)

<sup>321</sup> Ibid at 72

<sup>322</sup> (note 164 above)

<sup>323</sup> (note 28 above)

<sup>324</sup> (note 6 above;98-99)

## **4.2. SOCIAL MEDIA STRATEGY**

The first step that employers should take is to establish whether they have a presence on social media and what the marketing or branding strategy of the employer comprises of. This should be communicated to the employees as well as the mission statement or purpose that the social media presence wishes to achieve.<sup>325</sup> Employees should also be notified of who will be responsible to manage the online social activities and they should be informed of guidelines of acceptable online behaviour.<sup>326</sup> It is important for employers to be pro-active if they do not have social media guidelines in place because it becomes problematic to establish these guidelines when problems arise.<sup>327</sup> Employers that have no social media presence are easier to regulate but a social media policy is still imperative to establish even if the employer has no social media presence or accounts.<sup>328</sup> Damage to the reputation of the employer is still foreseeable.<sup>329</sup>

Employers should amend current disciplinary codes of conduct such as Bullying and Harassment policies to include online conduct.<sup>330</sup> In the event that no social media policy exists, employers are encouraged to adopt clear, written and detailed social media policies and processes to govern their employees' online conduct and prevent reputational damage and costly legal proceedings.<sup>331</sup> Most policies which are implemented by employers are non-contractual and do not require input from the employees when amendments need to be made. If employers have contractual policies then they will have to consult with employees before any amendments are implemented.<sup>332</sup>

It is also beneficial to employers to impose such policies to ensure that if they are breached, the courts will be aware of the employer's intent of prevention.<sup>333</sup> The success of these social media policies is dependent on their practical application and implementation within

---

<sup>325</sup> Ibid at 306-307

<sup>326</sup> Ibid at 102

<sup>327</sup> Ibid at 35

<sup>328</sup> Ibid at 102

<sup>329</sup> J, Van Zyl. 'How to regulate employee social media use' (9/02/2016) available at: [http://www.phinc.co.za/NewsResources/NewsArticle.aspx?Article\\_ID=1514#.WIRSlSbRbMI](http://www.phinc.co.za/NewsResources/NewsArticle.aspx?Article_ID=1514#.WIRSlSbRbMI), accessed on 31 August 2017

<sup>330</sup> (note 12 above;9)

<sup>331</sup> (note 1 above)

<sup>332</sup> H, Dear. 'Dealing with employees bad-mouthing the organisation on Facebook' (7/08/2015) available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/08/07/dealing-with-employees-bad-mouthing-the-organisation-on-facebook.aspx>, accessed on 19 July 2016.

<sup>333</sup> (note 1 above)

companies.<sup>334</sup> The policies should be coupled with training and monitoring as it is vital to educate employees on the scope and economic impact of excessive use of social media in the workplace from a marketing and personal use approach.<sup>335</sup>

### **4.3. LAYOUT OF A SOCIAL MEDIA POLICY**

A social media policy can be said to be a business's code of conduct that sets out the limitations for acceptable behaviour online.<sup>336</sup> Such a policy should not be adapted using existing precedents from other companies but it should be unique to the employer in question and address areas of concern that are specific to that organisation.<sup>337</sup>

The first section of the policy should comprise of an overview of the purpose of the policy and the risks of using company equipment for personal use, specifically making reference to social media.<sup>338</sup> The policy should also identify who it applies to and differentiate between employees using social media for business interests and employees using social media for their personal use during and after office hours.<sup>339</sup> The policy should express that an employee could be disciplined in the event that there is a grievance or complaint received from a customer or another employee. Discipline could ensue from an observation made or by monitoring done by the employer or manager.<sup>340</sup> As is evident from the previous chapters, most employers discipline employees as a result of issues of social media misconduct reported in newspaper articles or via other media.<sup>341</sup>

Secondly there should be a section defining ambiguous and important terms that have been used in the policy such as the definition of company equipment, acceptable use and online behaviour. These definitions should be broad and should be followed by specific examples.<sup>342</sup>

Thirdly the policy can identify the available disciplinary actions which can be instituted against any employees who breach the conditions of the policy.<sup>343</sup> The disciplinary actions

---

<sup>334</sup> Ibid

<sup>335</sup> (note 1 above)

<sup>336</sup> (note 329 above)

<sup>337</sup> Ibid

<sup>338</sup> Ibid

<sup>339</sup> Ibid

<sup>340</sup> (note 12 above;25)

<sup>341</sup> Ibid

<sup>342</sup> D.R, LaPlaca & N, Winkeller. 'Legal Implications of the use of Social Media: Minimizing the Legal Risks for Employers and Employees' (2010) Vol 5 *Journal of Business & Technology Law Proxy*, 1-19.

<sup>343</sup> Ibid

should be the same actions which the employer sanctions in the event of any other type of misconduct.<sup>344</sup> The employer should hold its own internal investigation and gather their evidence, witness statements and reports to substantiate any allegation of actual or potential reputational harm.<sup>345</sup> The investigation should be carried out by an objective individual and an external consultant could be involved.<sup>346</sup> Depending on the seriousness of the misconduct, the consequence could include a verbal warning, written warning (first and second), suspension or immediate dismissal.<sup>347</sup> An alternate to suspension could also include a temporary transfer of the employee to another work station or to fulfil other duties.<sup>348</sup> Employers must be cautious in their disciplinary action and should not just dismiss an employee for the misconduct.<sup>349</sup>

Other sections of the policy could explain the monitoring process that will be adopted, and what forms of conduct would be acceptable and what would be prohibited. There should be clear guidelines in place to assist employees who are representing the employer online. The guidelines can specify what personal opinions can and cannot be disclosed online such as political opinions should not be expressed.<sup>350</sup>

Prohibited conduct should not be limited to current social media only, but should be broad enough to incorporate future uses and technologies.<sup>351</sup> The policy can make use of catch all phrases such as ‘other social and professional networking media’. Some examples of prohibited conduct are:

*“accessing or transmitting sexually explicit or discriminatory content; sending or posting politically or potentially defamatory content, confidential company or client information without authorization, using, reproducing, posting, or sending copyrighted material without authorization; sharing employee passwords and using another employee’s passwords or*

---

<sup>344</sup> (note 12 above; 25)

<sup>345</sup> M, Hardiman. ‘How employers should react to bad behaviour outside the workplace’ (30/03/2015) available at <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/03/30/how-employers-should-react-to-bad-behaviour-outside-the-workplace.aspx>, accessed on 19/07/2016.

<sup>346</sup> (note 12 above; 26)

<sup>347</sup> (note 342 above)

<sup>348</sup> (note 12 above; 25)

<sup>349</sup> (note 345 above)

<sup>350</sup> (note 12 above;9)

<sup>351</sup> (note 342 above)

*computing equipment without proper authorization, and accessing, sending, or posting unprofessional content.*<sup>352</sup>

A point to note is that the policies should not encompass a non-exhaustive list of possible offences as the methods by which employees may harm their colleagues, customers and management in future are unforeseeable.<sup>353</sup> The policy should expressly state that it will be amended from time to time. Explanatory notes can be used to accompany policies which have complicated amendments.<sup>354</sup>

#### **4.4. TRAINING**

Training on social media use and policies should include reasonable use of social media and should refer to applicable consumer protection law, employment law, advertising standards, privacy, and data protection, as well as copyright and trademark, and rules of the social media platforms being used.<sup>355</sup> This type of training is important as it makes the employees aware of the social media policy which is in effect, the disadvantages to the employer's output and it will protect the employer when any disciplinary action is instituted against an employee.<sup>356</sup> Training can incorporate a variety of media and should always be a frequently implemented within the year.<sup>357</sup> Visual aids such as posters and charts or role playing scenarios can be used to raise awareness of responsible use of social media as well as the possible risks and consequences of social media misconduct to both management and employees.<sup>358</sup> Employers can also explain how the social media policy links with other policies and procedures that are already enforced. This could be the company disciplinary code of conduct, or any bullying or harassment policy in effect.<sup>359</sup> Employers can also inform employees about security measures that they can adopt such as revisiting their social media privacy settings.<sup>360</sup>

---

<sup>352</sup> Ibid

<sup>353</sup> (note 6 above;102)

<sup>354</sup> (note 332 above)

<sup>355</sup> (note 28 above;7)

<sup>356</sup> (note 38 above)

<sup>357</sup> M, Herlle & V, Astray-Caneda. 'The impact of Social Media in the Workplace' (2012) *Proceedings of the 11th Annual College of Education & GSN Research Conference* . Florida International University, Miami . 67-73.

<sup>358</sup> Ibid

<sup>359</sup> (note 12 above)

<sup>360</sup> Ibid at 18

#### **4.5. IMPLEMENTATION**

Employers may consult with their staff prior to implementation to ensure that the policy is fair, and ensure that it is relevant to the needs of the employer.<sup>361</sup> Once confirmed, employers should communicate any amendments to all new and current employees and management via corporate handbooks, e-mail, posting on the Intranet, letters or using other methods which are readily accessible. Some employers could also ask for written acknowledgments from the staff that they have read and understood the amended policy.<sup>362</sup> In most companies, employees are reminded every time they log onto their computer about reasonable usage of the Internet. Some companies even prevent access unless the employees agree to the terms and conditions.<sup>363</sup>

The social media policy should be applied consistently.<sup>364</sup> An employer cannot expect to be protected from liability if the employer has not taken steps to enforce the policy. This is something to be wary of especially when the employer fails to discipline an employee in terms of a social media policy.<sup>365</sup>

#### **4.6. ALTERNATE OPTIONS**

As discussed in Chapter One, the amount of time employees spend at work on social media sites can be detrimental to the employer and productivity. As a result thereof, some employers choose to ban the access to the internet completely, but this is not practical in the modern workplace where businesses are encouraged to promote themselves online.<sup>366</sup> Employees also have their own PCs, tablets, laptops and other smart devices which allow the SNSs to be easily accessible.<sup>367</sup> Therefore, employers should not ban the usage of employee smartphones and other personal devices at the office but they can restrict usage and access to specific websites during certain office hours by making use of the Web security tools.<sup>368</sup> Most employers restrict usage of social media sites like Facebook during the employee's lunch break; or limit the use of smartphones during office hours for emergencies only. For example an employee's child being in an accident would be regarded as an emergency.<sup>369</sup>

---

<sup>361</sup> Ibid at 19

<sup>362</sup> (note 6 above;75-76)

<sup>363</sup> Ibid

<sup>364</sup> (note 329 above)

<sup>365</sup> (note 342 above)

<sup>366</sup> (note 6 above;3)

<sup>367</sup> (note 6 above;1-2)

<sup>368</sup> (note 169 above)

<sup>369</sup> (note 6 above;77)

Employers must ensure that their application and operating systems are up to date.<sup>370</sup> They can use firewalls to filter the inappropriate content of e-mails in and out of the office. Spam prevention can be used to block certain e-mails which contain specific words.<sup>371</sup> However, by introducing these methods employees should still be given some leeway to send / receive personal e-mails but the content will be monitored.<sup>372</sup> Antivirus software could also be used to protect the employers' server from malicious software programs such as viruses and worms.<sup>373</sup> Employers can also implement content and traffic monitoring programs to monitor the time spent on the internet by the employees and the online pages which are frequently visited.<sup>374</sup>

Employers can also include provisions in the employees' contracts of employment which state that the company electronic devices should not be used for personal use and the employer can intercept any communication made on them.<sup>375</sup> This can be introduced in terms of section 5 and 6 of RICA.<sup>376</sup> An example of such a clause which can be inserted into the contract is:

*"The company's electronic equipment and telephone system is provided to the employee for business use and for the promotion of the business of the Company. For this reason, whilst the company permits reasonable personal use of this equipment, the company reserves the right to intercept, monitor, read, filter, block and act upon any electronic communications and stored files of the employee."*<sup>377</sup>

If the terms of the contract cannot be amended to include such provisions or the contracts cannot be renewed, then the employer should implement a policy on social media usage.<sup>378</sup>

Internal auditing can assist employers to: identify the proposed risks and crisis events associated with social media; test policies, process and systems to protect the employer from reputational damage; conduct gap assessment and risk assessment of current policies and procedures to ensure that they comply with current legislation and they are aligned with the

---

<sup>370</sup> D.V, Kumar, P.S, Varma & S.S, Pabboju. 'Security Issues in Social Networking' (June 2013) Vol 13 *International Journal of Computer Science and Network Security*. 120-124.

<sup>371</sup> (note 12 above;24)

<sup>372</sup> (note 31 above;19)

<sup>373</sup> (note 12 above;24)

<sup>374</sup> (note 6 above;1)

<sup>375</sup> (note 6 above; 75-76)

<sup>376</sup> Act No. 70 of 2002

<sup>377</sup> (note 6 above;103)

<sup>378</sup> (note 6 above; 75-76)

goals of the employer; make recommendations to mitigate risks; monitor compliance with the processes implemented and assess its effectiveness and assist with data classification methods to prevent confidential information from being leaked.<sup>379</sup> Internal auditing can also assist when outsourcing social media to a third party service provider.<sup>380</sup>

#### **4.7. CONCLUSION**

As stated earlier, the careless use of social media by employees has been at the forefront in news headlines all over the world depicting classic examples of employees who did not receive adequate training on social media policies and who do not understand the implications of their actions.<sup>381</sup> Employers lack accessibility to control employees' personal smart devices and have less or almost no control over employees' behaviour on social media sites.<sup>382</sup> However, employers can still gain some advantage by implementing a good social media policy, even if they have no social media presence. Employers can also gain assistance from their HR managers to implement a social media policy to train and guide their employees on the risks and consequences of social media misuse.<sup>383</sup> This will assist in disciplinary proceedings when making a determination if the employee knew or reasonably had to know that such a policy existed at the time the misconduct occurred.<sup>384</sup> Social media policies and guidelines should be reviewed every 6-12 months to keep up with the latest in technological advancements.<sup>385</sup>

As mentioned earlier, a healthy employment relationship is based on trust and respect for either party. Employers need to ensure that they are not too restrictive in their procedures enforced and their monitoring approach against social media misconduct, so they don't incite resentment from their employees.<sup>386</sup> It has been suggested that employers will be more productive and less stressed in an environment where they are not under so much scrutiny.<sup>387</sup> There should be a balance between respecting the employee's privacy and protecting the business interests of the employer.<sup>388</sup>

---

<sup>379</sup> (note 1 above;66)

<sup>380</sup> (note 1 above;66)

<sup>381</sup> (note 180 above)

<sup>382</sup> (note 47 above)

<sup>383</sup> (note 38 above)

<sup>384</sup> Ibid

<sup>385</sup> (note 332 above)

<sup>386</sup> (note 6 above; 35)

<sup>387</sup> (note 31 above; 18)

<sup>388</sup> (note 329 above)

## CHAPTER 5: CONCLUSION

There are many benefits which have arisen from social media which affords all individuals across the globe with the opportunity to connect with each other instantly by using a public platform for either professional or personal use.<sup>389</sup> However, the risks posed by this public domain are quite serious. Employees should be cautioned that nothing on the internet is private and that any posts made on social media are open to public scrutiny, even if privacy settings are in place.<sup>390</sup> What is said online is a reflection of the employee and the company they work for.<sup>391</sup> The identity of the employer can also easily be ascertained especially when posts amount to hate speech.<sup>392</sup> Employers must also note that they have no control over who views or receives their status and newsfeeds on social media sites. Facebook, as an example, makes use of a routing algorithm called 'EdgeRank' which randomly selects which users the feeds are posted to. If the user has selected that newsfeeds should be sent to their e-mail addresses, then they will also receive a notification of this on their e-mail accounts.<sup>393</sup> Employees need to be aware that their privacy settings should be adjusted and they should be wary of the fact that by adding more contacts to their profile, they increase the risk of information being wide spread.<sup>394</sup>

The use of social media has been extensively written about in many other countries around the world, yet our law has not developed to manage and alleviate the possible damages which arise from the misuse thereof.<sup>395</sup> The majority of the recent judgments in South Africa emphasise the need to adopt preventative and protective measures against social media use, and indicates that social media litigation should be recognised as a discipline in its own right.<sup>396</sup> As technology and electronic systems advance so should the applicable labour laws and employers' workplace policies.<sup>397</sup> Employers should implement clear social media policies or guidelines on acceptable use and the consequences for breaching them.<sup>398</sup> Employees are encouraged to familiarize themselves with the dangers of social media misuse

---

<sup>389</sup> Ibid

<sup>390</sup> M, Vries & N, Moosa. 'The laws around social media' (October 2015) *Without Prejudice* 39-40

<sup>391</sup> (note 164 above)

<sup>392</sup> (note 390 above;40)

<sup>393</sup> (note 6 above;81)

<sup>394</sup> (note 4 above)

<sup>395</sup> (note 1 above)

<sup>396</sup> Ibid

<sup>397</sup> (note 47 above)

<sup>398</sup> (note 329 above)

and the consequences that ensue when they like, share or comment on other users comments.<sup>399</sup>

Recently our courts have also passed judgments granting interdicts to remove offensive posts made on social media. However, they are reluctant to grant interdicts to prevent future defamatory posts on social media as these posts may not necessarily be actionable and the aggrieved party can always seek relief in terms of an interdict or damages.<sup>400</sup> Posts made on social media should be fair comment or the truth and not defamatory or scandalous.<sup>401</sup> Employees' rights of freedom of expression, privacy and dignity need to be protected, but not this must not be at the expense of the employer's reputation and right to fair labour practices which also incorporates the right to proprietary interests.<sup>402</sup>

---

<sup>399</sup> (note 50 above;184)

<sup>400</sup> (note 313 above; 55)

<sup>401</sup> (note 250 above; 20)

<sup>402</sup> (note 128 above)

## **BIBLIOGRAPHY**

### **Secondary Sources**

Ampofo-Anti, O & Marques, P. 'Taking Responsibility on Social Media' (October 2015) *Without Prejudice* 43-44.

Atefi, J 'Facebook remarks that justify dismissal' (24/10/2014) available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2014/10/24/facebook-remarks-that-justify-dismissal.aspx>, accessed on 19 July 2016

Baker, D ... et al 'Social Networking and Its Effects on Companies and their Employers' (2011). Neumann University, Astan p5

Brown, A. 'Employees need to know comments on Twitter are not personal' (10/02/2015) available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/02/10/employees-need-to-know-comments-on-twitter-are-not-personal.aspx>, available from 19 July 2016.

Cavico, J,F.... et al 'Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations' (2013) Vol 11 *New Media and Mass Communication*, 27

Culliers, F,Q. 'The Role and Effect of Social Media in the Workplace' (2013) *Northern Kentucky Law Review* 163

Davey, R. 'Off Duty Misconduct In the Age of Social Media' *GOLegal* available at <http://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media>, accessed 19 July 2016.

Davis, S,D. 'Social Media Activity & the Workplace: Updating the status of Social Media' (2012) Vol.39 *Ohio Northern University Review*, 360.

Dear, H. 'Dealing with employees bad-mouthing the organisation on Facebook' (7/08/2015) available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/08/07/dealing-with-employees-bad-mouthing-the-organisation-on-facebook.aspx>, accessed on 19 July 2016.

Engelbrecht (Streit), L Are negative or Derogative Postings on Social Media A Valid Ground for Dismissal (unpublished LLM thesis, University of Pretoria, 2017)

GilesFiles. 'Social Media: Valid reason to dismiss' (1/11/2015) available from: <http://www.gilesfiles.co.za/dispute-resolution-3/social-media-valid-reason-to-dismiss>, accessed on 19 July 2016

- Hardiman, M. 'How employers should react to bad behaviour outside the workplace' (30/03/2015) available at <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2015/03/30/how-employers-should-react-to-bad-behaviour-outside-the-workplace.aspx>, accessed on 19/07/2016.
- Herlle, M & Astray-Caneda, V 'The impact of Social Media in the Workplace' (2012) *Proceedings of the 11th Annual College of Education & GSN Research Conference* . Florida International University, Miami . 67-73.
- Hofmeyer, A & Howard, G. 'South African court limits the protection of human dignity' (October 2015) *Without Prejudice* 55
- Kaupins, G & Park, S. 'Legal and Ethical Implications of Corporate Social Networks' (2010) Vol 23(2) *Employee Responsibilities and Rights Journal*, 1-18.
- Kumar, D.V, Varma, P.S. & Pabboju, S.S. 'Security Issues in Social Networking' (June 2013) Vol 13 *International Journal of Computer Science and Network Security*. 120-124.
- Labour Relations Agency 'Advice on Social Media and the Employment Relationship' (September 2013), available at: [https://www.lra.org.uk/images/publications/copy\\_of\\_advisoryguide\\_social\\_media\\_september\\_2013\\_\\_2\\_.pdf](https://www.lra.org.uk/images/publications/copy_of_advisoryguide_social_media_september_2013__2_.pdf), accessed on 30/08/2017
- LaPlaca, D.R. & Winkeller, N. 'Legal Implications of the use of Social Media: Minimizing the Legal Risks for Employers and Employees' (2010) Vol 5 *Journal of Business & Technology Law Proxy*, 1-19.
- MacDonald, P & Thompson, P. 'Social Media(tion) and the Reshaping of Public / Private Boundaries in Employment Relations. (6 March 2015) *International Journal of Management Reviews*, available from: <http://www.onlinelibrary.wiley.com/doi/10.1111/ijmr.12061/full>, Accessed 15 February 2016.
- Maharaj, S 'Keep your Tweets twibel free' (May 2015) *De Rebus* 29
- Manyathi, N. 'Dismissals for social media misconduct' (December 2012) *De Rebus*.
- Mtuza, S,S,K. 'Social Media –reasonable use and legal risks' (July 2016) *Without Prejudice* 18-20
- Mushwana, G & Bezuidenhout, H. 'Social media policy in South Africa' (2014) Vol 16 *Southern African Journal of Accountability and Auditing Research*, 63-74. Available at <http://www.repository.up.ac.za/handle/2263/45395>, accessed 15 February 2016.
- Neethling, J & Potgieter, J,M. *Law of Delict 7ed*. Durban: LexisNexis (2015)
- Neethling, J, Pogieter, J M & Visser, P,J. *Neethling's Law of Personality* Durban: LexisNexis (2005).

Nel, S 'Social media and employee speech: the risk of overstepping the boundaries into the firing line' (2016) Vol. 49 (2) *CILSA* 218

News24. 'Racism: Penny Sparrow fined R150K, community service for Theunissen' (10/06/2016) available at <http://city-press.news24.com/News/racism-penny-sparrow-fined-r150k-community-service-for-theunissen-20160610>, accessed 8 August 2017.

Oosthuizen, V. 'How far is too far for employees on social media?' (22 October 2015) available at <http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media>, accessed 15 February 2016.

Osman, L 'Social Media: a menace or benefit in the workplace?' (2013) *SA Pharmaceutical Journal* available at: <http://www.sapj.co.za/index.php/SAPJ/article/view/1496>, accessed on 15 February 2016.

Padayachee, C. *Employee's Right to Privacy versus the Employer's Right to Monitor Electronic Communication in the Workplace*. (unpublished LLM thesis, University of KwaZulu-Natal, 2015)

Potgieter, M. *Social Media and Employment Law*. Cape Town: Juta, (2014).

Roos, A. 'Privacy In The Facebook Era: A South African Legal Perspective' (2012) *SALJ* 375 – 402.

Rubenstein, A 'NLRB Takes Down Costco Policy in 1<sup>st</sup> Social Media Ruling' (September 2012) available at: <http://www.law360.com/articles/37927/nlrb-takes-down-costco-policy-in-1st-social-media-ruling>, accessed on 30 August 2017.

Strachan, W. 'No such thing as 'private' on social media' available at <http://www.labourguide.co.za/most-recent/2173-no-such-ting-as-private-on-social-media>, accessed on 15 February 2016.

Subramanien, D &Whitear-Nel, N. 'A fresh perspective on South African law relating to the risks posed to employers when employees abuse the internet' (2013) Vol. 37 *South African Journal of Labour Relations*, 11.

The Human Rights Act of 1998. Available at: <http://www.equalityhumanrights.com/en/human-rights/human-rights-act>, accessed on 8 August 2017

Thuynsma, L and, Latib, B,O. 'Infringement of Privacy' (April 2013) *Without Prejudice* 94-96.

Van den Berg, E & Stark, C. 'The cost of a defamatory Facebook post' (May 2017) *Without Prejudice* 50-51

Van Zyl, J. 'How to regulate employee social media use' (9/02/2016) available at: <http://www.phinc.co.za/NewsResources/NewsArticle.aspx?Article ID=1514#.WiRSlsbRbMl>, accessed on 31 August 2017

Vries, M & Moosa, N. 'The laws around social media' (October 2015) *Without Prejudice* 39-40

Wicks, J. "'It's just the facts" – Penny Sparrow breaks her silence' (4/01/2016) available at <http://www.news24.com/SouthAfrica/News/its-just-the-facts-penny-sparrow-breaks-her-silence-20160104>, accessed 8 August 2017.

### **Table of Cases**

*American Medical Response of Connecticut, Inc.* No. 34-CA-12576 (NLRB)

*Bernstein v Bester* No. 1996 (2) SA 751 (CC)

*Blakey v Continental Airlines Inc.* (N.J. 2000).751 A.2d 538

*Costco Wholesale Corp* No. 34-CA-012421 (NLRB)

*Crisp v Apple Retail (UK) Ltd* ET/2330554/2011

*Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Devine World Ministries* 2012 (3) All SA 322 (GSJ)

*Feldman (Pty) Ltd v Mall* 1945 AD 733

*Grobler v Naspers Bpk* 2001 (4) SA 938 (LC)

*H v B (ZAGPPHC)* unreported case no. 20595/2016 of 5 December 2016

*Heroldt v Wills* 2013 (2) SA 530 (GSJ)

*Isparta v Richter and Another* 2013 (6) SA 529 (GNP)

*Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker* No. 13-CA-046452 (NLRB)

*Khumalo and Others v Holomisa* 2002 (8) BCLR 771 (CC)

*Minister of Police v Rabie* 1986 1 SA 117 (A)

*National Media v Bogoshi* 1998 (4) SA 1995 (SCA)

*National Union of Food, Beverage, Wine, Spirits and Allied Workers Union* 2014 (7) BALR 716 (CCMA)

*Otomewo v Carphone Warehouse Ltd* ET 2330554/2011

*R v L* (NBCRFI Bargaining Council) Case No.RFBC 35099 of 31 August 2015.

*Rain City Contractors Inc.* No-19-CA-31580 (NLRB)

*SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton* 2012 3 BALR 286 (CCMA)

*Sedick v Another v Krisray (Pty) Ltd* 2011 8 BALR 879 CCMA

*Smith and Partners in Sexual Health* 2011 32 (ILJ) 1470

*Stephens v Halfords plc* ET/1700796/10

*Teggart v TeleTech UK Ltd* [2012] NIIT/00704/11

*Trasler v B & Q Ltd* ET/1200504/2012

*Weeks v Everything Everywhere Ltd* ET/2503016/2012

*Whitham v Club 24 t/a Ventura* ET/18/0462/10

### **Table of Statutes**

Constitution of the Republic of South Africa Act No. 108 of 1996

The Basic Conditions of Employment Act 75 of 1997

The Electronic Communications and Transactions Act No. 25 of 2002

The Employment Equity Act No. 55 of 1998

The Labour Relations Act No. 66 of 1995

The Promotion of Access to Information Act No. 2 of 2000

The Protection of Personal Information Act No. 4 of 2013

The Regulation of Interception of Communications and Provision of Communication-related Information Act No. 70 of 2002