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SOCIAL MEDIA DISMISSAL: SWORD OR SHIELD?

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DECLARATION REGARDING ORIGINALITY

I, **Sipho Prince Dube**, declare that:

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DEDICATION

This dissertation is dedicated to my late father and my late uncles. A special dedication goes to my three beautiful kids who always gave me hard time when doing this dissertation by demanding me to spend time with them.

APPRECIATION

I would like to thank my beautiful fiancée for all the support she has given me throughout this dissertation. She understood that I needed to sacrifice time to complete this work and to stay focused all the time. I would also like to thank my mother and family who supported me when I was young until I became the person I am today.

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ABBREVIATIONS

LRA- Labour Relations Act

BCEA- Basic Conditions of Employment Act

CCMA-Commission for Conciliation Mediation and Arbitration

Code-Code of Good Practice: Dismissal

CC- Close Corporation

ECHR-European Convention on Human Rights

ILO- International Labour Organisation

UK-United Kingdom

SAPS- South African Police Service

PEPUDA- Promotion of Equality and Prevention of Unfair Discrimination Act

POPIA- Protection of Personal Information Act

RICA- Regal action of Interception of Communications and Provision Communication-related Information Act

ABSTRACT

The use of social media by employees has increased rapidly and has been met with different results. In the age of the internet, people share their thoughts and opinion on social media without thinking about the repercussions the post might have on the public in general and the workplace in particular. It is undeniable that employees have a constitutional right to privacy and freedom of expression but those rights are not absolute. This dissertation discusses the balance between the employee's right to privacy and freedom of expression against an employer's right to good name. It discusses the current legal position on social media and the procedure an employer must follow when disciplining an employee for social media misconduct. The dissertation also looks at the position of social media in the United Kingdom and attempts to draw lessons.

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CHAPTER ONE

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 INTRODUCTION

This dissertation explores the relationship between the employers' right to discipline employees for the misuse of social media and the employees' right to freedom of expression and privacy. The contention is that employees have the right to freely express themselves using social media. While exercising this right, employees must ensure that the image and integrity of the employer is not compromised. Put differently, employees must at all times act in such a way that the image of the employer is not tarnished. The question is how does one balance the employers' right to discipline based on social media misuse against the employees' right to privacy and freedom of expression? At what stage does such action become misconduct warranting dismissal? It is on this basis that this study examines the interplay between the employers' right to discipline employees for the use of social media against the employees' rights enshrined in the Constitution[1] and labour law.

1.2 BACKGROUND OF THE STUDY

1.2.1 Introduction

Social media has changed the way of communication in modern society and has had a great impact in the workplace. Its advancement has introduced effective employment advertisement and simplified communications in the workplace.[2] Willis J in *H v W*[3] stated that "Social media have created tensions between the right to freedom of speech[4] and right to private life[5] in a manner that could not have been anticipated by the Roman Emperor Justinian, the learned Dutch legal writers of the seventeenth century or founders of our Constitution''.[6] Social media usage has grown rapidly internationally, however in South Africa social media is relatively new.[7]

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[1]Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).
[2]FQ Cilliers '*The role and effect of social media in the workplace',* 2014, available at https://www.researchgate.net/publication 265420732 accessed on 28 February 2019.
[3]*H v W* [2013] 2 All SA 218 (GSJ), Para7.
[4]Section 16 of the Constitution.
[5]Section 14 of the Constitution.
[6]*Dagane v SAPS* (JR2219-14).
[7]N Manyathi 'Dismissal for social media misconduct' (2012) *De Rebus*, 80.

Court decisions have already confirmed the fairness of dismissing employees who use social media to make derogatory statements about fellow employees or their employer.[8] However, the use of social media by employees also brings about the question of whether or not an employer can conveniently discipline and even dismiss an employee for uploading unbecoming comments on social media, even if the remarks are unconnected to their employment.[9]

The conduct of an employee outside of their working hours normally falls outside the realm of his or her working relations with the employer and the employer is therefore not entitled to discipline the employee. However, where the employer can show a connection linking the conduct of the employee to the employer's business, the employer reserves the right to take disciplinary action against the employee.[10]

Thornthwaite[11] argues that through social media guidelines, companies are expanding their inherent control over their employees' private lives, thereby diminishing their freedom of speech outside of their employment. He further argues that the re-occurrence of employer supervision of employees' personal spheres resembles an ancient "traditional master-servant relationship, but without concomitant reciprocity from employers".[12]

An employer seeking to dismiss employees who express their thoughts on social media about their employer or their working conditions will need to establish whether any damage has been done to their brand by the comments and ensure that their response to the employee's conduct is proportionate.[13] In *Cantamessa v Edcon Group,*[14] the CCMA dealt with the issue of the social media conduct of employees outside of working hours and the necessity for a concise internet policy which clearly outlines the employer's position on the activities of its employees when using social media.

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[8]*National Union of Metalworkers of South Africa obo Zulu v GUD Holdings (Pty) Ltd* (2015) 24 DRC.
[9]S Singh 'Think twice before you tweet', 2015, available at *https://www.labourguide.co.za/latest-news-1/2214-think-twice-before-you-tweet* accessed on 8 July 2019.
[10]R Davey 'Off duty misconduct in the age of social media', 2016, available at https://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media/ accessed on 18 July 2019.
[11]L Thornthwaite 'Chilling times, social media policies, labour law and employment relations' (2016) *Asia Pacific Journal of Human Resources*.
[12]Ibid.
[13]V Siow *'The impact of social media in the workplace: an employer's perspective',* (2013) *Communications Law Bulletin 32*(4).
[14] [2017] 4 BALR 359 (CCMA).

This dissertation will look at the interplay between the employers' right to discipline employees who upload unacceptable statements on social platforms against the employees' right to freedom of expression and privacy as entrenched in the Constitution and other legislation. Consequently, the researcher will examine the approach adopted by the courts to interpret legislation, the risks inherent in social media usage and how other countries have developed jurisprudence around social media in employment law.

1.2.2 Legislative and policy framework relevant to the study

The conduct of employees when using social media, whether at work or outside, has an impact from a Constitutional perspective with regard to the chilling effect imposed by social media, not only on the right to privacy but on freedom of expression.[15] However, the right to freedom of expression and the right to privacy are subject to the limitations prescribed by the Constitution.[16]

The Constitution states that "everyone has the right not to have the privacy of their communications impinged upon".[17] The Constitutional Court held in *Gaertner & Others v Minister of Finance & Others*[18] that "as a person move into communal relations and activities such as business and social interaction, the scope of personal space shrinks".[19] This clearly illustrates that the rights in the Constitution are not unqualified and each right is subject to limitation, including the right to privacy.

The right to freedom of expression is no exception, as was pronounced by the Constitutional Court in *Le Roux and Others v Dey*[20] where O' Regan J said "with us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression... What is clear though and must be stated is that freedom of expression does not enjoy superior status in our law".[21]

[15]Ibid, para 4.
[16]Section 36 of the Constitution.
[17]Section 14(d) of the Constitution.
[18]2014(1) BCLR 38(CC).
[19] *Gaertner* case (supra), para 49.
[20]2011(3) SA 274 (CC).
[21]*Le Roux* case (supra), para 45.

The Constitution guarantees that everyone has a right to fair labour practices and provides for the enactment of legislation to promote collective bargaining.[22] The Labour Relations Act (LRA) [23] was enacted to ensure fairness between the employer and employee and to regulate collective bargaining.

The LRA contains the Code of Good Practice on Dismissals[24] which sets out the procedure an employer should follow when dismissing an employee. Essential is that an employee must have violated a standard governing conduct in the workspace in order to be disciplined. An inevitable question which arises in cases of misconduct for social media use is whether the statement posted by the employee constitutes a legitimate ground for their dismissal.

The employer is required to establish the impact of the statement posted by the employee on the reputation of the company, and whether such statement can bring disharmony in the workplace.[25] The employer needs to know how to legally intercept[26] the derogatory remarks made by the employee on social media, for the employer to present that statement as admissible evidence against the employee concerned.

This dissertation will comprehensively analyse the risks that the employer may face when employees commit social networks misbehaviour and the methods available to an employer to minimise the risk associated with the social media usage by its workforce. Relevant cases supporting the study to show the repercussions for posting unbefitting comments on social websites will be analysed. In addition, a comparative overview of social media in the United Kingdom will be undertaken as English law has had an influence on South African law and further, English law is more developed in social media law and will therefore be of benefit to South African law.[27] The nature of South Africa's legal system necessitates a comparative legal approach to develop its law. [28]Section 39 (1) of the Constitution[29] requires the courts to consider international law when interpreting the Bill of Rights and it is against this background that a

[22] Section 23 of the Constitution.
[23]The Labour Relations Act No. 66 of 1995.
[24]Schedule 8 of Code of Good Practice: Dismissal.
[25]*Custance v SA Local Government Bargaining Council and others* [2003] ZALC 26, para.28.
[26]Section 6 of the Regulation of Interception of Communications and Provision of Communication-Related Act No. 70 of 2002.
[27]*Cantamessa* case (supra), para 57.
[28] Rautenbach C, The South African Constitutional Court's use of foreign precedent in matters of religion: without fear or favour? PER Vol 18 n.5 Potchesfstroom 2015.
[29] Section 39 of the Constitution of the Republic of South Africa,1996.

comparative analysis with UK is made. The CCMA decision in *Cantamessa v Edcon group*[30] relies heavily on the UK judgment in *Smith v Trafford Housing Trust.*[31] This necessitated the researcher to examine the differences and similarities between the two countries.

1.3 PROBLEM STATEMENT

Social media represents an improved technological development in human communication in modern times. Social media remains an essential part of our lives, including the workplace.[32] Judge Chetty in *Braithwaite* v *McKenzie* stated, "in today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet".[33] Chetty continued to say, "the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to reputational integrity of individuals".[34]

Employees have a misconception that freedom of expression entitles them to make statements with impunity.[35] The Labour Court in *Juda Phoyongo Dagane* v *South African Police Services*[36] confirmed the existence of social media misconduct and pronouncements of racial statements are deemed as gross misconduct and may lead to a dismissal.

The Labour Court made it clear that an employer can dismiss his or her employees for misconduct emanating from the usage of social media, regardless of whether the conduct is regulated by policy or not.

The case of *Cantamessa v Edcon Group,*[37] however, provides a different perspective on whether or not an employer can discipline an employee for misconduct not regulated by policy in the place of work. The arbitrator found the reference by the employee that "government are monkeys" did not constitute racism. South Africa's

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[30] Cantamessa op cit note 27.
[31] (2012) EWHC 3221 (Ch) para 10.2.
[32] Cowan-Harper attorneys '*Social media in the context of employment law*', 2018, available at https://www.labourguide.co.za/.../1375-social-media-handout-cowen-harper-attorneys accessed on 29 July 2019.
[33] *Braithwaite v Mckenzie 2015 (1) SA 270 (KZP).*
[34] *Braithwaite* case (supra) para 28.
[35] S Bismilla '*Be careful of what you say online, your employer can fire you for contents you post on social media*', 2018, available at https://citybuzz.co.za/83179/be-careful-of-what-you-say-online-your-employer-can-fire-you-for-contents-you-post-on-social-media/, accessed on 29 July 2019.
[36] (JR2219-14).
[37] 2017(4) BALR 359 (CCMA).

historical and social context ought to have been considered, especially in light of the negative publicity that often-plagued companies when employees made racist or seemingly racist remarks on social media.[38] An analysis of whether the post was racist and the impact it had on the workplace would have been helpful in a determination of whether the dismissal was fair or not.[39]

From the above discussion it is clear that the stage at which comments arising from social media necessitate dismissal is still unsettled in South African law. This research will thus evaluate whether misconduct arising from the use of social media must be regulated by a policy to justify dismissal.

1.4 FOCUS OF THE STUDY

The study will focus on whether employees' rights to privacy and freedom of expression ought to be curtailed to prevent social media exploitation. A further focus is to determine the stage at which the conduct of an employee constitutes grounds for dismissal. This study evaluates the procedure an employer should follow when disciplining employees for uploading disparaging statements on social media.

1.5 OBJECTIVES OF THE STUDY

The objectives of the study are to:

1.5.1 Determine whether an employer can dismiss an employee for posting derogatory comments on social media.

1.5.2 Determine the current legal framework on social media usage in the workplace.

1.5.3 Analyse how have the courts interpreted the legislation.

1.5.4 Establish the challenges with the current jurisprudence on social media in South Africa.

1.5.5 Determine how has the United Kingdom addressed social media-related dismissals in the workplace.

1.6 RESEARCH QUESTIONS

This dissertation seeks to address the following research questions:

1.6.1 Can an employer dismiss an employee for posting derogatory comments on social media?

[38] R Davey LD Jansen '*Social media in the workplace'* (2017), 252.
[39] Ibid.

1.6.2 What is the current legal framework on social media usage in the workplace?

1.6.3 How have the courts interpreted the legislation?

1.6.4 What are the challenges with the current jurisprudence on social media in South Africa?

1.6.5 How has the United Kingdom addressed social media-related dismissals in the workplace?

1.7 RESEARCH METHODOLOGY

The study employs doctrinal research methodology to answer the research objectives. In so doing books, journal articles, legislation and case law are examined.

This research aims to provide an analytical overview of the implications of posting on social media in a derogatory manner, whether on or off-duty. The researcher also introduces a comparative survey, by considering legislative provisions and their implementation in the United Kingdom. This is because commissioners tend to rely on the decisions of the United Kingdoms' social media cases[40] and further, South African law is premised on English law.

1.8 ETHICAL CONSIDERATION

The study employs desktop research. An ethical clearance form was completed and submitted, then an exemption was granted by the Higher Degrees' Committee from the University of KwaZulu-Natal.

1.9 SIGNIFICANCE OF THE STUDY

The significance of this study is that it will provide solutions as to when an employee's right to freedom of expression and privacy can be exercised without curtailing an employer's right to freedom to manage his/her business. Further to this, the study will discuss in detail the dismissal laws applicable to social media misconduct and make recommendations as to how the law should be applied.

[40] *Smith v Trafford Housing Trust* [2012] EWHC 3221 para.57 [2013] IRLR 86.

Any employer faced with an inappropriate comment on a social media platform must consider the effect of the comment on the reputation of the company and should handle the situation in the same way as any misconduct in the workplace.[41]

1.10 STRUCTURE OF THE DISSERTATION

This dissertation consists of five chapters. The first chapter deals with the introduction to the study and outlines the background of the study, the problem statement, the focus of the study, the objectives and aim of the study, the research methodology and the significance of the study. Chapter two examines the legislative and policy frameworks regulating the study. Chapter three comprises of a review of the current literature, and other scholarly works. A comparative analysis of the United Kingdom's law on the subject is conducted in chapter four. Lastly, chapter five makes recommendations for best practice and this chapter concludes the entire dissertation.

1.11 CONCLUSION

The usage of social forums by workers has changed the way in which the normal employer-employee relationship operates. This study will explore the extent to which an employer can subject employees to a disciplinary process for posting derogatory remarks. Further to this, the study will examine the laws applicable to social media by exploring the existing literature surrounding this area of law, and introduce a comparative survey of case law from the United Kingdom. A doctrinal research methodology will be employed to address the research objectives and to answer the research questions. The next chapter is a review of legislation and policy framework applicable to social media misconduct.

[41]M Scutt 'Misuse of social media by employees' https:www.infolaw.co.uk/newsletter/2013/09/misuse-of-social-media-by-employees/, (2013) accessed on 22 May 2019.

CHAPTER TWO

LEGISLATIVE AND POLICY FRAMEWORK

2.1 INTRODUCTION

South Africa does not have specific legislation which regulates this area of law and the jurisprudence pertaining to social media is underdeveloped.[42] The recent changes to the Uniform Rules of Court have allowed parties in court to utilise social media platforms to exchange pleadings more easily.[43] *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD)*[44] is the first recent case where a notice of set down and pre-trial directions was furnished to the respondent through a message on Facebook with the approval of the court.

Though the judgement in the case above "introduced a new perspective as far the servicing of documents is concerned, the need to develop and better transform the judicial system to align itself with the evolving social media platforms for a better understanding and advanced knowledge in this area of law is important".[45] It is vitally important to contemplate the relevant constitutional rights as social media platforms are utilised by employees and a vacuum still exists in this area of law.[46] This chapter will analyse legislation such as the Constitution, the Labour Relations Act[47], the Protection of Personal Information Act,[48] the Promotion of Equality and Prevention of Unfair Discrimination Act[49], the Hate Speech Bill, the Films and Publications Amendment Act[50] and the Regulation of Interception of Communications and Provision of Communication-related Information Act.[51]

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[42] *S* Chandramohan 'An examination of the employee's conduct on social media and the effect on the employment relationship' Unpublished thesis UKZN (2017).
[43]K Hawkey 'Service of court process by social media' 2012 available at *www.derebus.org.za/service-court-process-social-media/,* accessed on 27 August 2019.
[44](Unreported case no 6846/2006, 3-8-2012).
[45] NG Wood 'Freedom of expression of learners at South African public schools' (2001) SAJE 142-146.
[46]BLC Attorneys 'Has the time come for social media specific legislation in South Africa' 2019 available at *https://www.blcattorneys.co.za/articles/has-time-come-for-social-media-specific-legislation-in-south-africa/*, accessed on 23 August 2019.
[47]Act 66 of 1995.
[48]Act 4 of 2013.
[49]Act 4 of 2000.
[50]Act 11 of 2019.
[51]Act 70 of 2002.

2.2 THE CONSTITUTION

Section 2 of the Constitution reaffirms the supremacy of the Constitution and provides that "any law or conduct inconsistent with it is invalid".[52] Section 7(2) of the Constitution provides that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights".[53] When interpreting any legislation, and when "developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".[54]The author will discuss the impact of the applicable legislation on social media and the impact it has on the constitutional rights of both the employer and employee.

2.3 THE RIGHT TO PRIVACY

2.3.1 The Constitutional right

"Section 14 of the Constitution provides that everyone has the right to privacy, which includes the right not to have their homes searched and the right not to have their private communications infringed" upon.[55]

The scope of protection of the right to privacy will be determined on an individual basis because the right to privacy is not unqualified.[56] There has been much controversy about whether employees are entitled to a reasonable expectation of privacy when using social media in the workplace.[57]

Generally speaking, the more a person interacts with the world, the more attenuated his or her rights to privacy will be. Conversely, the closer the invasion of privacy is to the inner sanctum, the greater the protection the right will be afforded.[58]

The right to privacy is relevant when it comes to social media misconduct as employees tend to raise this right as a defence when disciplined for social media misbehaviour by the employer. This right must be weighed up against the right of the employer to a good name and reputation. The question of whether an employer is

[52]Section 2 of the Constitution.
[53]Section 7(2) of the Constitution.
[54]Section 39(2) of the Constitution.
[55]Section 14 of the Constitution.
[56] Davey Jansen op cite note 38 page 6.
[57]T Pistorius ,"Monitoring interception and big boss in the workplace: is the devil in the details?" (2009)*Potchesfstroom Electronic Law Journal* 1.
[58] M Virginia ' I lost my job over a Facebook post- was that fair? (2018) International Journal of Comparative Labour Law and Industrial Relations.

entitled to dismiss an employee where he or she makes derogatory comments on social media in a private space and where that comment is limited to fewer people was answered by the Labour Court in *Edcon Limited v Cantamessa and Others.*[59] This case pertains to a review to the Labour Court where the Commissioner from the CCMA issued an award in favour of the employee who made racist remarks on social media while on leave and using her own devices[60]. The employer took the matter on review and the court held that there was a link between the employee's conduct and the employment relationship and that the employer is not prohibited from disciplining employees for social media misconduct if such misconduct puts the employers' reputation at risk.[61]

Therefore, where an employee makes a derogatory comment on social media regardless of whether such comment made a direct reference to the employer or not, the employer is entitled to discipline the employee concerned if such comments has the potential to bring the name of the employer into disrepute.[62] The moment an employee fails to restrict access to his or her social media account, he or she has waived the right to privacy and there would be no protection from the law because the derogatory comments would be in the public domain.[63]

The Constitutional Court in *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others*[64] confirmed that the right to privacy will come into play whenever:

a. A person has the capacity to elect what information must be made public;
b. The person's presumption that his or her right to privacy will be respected is reasonable in the circumstances.

An alleged transgression of the right to privacy will be stronger when the information in question is inaccessible or limited to a select number of people, as compared to such a claim when the information is readily accessible by anyone in the public domain.[65] It can be argued that despite the two cases discussed above confirming that

[59] (JR 30/17) [2019] ZALCJHB273;(2020) 41 ILJ 195 (LC).
[60] Ibid at para 2.
[61] Ibid at para 11.1.3.
[62] Sedick v Krisray (Pty) Ltd [2011] 8 BALR 879 (CCMA), para 39.
[63] Ibid at para 12.
[64] 2000(10) BCLR 1079 para 16.
[65] L Thornthwaite op cite note 11 page 2.

the employer is entitled to dismiss an employee for posting derogatory comments on social media, an employer is still required to comply with the substantive and procedural requirements before dismissing an employee. In the case of *Smith v Partners in Sexual Heath (Non-Profit)*[66], the employee successfully raised her right to privacy as a defence after her employer accessed the employee's private email account.[67] The Commissioner held that the employer had acquired the evidence unlawfully and had breached the employee's right to privacy.[68] As suggested by Roos, details divulged to 'friends only' shall be classified as confidential and any invasion thereof will amount to a breach of the right to privacy.[69] The courts have accepted that "employees have a right to privacy in terms of which they are ordinarily protected from having their private communications monitored, intercepted or accessed by their employer and from being digitally recorded by their employer without their knowledge and consent".[70] "The test to determine whether there is a legitimate expectation of privacy as set out in *Bernstein and others v Bester NO and others*, consists of two questions, namely whether the person has a subjective right to privacy and whether the public has accepted such an expectation as objectively reasonable".[71]

Commissioner Bennet *in Smith v Partners in Sexual Health (Non-profit)*[72] confirmed that the nature of social media sites permits the viewing of conversations by third parties without getting permission to do so and that precludes an employee from having a reasonable expectation of privacy. When an employee decides to upload a statement on social media that is viewable by everyone, the employer can contend that the employee has relinquished his or her right to privacy.[73] When an employer has adopted an internet policy that allows the employer to have access to its computing devices, the legitimate expectation of privacy will be restricted by the employer's policy and the employee will not enjoy any protection in this regard.[74]

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66 Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ (CCMA).
67 Ibid.
68 Ibid at para 46.
69 A Roos , 'Privacy in the Facebook era: A South African legal perspective' (2012) South African Law Journal..
70 *Reddy v University of Natal* [1998] 1 BLLR 29 (LAC).
71 *Bernstein v Bester* 1996 ZACC 2 (27 March 1996) Para 75.
72 *Smith v Partners in Sexual Health (Non-profit)* 2011 32 ILJ (CCMA) Para 51.
73 L Engelbrecht '*Are negative or derogative postings on social media a valid ground for dismissal?*' (Unpublished thesis, Pretoria 2017)15.
74 DR LaPlace N Winkler ' Legal Implications of the use of social media: minimizing the legal risks for employers and employees' (2010) 5 Journal of Business & Technology Law Proxy1..

2.3.2 The Protection of Personal Information Act

The Protection of Personal Information Act[75] (POPIA) is understood to be a codification of the common law and constitutional principles relating to the right to privacy.[76] The Constitution already ensures that its citizens have the right to privacy; however, POPIA further protects a person's right to personal privacy and governs how personal information is collected and processed by organisations.[77] The employee's social media profile is protected by POPIA and the employer would need permission from the employee to access it unless the settings are not restricted by the employee. Further to this, the employer can access an employee's social media account where an employer has a social media policy that entitles an employer to monitor social media usage in the workplace to prevent abuse by employees[78]. POPIA entrusts the employer with the responsibility for lawful information processing[79] and provides that an employer is solely responsible for breaching the Act.[80] Despite this section providing protection to employee's social media usage, an employer is entitled to access an employee's information on social media where the comments of such an employee has a potential of putting the reputation of the employer at risk and an employer is required to maintain the efficacy of his or her business.[81] Section 20 of POPIA provides that "anyone processing personal information on behalf of a responsible party must process such information only with the knowledge or authorisation of the responsible party and treat personal information which comes to their knowledge as confidential and must not disclose it unless required by law".[82] Any publication of an employee's social media information by an employer to a third party without getting permission from an employee will be in breach of this Act and an employee may institute civil proceedings against the employer.

[75]Act 4 of 2013.
[76]Davey Jansen op cit note 51 at page 11.
[77] 'The impact of POPI on social media in South Africa' (2018) available at *https://consiliumlegal.co.za/wp-content/uploads/2018/08/The-impact-of-POPI-on-social-media.pdf*, accessed on 10 October 2019.
[78] Ibid.
[79]Section 8 of POPIA.
[80]Section 99(1) of POPIA.
[81] Section 4 of POPIA.
[82]Section 20 *(a) to (b)* of POPIA.

Millard and Bascerano[83] argue that the employer is the accounting party to whom POPIA refers, even though the Act does not expressly state so because in normal circumstances it's the employer who is responsible for handling of personal information. An employee may sue an employer if an employee's private social media information is made available to the public by an employer without consent or if such information was unlawfully obtained.[84]Therefore, where an employee's social media account is restricted and an employer accesses information, an employee can challenge the evidence obtained by the employer and that social media dismissal can be found to be unfair. The CCMA made a distinction between personal information which is made publicly available and that which is restricted.[85] The commissioner held in *Sedick* that "two Facebook users who have a mutual friend, but who are not friends with each other, may gain access to posts made by each other when the mutual friend makes a comment on a post made by either of them".[86] The finding by the CCMA shows that an employee cannot rely on POPIA when he or she has not restricted his or her Facebook privacy.

2.3.3 The Regulation of Interception of Communications and Provision of Communication-Related Information Act

The purpose of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[87] (RICA) is to regulate the interception of direct oral communication and indirect communication made via telephone, voicemail, email and the internet. While employees have historically sought to protect the privacy of their communications in terms of the common law and the Constitution, they may now rely on the provisions of RICA as well.[88] This Act is relevant to social media usage as social media is internet based and any interception of communication in the workplace by an employer must comply with the regulations of RICA.

Section 2 of RICA provides that "no person may intentionally intercept or attempt to intercept, any communication in the course of its occurrence or transmission". This section gives effect to the right to privacy because it forbids the interception of

[83]D Millard EG Bascerano '*Employers' statutory vicarious liability in terms of the protection of personal information Act'* (2016) *Potchesfstroom Electronic Law Journal* 19.
[84] Ibid at note 76.
[85]*Sedick v Fredericks* para 52.
[86]Ibid para 20.
[87]Act 70 of 2002.
[88]Davey Jansen op cit note 76 at page 13..
[235] Act 70 of 2002.

communication unless the interception is done in terms of the following exceptions (only those exceptions that are relevant to social media have been set out below):

a. A party to the communication in terms of section 4 of RICA.
b. The consent of a party to the communication in terms of section 5 of RICA.
c. Business exception in terms of section 6 of RICA.

Section 4 of RICA makes provision for a party to the communication to intercept. A party to the communication includes a person who might be listening but not actively participating in the communication.[89] It is evident from Section 4 of RICA that parties to the communication may record or intercept a communication with or without consent provided it is not done for the purposes of committing a crime. It can be argued that an employer is a party to communication for social media purposes as an ultimate custodian of electronic devices and can have access to derogatory comments posted by an employee especially when an employee is on duty[90].

Section 5 of RICA requires an employer to get prior written permission because an employer would be deemed as a third party and any evidence collected by an employer without prior written consent would be unlawful. As a general rule where an employee makes derogatory comments on social media in a restricted account and an employer gains access without permission from parties to the communication, such evidence will be unconstitutionally obtained and cannot be used as evidence[91]. However, the exception to this rule would be that the employer intercepted the communication to prevent reputational damage to the business that occurs as a result of derogatory comments by an employee[92]. Lastly, an employer can evade this prior consent requirement by including a clause in a contract of employment which allows the employer to intercept communication.

Section 6(1) of RICA provides that "any person may, in the course of the carrying on of any business, intercept any indirect communication which otherwise takes place in the course of the carrying on of that business, in the course of its transmission over a telecommunication system". When an employee alleges that his or her employer has infringed the provisions of RICA and the employer is unable to prove that the employee

[89] Section1 of RICA.
[90] T Pistorius op cit note 57.
[91] Ibid.
[92] Ibid.

consented to the interception, the employer will rely on section 6 of RICA for justification of the interception.[93] The justification under section 6 of RICA is subject to four conditions that require the interception to be done: with the consent of the telecommunication system controller, to verify existing information, to spot unlicensed operation of the communication facility and to establish the successful operation of the telecommunication system.[94] Lastly, the employer is required to ensure that the telecommunication system is strictly used wholly or partly in connection with the operation of the business and the system controller must alert all users beforehand that transmission of telecommunications will be intercepted.[95]

Pistorius argues that section 6 of RICA is a tremendously intricate provision in that the protection offered by this section would only apply to clients of a business.[96] He further argues that any private use by employees would not fall within the parameters of section 6(1) in that indirect communication in the course of being transmitted would not facilitate the entering into a transaction in the course of the business and would not otherwise relate to the business[97]. Therefore, when an employer relies on section 6 of RICA to intercept communication, an employee can argue that an employer has unlawfully intercepted his or her communication where an employee makes derogatory comments on social media when off-duty because such posting of derogatory comments would not have occurred within the course of business.

In *Smith v Partners in Sexual Health (Non-profit)*[98] the employee's Gmail emails were retrieved by the employer in violation of RICA. The CCMA found that the planned entry over and over again was in breach of RICA and the evidence acquired through the breach was unconstitutional. The dismissal was thus found to be unfair by the commissioner[99]. Therefore, an employer cannot use unlawfully obtained evidence without the knowledge or consent from an employee to affect a dismissal.

2.4 THE RIGHT TO FREEDOM OF EXPRESSION

2.4.1 The Constitutional right

[93]L Thornthwaite op cite note 65 .
[94]Section *6(2) (i) (aa) to (cc)* of RICA.
[95]Section 6(2) of RICA.
[96] T Pistorius op cit note 90.
[97] Ibid.
[98](2011) 32 ILJ 1470 (CCMA).
[99] Ibid at para 3.

"Section 16 (1) of the Constitution[100] provides that everyone has the right to freedom of expression including the freedom of the press and other media and freedom to receive and impart information or ideas". Advocacy of hatred that leads to imminent danger is unequivocally prohibited under the Constitution.[101]

The right to freedom of expression is crucial in a democratic dispensation because of the role it plays in furthering democracy and giving citizens an opportunity to be part of decision making by giving input into how government should operate.[102] Employers are permitted by law to regulate social media usage in order to harmonise the working environment and employees don't have free reign to say what they want with impunity.[103]

The court confirmed in *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Divine World Ministries*[104] that:

> "The court must be mindful that freedom of expression is 'valuable for many reasons' which include 'its facilitation of the search for truth by individuals and society generally' because the 'Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters".

The types of expression that violate the rights of others or have the potential of causing harm to others do not enjoy constitutional protection.[105] An employee who violates an employer's rights by posting derogatory comments may not receive protection and may face disciplinary action from the employer. In *National Union of Metalworkers of South Africa obo Zulu v GUD Holdings (Pty) Ltd*[106] the employee was dismissed for uploading onto Facebook that "he wished he could bomb and burn the company including management". The employee claimed the comment should not be taken seriously and that the post did not reflect his imminent actions as he had no access to a bomb. The situation was very tense and life threatening because of the industrial

[100]Section 16(1) of the Constitution.
[101]Section 16(2) of the Constitution.
[102]Davey 'Understanding the limits of freedom of expression in the context of social media' (2016) available at https://themediaonline.co.za/2016/06/understanding-the-limits-of-freedom-of-expression-in-the-context-of-social-media/, accessed on 26 September 2019.
[103]Cowan-Harper Attorneys op cit note 32.
[104][2012] 3 ALL SA 322 (GSJ) para 20.
[105]*Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC), Para 30.
[106](2015) 24 DRC.

action that occurred on the employer's premises and some of the striking employees had been dismissed by the employer for violence.

The commissioner held that the employee's defence that "he did not think before he posted was improbable and the more probable interpretation was that the employee felt so strongly about the issue that if he had the means, he would burn and bomb the employer". The dismissal was therefore upheld by the commissioner.

An employer may be forced to take disciplinary action in a situation where disparaging comments appearing on social media pose a notable risk to the good name of the employer.[107] In *ANC v Sparrow* the respondent referred to black people on the beach as monkeys. The court held that the history of referring to black people as monkeys implied that black people were of extremely low intelligence. The court found that such utterances were hurtful and constituted hate speech, as defined in section 10 of PEPUDA[108]. The court in *South African Human Rights Commission v Khumalo*[109] held that "the test for hate speech is an objective test and it examines the effect of the text and not the intention of the author when *Khumalo* posted on social media that black people must act against white people as Hitler did to Jews". *Khumalo's* comments aimed to repudiate whites as unworthy and that they ought to be marginalised and subjected to violence in the eyes of a reasonable reader. The court found the utterances to be hate speech and ordered Khumalo to remove the utterances from social media. The above decisions are very important because they illustrate that when racist or derogatory comments are made on social media, the court will look at the effect of the text and what a reasonable reader will perceive the text to be. Employees who post racist comments can be dismissed for making derogatory comments and they can be charged in court for hate speech.

2.4.2 The Films and Publications Amendment Act

The Films and Publications Amendment Act[110] seeks to prohibit the distribution of private sexual photographs and to prohibit incitement of violence, hate speech and propaganda for war.

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[107]R Davey 'Legal consequences of social media in the workplace' (2015) available at *https://www.bizcommunity.com/Article/196/639/137357.html, accessed* on 3 October 2019.
[108] Promotion of Equality and Prevention of unfair Discrimination Act No 4 of 2000.
[109]2019 (1) SA 289 (GJ).
[103]Films and Publications Amendment Act 11 of 2019.

"Section 18F (1)[111] provides that no person may expose, through any medium, including the internet and social media, a private sexual photograph or film if the disclosure is made-

(a) Without the permission of the individual or individuals who appear in the photograph or film; and

(b) With the intention of causing that individual harm".

The employer has a positive duty to block access to offensive sites and to protect his or her employees from offensive material emanating from the internet in the workplace.[112] The Act seeks to prohibit the distribution "through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech".[113]

This Act will have far-reaching consequences for employees who use social media to publish hate speech and pornographic material which is associated with the business of the employer during the course of employment. In addition the employer will be able to discipline and even dismiss an employee for such conduct if such conduct impacts on the reputation of the business.

2.4.3 The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 outlaws' unfair discrimination by the state, private sector, and persons and prohibits harassment and hate speech. Section 10 of the Act provides that "no person may publish, circulate, promote or communicate words based on one of the prohibited grounds", against any person, if these words can rationally be interpreted to signify a crystal clear objective to either damage or broadcast hatred. The prohibited grounds are inclusive of "gender, sex and race, ethnic or social origin" and the Act also includes any other grounds that undermine human dignity. Any social media post by an employee that has the effect of perpetuating hate speech and discriminating against other employees on any of the prohibited grounds will justify an employer taking disciplinary action against the employee concerned.

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[111]Section 18F (1) of the Films and Publications Amendment Act 11 of 2019.

[112] N Whitear D Subramanien 'A fresh perspective on South African Law relating to the risks posed to employers when employees abuse the internet' (2013) SALJ 9-23.

[113]Section 18 H of the Films and Publication Act.

The Prevention and Combating of Hate Crimes and Hate Speech Bill[114] seeks to address "the increasing number of hate crimes; hate speech; the increasing number of incidents motivated by prejudice, and to assist persons who are victims of hate crimes and hate speech".[115] Clause 4 of the Bill provides that "a person is guilty of an offence of hate speech when he or she intentionally publishes, advocates anything or communicates a clear intention to be harmful, or incites harm or hatred based on a range of factors, including age, race and colour".[116]

In *ANC v Sparrow*[117] the court made it clear that South African courts will not tolerate the conduct of hate speech on social media that totally disregards the rights of others. The Bill further states that it is a crime when the hate speech is directed at one person or a group of people, or even intentionally distributed or made available in cyber space.[118] This Bill has not been legislated but it is relevant as it shows commitment to the removal of hate speech. While social media comments are not categorised as hate speech, they can result in hate speech thus making this Bill relevant and important.

2.5 THE LIMITATION OF RIGHTS

Section 36 of the Constitution is regarded as a limitation clause because every right in the Bill of Rights is subjected to it and its application criteria are identical for every right.[119] A right in the Bill of Rights "may be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[120] According to Venter, the law of general application relates to all forms of legislation, including common law and customary law.[121] The general application requirement requires that legislation must be adequately comprehensible, attainable and detailed, and must be clearly written so that the bearer of the right has a clear understanding of the magnitude of their rights and responsibilities.[122] Currie and De Waal[123] argue that the

[114]Bill of 2018.
[115]'Prevention and Combating of Hate Crimes and Hate Speech Bill and International Crimes Bill: briefing with Minister and Deputy Minister'2018 available at *https://pmg.org.za/page/Prevention*, accessed on 2 October 2019.
[116]Prevention and Combating of Hate Crimes Bill, Supra.
[117](01/16) [2016] ZAKZDHC 29(10 June 2016).
[118]Clause 4.1 of the Bill, supra.
[119] I Currie J De Waal"The Bill of Rights Handbook' 6 ed (2013).
[120]Section 36(1) of the Constitution.
[121]Currie De Waal op cit note 119 p 169.
[122]*Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC).
[123]Currie De Waal op cit note 121.

law should be evenly applied to everyone. The second part of the requirement is that "the limitation must be reasonable and justifiable in an open and democratic society" and requires the following factors to be taken into consideration[124]:

(a) "The nature of the right;
(b) The importance of the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) The relation between the limitation and its purpose; and
(e) It must be a less restrictive means to achieve the purpose".

According to Currie and De Waal[125]:

> "It must be shown that the law in question serves a constitutionally acceptable purpose and that there is a sufficient proportionality between the harm done by the law and the benefits it is designed to achieve".

As an established practice, conflicting rights are balanced equally and weighed against the harm endured by the victim.[126] Coetzee[127] argues that where the remarks of an employee are devoid of any truth and not in the public interest, the employer's right to a good name will prevail over the untruthful comments of the employee. The right to privacy can also be limited where an employee chooses to act in a space to which others have easy access, as that employee cannot then claim to have his or her right to privacy intruded upon.[128]

2.6 THE LABOUR RELATIONS ACT

The LRA[129] provides that "every employee should not be unfairly dismissed and unfair labour practices are prohibited".[130] The Act[131] further requires that "a dismissal should not only be for a fair reason, but it must be 'achieved in accordance with a fair procedure' and must consider any relevant code of good practice in terms of the LRA". Section 185 of the LRA provides that an employee may not be unfairly dismissed. In

[124]Section 36(1) *(a) to (e)* of the Constitution.
[125]ICurrie J De Waal op cit note 123 p 163.
[126]N Coetzer 'Watching what you say will keep the dismissal away'2019 available at *https://www.golegal.co.za/freedom-expression-employment/*, accessed on 16 January 2020.
[127]Ibid.
[128] SA Coetzee. 'A legal perspective on social media use and employment: lessons for South African educators' (2019) PER/PELJ 22(1). .
[129]Act 66 of 1995.
[130]Section 185 of the LRA.
[131]Section 188 of the LRA.

keeping with the Code[132] of Good Practice: Dismissal, any person who is determining the fairness of a dismissal for misconduct 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. If dismissal was an appropriate sanction for the contravention of the rule or standard".

The employer has a duty to advise the employees on the manner in which they are required to conduct themselves in the workplace, and the employer should familiarise the employees with the code of conduct.[133] In dismissing an employee for social media misconduct, an employer must comply with substantive fairness and procedural fairness. For procedural fairness[134], "an employer must clearly inform the employee of the allegations in writing; inform an employee of his or her right to make representation in support of his or her case; afford an employee reasonable time to respond to the allegations and the right to be represented by a union or a fellow employee; and communicate the decision to the employee in writing". Social media policies should not only make employees aware of their responsibilities as social media users but also lay down a set of rules.[135] If an employee is found to have contravened a rule in the workplace, the next enquiry will be to establish whether the dismissal is an appropriate sanction.[136] Generally, "it is not appropriate to dismiss an employee for the first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable".[137] "Before a decision to dismiss an employee is reached by a commissioner, the seriousness of the violation of the rule must be taken into account and whether the employer has applied the rule

[132]Item 7 of the Code of Good Practice: Dismissal.
[133]S Henman '*Determining a fair sanction for misconduct* (unpublished thesis UKZN,2014).
[134]Item 4 of the Code of Good Practice: Dismissal.
[135]H Eloff 'Why a social media post can get you fired' (2019) available at *https://citizen.co.za/news/south-africa/social-media/2092961/why-a-social-media-post-can-get-you-fired/,* accessed on 8 October 2019.
[136]S Henman op cit note 133.
[137]Item 3(4) of the Code.

consistently, as well as any other grounds that can attract a different sanction other than dismissal".[138]

"The test is whether the employer could fairly have imposed the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct".[139]

A penalty specified in the disciplinary code must be adhered to when considering any relevant factors in aggravation and mitigation of a sanction.[140]

2.7 SUMMARY

This chapter has discussed the legislation that is applicable to social media and the policy that is applied to social media misconduct. Social media is among us and we need to prepare ourselves for this fast growing area of law.

The Bill of Rights is a cornerstone of all rights in the Constitution, but the rights entrenched therein can be limited in terms the limitation clause. It has been confirmed by the CCMA and the Labour Court that social media is a public platform and no one can claim the right to privacy when he or she has made a post on social media.

Employees have the right to freedom of expression, but the right does not hold a higher place than other rights in South African law. Where an employee uses his right to freedom of expression in a manner that violates the rights of others, that employee can be disciplined by the employer.

The employer is obliged to follow the guidelines in the LRA and not dismiss an employee unfairly. The employer needs to ensure that it takes all the reasonable steps to prevent unfair discrimination emanating from social media use, in order to avoid vicarious liability. The employer is also obliged to protect the personal information of the employees.

[138] Ibid at 71.
[139] Ibid.
[140] Ibid.

Lastly, the rules of evidence apply to social media misconduct and the employer needs to follow a legal procedure when obtaining evidence in order to prove misconduct.

The next chapter will look at the use of social media in the workplace and the impact of social media usage for both the employer and employee.

CHAPTER THREE

AN ANAYLISIS OF SOCIAL MEDIA IN THE WORKPLACE

3.1 OVERVIEW OF SOCIAL MEDIA USAGE IN THE WORKPLACE

Social media is known as an internet-based network of users who interact, share information and communicate with a number of similarly connected users in real time.[141] The issue of employees being dismissed based on their social media conduct has attracted a lot of debate. Many companies have introduced policies to monitor social media usage, however, gaps exist as to how to curb misbehaviour of social media usage when an employee is off-duty i.e making derogatory statements relating to one's personal thoughts which is then linked to the business of the employer, and how such misconduct is dealt with within the workplace. The problem is compounded by conflation of the lines between work and private space, which makes it impossible to monitor and regulate access and uploads to these sites.[142]

The good name of an employer has long been identified as an asset and if their brand is tarnished through reckless social website statements, this can damage the employer's reputation.[143] The responsibility to act in good faith is one of the core values of the employment relationship that an employee has towards his/her employer.[144]

Social media encompasses a range of websites on which people share biographical details, express opinions and share other information with online communities.[145] The advancement brought by social media has improved the method by which people connect and share information amongst one another, in that they make "use of telephonic-type links, instant messaging and posting of pictures or videos".[146] There are two main categories of social media: social networking sites, such as Whatsapp,

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[141]FJ Cavico BG Mujtaba SC Muffler M Samuel 'Social media and employment-at-will: tort law and practical considerations for employees, managers and organizations' (2013) *Journal of New Media and Mass Communication* 13(1), 25-41.
[142]D Baker N Buoni M Fee C Vitale *'Social networking and its effects on companies and their employees'* (2011).
[143]R Shullich *'Risk assessment of social media'* (2011).
[144]V Oosthuizen *'How far is too far for employees on social media?'* (2015), available at http://www.labourguide.co.za/most-recent/2166-how-far-is-too-far-for-employees-on-social-media accessed on 7 July 2019.
[145]L Thornthwaite *'Social media, unfair dismissal and the regulation of employees' conduct outside work'* (2013).
[146]S Chandramohan op cite note 42 page 9.

Facebook, Instagram and MySpace. The second one is content sharing sites including YouTube, Blogs and Twitter.

These social media developments have attracted the attention of academics since their advent in the early 2000s, and scholars have devoted efforts not only to studying social media, but also to identifying and interpreting the growing body of research on this topic.[147] Social media presents many advantages such as cheap product advertising and convenience for customers to share and purchase products online, but it has created challenges in the work environment in that it has caused strain on the employer-employee relationship.[148]

McDonald and Thompson contend that the creators of social networks have derailed established interrelations in the employment sphere by shifting spheres that reshape and reconstitute the confines between employers' and employees' lives.[149] It is against this background that this study seeks to address the issue of blurring of lines between employer and employee, by setting the boundaries of disciplining employees for social media misconduct.

3.2 THE IMPACT OF SOCIAL MEDIA ON THE EMPLOYER

3.2.1 The need for business efficiency- reputational damage

"An employer who seeks to dismiss employees for social media activities will need to establish there has been damage to their brand by the posts and that his or her response to the situation is proportionate to the harm done".[150]

In *Dover-Ray v Real Insurance,*[151] an employee made allegations of sexual harassment against a fellow employee. The employer initiated an investigation into the matter and the employer found that the allegations were unsubstantiated. After being notified about the outcomes of the investigation, the employee expressed her frustrations on her MySpace page in a post entitled, "corruption", in which she referred to the company's values as "absolute lies". The employee was summarily dismissed

[147]A el Ouirdi et al 'Employees' use of social media technologies: a methodological and thematic review' (2015) *Behaviour & Information Technology*.
[148]JC Duvenhage (2017) '*Social media in the workplace: legal challenges for employers and employees*' (Unpublished thesis University of Notre Dame Australia).
[149]P McDonald P Thompson Social media(tion) and the reshaping of public/private boundaries in employment relations (2016) *International Journal of Management Reviews* 18, 69-84.
[150]V Siow op cit note 13.
[151][2010] FWA 8544 at [49].

for misconduct related to insubordination after she refused to remove the writing on the blog. The employee approached the Fair Works Commission for an unfair dismissal ruling, and in dismissing her application, the Commission held that "although she had not identified her employer by name in her post, there was enough information on her MySpace page to link her comments to her employer"[152]. The Commission found that the criticisms of the company were so severe that her summary dismissal was justified.

The inevitable question that arises in cases of misconduct from social media is whether the statement posted by the employee constitutes a fair reason for their dismissal.[153] When relying on social media conduct as the grounds for employment decisions, employers should have a comprehensive social media policy and take steps to educate employees on those policies.[154]

Cilliers[155] suggests that dismissal for social media misconduct will only be fair once an employer conducts a proper investigation into the matter, and follows this up with a hearing. A proper investigation will ensure that the employer has sufficient reason to discipline the employee concerned in terms of the required standard.[156]

"It is imperative for the employer to consider what damage the comment has made to the business and to treat the situation in the same way as any other misconduct".[157]

Thornthwaite suggests that the employer must establish a causal link between the off-duty conduct and the working relationship to legitimately justify disciplinary action. He further emphasises that the monitoring of employees' conduct outside working hours will have a chilling effect on the employees' right to express themselves freely.[158]

3.3 LEGAL RECOURSE AVAILABLE TO EMPLOYERS

3.3.1 Defamation

[152] Ibid at para 79.
[153]T Merrill K Latham R Santalesa D Navetta 2011 *'Social media: the business benefits may be enormous, but can the risks - reputational, legal, operational be mitigated?*
[154] L Thornthwaite 'Social media, unfair dismisal and the regulation of employees' conduct outside work' (2013).
[155]Cilliers op cit note 2.
[156]Schedule 8 of the Labour Relations Act No. 66 of 1995.
[157]M Scutt op cit note 41.
[158]Thornthwaite op cit note 93.

Defamation is defined as the "wrongful, intentional publication of words or behavior concerning another which has the tendency to undermine his status, good name or reputation".[159] The law of defamation is meant to compensate a person for an injury to their reputation when the injury arises out of the publication of defamatory material.[160] "Due to the nature of social media, a presumption of publication is created as soon as a comment is posted on the internet".[161] The restriction of privacy and "freedom of expression is aimed at restoring the good name and reputation of a person who has been defamed through the publication of a false or unjust statement".[162]

The elements that need to be proved in order for a claim of defamation to succeed consist of "wrongful and purposeful publishing of a disparaging statement regarding the plaintiff".[163] Publication is a necessary requirement for defamation and will be satisfied if the "words or conduct are made known to at least one person other than the plaintiff".[164] Another requirement for defamation is wrongfulness and it manifests in the transgression of a right to a good name.[165] The employer will have to prove that in the opinion of a reasonable person with normal intelligence and development, the reputation of the employer has been injured by the comments made by the employee.[166] "The publisher of the statement must then rebut the presumption by proving that the statement is true and in the public interest or it constitutes a fair comment".[167]

The very nature of defamation by social media is potentially more damaging than defamation by other means "because the unjust statement can be seen by more people and be shared out of context".[168]

In *H v W*[169] the court dealt with the question of defamation arising from social media. It was held that the court could grant an interdict and order the party responsible for

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[159]D Iyer 'An analytical look into the concept of online defamation in South Africa' (2018) *SAFLII Speculum Juris* 32(2).
[160]Davey Jansen op cit 76, at page 100.
[161]SA Coetzee op cit note 128.
[162]A Singh '*Social media and defamation online: Guidance from Manuel v EFF* (2019) available at https://altadvisory.africa>2019/05/31>social-media-and-defamation-online, accessed on 14 January 2020.
[163]*Khumalo and others v Holomisa 2002* (8) BCLR 771 (CC), para18.
[164] R de Jager '*Defamation, slander, how does it work?'* (2018) available at https://legaltalk.co.za/defamation-slander-how-does-it-work/, accessed on 14 May 2020.
[165] Ibid.
[166]Ibid.
[167]Coetzee op cite note 161.
[168]Ibid.
[169]13-01-30: ZAGP-JHC: 12-10142.

the post to "remove the defamatory posting from their social media account that was open to the public." In other words, comments made on Facebook about others ought to be an honest comment.[170]

In *Sparta v Richter*[171] the court held that "defamation on social media exposes the person making the defamatory statements to a claim for damages by the party having been defamed".[172] The court held that "crude as damages for defamation may be, the victims of defamation have always been vindicated by the courts through awarding of compensation".[173]

A person alleging defamation on social media will need to satisfy the court that there has been dissemination of an offensive post and that he or she has been defamed by the post.[174] Davey adds that everyone that has participated in the dissemination of the disparaging remarks is equally liable.[175] In *Pritchard v Van Nes,*[176] Saunders J held that "if a reasonable reader would draw a defamatory innuendo from the words, liability will arise".[177] Coetzee argues that if the comment is unbecoming and hurtful, the "*action iniuriarum* could be used to claim satisfaction for injury caused by way of damages".[178]

In *Heroldt v Wills*[179] the claimant sought an interdict to restrain the defendant from uploading any information relating to the claimant on Facebook or any other social platforms. The defendant had uploaded an open letter to the applicant on Facebook, expressing her views on his life and the influence of alcohol thereon. The claimant complained that the uploaded information portrayed him as a father who did not support his family financially, who chose to drink than looking after his family, and who was addicted to drugs and alcohol. The court was satisfied that it was not in the public interest for the defendant to publish such words, and that the defendant had acted out

[170] Davey Jansen op cit note 160.
[171](12/10142) [2013] ZAGPJHC1.
[172] Davey Jansen op cit note 170.
[173] Ibid.
[174]S de Kock 'Defamation on social networking sites: Think twice before you make that post, share it or like it & if you are tagged, make sure it's not a defamatory status' (2017). Available at *https://www.sdekockattorneys.com/single-post/2017/07/14/Defamation-on-social-networking-sites-Think-twice-before -you-make-that-post-share-it* accessed on 26 September 2019.
[175]R Davey, 'Social media in the workplace' 2015. available at *https://ivypanda.com/essays/social-media-in-the-workplace/*, accessed on 14 August 2019.
[176]*Pritchard v Van Nes* 2016 BCSC para 66.
[177]*Pritchard* case (supra) para 66.
[178]Coetzee op cit note 167.
[179][2014] JOL 31479 (GSJ).

of malice when she posted the offending comments. The court found that the posting was unlawful and directed the defendant to delete all postings about the claimant.

The above case shows that the court has to strike a balance between rights to dignity, privacy and freedom of expression.[180] While this case does not pertain to workplace relations, it is crucial because it demonstrates the threats connected to social media misapplication.[181]

3.3.2 Vicarious liability

Vicarious liability is a legal concept that is derived from English Law, which attributes liability to a third party. It comes into effect when an employee has performed a negligent act for which the employer could be held accountable. The issue of vicarious liability was first discussed in *Feldman (Pty) Ltd v Mall,*[182] when an employee pursued his personal interest while on duty and consumed alcohol while driving his employer's motor vehicle. The employee was subsequently involved in an accident because of his negligence and the Appeal Court held that the employee never entirely deserted his duties as he had custody and control of his employer's motor vehicle at all times. The employer was found to be vicariously liable. The court went on further to emphasise the principle of vicarious liability as follows:

> "[A] master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment".[183]

Vicarious liability arises when it has been established that there is an employment relationship, the employee must have committed a wrongful act, and the employee must have been working within the boundaries of his employment.[184]

The case of *Otomewo v Carphone Warehouse Ltd*[185] demonstrates a situation where social media misconduct led the employer to be held vicariously liable. Some

[180]R Davey 'Social media and defamation' (2015), available at *https://www.golegal.co.za/social-media-and-defamation/*. accessed on 15 May 2020.
[181]Ibid.
[182]1945 AD 733.
[183] *Feldman* supra at 741.
[184]R Davey Jansen op cit note 173 at page 138.
[185] [2012] EqLR 724.

employees used their manager's cellular phone to access his Facebook page and posted a new status on his wall, "finally came out of the closet. I am gay and proud of it." The employer dismissed the employees concerned for misconduct unconnected to this alleged one, but in the course of the subsequent dismissal dispute, the manager raised the sexual harassment issue against the employer. The commissioner held that the conduct amounted to harassment regarding sexual orientation and that the employer was vicariously liable; "Carphone must be held vicariously liable for the conduct of the employees in this regard, as the status update was uploaded on the manager's Facebook page, without his consent, and it was posted during working hours".[186]

The case of *Cronje v Toyota marketing*[187] deals with the internet-related misconduct of an employee who viewed racist material using the employer's computer. The title stated, "we want to grow bananas". The employee alleged that he did not perceive the email to be racist as he wanted to show that Zimbabwe has a weak economy. The employer testified that the email circulated by the employee was racist and was not allowed on the employer's premises. The majority of the company's workforce was black people and race issues were very sensitive on the shop floor. Black employees were provoked by the email and threatened to embark on a strike if the employee concerned was not dismissed. The company subsequently dismissed the employee and he referred the matter to the CCMA. The CCMA held that it was an established practice that employers have a policy that explicitly prohibits any form of racism, and the dismissal of the employee was fair.

In *Grobler v Naspers Bpk*[188] the employer did not do enough to protect its secretary from sexual exploitation committed by the trainee manager. The court found the company vicariously liable for sexual harassment committed by one of its employees. The court relied on the "sufficiently close connection" test to find the employer vicariously liable for an act of sexual harassment committed by one of its employees.[189] In determining the "sufficiently close connection test", the court will take into account the manner in which the employee misused his or her position, the extent to which the reprehensible act may have benefited the employer, the relevance of the misconduct to the business of the employer, the degree of power given to the

[186] Ibid.
[187] 2001 (3) BALR 213 (CCMA).
[188] 2001(4) SA 938 (LC).
[189] *Grobler* case supra para 66.

employee against the victim, and the position of the victim in relation to the exercise of misuse of power.[190] While this judgment answers many questions on the duty of the employer to protect its employees, it also raises the question of what the appropriate test to determine the employer's vicarious liability for social media misconduct must be.

Whitear and Subramanien[191] argue that the defence of an employer that sexually orientated misconduct committed by an employee is not sanctioned by the employer is eliminated by the court's decision where an employer attempts to evade liability. Sexual harassment leads to an unfriendly working environment and employees are entitled to institute civil proceedings against the employer for failure to maintain a working environment conducive to freedom from harassment.[192] The employer is required to be proactive in combating any conduct that will render the workplace unsafe and must take all the reasonable steps to prevent any harm from occurring.[193] Similarly, the employer is required to "adopt an internet policy which prohibits inappropriate use" by employees, and monitor the employees' use of social media thereafter. This policy must also clearly state the consequences if there is a violation of the policy, and detail the disciplinary steps that the employer may take against an employee that violates this policy.[194]

3.3.3 Can the employer dismiss an employee for social media misconduct after working hours?

Social media is a collective term for websites and applications that focus on communication, community-based input, interaction, content-sharing and collaboration.[195] Employees use social media to communicate with their friends and colleagues on a daily basis whether at work or outside work. It is important to distinguish an approach that an employer should follow when social media misconduct occurs at work or outside work.

[190] K Calitz '*Sexual harassment: why do victims so often resign*? *E v Ikwezi Municipality* (2016) 37 ILJ 1799 (ECG)' PER/ PELJ (2019) (22).
[191]N Whitear D Subramanien op cite note 112.
[192] Ibid.
[193]Ibid.
[194]Ibid.
[195] Ben Lutkevish What is Social Media? 03 September 2021. available at https://whatis.techtarget.com accessed on 12 October 2021.

Both the right to freedom of expression and the right to privacy are limited by the employer's reputation.[196] If the comments made on social media have the potential to bring the name of the employer into disrepute, the employee may be dismissed for social media misconduct.[197] From a business perspective, protecting the employer's name and business is more important than the comments made by the employee if such comments can harm the employer's business.[198] From a human rights perspective, protecting the employer's name even if the employer has no social media rules and guidelines in its workplace seem to broaden the scope of dismissing employees, especially if the comments are not directed at the employer.[199]

The employment relationship between an employee and an employer is a 24/7 one, as was laid down by the CCMA in the case of *Van Zyl v Duva Open Cass Services.*[200] This case involved two employees who fought outside of the working environment, which strained the working conditions and made the continued employment relationship intolerable. The two employees were dismissed and the CCMA confirmed their dismissal.

The Industrial Court in *Nyembezi v NEHAWU*[201] also endorsed this principle by confirming the dismissal of an employee who committed misconduct after working hours by consuming alcohol at a congress held by the union. The union had no policy regulating misconduct after working hours, but the conduct of the employee was perceived by the union to render the employment relationship unbearable and dismissed the employee. The commissioner held that the employment relationship is based on trust and a break of trust during or after working hours is sufficient to justify dismissal.

It is trite in our law that whether or not misconduct is expressly prohibited in a contract or policy, the fact that an employee is aware or ought to know that misconduct is prohibited may be sufficient to justify their dismissal.[202] The employer will, however,

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[196] S Phungula, The clash between the employee's right to privacy and freedom of expression and social media misconduct: what justifies employee's dismissal to be a fair dismissal? Obiter vol.41 n.3 Port Elizabeth 2020.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200](Edms) Bpk (1988) 9 ILJ 905 (IC).
[201][1997] 1 BLLR 94 (IC).
[202]J Grogan *Workplace Law* 10 ed (2009) 203.

need to prove that the misconduct is aimed at destroying the employment relationship.[203]

Any conduct affecting the employment relationship is sufficient to attract a sanction of dismissal. Du Toit et al[204] suggest that "the cardinal test is whether the employee's conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable".

It appears that authors are unable to agree on the correct procedure to follow in terms of an internet policy and dismissal. Mischke suggests that an employer should develop a policy that regulates the use of the internet in general, and that the policy should be given to the employees to familiarise themselves with it before the employer attempts to enforce that policy. Mischke[205] suggests that companies clearly implement an "acceptable internet use policy", to be accompanied by a concise disciplinary code should the policy be breached. He further submits that the policy should outline the limitations on personal use of the internet at the workplace and the policy should prohibit the posting of racially based material. Lastly, he points out that the policy should be made available to employees and that employees could be expected to respond in writing to show that they have read the policy and they would abide by it. Grogan[206] and Du Toit et al[207] seem to suggest the opposite by saying that any conduct by the employee which may have the effect of rendering the employment relationship intolerable is sufficient to justify a dismissal, whether or not that misconduct is regulated by a policy.

The duty of good faith is one of the core principles of an employment relationship that an employee has towards his/her employer. The employee has certain rights conferred by legislation, including the right to disclose operational issues.[208] This right allows an employee to discuss his or her working conditions with his/her fellow employees or any other person,[209] provided such discussion does not break down the trust relationship.

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[203]Ibid.
[204]D Du Toit et al *in 'Labour relations law - a comprehensive guide'* 6 ed (2015) ch 8.
[205]C Mischke 'Disciplinary action and the internet' (1999) *CLL* l9(5), 41-43.
[206]Grogan op cit note 202.
[207]Du Toit et al op cit note 204.
[208]Section 79(2) (ii) of Basic Conditions of Employment Act 75 of 1997.
[209]Section 78*(b)* of the BCEA.

In situations where an employee's social media conduct comprises of dishonest or unlawful behaviour, the dismissal will be justified provided the employer follows a fair procedure.[210] The Tribunal in *Whitham v Club 24 Ltd*[211] held that offensive comments on Facebook will not always warrant a dismissal, even where such comments violate a rule in the workplace. The employee in this matter was involved in a chat with fellow employees on Facebook after a strenuous day, and these chats could only be seen by 50 Facebook friends. The employer contended that the remarks had the potential to place its relationship with its client in jeopardy and disciplinary actions were justified. The company however failed to establish the extent of the damage caused by the comments to its client and the Tribunal held that the relationship could not be said to have been affected by the employees' messages appearing on social media.

The *audi alteram partem* rule however still applies, even if the conduct is committed by means of a comment made on social media.[212] It must be borne in mind that any intention to discipline by an employer on the basis of the breakdown of trust is not necessarily required to be written in a policy.[213] The charge can be formulated on a wider spectrum of misconduct having the intention of destroying the trust relationship between the employer and employee.[214] Social media has been identified as a key risk to a company's brand and reputation[215] and the need to address this is urgent to prevent the damage to the reputation and brand of the company.

The resurrection of an employer's control over employees brings back the ancient master-servant relationship, without affording the employees the same privilege.[216] The idea behind the master-servant relationship is the assumption that the employer controls the movements of the employees' lives during working hours.[217] When an employee makes a comment on social media that has the effect of destroying the employment relationship or rendering the employment relationship intolerable, the employer can dismiss the employee concerned.[218]

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[210]M Scutt op cit note 157.
[211]t/a Ventura ET/1810462/10.
[212]Manyathi op cit note 7.
[213]B Davies K Badal '#Yourefired: Dismissals of employees due to social media usage. Insights into the law in South Africa' (2016) available at *https://www.golegal.co.za/yourefired-dismissals-of-employees-due-to-social-media-usage* accessed on 12 June 2019.
[214]Ibid.
[215]Deloitte 'Exploring the universe of strategic risk: A South African perspective', 2014 available at *http:www2.deloitte.com/za/en/pages/risk/articles/strategic-risk-survey.html*, accessed on 9 July 2019.
[216]Thornthwaite op cit note 158.
[217]Ibid.
[218]Grogan op cit note 206.

The individual usage of social networks by employees in their private dwelling is becoming a dominant justification for the employer to substantiate the allegations of employees' misbehaviour and for dismissal.[219] Deloitte expands on this by stating that, "in contemporary society, people maintain separate spheres in their lives, [and that] developments in social media may require that individuals regulate the disclosure of information about themselves online such that all communication is shaped to protect their 'core role' as an employee, perhaps to the detriment of their ability to develop and maintain other aspects of their personal identity".[220] In *Dyonashe v Siyaya Skills Institute (Pty) Ltd,*[221] the CCMA had to determine whether the decision to dismiss the employee was fair. The racist remarks uploaded on Facebook by the employee were as follows: "Kill the Boer, we need to kill these". He approached the CCMA, claiming unfair dismissal. The employee alleged he was not aware that he could not post such comments on Facebook and that dismissal was therefore unwarranted. The commissioner however held that the dismissal was justified and fair.

In the case of *Shamuyarira v Commodity Inspection Group (Pty) Ltd*[222], the applicant was dismissed for incitement, gross insolence and dishonesty for claiming in a Whatsapp 'chat' that he was more intelligent than the respondent's White and Indian managers and directors. The applicant claimed that he had not sought to incite colleagues, but was merely "fighting for his rights". The commissioner noted that racism was defined as an expression of prejudice against members of another group, based on the belief that they were inferior. It was common cause that the applicant had written the comments concerned, and that four other members of the 'chat' group had also been dismissed for agreeing with the statement. The law prohibits comments that demonstrate malice to hurt, injure or insinuate hatred. The applicant had uttered the words about the intelligence of Whites and Indians because he felt he should have been paid more than them. This amounted to racism, which warranted dismissal. This decision shows that employees should be careful about what they post on social media as they can be disciplined for what they post if it constitutes racially offensive remarks towards other employees. Lastly, our courts and dispute resolution forums have made it clear that those employees who post racist or derogatory comments on social media will be held accountable and can be dismissed.

[219] Ibid.
[220] Ibid.
[221] [2018] BALR 280 (CCMA).
[222] [2019]6 BALR 676 (CCMA).

3.4. THE IMPACT OF SOCIAL MEDIA ON THE EMPLOYEE

3.4.1 The right to privacy

The Constitution protects an individual's right to privacy.[223] Section 14(d) provides that "everyone has the right to privacy, as well as to protection against certain specific infringements of privacy, including the right not to have the privacy of their communications infringed".[224] Ackerman J however holds that "while privacy is acknowledged in respect of a person's inner sanctum, protection erodes as he or she moves into communal relations and activities such as business and social interaction".[225] Burchell states that "international telecommunications and convergence ease the circulation of knowledge, however present huge risk to individual confidentiality".[226] The availability of technological mechanisms presents enormous opportunities for clandestine supervision at the helm by people who access personal information to further their own agenda. He further argues that "if the law does not recognise the protection of individual privacy as a hallowed right, then a combination of governmental knee-jerk reaction to perceived terror threats and individual exploitation of the intrusive potential of electronic communications and data capture might signal the demise of what little privacy we have".[227]

Davey and Dahms-Jansen[228] suggest that the threat to privacy is increased due to social media usage because an infringement on the right to privacy occurs when a person's private information is disclosed against that person's will. This, however, does not mean that the right to privacy has become less important but rather that the traditional scope of protection given to that right requires reassessment by the courts in light of changes in technology.[229] In the context of social media and workplace, section 14(d) of the Constitution protects the employee from having their social media account hacked.[230] The question would be does an employee have a right to privacy if such employee has made derogatory comments on social media that the employer has access to?[231] What if the employer is not aware of those comments, but is informed by the public and then later opens the employee's social media account to

[223]Whitear and Subramanien op cit note 191.
[224]Ibid.
[225]*Bernstein v Bester 1996 (4) BCLR 449 (CC).*
[226]J Burchell '*The legal protection of privacy in South Africa: A transplantable hybrid*', (2009) *Electronic Journal of Comparative law* 13(1).
[227]Ibid.
[228] Davey and Jansen op cit note 184.
[229]Ibid.
[230] S Phungula op cite note 196.
[231] Ibid.

confirm if there are indeed derogatory comments? [232] Lastly, does it mean that the right of the employee's privacy is affected when the employer accesses an employee's social media account?[233] These questions were answered by the Commissioner in *Sedick v Krisray (Pty)*[234] where the employees made derogatory statements on social media and were dismissed. The employees argued that they had not made any direct references to the employer and that their right to privacy had been infringed. The respondent argued that the dismissal was fair as the comments made by the applicants caused disrepute within the company.[235] The Commissioner found that the internet and Facebook is a public domain unless access to such Facebook is restricted by its members.[236] The employee's failure to restrict access to their social media waived their right to privacy as the posts were visible to everyone.[237] It is clear from the above case that if the employee makes derogatory comments on social media, such comments do, limit the employee's right to privacy.[238]

The court in *H v W*[239] held that:

> "The law has to take into account changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people. Without credibility, the law loses legitimacy. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom".

In establishing and determining the scope of privacy, an important consideration will be whether privacy settings have been put in place by the user.[240] The number of people to whom personal information or private facts are published may also reduce the scope of the protection of privacy, particularly when the friends or followers in question are mere acquaintances.[241]

Roos[242] suggests that because privacy involves the exclusion of information to third parties, the only way in which privacy can be violated is if another person becomes

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[232] Ibid.
[233] Ibid.
[234] [2011] 8 BALR (CCMA).
[235] Ibid, para 8.
[236] Ibid, para 50.
[237] Ibid.
[238] S Phungula op cite note 230.
[239][2013] 2 ALL SA 218(GSJ), para.31.
[240] Ibid.
[241] Ibid at 59.
[242]A Roos op cite note 69.

privy to the confidential information, without the approval of the bearer of the information. Lastly, Roos[243] proposes the enactment of new legislation that will regulate people who use social network services and guarantee the expectation of privacy to subscribers. The sole reason that they divulge private information on what may be deemed a public platform does not imply that they renounce their right to privacy. Information disclosed to 'friends only' should be deemed as information that has been made available to close persons and any publication therefore to third parties could be regarded as an intrusion of privacy.[244]

The introduction of social networks in the workplace has elevated countless legal issues that are yet to be settled by the courts or lawmakers.[245] International Tribunals tend to regard social media as a public forum in which communication forms broadcasting to the entire globe and has eased a shift in the frontiers of the employment relationship in favour of employer control of employees' private lives.[246] Tribunals have endorsed the notion that employers can monitor the online behaviour of employees when off duty and have reaffirmed the decision of the employer to dismiss employees for online misconduct.[247]

As online postings are deemed public because they are readily accessible to the outside world, the protection of privacy will only be afforded to people who have kept their information private.[248] "There is a growing trend of employers dismissing employees, not only for expressing their thoughts about the employer but also for using social media to express views which employers do not wish to be associated with their business".[249] "In a world where technological advancements have made it easier than ever to gather massive amounts of information about those in the workplace and where employers feel the increasing need to collect such information, looming questions remain regarding the proper scope and limits of employees' privacy".[250]

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[243] Ibid.
[244] Ibid.
[245]R Sprague 'Invasion of the social networking: Blurring the line between personal life and the employment relationship*'* (2011), *University of Louisville Law REview*.50.
[246]Thornthwaite op cit note 216.
[247]Ibid.
[248]Sprague op cit note 245.
[249]PM Wragg 'Free speech rights at work: resolving the difference between practice and liberal principles' (2015) *Industrial Law Journal*, 44(1).
[250]J K Fink, *'In defense of snooping employers'* (2014).

Employers are able to gain access to the social media websites through a variety of methods.[251] Fink[252] argues that "without proper legislation regulating social media, development in communication automation can lead to predestined infringement of privacy".

It should be emphasised that an employer does not have the right to hack into or gain access illegally to employees' social media sites in contravention of security protections or permissions.[253] There is, however, potential conflict of interest between an employer and employees when social media is used in a non-official capacity, unless their personal capacity relates to work and then the boundaries can become more blurred.[254]

From a legal point of view, reasonable expectations of privacy consist of a two-step process.[255] Firstly, the employee must have a subjective expectation of privacy. Secondly, there must also be an objective expectation of privacy that society accepts and legitimises.[256] However, if the site is open to the public, the employee has waived his or her right to privacy, the employer does not require permission to access the employee's account.[257]

Employers have used social media policies to discipline employees who share their thoughts outside work about work-related issues and treatment at work, by extending the policy to include remarks made online at any time.[258] In *Robyn Vosper v Angie's Cake Emporium,*[259] an employee was dismissed for posting on social media about changes relating to her position becoming redundant. The Fair Works Commission decided that the Facebook comments did not constitute misconduct as they were not derogatory or offensive. The commission stated that:

> "An employee has the right to complain about their employment rights and their treatment at work. We do not live in a society where employees are prohibited from discussing their employment status or their treatment at work with others".[260]

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[251] Ibid.
[252] Ibid.
[253] DL.Barron 'Social media: frontier for employee disputes' (2012), available at www.baselinemag.com/social-Media-Frontier-for-Employee-Disputes, accessed on 08 August (2019).
[254] JM Karlen '*Privacy: expectations and employment*', (2014) *Business Management Dynamics* .3(10).
[255] *Katz* case (supra).
[256] *Katz* para 352[368-9].
[257] Barron op cit note 253.
[258] Thornthwaite op cit note 246.
[259] [2016] FWC 1168.
[260] *Robyn* case (supra) para 20.

This decision provides that there must be clear and concise language in legislation to warrant the conclusion that an intrusion into the non-working lives and rights of employees was necessary.[261]

While it is settled that an employee does not have an unqualified right to privacy, they are entitled to openly condemn management and working conditions online, when not at work, largely with impunity.[262] However, employers have been intruding on the privacy of employees with the introduction of social media policies that prevent employees from engaging in social media conduct outside work.[263] In *Linfox Australia Pty Ltd v Stutsel,*[264] the commission held that "while the posting of derogatory, offensive and discriminatory statements about work colleagues and managers on Facebook might provide a valid reason for termination", employers must consider evaluating the extent of the damage before making an appropriate decision. It is apparent from this case that the employer should establish whether such comments by an employee have affected the employer negatively or have caused a breakdown of trust. Any comment by an employee should be thoroughly evaluated before a decision is taken to discipline the employee.

The CCMA in *Smith v Partners in Sexual Health (Non-profit*)[265] dealt with unlawfully obtained evidence by the employer. The company's Chief Executive Officer unlawfully retrieved an employee's private email account while the employee was on leave. The employee exchanged emails regarding work related issues with former colleagues and third parties, without the knowledge of the employer. The first entry into the employee's private emails was not pre-meditated but the subsequent entry was planned. The employer decided to charge the employee for bringing the company into disrepute. The employee argued that her right to privacy was violated by the employer when her private emails were accessed without her knowledge. The commissioner found that the deliberate entry into the employees' private email by the employer was unlawful, thus rendering the evidence obtained inadmissible because of the violation of the right to privacy. The commissioner found the dismissal to be unfair.

[261]L Thornthwaite '*Social media and work: an emerging privacy' Precedent* (2016).
[262]L Thornthwaite 'Social media and dismissal: towards a reasonable expectation of privacy?' (2018) *Journal of Industrial Relations* 60(1).
[263]Ibid.
[264][2012]FWAFB 70997 p (25-26).
[265] (2011) 32 ILJ 1470 (CCMA).

An employer is obliged to follow a fair procedure when attempting to collect evidence used in committing a social media misconduct. If an employee's social media account is restricted, this means that what an employee posts are for the eyes of the recipient. An employer's access to an employee's social media account will be justified if an employee did not restrict access to the comments made on social media.[266]

In *Halse v Rhodes University,*[267] the employee was employed as a lecturer in the department of computer science. Following a student protest on campus, the employee uploaded a picture of her co-worker onto Facebook, asking students if the person in the picture was the one who had used a pepper-spray when the students had attended lectures. The employee was issued with a written warning because the employer deemed the posting of a fellow employee on Facebook as unprofessional conduct. Unhappy with the decision of the employer, the employee appealed the decision with the CCMA on the basis that it amounted to unfair labour practice in terms of section 186(2) of the LRA. The commissioner found the issuing of a written warning to be unfair and directed the employer to pay the employee compensation. Put differently, the "disciplinary action short of dismissal" was unfair. The employer issued a written warning to the employee based on the photo on Facebook, without affording the employee an opportunity to respond to the allegations levelled against her.

An employer is obliged to follow the rules of natural justice when disciplining an employee for social media misconducting by affording an employee with an opportunity to make representation against the allegations made against him or her before coming to a decision.[268]

In *Cantamessa v Edcon Group,*[269] the employee was dismissed for posting inappropriate racial comments on Facebook, to the effect that the government was a troop of 'monkeys'. The post was made on the employee's personal Facebook page while she was on leave, using her own internet facilities and equipment. The employer alleged that, amongst other things, the employee's conduct had put the employer's reputation at risk, destroyed the trust relationship and had violated the workplace social media policy, disciplinary code and internet policy.

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[266] S Phungula op cit note 238.
[267](2017) 38 ILJ 2403 (CCMA).
[268] Schedule 8 of the LRA.
[269](2017) 38 ILJ 1909(CCMA).

The employee had a private Facebook page with about 370 friends and her Facebook post was brought to her employer's attention by a customer who complained that the post was racist.

The commissioner found that the fact that the employee had confirmed on her Facebook page that she worked for the employer did not mean that a reasonable internet user would attribute her Facebook statements to the employer. The commissioner also found that the employee had not breached the employer's social media and internet policies in that she had not gained access to the internet by using the employer's equipment and facilities, and the policies did not regulate the private use of the internet by employees outside working hours. Subsequently, the matter was taken on review in the Labour Court in *Edcon Ltd v Cantamessa*,[270] and the court found that even though the employee had used her own device to post on Facebook, the post exposed Edcon to reputational risks.[271] The court held that a link was apparent between the post of the employee and the employer, because the employee had indicated on her Facebook page that she worked for *Edcon*.[272] The court found the dismissal to be substantively fair and set aside the award.

The above cases have shown that the issue of social media misconduct is taken very serious as it has an impact of resurfacing the old racism roots and the courts and CCMA treat social media misconduct with the necessary precautions it deserves taking into account the racial history of South Africa.[273] The employer is still however required to follow the code under Schedule 8 of the LRA when an employer is of the opinion that an employee has committed social media misconduct.[274]

3.4.2. The right to freedom of expression

A person's right to freedom of expression is constitutionally protected in South Africa.[275] Social media provides a new and valuable means of publishing and disseminating thoughts and opinions, and plays a crucial role in providing South Africans with a 'voice' and platform on which to be heard.[276] The right to freedom of expression is broader than free speech in that it embodies all types of "verbal, non-

[270][2020] 2 BLLR 186 (LC).
[271]Ibid at 21.
[272]Ibid at 16.
[273]Manyathi op cit note 212.
[274]Ibid.
[275]Section 16 of the Constitution.
[276]Davey Jansen op cit note 228.

verbal, physical and creative expression including posters, paintings, photographs and performances".[277] The majority of South Africans were previously denied this right and its protection is very significant.[278] Clayton and Tomlison[279] argue that freedom of expression is a necessity for partaking in the democratic dispensation. Wood[280] agrees with Clayton and Tomlison that the right to express one's views is a fundamental pillar of any liberated society. Shyllon[281] agrees with Wood that free speech is crucial in fighting against social ills and exposing poor service delivery, nepotism, mismanagement and the looting of public confers. Currie and De Waal[282] argue that the refutation of the right to freedom of expression would be uncalled for because the ability to express oneself is an indispensable human activity. Van Wyk and Heyns[283] argue that any attempt by the employer to prevent an employee from mentioning his or her employer's name on social media profiles or social media sites could be seen as interfering with the employee's right to freedom of expression. Employees are being discouraged from posting unfounded statements about their employers as that can lead to their dismissal.[284] It is imperative to strike a constitutional balance between an employee's right to freedom of expression and the reputation of the company to prevent social media conflict in the workplace.[285] The right to freedom of expression does not enjoy supremacy over other rights and should be exercised in line with the rights to dignity and privacy.[286] The exercising of the right to freedom of expression should not amount to "advocacy of hatred" and needs to conform to the values and ethos of the Constitution.[287] Therefore, "employees should use social media platforms carefully to avoid the negative consequences of social media related misconduct".[288]

[277]Ibid.
[278]WJ Van Vollenhoven *'The right to freedom of expression: The mother of our democracy'* (2015) *Potchesfstroom* 18(6) 1727-3781.
[279]R Clayton H Tomlinson *'Privacy and freedom of expression'* 2 ed (2001) 112.
[280]NG Wood 'Freedom of expression of learners at South African public schools' (2001) *SAJE* 142-146.
[281]O Shyllon 'The link between socio-economic rights and the decriminalisation of laws that limit freedom of expression in Africa' (2012) *ESR Review* 13(3).
[282] I Currie J De Waal '*The Bill of Rights Handbook'* 6 ed (2013).
[283]J Van Wyk M Heyns 'To name or not to name, that is the question', (2012) available at *www.werksmans.com/wo-content/uploads/2013/04/150/_JN5313*, accessed on 17 April 2020.
[284]H Chitimira K Lekopanye *'A conspectus of constitutional challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace'*, (2019) *Scielo* 15.
[285]Ibid.
[286]Davey '*Understanding the limits of freedom of expression in the context of social media'* (2016) available at *https://themediaonline.co.za/2016/06/understanding-the-limits-of-freedom-of-expression-in-the-context-of-social-media/*, accessed on 26 September 2019.
[287]Oosthuizen op cit note 144.
[288]Ibid.

In *South African Human Rights Commission v Khumalo*[289] proceedings were instituted against *Mr Khumalo* for his social media posting, that "black people must act against white people as Hitler did to the Jews", and it was found that this constituted hate speech. The question in this matter was, "whether *Khumalo's* comments constituted hate speech, as contemplated by section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000".

The court held that in order to achieve alignment with section 16(2) of the Constitution, section 10 of the Equality Act must be read conjunctively and the factor of 'incitement' must be present in the prohibited utterances.[290] The court had to decide whether *Khumalo's* utterances "could be reasonably construed to demonstrate a clear intention to incite harm".[291] Thus, if a reasonable person read the text and understood the text to mean an incitement to cause harm, the test was met. An objective test of the reasonable reader was therefore applied and it assessed the effect of the text and not the intention of the author.[292] The court declared the utterances by *Khumalo* to be hate speech in terms of section 10(1) of the Equality Act and interdicted him from repeating the utterances. This case shows that while freedom of expression is fundamental to our democracy, hate speech will not enjoy constitutional protection and employees committing such misconduct can be disciplined by the employer and can even be taken to the Equality Court.

In *Robertson v Value Logistics*[293], the employee uploaded a status on social media that her retrenchment was sanctioned without concluding the entire process. The employer became aware of the employee's post and subjected the employee to a hearing and dismissed the employee. The employee referred the matter to the relevant Bargaining Council, where she argued that she was unfamiliar with social platforms. The commissioner held that the employee was actually trying to express her feelings about the whole process rather than shaming the employer in public about the process. The commissioner found the dismissal to be harsh and directed the employer to reinstate the employee. This case indicates that employers should approach the issue of social media misconduct with an open mind to avoid taking uninformed decisions to dismiss employees without substantive reasons, in violation of the

[289]2019(1) SA 289 (GJ).
[290]Khumalo supra, para 88.
[291] Ibid at 88.
[292]Ibid at 89.
[293](2016) 37 ILJ 285 (BCA).

employees' right to freedom of expression.[294] Case law is emerging which deals with the interplay between social media and employment. Many of these emerging cases raise the question of whether "social media is altering the scope of employees' implied contractual duties to employers by expanding employer supervision of their off-duty conduct".[295] The use of social media implies that employees will always be under the radar of the employer and it has become compulsory for employees to comply with their contractual obligations to communicate within the prescript of their employment policy.[296]

Thornthwaite[297] suggests that employees are faced with disciplinary sanctions for posting online because internet policies are invading the privacy of employees, both on and off-duty. Employers, however, argue that the extension of the policies to regulate outside misconduct is vital to protect the good name of the employers.[298] Every employer is keen to ensure that the reputation of the business is always protected and any internet misconduct by employees that seeks to tarnish the image of the business should be prevented.[299] A social media policy's effectiveness is determined by how carefully it is drafted though, as well as the extent to which it is enforced. Such a policy should also clearly state "that employees have no reasonable expectation of privacy in the use of their work-related equipment and that the employer reserves the right to monitor an employee's computer use".[300]

The arrival of social media has amalgamated the spheres of private and public life and has increased the ordinary control the employer already enjoyed over employees in the workplace.[301] Social media has transformed the configuration of communication and the manner in which people interact, with interconnection through social media becoming discernible, seamless and unrestricted.[302] "With the non-stop stream of individual expression on social media platforms… as would be expected, many posts and tweets discuss work and employment-related matters".[303]

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[294]Ibid at 155.
[295]Thornthwaite op cit note 258.
[296]Ibid.
[297]Ibid.
[298]Ibid.
[299] Ibid.
[300]DR LaPlace N Winkler op cit note 74.
[301]Duvenhage op cit note 148.
[302]Ibid at 162.
[303] R Brice S Fifer G Naron 'Social Media in the workplace: the NLRB speaks' (2012) *Intellectual Property & Technology Law Journal* 24(10).

Akers[304] argues that "online technologies have also opened new windows through which employers may view and potentially regulate employees' off-duty conduct". Therefore, using "workplace policies in a constructive way will promote the benefits of the use of social media in the workplace, as well as reduce the potential challenges it presents such as privacy, breach of confidentiality and workplace surveillance".[305]

In *Malcolm Pearson v Linfox Australia Pty Ltd*[306] the employee was dismissed for refusing to sign the employer's social media policy, contending that the policy was overreaching. He stated "as *Linfox* do not pay me or control my life outside of my working hours, they cannot tell me what to do or say outside of work; that is basic human rights on freedom of speech"[307]. In deciding in favour of the employer, the Fair Works Commission approved the overreaching of the employer's disciplinary code to regulate the usage of social media off-duty, summarising the execution of a social media policy as follows:

> "… Is clearly a legitimate exercise in acting to protect the reputation and security of a business… Gone is the time… where an employee might claim posts on social media are intended to be for private consumption only… it is difficult to see how a social media policy designed to protect an employer's reputation and security of the business could operate in a work context only".

Therefore, it is important for any company to adopt a social media policy that does not violate or seek to stop the exercising of employees' rights protected by law. In determining whether to interdict the posting of statements on social media, the courts have considered the past reluctance of judges to interdict publications in traditional media for fear of "stopping the free flow of news and information", as this might have a "chilling effect" on freedom of expression.[308] In applying this consideration to social media, the courts have held that social media are fundamentally different to electronic news media, so the courts are therefore likely to be more open to interdicting publications on social media.[309] In considering the scope of protection that will be

[304]B Akers 'Face-off on Facebook' (2009) *Law Society Journal* 42.
[305]Ibid at 166.
[306] [2014] FWC 446 para 46.
[307] Ibid at para 15.
[308] H v W [2013] 2 ALL SA 218 (GSJ), para 34.
[309] Ibid at 147.

afforded to this right, the courts have reiterated that the right is not unfettered and that, in expressing oneself, one should be aware of the rights of others.[310]

3.4.3 The right not to be unfairly dismissed for social media misconduct

"Employees active in social media are becoming brand ambassadors for their respective brands, often outperforming brands themselves on social media".[311] A social media post containing unbecoming, racist and derisive comments about the employer or fellow employees that has the potential of affecting the employment relationship will attract a sanction of dismissal.[312] Virginia[313] argues that the decision by an employer to dismiss an employee for online behaviour should be deemed fair to a certain extent, because employers should not be given unlimited powers to control employees' social interaction and employees should be at liberty to participate in social discussions. Davey argues that the nature of social networks contributes to a large number of viewers, thus susceptibility to 'brand damage' is imminent as a result of social media misbehaviour.[314] The pertinent question is whether an unbefitting post serves as a valid reason for dismissal. It is argued that before an employer decides to dismiss an employee, the employer must establish the following: whether any negative reaction from the public is justified; if it is indeed misconduct on the part of the employee for making a statement; the reasonableness of the decision to dismiss in response to managing the impact; or whether the misconduct is so severe that the employer has no choice but to dismiss the employee.[315] As the Labour Relations Act governs the employment relationship, it also provides guidelines on what constitutes a fair dismissal[316]. Section 188(1) states that a dismissal "is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct or capacity; or is based on the employer's operational requirements;and that the dismissal was effected in accordance with a fair procedure"[317].

The employer can fairly dismiss an employee when he or she uploads a statement on social media that has the potential to cause disunity between workers in the

[310] Ibid.
[311]Singh op cit note 162.
[312]Davey op cit note 10.
[313]M Virginia op cit note 58.
[314]Ibid
[315]Ibid.
[316] Section 188 of the LRA.
[317] Ibid.

company.[318] However, the employee is still entitled to make representations in response to the allegations and the employer must apply his or her mind to the facts before reaching a verdict on the conduct of the employee.[319]

3.5 SUMMARY AND CONCLUSION

The study of the literature consulted revealed that misconduct arising from social media may constitute a fair reason for dismissal. It showed that the employer is obliged to follow a fair procedure when dismissing an employee as a result of social media misconduct. The study has, however, showed that some scholars are concerned that "an employer's right to discipline an employee for using social media has far-reaching consequences when it comes to the employees' right to privacy and freedom of expression"[320].

Case law has shown that an employer is entitled to dismiss employees for posting derogatory or offensive comments on social media, even if the social media policy of the employer does not extend to off-duty misconduct. However, cases have reiterated the need to formulate a proper social media policy in the workplace so that employees will acquaint themselves with what is expected of them when they are online and what will constitute misconduct. The importance of employers formulating a detailed and comprehensive internet policy to address the changing reality of social media and to mitigate the repercussions associated with its use is evident.

The next chapter will look at a comparative review between South Africa and the United Kingdom in terms of the approaches to social media misconduct.

[318]Davies Badal op cit note 213.
[319]Ibid.
[320] Davey and Jansen op cite note 276.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF SOCIAL MEDIA LAWS APPLICABLE TO SOUTH AFRICA AND THE UNITED KINGDOM

4.1 INTRODUCTION

The involvement of employees on social media during their private time has caused a rift in the workplace because their active participation in the online world may be connected with their workplace.[321] It is important that employers familiarise themselves with the dynamics that come with social media in the workplace, and all its associated challenges.[322]

"In a society where social media is more pervasive than ever and with a range of online platforms at our disposal, the potential exposure for employers is significant if such platforms are used recklessly by employees".[323] Virginia argues that "employees' social media usage should be protected as it is the only tool to realise privacy and freedom of expression in an environment where the employer has more powers than employees that is tilted in favour of the employer by the nature of the employment relationship".[324]

This chapter will discuss the law on social media in South Africa in comparison with that of the United Kingdom (UK), identifying similarities, differences and lessons from their jurisprudence. South African labour law principles are very similar to those of the UK labour law, and it is for this reason that a comparison of the two jurisdictions is being undertaken.

4.2 SOCIAL MEDIA IN THE UNITED KINGDOM

The Employment Tribunals have decided social media dismissals under the Employment Rights Act of 1996 in the UK.[325] Social media has given employees a platform to engage in an online world with ease, while allowing an employer to view

[321] V Siow op cit note 150.
[322] G Mushwana H Bezuidenhout *'Social media policy in South Africa'* (2014) *Southern African Journal of Accountability and Auditing Research* 16.
[323]Brabners LLP 'An employer may be vicariously liable for an employee's posts on social media' 2019 available at *https://www.fcsa.org.uk/an-employer-may-be-vicariously-liable-for-an-employees-pots-on-social-media/*, accessed on 03 October 2019.
[324]Virgina op cit note 313.
[325]Thornthwaite op cit note 295.

an employee's participation online,[326] as employees can be linked through their profiles to their employer.[327]

Virginia[328] contends that the apparent deficiencies in English law related to unfair dismissal have swayed the courts and tribunals to incorrectly endorse the lawfulness of social media dismissals and further contributed to limiting the human rights of the employees. She further submits that there are two factors that make social media dismissal challenging for courts: first, social media are online forums that are easily accessible and their visibility is more public, thus unprotected. Secondly, posting on social media happens faster than ordinary expression, thus allocating less protection for it than for the usual forms of expression.[329] The effect that accompanies the use of social media is that employees are often prone to violating employment policies, either at work or outside of the work environment, through their involvement on social media, with the possibility of unwittingly bringing the employer's name into disrepute.[330]

"An employee who uploads a racist tweet or an unbefitting comment on a social media wall will be subjected to a disciplinary hearing if the tweet impacts on the reputation of the employer irrespective of whether it is uploaded at home or at work, with the employer's equipment or the employee's, as the lines between work and private spaces becomes blurred".[331]

Where an employer has a clearly written social media policy in place, which is applied consistently and employees are made aware of the policy and the consequences of any violations, a dismissal is more likely to be fair.[332] The majority of dismissals in this area are premised on employees' unbecoming comments about the workplace and unprofessional comments unconnected to work that can be perceived as having the

[326]Virgina op cit note 324.
[327]Ibid.
[328]Ibid.
[329]Ibid.
[330]'Lexology- Vicarious liability and social media- what are the risks to employers?' 2012 available at *https://www.lexology.com/library/detail.aspx?g=114a1180-a69e-4db1-bce0-47ae24b35cc9*, accessed on 3 October 2019.
[331]M Scutt 'Risks of social media use in the workplace' (2011) available at *https://www.infolaw.co.uk/newsletter/2011/05/risks-of-social-media-use-in-the-workplace/*, accessed on 9 October 2019.
[332]H Thomas 'Social media misconduct and dismissals' (2018) available at *https:www.markellaw.co.uk/insights/social-media-misconduct-and-dismissal/*, accessed on 23 January 2020.

potential of affecting the employer negatively and that are viewable by the workforce at large.[333]

Although it might seem ridiculous that an employee may be fired over a Facebook comment or tweet, the law in the UK upholds that misconduct on social media is taken as seriously as verbal misconduct in the workplace.[334] Employers must, however, consider whether informal action will be sufficient to address the problem, in the same way as any other alleged misconduct.[335]

Where an employer believes the employee has brought the organisation into disrepute, they must present evidence of this, which can be complaints or other comments from third parties online.[336]

In *Weeks v Everything Everywhere Ltd*[337] a dismissal of an employee was found to be fair by the Tribunal for uploading threatening remarks on Facebook to a fellow employee and mocking his workplace as "Dante's Inferno", without referring to his employer. The comments were brought to the attention of the employer by a fellow colleague. The employee concerned was "unrepentant, continued to post on Facebook in the same vein and made comments that made the colleague feel she was being threatened".[338] The employee was subsequently dismissed because his actions were deemed serious by the employer and the employee's behaviour was found to have a potential of tarnishing the brand of the employer. The employee's claim of an unfair dismissal failed as the Tribunal found that the decision to dismiss was "proportionate to the seriousness of the offence or offences". It is clear from the judgment in this case that the Tribunal, whilst swayed by the "employee's truculent approach to his employers when questioned and his refusal to desist from making further derogatory references, were more unimpressed by the threatening comments to his fellow colleague".[339]

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[333]A Raval 'What does case law say about social media?' 2017 available at *https://www.peoplemanagement.co.uk/experts/legal/social-media-case-law*, accessed on 23 January 2020.
[334]Thomas op cit note 332.
[335]D Nathan 'Social Media: Legal issues in recruitment & dismissal' 2012 available at *https://www.Russell-cooke.co.uk/media/1921/workshop-f-notes-social-media-legal-issues-in-recruitment-and-dismissal.pdf,* accessed on 23 January 2020.
[336]Ibid.
[337]ET/2503016/2012.
[338]Ibid.
[339]Scutt op cit note 331.

If an employee 'smears' his or her employer on social media, regardless of whether at work or at home, disciplining the employee for such misconduct will be warranted despite the fact that the employee did not mention the employers' name in the comment.[340] In *Pay v Probation Service*[341] a probation officer was responsible for looking after sexual offenders and also owned an enslavement business distributing sexual apparatus and performed sexual related activities in his own time. The employer was aware that the employee had a business, but the scope of the business was not disclosed to the employer. The employer became aware of the nature of the employee's business by a fax that was sent to the company that showed a photo of an employee promoting sexual content. The employer perceived the conduct of the employee to be incompatible to his duties to look after sex offenders and the employer dismissed the employee, not for failure to do work but for conduct that could bring the name of the employer into disrepute.

The Tribunal was of the view that the probability of brand damage was apparent although the employer had not proved any damage. The decision of the Tribunal was taken on appeal by the employee to the Appeal Tribunal, on the ground that his right to privacy as provided for by the Convention on Human Rights had been violated. The Employment Appeal Tribunal dismissed the appeal on the ground that when the employee published his actions on the website he made his actions public and therefore could not rely on his right to privacy.

The Tribunal is likely to confirm a dismissal of the employee, even if there are some procedural irregularities, where an employee has violated a social media policy.[342] However, the Tribunal made it clear that an employer must prove that the behaviour of an employee on social media has brought the organisation into disrepute before the Tribunal can be persuaded that such conduct justified dismissal.[343] "The Tribunal emphasised that an employer does not need to prove actual damage to reputation but the possibility of reputational damage".[344]

[340]Ibid.
[341][2004] ICR 187.
[342]*Mrs R Burns v Surrey County Council* 2301665/2016.
[343]*Whitham*, ET/1810462/10.
[344]*Weeks*, ET/2503016/2012.

The right to privacy and the right to freedom of expression are a cornerstone of every democratic society and this study will now explore legislation applicable to the use of social media by employees in the UK.

4.3 LEGISLATION GOVERNING THE EMPLOYMENT RELATIONSHIP IN THE UK

UK statute does not deal directly with the issue of social media, but the following legislation is relevant to the topic under discussion.[345]

4.3.1 The Employment Act and Employment Rights Act

The UK's labour relations are governed by the Employment Act[346] and the Employment Rights Act.[347] Section 94(1) of the Employment Rights Act prevents the employer from unfairly dismissing an employee without specifying the reason for the employee's dismissal. Section 98(2) of the Act[348] sets out the valid grounds for dismissals that constitute a fair reason for an employer to dismiss an employee: lack of capacity or qualifications to do the job, poor conduct of an employee, redundancy, and contravention of the Act.

In the UK, as in South Africa, a fair dismissal must comply with the requirements of a fair procedure and fair reason to dismiss.[349] It is quite clear in both countries that an employee's social media misconduct can lead to their dismissal, if the dismissal complies with the requirements of fairness as required by the law.

"Regulation 4 of the Employment Act[350] provides that where an employer is considering the dismissal of one of their employees, or is contemplating disciplinary action against them, the employer should follow three steps. The first step is for the employer to inform the employee in writing about the nature of the allegations.[351] Secondly, the employer must arrange a disciplinary hearing with the employee so that the employee will be able to present his or her case.[352] Thirdly, the employer should arrange an appeal with a more senior member of the company, should the employee

[345]Croner 'Social media and employment law' 2019 available at *https//.www.app.croneri.co.uk/feature-articles/social-media-and-employment-law?product=136*, accessed on 23 January 2020.
[346]Act 2002 (Dispute Resolution) Regulations 2004.
[347]Act 1996.
[348]Employment Rights Act 1996.
[349]Engelbrecht op cit note 73.
[350]Regulation 4 of Employment Act.
[351]Section 31 of Employment Act.
[352]Section 32 of Employment Act.

wish to appeal the decision taken".[353] It is apparent from the Employment Act that an employer is required to follow a detailed procedure before dismissing an employee. The Employment Act also prevents an employer from arbitrarily dismissing an employee for social media misconduct where an employee has been denied the right to make representation on the charges against him or her.

4.3.2 The Human Rights Act

The Human Rights Act[354] sets out unalienable rights and freedoms that everyone is entitled to in the UK. The Act has assimilated the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. Article 8 of the ECHR provides that "employees have a right to private and family life, a right that can be extended to include privacy in the workplace". Article 10 of the ECHR provides that "everyone has a right to freedom of expression which includes freedom to hold opinions and to receive and impart information and ideas without interference". This Act affords employees a legitimate expectation of privacy when they are online and it also guarantees freedom of expression for employees when using social forums, without fear of appraisal. The rights to privacy and freedom of expression are not absolute and can be limited if it is in the public interest to do so.[355]

4.3.3 The Regulation of Investigatory Powers Act

The Regulation of Investigatory Powers Act[356] provides that "the employer is entitled to monitor or intercept employees' communications". Section 48 (2) of the Act provides that authorisation is not required to monitor or intercept employees' communication if the information is published in the public domain. The Act makes it clear that interception of communication can be done by the employer during its transmission through a telecommunication system without obtaining authorisation from employees.[357] The reason why the Act allows an employer to intercept the communication of an employee without authorisation is to ensure that an employer has the power to check if its employees abuse communication devices.[358]

[353]Section 33 of Employment Act.
[354]Act 1998.
[355]Article 8 (2) and Article 10(2) of ECHR.
[356]Act 1998.
[357]Section 42*(a)* of Act 1998.
[358]Section 42*(b)* of Act 1998.

4.4 COMPARISON OF LEGISLATION IN SOUTH AFRICA AND THE UNITED KINGDOM

South Africa and the United Kingdom are both members to the International Labour Organisation (ILO). The researcher will now explore the similarities in both legal systems, with more emphasis on the requirements of the Termination of Employment Convention, 1982 (No. 158) of the ILO when it comes to the termination of employment. Social media misconduct requires the employer to follow a fair procedure when disciplining an employer and it is against this background that this study will draw similarities between the two legal systems, in comparison with the requirements of the ILO.

4.4.1 A valid reason for termination of employment

Convention 158 of the ILO provides three reasons that are deemed to be fair to dismiss an employee. The three valid reasons must relate to the conduct of the employee, their capacity to do their jobs and the employer's operational requirements.[359]

The South African employment relationship is governed by the Labour Relations Act.[360] Section 188 of the LRA provides that a dismissal can only be fair if it effected on one of the following grounds: the conduct of the employee, the capacity of the employee, and the employer's operational requirements. The three grounds required by Convention158 of the ILO are very similar to those provided for by section 188 of the LRA. Also, these three grounds are similar to those provided for by section 98(2) of the Employment Rights Act governing the employment relationship in the UK. Therefore the two legal systems provide similar protection to the employees when it comes to termination of employment. It is evident from both jurisdictions that if there is a rule in the workplace regulating the use of social media and the employee contravenes that rule, dismissal may be fair in that regard.[361]

4.4.2 The right to defend allegations

The labour laws of South Africa do not prescribe a procedure that the employer must follow when conducting a disciplinary hearing. In most companies the disciplinary process is regulated by the company's policy, which stipulates the procedure that must be followed. It has been settled in South African labour law that there is clearly no

[359]Article 4 of Convention 158 of the ILO.
[360]Act 66 of 1995.
[361]Engelbrecht op cit note 349.

precondition for a formal disciplinary procedure that integrates all the stipulations of a criminal trial in a labour dispute.[362] The reason why the disciplinary hearing is not subject to strict requirements is because the LRA recognises that managers are not experienced judicial officers and that labour disputes should be resolved expeditiously.[363]

The Code of Good Practice: Dismissal outlines the standard that the employer should follow for a dismissal to be deemed fair. Item 4 of the Code[364] provides that "the employer should investigate if there are any reasons justifying a dismissal and it may be an informal enquiry". The Code goes further to say that the employer must write to the employee about the allegations the employee is facing. An employee must be provided with an opportunity to rebut the allegations. The employer is required to consult the union if the employee concerned is a union representative before instituting disciplinary hearing.[365] The employer should furnish an employee with reasons for dismissal and advise the employee of his or her rights to refer the matter to the CCMA or relevant Bargaining Council.[366]

In *NEHAWU obo Motsoagae v SARS*[367] the CCMA held that "the notion that it is not necessary for an employer to call as a witness the person who has taken the ultimate decision to dismiss or to lead evidence about the dismissal procedure, can therefore not be endorsed". The arbitration process does not constitute a fresh hearing in the true sense of the word and the commissioner is only tasked to determine the fairness of a dismissal. The employer has a duty to adduce evidence before a commissioner because the employer is *dominus litis* in proving the fairness of a dismissal.[368]

In *SARS v CCMA & Others*[369] "the respondent did not bother to lead any evidence to show that dismissal had been the appropriate penalty in the circumstances and it is not known which 'aggravating' and 'mitigating' factors might have been taken into consideration". There were doubts that "any evidence had been led to the effect that

[362]*Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* (2006) 27 ILJ 1644 (LC), at 1652G.
[363]*Avril* case (supra) para 1651.
[364]Code of Good Practice: Dismissal.
[365]Item 4(2) of the Code.
[366]Item 4(3) of the Code.
[367](2010) 19 CCMA at para 7.1.6.
[368] *Nehawu* case (supra).
[369](2010) 31 ILJ 1238 (LC) 1248 para 56.

the employment relationship between the parties had been broken down"[370]. The inability of the employer to adduce evidence to justify the sanction of dismissal left the court with no choice but to decide that the employer failed to discharge the onus of proof that the dismissal was a suitable sanction.

In *Townsend v Commercial Storage Ltd*[371] an employee left his employment after he was told to "not bother coming back on Monday" when he had an altercation with his superior. The statement was perceived by the employee to amount to a dismissal and the employer did not make any effort to reach to the employee after telling him to not to come back. The employer argued that the disappearance of the employee amounted to a resignation rather than a dismissal as alleged by the employee. The Tribunal found that the employee had been unfairly dismissed because of the dismal failure by the employer to adopt any sort of fair procedure.

It is apparent from the above two cases that both the UK and South African jurisprudence requires an employer to adopt a fair procedure when contemplating dismissing an employee.

Lastly, the right to privacy in Article 8 of the ECHR and the right to freedom of expression in Article 10 of Convention 158 are similar to Section 14 and Section 16 of the South African Constitution. The minor differences that are apparent in these two countries are attributed to the fact that the UK is a developed country and South Africa is a developing country.[372] However, the principles regarding dismissal of the employee are almost identical and they both comply with Convention158.

Regulation 4 of the Employment Act requires the notice to attend a disciplinary action be in writing. In South Africa, as stated above, item 4(1) of the Code requires the employer to notify the employee in writing of the allegations against him or her in a fathomable language.

4.4.3 Right to appeal against a decision

Item 4(3) of the Code provides that "the employee should be given the reason for dismissal and be reminded of any rights to refer the matter to the council that has

[370] Ibid at para 56.
[371] ET/2701352/2014.
[372] Engelbrecht op cit note 361.

jurisdiction to hear the matter or to the CCMA or to any dispute resolution established in terms of the collective agreement". The labour dispute resolution has two stages: the matter is conciliated first, and it goes to arbitration if it was not resolved at conciliation.[373] The CCMA or Bargaining Council is accessible, free of any charge, and the employee is at liberty to represent himself or herself without requesting the assistance of a legal representative. The Supreme Court in *G v the Governors of School X* held that an employee may use the services of a legal representative in cases where an employee's future prospect of professional employment is in jeopardy.[374] Employees are also allowed to represent themselves at the Employment Tribunal in the UK but they are advised to seek legal representation because of the complex rules applicable at the Employment Tribunal.[375]

In the UK, an employer must arrange a 'hearing' meeting with the employee to discuss the issues contained in the charge sheet. It is at this hearing that the employee will refute and defend allegations levelled against him or her.[376]

In the UK, the Employment Tribunal and the Advisory Conciliation and Arbitration Service deal with most disputes relating to alleged unfair dismissals.[377] Therefore, either jurisdictions have recourse in the form of tribunals for an employee who feels his or her dismissal is unfair.

There is a difference however in these countries when it comes to appeals. Regulation 4 of the Employment Act[378] makes it compulsory for an appeal to take place internally before the matter can be heard by an impartial body. In South Africa there is no strict rule that a matter must be appealed internally before it can be heard by the CCMA or Bargaining Council.

Another difference between the two jurisdictions is that if an employee decides to do an external appeal, he or she must pay fees in the UK.[379] In South Africa, an employee

[373]S 191(4) & (5) *(a)* of the LRA.
[374][2011] UKSC para 30.
[375]P Smith 'Taking the employer to tribunal: employee tribunal services & representation' 2010 available at *https:* www.ms-solicitors.co.uk, accessed on 16 May 2020.
[376]Regulation 4 of Act 2002.
[377]P Smit '*Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995'* (Unpublished Thesis, University of Pretoria, 2010) ch 3.
[378]Regulation 4 of Act 2002.
[379]Engelbrecht op cit note 372.

can approach the CCMA or Bargaining Council to refer a matter without paying any fees.

4.5 LESSONS FROM THE UK

The researcher will use case studies to highlight lessons from the UK.

In *Plant v API Microelectronics Ltd*[380] the employee breached the social media policy after uploading a series of unbecoming Facebook status updates directed at her employer. The Tribunal found the dismissal to be justified because the profile of the employee related to her employer and the status was disparaging.

It is clear from this case that inappropriate posts on social media about the employer that link the employee to their workplace will be a valid ground for dismissal. The lesson to South African employees is thus not to post derogatory statements about their employer and not to put up negative posts that link them to their workplace. Employers can learn that having a social media policy will help them to be in a better position to discipline their employees, should they commit misconduct on social media.

In *British Waterways Board v Smith*[381] the employee was dismissed for posting a number of unprofessional comments about his colleagues and the employer on Facebook. The employee was responsible for being on standby in case of an emergency and in one of his status updates he posted that he was going to consume alcohol. The employer decided to dismiss the employee and the Tribunal confirmed the dismissal by stating that the content of the employee's post related to his job.

This case proves that an employment relationship between an employer and employee is a 24/7 one and contents found on social media can be used by the employer to dismiss an employee.[382] This principle that an employment relationship extends beyond working hours has been settled in labour law and the employer can use evidence from social media to dismiss an employee, even if such conduct occurs after working hours.

[380]ET/3401454/16.
[381]UKEAT/0004/15.
[382]*Van Zyl* case op cit note 200.

In *Smith v Trafford Housing Trust*[383] an employee uploaded a status on Facebook disapproving of same-sex marriages because of his religious convictions. The employee listed his employer on his Facebook profile and he had his fellow employees as Facebook friends. The employee was subsequently dismissed when the comments were brought to the attention of his employer. His dismissal was found to be unfair by the High Court because his Facebook account was for private use and he was permitted by law to express his views on social issues.

The outcome of this case is vitally important because the court highlighted that employees are entitled to express their views on social media regarding social issues without fear of being disciplined by the employer, and the need to establish the context in which the post was made for is very important. South African employers can learn from these cases that employees are entitled to voice their opinions on social issues that may be controversial in the public domain and that dismissing an employee for expressing a strong view on a controversial issue can be unfair. However, employees must be mindful that their right to freedom of expression is not sovereign and must be used within the confines of the law.

4.6 SUMMARY

Social media has transformed the way we interact and it is here to stay. Employers are confronted with the dilemma of having to deal with online misconduct of employees as the majority of the world's population is active on social media.[384]

Many tribunal decisions have emphasised the need for a social media policy that will guide employees as to how they should behave online.

The right to privacy and freedom of expression are not absolute and we have seen tribunals finding in favour of the employer and stating that an employee does not have a reasonable expectation of privacy because social media is a public platform. The employer is entitled to dismiss an employee who makes derogatory comments about the employer or racist remarks towards fellow employees.

[383][2012] EWHC 3221.
[384] D Cadin 'Social media and the workplace: a recipe for disaster?' (2020) available at *https://www.bedellcristin.com/insights/briefings/social-media-and-the-workplace-a-recipe-for-disaster/,* accessed on 31 January 2020.

It is apparent that the legal systems for both the UK and South Africa are similar when it comes to laws of dismissal and one can argue that South African courts and forums will follow the decisions of the tribunals and courts in the UK. Lastly, the Constitution of South Africa requires the courts and tribunals to consider international laws when interpreting the Bill of Rights.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 INTRODUCTION

The issue of social media use in the workplace context is one which is likely only to become more relevant as individuals increasingly operate their social lives online and merge the boundaries of their professional and personal lives.[385] Social media has been deemed as the public forum that enables everyone to participate and share opinions. The presence of social media has been perceived by others as a tool that has shifted the scale in favour of employers having an upper hand in the lives of employees outside of work.[386]

The Constitution has guaranteed employees the right to privacy and the freedom of expression, but employees must use these rights in a legally acceptable manner that will not impede the rights of their employer.[387] Further to this, employees do not have the authority to upload comments that seek to cause division in the workplace with immunity as the employer has a duty to maintain a healthy working environment and protect all employees equally.[388]

More often than not, social media comments are made without comprehending the ramifications of their possible impact on the business of the employer and employees have become so entrenched in social media that they see it as their only tool to articulate their viewpoints.[389]

[385]C Bryden M Salter 'Employers must get their social media policies in order' (2013) available at *https://www.newlawjournal.co.uk/content/beware-web,* accessed on 28 January 2020.
[386]Thornthwaite op cit note 295.
[387]Section 36 of the Constitution.
[388]Cowan-Harper Attorneys op cit note 103.
[389]Coetzer op cit note 126.

5.2 SUMMARY

This study revealed the strain caused by social media on the employer-employee relationship. The growth of social media has resulted in employees never being entirely off-duty because their conduct outside of work can have a negative impact on the employment relationship.

It is has been settled that any conduct that has the potential of destroying the employment relationship is sufficient to attract a dismissal because the employment relationship is premised on the inherent basis of trust and good faith.

Although the employer may discipline an employee for posting inappropriate remarks on social media, the employee still has the right to present his case in defence of the allegations against him or her. The employer must also show the connection between the misconduct of the employee and the impact that the conduct has on the employment relationship, in order to prove the impact of the misconduct. The study argued that the employer should not adopt a social media policy that is so broad that it impacts negatively on employees' rights.[390]

The right to privacy[391] in the Constitution is a very important right and needs to be protected at all times. It was, however, established that the right to privacy is "not absolute and it can be limited if it is reasonable and justifiable to do so". The study has revealed that when an employee posts comments on social media, he or she gives away any reasonable expectation of privacy because social media is considered to be a public platform which can be viewed by everyone. Employees need to understand that the right to privacy is not an unfettered right and is subject to limitation in a society that is exposed to dynamic technology.[392] The employer can also limit this right by stating in the contract of employment or in a policy that the employer reserves the right to access the devices in the workplace to ensure the safety of the employer's equipment and abuse of the company resources.

Although the right to freedom of expression[393] is very important in our constitutional democracy, the use of this right is very crucial as it can have a great impact if it is not used correctly. The study has revealed that the right to freedom of expression is not

[390]Thornthwaite op cit note 386.
[391]Section 14 of the Constitution.
[392]Section 36 of the Constitution.
[393]Section 16 of the Constitution.

absolute and comes with an internal limitation that prohibits the use of this right in a manner that perpetuates hatred and incitement of violence. Any statement posted by an employee on social media that has the effect of perpetuating hatred or inciting violence may justify an employer taking disciplinary actions against the employee concerned.

The requirement that an employer must have a policy regulating social media is very important and the study agrees with this submission. A social media policy provides certainty and consistency in the workplace. In the age of social media, employees expressing their feelings by posting comments and remarks can damage the employment relationship and this can lead to their dismissal. A clear social media policy should be informative to employees with regards to the standard that is expected of them when posting comments on social media and how to use social media in a manner that is acceptable in the workplace. It should also state clearly the consequences for the misuse of social media.

The interception and monitoring of employees' devices by the employer has been a subject of debate as some academics have argued that it amounts to gross intrusion of privacy.[394] This study has however relied on the decisions of the CCMA and Tribunals to show that the employer is entitled to intercept and monitor the social media devices in terms of RICA.[395] The employer however must comply with certain requirements before an interception can be deemed legal. The requirements include that the employer must have a systems controller that will monitor the use of social media in the workplace and to secure the effective operation of the system.[396] This researcher agrees that the employer has a right to monitor his or her business to protect its reputation and prevent brand damage that may be caused by the reckless and irresponsible use of social media by employees.

The research has revealed that both South Africa and the UK have adopted and incorporated Convention158 of the ILO.[397]

5.3 RESEARCH QUESTIONS

[394]Thornthwaite op cit note 390.
[395]Section 6 of RICA.
[396]Section 6 of RICA.
[397]Convention 158 of the ILO.

The section provides the answers to the research questions set out in chapter one of this dissertation.

5.3.1 Can an employer dismiss an employee for posting derogatory comments on social media?

As a general rule "an employer has no right to institute disciplinary proceedings unless it can be demonstrated that it has some interest in the conduct of the employee".[398] However, the conduct of an employee in relation to the business of an employer determines the interest of the employer and therefore their right to discipline the employee.[399] There can be many serious consequences to posting on social media such as defamation, vicarious liability, harassment and a breach of contract.[400] The professional use of social media is key for an employer's good name because of its convenient ways to promote and market the employer's business to potential clients and to maintain good publicity for the business.[401] Whether an employee's social media misconduct is sufficient for the employer to take disciplinary actions is grounded on two principles[402]. The first principle relates to the impact of the misconduct on the working relationship between the employer and employees or amongst the employees. The second principle relates to the inherent basis of trust and good faith of a working relationship between the employer and employee who committed the social media misconduct.

The inference is that when a statement is uploaded by an employee on social media and the employer believes that the statement has the potential of destroying the employment relationship, the employer is entitled to discipline the employee concerned.[403] The employee can be found guilty based on having the intent of destroying the employment relationship, and need not be based on a breach of the company's policy.[404]

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[398]A Truter Use of Social Media Outside the Workplace (2017), available at *http://www.strat-g.co.za/up-content/uploads/20170721_Use-of-social-media-Outside-the-workplace5.pdf*, accessed on 1 October 2019.
[399]Ibid.
[400]W Strachan 'No such thing as 'private' on social media' 2015 available at *https://www.labourguide.co.za/most-recent/2173-no-such-thing-as-private-on-social-media*, accessed on 2 July 2019.
[401]Abrahams and Gross attorneys 'Can employees be dismissed based on their social media conduct?' 2017 available *at https://www.abgros.co.za/employee-dismissed-based-on-social-media-conduct/, accessed* on 16 January 2020.
[402]Ibid.
[403]Ibid.
[404]Ibid.

5.3.2 What is the current legal framework on social media usage in the workplace?

"The law in South Africa with regards to social media conduct is undeveloped and our courts follow the precedent set by tribunals and courts in the UK".[405] The right to privacy[406] and the freedom of expression[407] play a critical role because they protect the interest of the employee to have his or her communication kept private and to express his or her views. However, "these two important rights are not absolute and can be limited if it is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom".[408]

The manner in which the Labour Relations Act[409] applies to general misconduct committed by an employee and social media misconduct is no different. The Act also has a code[410] attached to it that outlines the procedure that must be followed when an employer envisages disciplining an employee for social media misconduct.

Other laws that are relevant with regards to complaints relating to social media misuse or misconduct include the Protection of Personal Information Act,[411] the Promotion of Equality and Prevention of Unfair Discrimination Act,[412] the Prevention and Combating of Hate Crimes and Hate Speech Bill[413], the Films and Publications Amendment Act[414], and the Regulation of Interception of Communications and Provision of Communication-Related Information Act.[415]

5.3.3 How have the courts interpreted the legislation?

The CCMA and courts have taken a firm stand when it comes to social media misconduct and they are not persuaded by the "fable of special privilege, privacy and anonymity of employees online".[416] The employees' right to privacy and freedom of expression have been at the centre of the decisions reached by the CCMA and the courts. These rights have to be balanced against the employers' right to protect its

[405]Ibid.
[406]Section 14 of the Constitution.
[407]Section 16 of the Constitution.
[408]Section 36 of the Constitution.
[409]Act 66 of 1995.
[410]Schedule 8 of the LRA, Code of Good Practice: Dismissal.
[411]Act 4 of 2013.
[412]Act 4 of 2000.
[413]Bill of 2018.
[414]Act 11 of 2019.
[415]Act 70 of 2002.
[416]Manyathi op cit note 273.

reputation. The debate of whether an employer can dismiss an employee for making derogatory remarks on social media outside of working hours came to the fore in *Edcon* v *Cantamessa,*[417] where the court ruled that the dismissal was fair because a connection was made to the employer when the employee indicated that she worked for *Edcon* and it exposed the company to reputational risk. Also, the Labour Court in *Juda Phonyongo Dagane v SSBC and Others*[418] ruled that an employer is entitled to discipline an employee for social media misconduct that is not covered by the employer's policy, where such misconduct is contrary the values of the Constitution of South Africa and the ethics of the employer.

5.3.4 What are the challenges with the current jurisprudence on social media in South Africa?

"Social media has become a vital communication tool through which individuals can exercise their right to freedom of expression and exchange information and ideas".[419] Tiwari et al argue that "the freedom of speech and expression do not confer on citizens the right to speak or publish without responsibility and the legislature may enact laws to impose restrictions on the right to speech and expression on several grounds".[420]

Employees may also unknowingly become the victims of cyberspace hunting by unknown persons pursuing personal or political agendas.[421] Thornthwaite argues that the conundrum with the contemporary jurisprudence on social media is that employers have policies that have intensified encroachment into the private lives of employees because social media policies prohibit social media misconduct both at work and outside of work.[422] He further argues that social media breaks down boundaries, makes it easy for intended private communications to become public and has a seemingly limitless reach.

Therefore, the modern jurisprudence on social media exterminates the reasonable expectation of privacy because social media is regarded as a public forum and it has a dissuasive effect on freedom of expression.

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[417][2020] 2 BLLR 186 (LC).
[418]JR2219/14) 16 March 2018.
[419] S Tiwari G Gitenjali '*Social media and freedom of speech and expression: challenges before the Indian Law*' (2014) available at *https://ssrn.com/abstract=2892537*, accessed on 24 February2020.
[420]Ibid.
[421]Thornthwaite op cit note 394.
[422]Thornthwaite op cit note 394.

5.3.5 How has the United Kingdom addressed social media dismissals in the workplace?

This research has conducted a comparative study between South Africa and the UK. The study has revealed that the labour laws applicable to social media are almost identical. The Employment Tribunal has recommended an efficacious social media policy when arriving at decisions pertaining social media misbehaviour.[423] It has been decided by the Tribunal that the existence of a social media policy will be an aggravating factor when an employer proves a violation of the policy by an employee.[424] Further to this, the Tribunal reaffirmed the employer's right to exercise control over its employees to protect its good name.[425] The Tribunal has held that "an employee does not have a reasonable expectation of privacy on social media, as posts can be easily forwarded on, regardless of privacy settings".[426] However, Virgina argues that these Tribunals ignore the fact that employees have a right to privacy and to free speech. She further argues that even if the employer does not like the posts because they may be demeaning, unpleasant or unpalatable, that does not sanction a dismissal.[427]

Therefore, the Tribunals and courts in the UK have used similar interpretations of social media misconduct and have come to similar conclusions as the CCMA and labour courts.

5.4 RECOMMENDATIONS

The momentum with which social media is changing the means of communication and the ways in which employees interact with one another poses a threat of unprofessional conduct in the workplace and calls for advance mechanisms to curb the effect it may cause in the workplace.[428] Social media education has been identified as a crucial tool that will help the employer to fight the scourge of unbecoming comments on social media and it will advise employees that not every post on social media will be acceptable in the workplace.[429]

[423]D Cadin op cit note 384.
[424]*Whelan v Blue Triangle Buses* Ltd ET/3200787/18.
[425]*Crisp v Apple Retail (UK) Limited* ET/1500258/11.
[426]*Crisp* case (supra),
[427]Virgina op cit note 326.
[428]Cowan-Harper Attorneys op cit note 388.
[429]Ibid.

Employees must be taught about the limitations imposed by the Constitution on their rights to privacy and freedom of expression. Social media usage has become a societal norm and every employer is enjoined to better equip its workforce for effective business continuity. Therefore, this research agrees with Scutt[430] that "employers should have a well drafted social media policy or, at least, appropriate clauses about usage in contracts of employment".

"Though existing law and policy cover social media misconduct and social media related unprofessional conduct sufficiently, the misuse of social media creates unique dangers such as passing information to people who are not friends".[431] This research also agrees with Coetzee[432] that "social media sites are public spaces and whether access to a social media account is restricted or not impacts on the level of the legitimate expectation of privacy a user has". Employees should be encouraged to use privacy settings to protect the content of their social media and to avoid liability.

The probability of an employer being held liable for the misconduct of its employees online is more feasible in the digital age and the employer should strive to minimise the risk of vicarious liability by its employees.[433] This research further agrees with Cilliers[434] that "an employer will be held vicariously liable for the actions of his or her employee if the offence committed during the existence of the employment relationship and the wrongful act was committed in the scope of employment".

Employers are encouraged to follow a fair procedure as set out in Schedule 8[435] to prevent subjecting employees to an unfair dismissal. Also, the policy regulating social media should be in line with the Code of Good Practice: Dismissal. Companies need to fully transform their policies to properly address the impact and demands of social media. Lastly, the research agrees with Cilliers[436] that it is "unclear how much information an employee may share online before the disclosure constitutes a breach of contract, unfair discrimination, or other misconduct". Therefore, this study submits that the best avenue available to employers is to enrich their employers with education so that employees will be in a better position to utilise social networks in a professional

[430]Scutt op cit note 339.
[431]Coetzee op cit note 178.
[432]Ibid.
[433]N Froneman 'Warning employers - liability for hate speech on social media' 2018 available at *https://www.golegal.co.za/hate-speech-liability-employers/*, accessed on 10 October 2019.
[434]Cilliers op cit note 155.
[435]Schedule 8 of the LRA, Code of Good Practice: Dismissal.
[436]Cilliers op cit note 434.

manner and avoid tarnishing the brand of the employer. Lastly, the study encourages employers to adopt a comprehensive social media policy that will enable employees to have clarity on how to behave online.

5.5 CONCLUSION

This study has shown that more needs to be done to address the impact that social media has on the business world. The study has revealed that in drafting a social media policy, employers should be wary of restricting their ability to adequately discipline employees for online misconduct. Lastly, employees need to be mindful of their words and actions on social media platforms as these may have serious repercussions in the workplace and they may face dismissal.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Mr Sipho Prince Dube (218072194)
School Of Law
Howard College

Dear Mr Sipho Prince Dube,

Protocol reference number: 00011599
Project title: Social Media Dismissal: Sword or Shield?

Exemption from Ethics Review

In response to your application received on 16/03/2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law