The justification of dismissals emanating from social media misconduct in the workplace.

A dissertation presented

by

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ALANKAR RATHNESH MAHARAJ

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ii. Acknowledgement

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I give thanks to the almighty Lord and surrender my work unto him as a form surrender and devotion unto him.

iii. List of abbreviations

CCMA	Commission for Conciliation Mediation and Arbitration.
LRA	Labour Relations Act 66 of 1995.
BCEA	Basic Conditions of Employment Act No. 75 of 1997.
ECTA	Electronic Communications & Transactions Act 25 of 2002.
ECA	Electronic Communication Act 36 of 2005 (as amended by the Electronic Communications Act).
ICAASA	Independent Communications Authority Act 13 of 2000.
RICA	Regulation of Interception of Communications & Provisions of Communications Related Information Act 70 of 2002.
PAIA	Promotion of Access to Information Act 2 of 2000.
POPIA	Protection of Personal Information Act 4 of 2013.
PEPUDA	Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000.

CHAPTER 1: INTRODUCTION AND OVERVIEW

1. DESCRIPTIVE TITLE

The justification of dismissals emanating from social media misconduct in the workplace.

1.1 Introduction

In the ever-growing technologically advanced society, we presently find ourselves in, there is an incremental frequentation of social media usage not only in personal and private usage but also in the workplace. This research canvasses the repercussions of social media misconduct in the workplace, the consequences that flow from it, and analysing social media policies in the workplace.

Primarily, this research analyses to which extent employers can terminate employment in the event of social media misconduct and to which extent employers may intercept employee communication without infringing on an employee's constitutional rights.

The research explores when social media misconduct will constitute a dismissible offence. The investigation also contemplates issues of employee social media misconduct committed after work hours in instances where employees transgress employer policies either using their own private account platforms or business account platforms.

Notwithstanding an employer's prerogative of incorporating social media policies in the workplace, the research strives to disclose circumstances when employers may intercept employee communications. The focus of the research is predicated on when a dismissal would be justifiable as a result of social media misconduct. Flowing from this, the research assimilates whether an employee transgressions of social media policies verily warrant dismissal or whether employers can impose less detrimental sanctions.

The research establishes instances when social media usage may be authorised or unauthorised by an employer, and if tantamount to misconduct, to what extent an employer may become consequentially liable to third parties. To this end, the research provides guidelines to employers that may be implemented at the workplace thereby reducing risks emanating from social media misconduct.

The research will specifically look at the influence of social media in the workplace. The research will analyse the responsibilities of employers to incorporate social media policies. Insofar as the social media policies regulate employee online activities during work hours, a determination will be made to extrapolate the extent to which employers may intercept employee online communications after work hours. The research contrasts consequences that may arise from employee posts made during work hours as opposed to those made after work hours. Ultimately, the research considers when social media misconduct may lead to termination of the employment relationship.

1.2 Background and outline of the research problem

At the time of submitting this dissertation, social media misconduct remained undefined by the Legislature.[1] As an undefined concept, it is contentious as to when employers may use social media misconduct to justify dismissal. The reliance of the concept in justifying dismissal coincides with employee constitutional rights, existing Labour legislation, the common law and varied case precedent. To bring about legal certainty, the research postulates an adaptable legal definition of 'social media' misconduct.

From a constitutional perspective, the extent to which an employer may intercept employee social media post is not readily discernible. There is little guidance on whether an employee consents to an employer's social media policies when entering into a contract of employment thereby giving the employer consent and limiting their rights to privacy and freedom of expression.[2] There may be instances where employers do not have social media policies in place to regulate cases of misconduct. The research seeks to determine whether an employer or an employee's rights should be preferred in cases of social media misconduct. This determination is of significance as it will elucidate when an employee's rights may be limited and when dismissal would be justified for such misconduct. The research addresses the constitutional rights of privacy, freedom of expression, dignity, labour relations and their limitations.

[1] V Oosthuizen 'Social Media Law' available at *https://www.wylie.co.za/our-services/social-media-law/*, accessed on 3 January 2020.
[2] S 2 of the Regulation of Interception of Communications & Provisions of Communications Related Information Act ('RICA').

Whilst the Labour Relations Act[3] presides over all dismissals in the country, the Act does not define social media misconduct and it is not certain as to how the Act should contend with this form of misconduct. The research considers the employment contract and duties of the employer and employee respectively. The substantive and procedural fairness standards for dismissal is considered in relation to social media misconduct. Considering that social media can be used by an employee during and after work hours, sometimes using their own devices or employer devices, the Act does stipulate an employer's interception powers in this form of misconduct. In this regard, guidance is needed from the Legislature. The research seeks to establish when an employer may intercept an employee's social media posts with reference to RICA.

The research focusses on the enormous influence that social media has in the workplace. The lack of a legal definition for 'social media' is considered with a view of postulating an adaptable legal definition. The research further addresses risks assumed by employers for social media posts made by employees. In particular, the research considers the employers consequential liability and vicarious liability emanating from employee social media posts. To that end, the research considers the purport of social media policies, literacy, monitoring and strategy.

Contrast is made between jurisdictions of the United Kingdom and Germany and how these countries have contended with social media misconduct in the workplace. the research discloses when and why these countries have imposed dismissal as a sanction for such misconduct and how South Africa could obtain guidance from their example.

At common law dismissal occurs when the misconduct has a negative impact on the work relationship even if the misconduct occurred after work hours.[4] If the misconduct can undermine the relationship of good faith and trust underpinning the employment contract, then dismissal may be warranted in such circumstances.[5]

The case law canvassed in the research indicates that the courts have treated cases of social media misconduct objectively on a case-by-case basis. There have been landmark cases[6] which

[3] Labour Relations Act 66 of 1995 ('LRA').
[4] *Nyembezi v NEHAWU* 1997 (1) BLLR 94 (IC).
[5] B Conradie G Giles & D Du Toit *Labour Relations Law - A Comprehensive Guide* 5ed (2015) Part 2: 419-442.
[6] *Cantamessa v Edcon Group* 2017 (4) BALR 359 (CCMA).

have provided authoritative guidance on how employers should contend with dismissal for social media misconduct.

The research is limited predominantly to desktop analysis. This has placed limits on engaging with an employer with a robust social media policy. Similarly, the limitations have curtailed a study of instance where an employer has not actively incorporated social media policies in the workplace. The paradigm of this study is such that it would have been intrusive to approach an employer to investigate how it contends with social media in the workplace and thereby unethical.

If postulated well and enough guidance can be metered out, then perhaps the present paper may very well dispel common misgivings about social media usage and misconduct and eliminate the misnomers and uncertainty that exists in the work sector in relation to such misconduct.

The research considers when social media misconduct may lead to termination of the employment relationship. In order to conclusively answer this question, the following key sources will be reviewed:

1.2.1 Constitution

A constitutional challenge when relying on social media misconduct is the extent to which employers may be able to intercept employee posts before transgressing employee constitutional rights to privacy[7] and freedom of expression.[8] The research shows whether employees, by virtue of entering the employment contract, consent to the employer's social media policies.[9] It is possible that employee's limit their constitutional right to association in relation to interception of communications by consent.[10] Inspection of how such posts may

[7] Constitution of the Republic of South Africa ('Constitution') Section 14 (d) provides that '*everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed'.*
[8] Section 16 of the Constitution.
[9] Section 5(1) of the RICA reads as follows:
'*Interception of communication with consent of party to communication*
5. (1) Any person, other than a law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence.'
[10] Section 2 RICA reads as follows:
'*Prohibition of interception of communication*

impact on the contract of employment and specifically the extent of liability for such posts by the employer and employee.[11] The research contrasts approaches adopted by the courts and Commission for Conciliation, Mediation and Arbitration (CCMA).

Hereunto, credence must be given to Section 36 of the Constitution[12] with reference to the law of general application and how it finds application in relation to such conduct.

1.2.2 Legislation

In the absence of a definite categorization of social media misconduct, an extrapolation of our existing labour laws and constitutional rights against the backdrop of already decided case law and authorities on the subject matter, context seeks to determine when social media posts may be construed as a form of misconduct and how existing labour laws may be adapted alternatively amended to accommodate for this advanced and evolving form of misconduct.

Contrast is sought to distinguish how foreign jurisdictions such as Germany and United Kingdom contend with such misconduct. In considering the potential risks to the employer, the research highlights instances where employees are justified in their postings. The research contemplates common excuses preferred by transgressing employees who breach media policies in the workplace and the risk of liability they may expose their employers to on account of non-adherence.

At present, the Labour Relations Act[13] presides over all employment related issues in the Republic. The research questions if dismissals emanating directly or indirectly from a pseudo reality must adhere to the prevailing labour legislation substantively and procedurally.

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2. Subject to this Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission'.

[11] Section 6(1) of the RICA reads as follows:
'*Interception of indirect communication in connection with carrying on of business*
6. (1) Any person may, in the course of the carrying on of any business, intercept any indirect communication-
(a) by means of which a transaction is entered into in the course of that business;
(b) which otherwise relates to that business; or
(c) which otherwise takes place in the course of the carrying on of that business, in the course of its transmission over a telecommunication system'.

[12] Section 36 of the Constitution.

[13] Labour Relations Act 66 of 1995 ('LRA').

Notwithstanding an employer's incorporation of social media policies in the workplace, the research focuses on whether employers can regulate employee social media posts after work hours. In assessing this possibility, the research contemplates instances where employees make use of their own devices or that of the employers.

Naturally, consideration is given to the *Labour Relations Act* 66 of 1995, the *Basic Conditions of Employment Act* 11 of 2002, the *Electronic Communications & Transactions Act* 25 of 2002 and the *Regulation of Interception of Communications & Provisions of Communications Related Information Act* 70 of 2000 to determine existing insight on how our present legislation sanctions inappropriate social media conduct at the workplace. This warrants analysis of both domestic and foreign case law to adapt prospective guidance for effective usage and elimination of potential risk exposure.

Such adaptations on prospective guidance will must be evaluated with due consideration to constitutional imperatives of the South African Constitution necessitating constitutional compliance when examining the competing interests of employers and employees.

The research contemplates instances when employers and employees may vary the employment agreement departing from the understanding of existing collective agreements allowing employers rights to intercept social media posts during non – working hours.[14]

In contrast, the research envisages if grounds could be established whereby an employer would be able to dismiss an employee for social media misconduct. An employer would have to demonstrate that the employee disclosed confidential information of the employer on social media[15] and substantiate that based on the nature of such a disclosure that the employer has the

[14] Section 49 (2) and (3) of the Basic Conditions of Employment Act No. 75 of 1997 ('BCEA') reads as follows:
'*Variation by agreement*
49. (2) A collective agreement, other than an agreement contemplated in subsection (1), may replace or exclude a basic condition of employment, to the extent permitted by this Act or a sectoral determination.
(3) An employer and an employee may agree to replace or exclude a basic condition of employment to the extent permitted by this Act or a sectoral determination'.

[15] Section 19 of the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') reads as follows:
'Security measures on integrity and confidentiality of personal information
19. (1) A responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent—
(a) loss of, damage to or unauthorised destruction of personal information; and
(b) unlawful access to or processing of personal information.

right to utilise personal information[16] of an employee in their social media posts to justify dismissal. Where an employer elects to process such personal information to establish grounds for dismissal, the Act will dictate the permissibility of such confidential information for disciplinary purposes.[17] It also determines if the Act can exempt social media posts prejudicing employee to justify dismissal.[18]

1.2.3 Common Law

Notwithstanding any misconduct of an employee that causes reputational harm to an employer, and which permits the employer to dismiss such an employee, the basis for an employer to potentially dismiss an employee for social media misconduct emanates from two principles which have long been applied in South African labour law.

First, from a common law perspective, the principle that an employee's conduct after work hours, can have an impact on the working relationship.[19] The research shows that even though the employee may not be present at the workplace, acting in his private time and capacity and using his own device, may not be a valid defence if such conduct hinders the interests of the employer. Such conduct may very well compromise the working relationship altogether. This principle has been applied historically in South Africa.[20] The research extrapolates the extent to which an employee must link himself to the employer to undergo disciplinary sanction. In short, the enquiry is whether the employee should overtly link himself to the employer on social media to establish liability. It is contemplated that if employees remain silent about their employment status on social media, making no mention of the employer in his profile, to what

(2) In order to give effect to subsection (1), the responsible party must take reasonable measures to—
(a) identify all reasonably foreseeable internal and external risksto personal information in its possession or under its control;
(b) establish and maintain appropriate safeguards against the risks identified;
(c) regularly verify that the safeguards are effectively implemented; and
(d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.
(3) The responsible party must have due regard to generally accepted information security practices and procedures which may apply to it generally or be required in terms of specific industry or professional rules and regulations'.

[16] Section 23 of PEPUDA.
[17] Section 26 of PEPUDA.
[18] Section 38 of PEPUDA.
[19] *Van Zyl v Duvha Open Cast Services* 1995 (1) ICJ 11-12.
[20] *Nyembezi* supra note 4.

extent an employer can discipline the employee for online posts when a reasonable user may not be able to illicit who the employee's employer is.

Secondly, the principle that an employment relationship is predicated on a platform of trust and good faith.[21] The research shows through case law that sometimes employees can easily abuse such a relationship. Any conduct of an employee that brings about distrust and effectively compromises the relationship may warrant a sanction of dismissal.

> *'The cardinal test is whether the employee's conduct has destroyed the necessary trust relationship or rendered the employment relationship intolerable.'*[22]

Contrastingly, distinction will be made between the usage of social media during work hours and after work hours and the consequences that may flow from same. The aim being to establish a comparative analysis between work hours and employees private time and whether employers can sanction social media usage posted during non-working hours.

Premised on the fact that the concept of social media and social media misconduct are dynamically evolving this area of law may be categorised as being underdeveloped in the South African context, legislators and legal authorities are in a need to develop legislation and protocols to meet the rapid ever-growing technological advancements in media in general.

To facilitate the recommendations in this dissertation, comparison will be made with foreign jurisdictions to determine how social media in the workplace in such jurisdictions is dealt with and how we can appropriate same to apply in the South African context. The purpose of this dissertation will hypothesise when dismissals would be justified for social media misconduct and what should comprise social media policies.

1.2.4 Case Law: Precedential perspective from the judiciary

Insofar as it can be established that employers may dismiss employees for social media misconduct, it is apparent that a rubric on how to contend with such misconduct can be

[21] B Conradie G Giles & D Du Toit op cit note 5.
[22] Ibid.

extrapolated from case law, when assessing the substantive and procedural fairness of such dismissals.

If anything, it appears that the courts prefer to deal with the merits of each case objectively, isolating the issues before it as opposed to creating a blanket rule in the circumstances. The overriding consideration regarding the dismissal emanates from the common law basis of the impact on the working relationship and to what degree has the misconduct affected the relationship of good faith and trust between employer and employee. Enquiry is made into the employment contract terms to ascertain specified roles and duties of employees and employer's social media policies and the manner in which they operate. In instances where the employment contract proves insufficient, courts will depend on the *Labour Relations Act* as an overriding consideration on how to dispense with the matter. The case law is eclectic in this regard.

The courts have considered the issues of where members of the public opt to tag, like and comment on employee posts.[23] In isolating such issues, the courts must balance arguments of employees with regard to posts made within the ambit of their freedom of expression weighed up against considerations of harm to the employer. This has also manifested in the age-old question of defamation and vicarious liability for the employer.

Prevailing labour law directs that employees maintain employer confidentiality.[24] The research questions if employees' social media postings tantamount to misconduct could breach employer confidentiality policies thereby jeopardising the employer's endeavours.[25] The research contemplates instances where employers authorise employees to utilise social media platforms for work purposes, whether employee disclosures on social media are truly for work purposes or vitiate confidentiality policies.[26] In this regard, determination is sought on security safeguards implemented by employers to maintain the integrity of confidentiality of personal information.[27]

The research considers if an employer's interception of an employee's social media posts could raise issues pertaining to an invasion of employee's rights to privacy, human dignity, and the

[23] *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai* Ladysmith (2013) 7 BALR 689 (MIBC).
[24] Section 84 of the Electronic Communications & Transactions Act 36 of 2005 ('ECTA').
[25] Section 42 of RICA.
[26] Section 43 of RICA.
[27] S 19 of the Protection of Personal Information Act 4 of 2013 ('POPIA').

extent that such rights could be limited constitutionally. This includes instances where employees have excused misconduct on account of not being techno savvy and the overriding consideration of public interest. The courts have also considered instances where employers provide employees with Internet services during work hours, where employers have no social media policies in place, work forum etiquette training and under which circumstances such misconduct may be punishable by verbal warning or lesser sanctions.

At the time of presenting this paper, the legislature and no South African court had provided a legal definition of social media or social media misconduct.[28] This does not mean that the courts have not attempted to expound on the concept. On the contrary, the courts have attempted to adjudicate on aspects of the concept. In the *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divine World Ministries* case Judge Satchwell considered an American case, *Largent v Reed and Pena,* in addressing social media and more in particular Facebook. The court noted the nuances in social media, more particularly Facebook, in creating online profiles, usernames and passwords. The court contemplated that social media allowed users to interact with each other using instant messaging, email, and interact through online gaming, uploading notes, photos, videos and *friending* other users. The court noted that social media platforms allowed users the ability to disclose locations to other users, to *like*, *comment* and post *statuses* online indicating that most social media platforms are pervasive.[29] The court stated that

> '*Social networking websites also have a dark side – they have caused criminal investigations and prosecutions and civil tort actions . . .*'[30]

In the *Heroldt v Wills* case the court noted that:

> *'It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond*

[28] V Oosthuizen op cit note 1.
[29] *Dutch Reformed Church Vergesig Johannesburg Congregation and Another v Rayan Soknunan t/a Glory Divine World Ministries* 2012 (6) SA 201 (GSJ) 42.
[30] *Largent v Reed and Pena* 39th Judicial District of Pennsylvania, Franklin County 2009-1823 at 3-5.

appropriately, but also from the lawyers who prepare cases such as this for adjudication.'[31]

The purport of this quote highlights that due to the growing pace of technological progress that legal practitioners and courts must develop the law specifically to appropriately deal with such advancements. This development must cater for social media misconduct and grounds for dismissal.

From an analysis of case law, employees have used ignorance of not being technologically savvy as a reason not to be dismissed for misconduct. This was illustrated in the *Robertson v Value Logistics* case[32] where the commissioner felt that an employee's post on social media illustrated the hurt, she felt as opposed to harming the integrity of the employer and found that the dismissal was substantively unfair and ordered the employees reinstatement.

It has become rather controversial as to whether an employer may be permitted to obtain and use an employee's social media posts to warrant a dismissal. First, there must be enquiry into employee's right to privacy and, in particular, how the employer's interception of communications is dealt with in the employment contract.[33] This should be understood in conjunction with employer's social media policies. The enquiry must determine if an employee has a legitimate right to privacy. Secondly, will such attainment of evidence be in contravention of section 86 (1) of the *Electronic Communications and Transactions Act* 25 of 2002[34] Here the enquiry must determine if the employee was using his own device or that of the employer.

If an employee was making use of his own device, the court must enquire as to how such posts were solicited by employer either lawfully or unlawfully.[35] Notwithstanding that the courts have a common law discretion to admit such evidence.[36] The court must inquire into the nature and extent of violation to the employee's right to privacy and as to whether such evidence could have been obtained through alternative means.[37] These issues were dealt with in the *Harvey v*

[31] *H v W* 2013 (2) All SA 218 (GSJ) 8.
[32] *Robertson v Value Logistics* 2016 (37) ILJ 286 (BCA).
[33] *Bernstein v Bester* 1996 (2) SA 751 (CC) par 67.
[34] Section 86(1) of ECTA.
[35] *Harvey v Niland* 2016 (2) SA 436 (ECG) para 38.
[36] Ibid.
[37] Ibid para 39.

Niland case[38] where the court found that public interest far superseded the employee's right to privacy which was not an absolute right and allowed the evidence as admissible.

In 2016 the *ANC v Sparrow*[39] case heard in the Magistrates Court and then the Equality Court centered around a Facebook entry made by Sparrow, a white estate agent. In a post where she labelled all black people as '*monkeys*'. The Equality Court found Sparrows remarks as amounting to hate speech in terms of section 10 of the *Promotion of Equality & Prevention of Unfair Discrimination Act* 4 of 2000.[40] Sparrow was found guilty of *crimen injuria* at the Magistrates Court. Amongst various conflicting views regarding the case and more in particular the right to freedom of expression, is the distinction that pursuant to World War II, international agreements sought the narrowest restriction of free speech, earmarking criminal sanction only for extreme forms.[41] In contrast the Constitution[42] affords no protection for expressions falling outside the ambit of the Constitution short of its protection yet still subject to limitation. It should be construed in light of the fact that the *Equality Act*[43] is directed at transformation as opposed to punishment. It stands to reason that perhaps the Equality Court has erred to propound the transformative goals of the *Equality Act* by failing to consider in hindsight the context under which such posts were made. Whilst Internet communications increase extreme hate speech it also heralds potential to bring about transformative initiatives through social pressures especially when expressions fall out of the ambit of section 16(2).

Again in 2016, the *South African Human Rights Commission v Khumalo* case[44] saw application being made in the Equality Court regarding a comment deemed as hate speech. The respondent Mr Khumalo made comments on social media posts saying, '*we must act (against white people) as Hitler did to the Jews*'. The court had to contend with issues relating to its competence to adjudicate upon the matter with regard to pleas of res judicata and estoppel. In a subsequent hearing the applicants sought to amend its complaint after the respondent made yet another social media post hours after the first court hearing stating that '*white people in South Africa deserve to be hacked and killed like Jews*' and that they '*must be burned alive and skinned and their offspring's used as garden fertilizer*'. The previous complaint on hate speech was

[38] Ibid.
[39] *ANC v Sparrow* 2016 ZAEQC 1.
[40] Section 10 of PEPUDA.
[41] *ANC* supra note 39.
[42] Section 16(2) (c) of the Constitution.
[43] Section 10 of PEPUDA.
[44] *The South African Human Rights Commission v Khumalo* (EQ6-2016) 2018 ZAGPJHC 528.

withdrawn by the respondent as he indicated that they were '*meaningless hyperbole'* made in anger against previous social media posts aimed against black people and should have not been understood to incite harm. The court found that res judicata and estoppel did not apply. The court held that the present proceedings were broader than the previous proceedings and the complaints made were of not the same character as the first proceedings given that the subsequent retraction of the admission that the comment was hate speech and required a definitive decision on that question.

Central to the question of the employment contract is whether an employee's posts incite harm or violence and propagates hatred. This issue was dealt in the *Halse v Rhodes University* case[45] in 2017 where the chairperson of the disciplinary committee found that the misconduct of the employee made her guilty of overt offensive behaviour. When the decision of the chairperson was challenged the commissioner found that the conduct of the employee was not incitement and did not warrant a first warning. The commissioner further found that the employee was not given an opportunity to present mitigating factors, and this was procedurally unfair. Accordingly, the employer was said to have committed an unfair labour practice.

A cornerstone of social media misconduct and the employer's right to intercept employee's social media posts pivots on the inquiry as to whether the employer had a social media policy in place. Further to the inquiry is whether such posts were made during or after work hours and to what extent did the employee link himself to the employer.[46] These issues were dealt with in the 2017 *Cantamessa v Edcon Group* case[47] where the commissioner found that the employer had committed a gross error. An employee made a scathing post on Facebook referring to South African government and former President Zuma as '*monkeys'.* The employee was on leave in December 2015. She used her own personal device for the post. The post was subsequently captured by a customer who conveyed it to the employer. This culminated in the post being published in the Sowetan newspaper. Needless to state that the post and its publishing were met with furious social criticism which endangered the employers' establishment.

[45] *Halse v Rhodes University* 2017 (38) ILJ 2403 (CCMA).
[46] *Cantamessa* supra note *6*.
[47] Ibid.

Crucial to the question of social media misconduct pivots on an employer's social media policy and more emphatically its stance on off-duty posts made by employees. The obvious consideration then was whether an employee always kept within the permissible parameters of acceptable standards of online behaviour and any misconduct would constitute grounds for dismissal. The employee's dismissal was found to be substantively unfair as the policy relied upon by the respondent did not comply with its off-duty social media policies. The commissioner found that referring to the President as '*stupid*' was not racist and the employee was reinstated.

The Edcon group on review challenged the decision for several reasons. In assimilating the guidance metered out from the CCMA, it should be understood then that employer must implement specific policies with emphasis on employees always adhering to strict parameters of acceptable online behaviour and that any defamatory comments relating to employer or other employees may constitute grounds for disciplinary action. The commission has opined that social media misconduct must be construed in the same way as any other form of misconduct and comply with disciplinary action mentioned in *Labour Relations Act*.[48] Accordingly, employees can be dismissed for misconduct committed outside the workplace even if the misconduct does not relate to employee's employment but may negatively impact on the employment trust relationship. Therefore, an employer may take disciplinary action against an employee for social media misconduct if:

i. An employer can establish a legitimate interest in the matter establishing that the misconduct is disruptive to business efficacy or business reputation.[49]
ii. Where the misconduct complained of transpires outside the workplace, employers must be able to show a connection between the misconduct and its operational requirements. In such instances, the employer can fairly discipline employees for off-duty or off-premises misconduct.[50]

In 2019, most recently, the *Edcon Ltd v Cantamessa*[51] case heard in the Johannesburg Labour Court saw the Edcon group challenge the decision of the CCMA in terms of the *Labour*

[48] Schedule 8 of the LRA.
[49] *Edcon Ltd v Cantamessa* 2020 (2) BLLR 186 (LC) para 12-15.
[50] Ibid.
[51] Ibid.

Relations Act.[52] The court had referred to a United Kingdom case of *Smith v Trafford*.[53] The court in considering the matter found that the employee's use of the word '*monkey*' could not be disassociated from the history of our country. The employee of her own accord had conceded at arbitration that her comment could have caused offence. Her assertion that the Edcon group sustained no damage was unsubstantiated as the comment clearly exposed the employer to reputational harm.[54] The court found that the right to free speech does not extend to statements calculated to cause harm. The employees right to criticise government could not excuse her expression of anger manifestly rooted in the countries racist past and had no place in a democratic country.[55] The commissioner was found to have not properly have evaluated the evidence before him and had come to an unreasonable decision.[56] In the circumstances the court set aside the decision of the commissioner and the employees' dismissal was deemed as substantively fair.[57]

Social media misconduct impacts on an employee's right to privacy and freedom of expression. This form of misconduct is dealt with in terms of the LRA. Because of the sporadic advancements in social media, this form of misconduct requires specific regulation to determine when dismissal would be justified.

[52] Section 145 of the LRA.
[53] *Smith v Trafford Housing Trust* 2012 EWHC 3221 (Ch).
[54] *Edcon* supra note 49 at para18 -19.
[55] Ibid para 21.
[56] Ibid para 22.
[57] Ibid para 23.

1.3 RATIONALE: VALUE OF THE PROPOSED RESEARCH

In the globally technological advanced era, the world has been thrust into, Internet usage, techno-savvy software upgrade competition and information technology radicalism have become tools of the trade for most flourished business enterprises.[58] Social media has risen to the forefront of effective and profitable business marketing strategies with many enterprises flocking to the technological shores. Many employers may not be aware of what to include in social media policies.

Increased social media *friending*, group chats, public forums and the pseudo cyber personality opportunities have manifested with increase in social media usage personally and at work. Employers may enable employees with unlimited Internet faculties for work purposes. Employers may provide employees with devices which can be used during and after work hours. This dissertation aims to highlight the prolific effects innate in social media misconduct but specifically when it sanctions dismissal. Social media misconduct, like any other form of misconduct has the potential to undermine the relationship of trust underpinning the employment relationship and causing the employer reputational harm. In extreme cases, it may sanction dismissal. Considerations of existing labour legislation will illustrate why social media misconduct necessitates the same sanctions as any other misconduct.[59]

To establish misconduct, an enquiry must be made on the degree of Internet access employer's avail to their employee's and its necessity in daily business practices.[60] The social media misconduct enquiry must look at the employment contract, its mention of social media policies and whether employers would be able to hold employees liable for social media posts made in employees private time especially if the post relates directly or indirectly to employers' interests.[61]

Social media misconduct in the workplace may very well manifest in the breach of an employee's fiduciary duty where he fails or neglects to further the endeavours of his

[58] B Singh *The South African Employer's regulation of internet misuse in the workplace* (unpublished LLM Thesis Kwazulu-Natal: University of Kwazulu-Natal, 2015) 16.
[59] *Weeks v Everything Everywhere Ltd* ET/2503016/2012: 15.
[60] S Bismilla 'Social media and in the context of employment law' Cowen Harper 2017, available at *http://www.labourguide.co.za/workshop/1375-social-media-handout-cowen-harper-attorneys/file/*, accessed on 23 July 2018.
[61] S Bismilla op cit note 60.

employer.[62] Actual damage to the employer's reputation may not be necessary but rather the threatening conduct of an employee that poses a potential damage may suffice as proof of misconduct[63]or consequential liability of an employer to third parties.

Potential damage to employers emerges where employees disclose sensitive, confidential business information via social media. Employers barring usage of social media at work, as a policy, must be weary of infringing on employees' rights to freedom of expression and privacy. Aside from civil liability, social media postings threaten to perpetuate certain cybercrimes warranting criminal sanctions for employee and employer alike. This is beyond the scope of the present dissertation but may be contemplated in yet to come analyses of the subject matter at hand.

For social media misconduct to justify dismissal, the gravity of the transgressions, the damage caused, and substantive and procedural fairness elements must be balanced relatively.[64] For such misconduct to become actionable by an employer, two pillars must exist.[65] Primarily, the impact on the employment relationship, such as the breach of trust between actors,[66] and second the damage sustained to an employer's reputation such as bringing the employers enterprise into disrepute.[67] The proposed paper therefore intends to propagate cautionary measures to be implemented in the case if disciplinary hearings for social media misconduct curtailing the onset of unjustified dismissals.[68]

Social media misconduct may render an employer legally liable and vulnerable.[69] The risk of civil liability to employers may include common law concepts of vicarious liability where employers are held accountable for the delicts committed by their subordinates emanating in harm sustained by third parties.[70] The doctrine has a dual operation. First, it provides third party claimants, who sustained damages, a right of vindicatory recourse and second, it encourages

[62] J Du Plessis & M Fouche *A practical guide to labour law* 8th ed (2015) 23.
[63] *Weeks* supra note 59.
[64] M McGregor A Dekker & M Budeli et al *Labour law Rules* 2nd ed (2014)168, 173.
[65]D Badal 'Dismissals of employees due to social media usage 'available at *https://www.golegal.co.za/yourefired-dismissals-of-employees-due to-social-media-usage/.*, accessed on 31 August 2018.
[66] *Dewoonarain* supra note 23.
[67] *Sedick and Another v Krisray (Pty) Ltd* 2011 (8) BALR 879 (CCMA).
[68] Cliffedekkerhofmeyr.com 'Social media and the workplace guideline' (2017) available at *https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/practice-areas/downloads/Social-Media-and-the-Workplace-Guideline.pdf.*, accessed on 31 August 2018.
[69] B Singh op cit note 58.
[70] J Neethling & J Potgieter JM *Law of Delict* 7th ed (2015) 390.

employers to implement preventative measures to prevent employees from transgressing civil wrongs against public constituents.[71] Other types of civil liability include breach of fiduciary duty, intermediary liability[72], disclosure of privileged information, trade secrets, defamation, discrimination, breach of confidence, copyright infringement and insider trading to name a few.

Aside from social media policies implemented at work, other options deterring social media misconduct are practical training exercises and electronic Internet monitoring software. These may protect the interests of employers from potential liability dangers and penalties for noncompliance.[73]

Technological advancements in social media find employers contending with breach of fundamental rights such as the right to freedom of expression, privacy, non-accountability for defamations and derogatory remarks and providing rational justifications for the limitation of such rights. Transgression of such rights may be used as defences for offending employees. The law of general application contained in section 36 of the Constitution[74], makes provision for the limitation of such rights insofar as the limitation is justifiable and reasonable.[75]

The right to human dignity contained in section 10 of the Constitution also broadly extends to the common law right to maintaining a good name and reputation which far surpass the right to freedom of expression.[76] The research aims to purport that employee's waiver their rights to freedom of expression when posting on social media, regardless of the existence of satisfactory privacy measures limiting those exposed to such posts.[77] The concept of personal space diminishes somewhat when actors interact socially online, limiting the right to privacy and freedom of expression which no longer remain as absolute.[78]

[71] A Van Niekerk M Mcgregor & B Van Eck *Law@Work* 3rd ed (2017) 87.
[72] S Papadopoulos & S Snail *CyberLaw @ SA III* 3rd ed (2012) 239.
[73] B Singh op cit note 58.
[74] Section 36 of the Constitution.
[75] I Currie & J De Waal *The Bill of Rights Handbook* 6th ed (2005) 151.
[76] M Manyathi '*Dismissals for social media misconduct'* (2012) 80(6):3 *De Rebus*: 80.
[77] *Fredericks v Jo Barkett Fashion* 2011 JOL 27923 (CCMA).
[78] *Gaertner v Minister of Finance* 2014 (1) BCLR 38 (CC) 49.

1.4 RESEARCH QUESTIONS

1.4.1 Main research problem

Under what circumstances will social media misconduct in the workplace warrant a dismissal?

1.4.2 Secondary research questions

The proposed research will seek to answer further uncertainties in relation to the research problem:

a) When will social media usage during workhours constitute a form of misconduct and to what extent should it constitute a dismissible offence?
b) Can an employee be dismissed for posts made on social media after working hours, on a private or business social media account?
c) To what extent can an employer monitor and intercept an employee's social media communication notwithstanding incorporation of social media policies?
d) Does the authorised or unauthorised social media usage at the workplace expose an employer to potential consequential liability to third parties?
e) What guidelines can be adapted and implemented by employer to reduce risks emanating from social media misconduct?

1.5 RESEARCH METHODOLOGY

The doctrinal approach will be best suited to the endeavours of the proposed research topic. This will include critical textual contemplation of existing statutes, prevailing labour practices and codes of good practice and Constitutional considerations.

The methodology implemented will encompass a desktop study of primary and secondary sources of research including use of books, online resources such as LexisNexis, Sabinet, Heinonline, Westlaw and Jutastat.

Credence will be given to pertinent case precedent and topic literature. There have been many cases dealing with social media misconduct dismissal in recent years. In consideration of such judgements, the opinions and postulation of other authors will be contemplated therein.
South African courts have not been remised in deferring to the decisions of alternate jurisdictions and appropriating jurisprudential licence in combating the issues surrounding social media misconduct and consequent dismissal. Thereunto brief contrasts will be necessitated between national and international case studies.

1.6 STRUCTURE OF THE PROJECT

This research project consists of six chapters.

Chapter one is a contextual background. Under the descriptive title, an introduction to the topic followed by a background and outline of the research problem. This contemplates sections of the Constitution, relevant legislation, common law and case law. The chapter proceeds with the rationale and value of the proposed research where after the research questions and methodology are disclosed.

Chapter two will focus on labour relations and social media misconduct. To commence, the research will consider the constitutional rights to privacy, freedom of expression, dignity labour relations and limitation of rights. An investigation into the Labour Relations Act will deal with the employment contract and the duties of the employer and employee. Grounds for dismissal will be contemplated in accordance with substantive and procedural fairness standards. Misconduct and poor work performance will be analysed together with dismissal sanctions and remedies in the case of unfair dismissals. The chapter will also contemplate the concepts of interception and monitoring of employee social media posts against a backdrop of decided cases.

Chapter three considers the influence of social media in the workplace. The chapter considers the shortcomings in establishing a legal definition for social media and its common features. A postulated definition will be submitted for consideration. Social media will be examined in terms of the law more particularly the LRA and common law. The chapter will consider the difference between social media misconduct during and after workhours. The chapter will consider the social media's utility, its occurrence in the workplace and its usages.

Chapter four contemplates the potential risk to employers emanating from employee social media posts. The sources of employer liability will be considered during and after work hours. Analysis will be made as to how employers can manage risk by introducing social media policies and training. The chapter will also consider instances of when social media misconduct could extend to an employer's vicarious liability to third parties who sustained injury on account of an employee's social media misconduct.

Chapter five will contemplate social media misconduct in the United Kingdom and Germany as foreign jurisdictions. Guidelines from both foreign jurisdictions will be extrapolated to be synthesized in a South African context.

Chapter six will set out the conclusion and recommendation. It will articulate a recommendation for interim regulation, in the absence of adequate legislation. Upon conclusion of the proposed research, the crucial need for appropriate statutory measures will be evident and guidelines that may be adapted and implemented by employer to reduce risks emanating from social media misconduct.

CHAPTER 2: LABOUR RELATIONS AND SOCIAL MEDIA MISCONDUCT

2.1 Introduction

Disciplinary inquiries into social media misconduct are often met with defences from an employee regarding an infringement to constitutional rights to privacy and freedom of expression. Whilst these constitutional rights may not be absolute, guidance is needed on when these rights may be limited. To establish grounds for dismissal and social media misconduct, employers must know when they are permitted to intercept and monitor an employee social media communication in terms of RICA. This chapter considers the rights and duties of the employer and employee and misconduct under the LRA. A distinction is made between social media misconduct perpetuated during and after work hours. This chapter will also consider the dismissal sanctions and remedies for unfair dismissals and the need for disciplinary consistency. The substantive and procedural fairness requirements to establish a dismissal in the case of social media misconduct will also be discussed.

2.2 Constitution: Balancing of rights

2.2.1 Privacy – Section 14

Section 14 of the Constitution contains the general right to privacy as well as specifically enumerated infringements of privacy which form part of the right to privacy.[79] The scope of a person's privacy extends only to those aspects '*in regard to which a legitimate expectation of privacy can be harboured'*.[80] This gives rise to two distinct components to this expectation, subjective expectation of privacy and objective expectation of reasonableness.[81] A person cannot have a subjective expectation of privacy in cases where he has willingly consented to waive that privacy. The second component does not contemplate the explicit or implicit consent to waive privacy rights but rather focuses on a determination by a court on whether a person claiming privacy rights were infringed could reasonably expect his right to privacy to be

[79] I Currie & J De Waal op cit note 75 at 294.
[80] *Bernstein* supra not 33 at 75.
[81] Ibid.

protected under the circumstances.[82] This raises the question of a legitimate expectation to privacy. A legitimate right to privacy would be an entitlement to the right as it appears in the Constitution. An employee or any person cannot expect to have a legitimate right to privacy where he has willingly consented to waive the right to privacy. A legitimate expectation to privacy depends at the very least whether any interference was of the '*inner sanctum*' of personhood or not.[83]

In the *Bernstein* case the court stated that '*Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.*[84] The determination of the scope of the right to privacy is a difficult task.[85] '*Social interactions'* could very well include social media and users thereby participate in a larger communities where privacy rights and intimacy may not exist or becomes significantly diminished.[86]

The right to privacy is enshrined in the Constitution and has a close nexus to freedom of expression. The law states that communications are protected under the right to privacy.[87] In the *Heroldt* case, the court found that social media has caused tension between these two rights.[88] As a constitutional right, the right to privacy is of great significance in South African constitutional and common law. The right was protected in common law before being reiterated as a constitutional right.[89] Privacy infringement has existed in South African law historically and has gradually evolved to its present form sanctioning constitutional protection.[90]

The *Gaertner v Minister of Finance* case stated that the right to privacy embraced freedom from intrusions and interference by the state and others in one's life.[91] A characteristic feature of the right includes a person's personal affairs being separated from the public and the right is transgressed where there is an unauthorised intrusion by another.[92] In short, the right

[82] Ibid para 67.
[83] Ibid.
[84] Ibid.
[85] Ibid para 72.
[86] M Potgieter *Social Media and Employment Law* (2014) 71.
[87] Section 14(d) of the Constitution.
[88] *H* supra note 31.
[89] L Swales 'Protection of personal information: South Africa's answer to the global phenomenon in the context of unsolicited electronic messages (spam)' (2016) *SA Merc LJ* 49 at 51.
[90] D Bilchitz 'Privacy, surveillance and the duties of corporations' (2016) *TSAR* 45 at 49-50.
[91] *Gaertner* supra not 78 at 47.
[92] J Neethling & J Potgieter op cit note 70 at 371.

enshrines the right to be free from and unauthorised outside intrusion. However, in the workplace, an employer can be ostensibly authorised to intercept an employee's social media communications by establishing authorisation from a social media policy or employment contract.[93]

The court commented in the *Bernstein* case that the right to privacy comes into close proximity with the right to dignity as an independent personality right and its extended relation to the concept of identity.[94] Dignity encompasses privacy as it propagates concepts of self-worth and autonomy.[95] This means that an employer who intercepts an employee's social media communications must exercise great caution in not negatively impacting on the employees right to self-worth or being injurious to their dignity. Such interceptions should occur on the instance of investigation for disciplinary purposes and to potentially establish grounds for dismissal.

The Internet can be categorised as both a public and private interface. Private use of the Internet may not have onerous infringements to the right of privacy. The public use of the Internet may limit the right to privacy. The South African legislature and courts have attempted to establish a legal benchmark to protect privacy rights and freedom of speech.[96] The Constitution provides that

> '*Everyone has the right to privacy, which includes the right not to have –(d) the privacy of their communications infringed'*.[97]

In relation to employment contracts, privacy rights pivot on two notions. Firstly, employee rights for the prohibition of social media communications being intercepted and secondly, employer rights for the prohibition of confidential information being disclosed online by their employees.[98] The *Dutch Reformed Church Vergesig v Sooknunan* case, involved a lessee of the church, who leased the premises pending the finalisation of the sale of the leased premises subject to an appropriate sale offer. The lessee's offer to purchase was denied and the church accepted another offer for a higher purchase price from an Islamic based community enterprise.

[93] D Bilchitz op cit note 90 at 49-50.
[94] *Bernstein* supra note 33 at 65-68.
[95] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) 27.
[96] F Cassim 'Regulating hate speech and freedom of expression on the internet: promoting tolerance and diversity' (2015) *South African Journal of Criminal Justice* 326.
[97] S14 (d) of the Constitution.
[98] *Dutch Reformed Church* supra note 29 at 79.

Accordingly, the lessee received notice to vacate which was not received well. The church then initiated eviction proceedings which was withdrawn with a view to reinstate at a later stage. The lease, offer to purchase and eventual sale were all private transactions between the necessary parties. The lessee being disgruntled about the sale of the premises and pending eviction embarked on a public campaign using social media. The idea was to compel the church to abandon the sale of the premises and incited threats to members of the church board responsible for the sale. The lessee's posts on social media also created friction between proponents of the Christian and Islamic faiths. The court had to consider the issue of an invasion of privacy subject to the use of social media. The lessee denied being the creator of the Facebook page but admitted visiting the page and posting upon it. The court found that the page did in fact belong to the lessee. The court found it to be a gross invasion of privacy where an individual's personal information was disclosed on an online public forum without that individual's consent.[99] Such conduct may be construed as a form of social media misconduct. Privacy rights are a contentious point of contemplation in decisions of dismissal or discipline for an abuse of technology and appropriate sanctions must be imposed in accordance with the LRA.[100] Privacy rights in the workplace extend beyond physical privacy but also to employee communications such as social media.[101]

In summary, all persons have a legitimate expectation to privacy including employers and employees. An infringement of the right to privacy is determined by considering the degree of interference with the inner sanctum of personhood. The right to privacy is not absolute and an employer will have to consider to what degree will an interception of an employee's social media communication be regarded as an interference of the employee's inner sanctum of personhood. Subjectively, employees could waiver the right to privacy thus authorizing employers to intercept their social media communications or by agreement to adhere to an employer's social media policies. Employees must be made aware that social media communications occur on a public platform and such publications diminish the right to privacy. Employers and other members of staff equally have a right to privacy. If an employee's social media communication discloses the personal information of other members of staff or an employer's confidential information, this may be construed as a form of social media misconduct.

[99] Ibid para 78.
[100] D Collier 'Workplace privacy in the cyber age' (2002) *Industrial Law Journal* 1743 at 1746.
[101] L Swales op cit note 89 at 49.

2.2.2 Freedom of expression – Section 15

Prior to the Internet and during apartheid, South Africa was subjected to high degrees of censorship. Such restrictions thwarted progress toward democracy and exacerbated the impact of systematic violations of other fundamental human rights in South Africa.[102]

In the *Shabalala* case, the court noted that censorship is incompatible with South Africa's commitment toward a society based on constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes, and colours.[103]

Freedom of expression is contained in section 16 of the Constitution but does not protect all forms of expression. Subsection (2) defines the boundaries beyond which the right to freedom of expression does not extend representing an acknowledgment that certain expressions do not deserve constitutional protection because it has the potential to impinge adversely on the human dignity of others and cause harm.[104]

The right recognizes the importance for a democratic society and individuals personally and the ability to form and express opinions even where those views are controversial.[105]

The right is important for two reasons. Firstly, it contributes to the goal of establishing a democratic society and secondly it constitutes an important aspect of what it is to be human thus empowering individuals and agency allowing informed and wise life choices for ourselves.

In the *Mamabolo* case, the Constitutional Court emphasized free and open exchange of ideas having regard to our recent past of thought control, censorship and enforced conformity to governmental theories.[106] The right is commonly related to the search for truth, which is said to be best facilitated in an open marketplace of ideas.[107]

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[102] *S v Mamabolo* (CCT 44/00) (2001) ZACC 17; 2001(3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) 28.
[103] *Shabalala and Others v Attorney General of the Transvaal and Others* (CCT23/94) (1995) ZACC12; 1995 (12) BCLR 1593; 1996 (1) SA 725 (29 November 1995) 26.
[104] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 30.
[105] *South African National Defence Union v Minister of Defence and Others* 2007 (1) SA 402 (SCA) 8.
[106] *Mamabolo* supra note 102 at 37.
[107] Ibid para 37.

Freedom of expression shares a nexus with dignity and in the workplace both rights can be limited. A limitation to the right could include the right to incite hatred, racism or similar derogatory remarks.[108] What some may deem as offensive may not be offensive to others and social media communications must be determined on grounds of reasonableness. In making such a determination the seriousness and nature of an infringement of dignity must be considered.[109] The right may also be limited for business purposes in maintaining the good reputation of the employer. Employees can also agree to the limitation of this right in the employment contract or be subjected to employer's social media policy.

'Expression' is a broad term. It includes words, expressive activities, and symbolic acts. It includes expressive activities. In the *Phillips and Another v Director of Public Prosecutions* case the court considered a statutory provision prohibiting any person from appearing or performing naked or semi naked at a venue licensed to sell alcohol and regarded such behaviour as an infringement of freedom of expression.[110]

The constitutional court has also found that the right to freedom of expression does not only extend to ideas favourably received or those regarded as inoffensive. The right also includes those ideas that offend, shock or disturb.[111]

Notwithstanding the constitutional courts broad interpretation of 'expression', the right does not extend to every form of expression. Propaganda for war, incitement of imminent violence an advocacy of hatred based on race, ethnicity, gender or religion which amounts to incitement to cause harm do not form part of this broad interpretation of the right. Subsection 2 acknowledges that some forms of expression have the potential to impair the exercise and enjoyment of other rights.[112] The Constitution recognizes that the State has a particular interest in regulating expression in terms of developing a non-racial and non-sexist society based on human dignity and equality.[113]

[108] *RM v RB* 2015 (1) SA 270 (KZP) 27.
[109] *Le Roux v Dey* 2011 (3) SA 274 (CC) 46.
[110] *Phillips and Another v Director of Public Prosecutions* 2003 (3) BCLR 357.
[111] *Islamic Unity* supra note 104 at 28-29.
[112] Ibid para 28.
[113] Ibid para 31.

With the exceptions of the forms of expression in subsection 2, the right to freedom of expression protects all other forms of expression. This means that any restrictions imposed by the state or private institution such as an employer or any form of expression falling outside the ambit of subsection 2 will amount to infringement of the right to freedom of expression. Such an infringement has to be justified in terms of the law general application.

Employees cannot hide under the protection of the right to freedom of expression when making any utterances on social media. This is because an employee owes the duty of good faith to the employer. This duty of good faith has a broad scope and cannot be defined with certainty but should include a duty of an employee to always act in the best interest of the employer.

In the *Democratic Alliance v South African Broadcasting Corporation Limited and Others* case Hlaudi Motsoeneng, chief executive of the SABC addressed a press conference making defamatory comments about the SABC, its board of directors' and board members. At the CCMA the commissioner found that defamatory comments about an employer only came under judicial protection if they were made to advance the interests of justice, made in good faith and were not misleading or reckless. The commissioner noted that employers are not immune from defamatory remarks made by employees. The commissioner expressed that the right to freedom of expression is not absolute and that negative comments of an employee does not enjoy legal protection if it impairs the dignity of others.[114]

In the *Ndzimande v Dibben* case, the labour court considered limits to the freedom of expression when employees made defamatory and fraudulent statements about their employer on live radio. The court held that whilst employees have a right to express legitimate grievances and exercise their constitutional rights, the right to freedom of expression is not unfettered. As a general principle a balance must be sought between the rights of the employer and the employee. There may be many instances where an employer's right to a good reputation and good name may supersede the employee's right to freedom of expression especially in cases where employees' utterances are misleading, untruthful, harmful and contrary to public interest.[115]

[114] *Democratic Alliance v South African Broadcasting Corporation Limited and Others* 2015 (1) SA 551 (WCC).
[115] *Ndzimande v Dibben* 2019 ZALCJHB 73.

In the *Dewoonarain* case an employer considered the comments on Facebook to be directed at it because its directors and many of its employees are Indian. The employee, Ms Dewoonarain, posted a comment of Facebook that read '*Working for and with Indians is pits; they treat their own as dirt'*. The employee was charged for bringing the company's name into disrepute in that the employee posted derogatory remarks on Facebook. The employee challenged the procedural fairness of her dismissal claiming that she was not provided with further particulars as to what was meant by the phrase '*bringing the company's name into disrepute*' and was also not permitted to provide submissions in mitigation.[116]

The employee argued that her post was protected due to her constitutional right to freedom of expression. The arbitrator ruled against the employee's right to freedom of expression and pointed out that the right is not absolute and stated that making unjustifiable and irresponsible remarks on social media had the potential for harm to the business of the employer. The arbitrator found that the employer faulted in not following its own internal procedure which permitted the employees to submit mitigating factors during the inquiry. On this basis the arbitrator found that the dismissal was substantially fair but procedurally unfair.[117]

Freedom of expression and human dignity are considered equally important.[118] The one right may prevail over the other which may be limited depending on the circumstances of a case.[119] Freedom of expression is important in a democratic society as it allows people to make responsible decisions and participate effectively in public life.[120] This right is not of a paramount value and must be balanced with other constitutional rights which is challenging in determining which right outweighs the other in cases where employees have the right to express themselves on social media. For this reason, the truthfulness and public interest in the publication is a crucial requirement to establish social media misconduct.

Freedom of expression must be balanced against dignity and in cases of defamation an award of damages must be appropriate. A generous award could impact negatively on the right to freedom of expression and in nominal awarded damages could be injurious to the right to

[116] Dewoonarain supra note 23.
[117] Ibid.
[118] *Mamabolo* supra note 102 at 41.
[119] *RM* supra note 108 at 27.
[120] *Khumalo* supra note 95.

dignity.[121] Therefore the right to freedom of expression is not an absolute right. The necessity of establishing a test is not to curtail the right to freedom of expression but rather to regulate and disallow harmful misconduct on the Internet.

In the *Heroldt* case Justice Willis considered granting an interdict in respect of defamatory remarks made on Facebook. Mr Heroldt sought an interdict against Mr Wills for posting a message on Facebook which is defamatory nature. The remarks eluded that the applicant was a poor parent dependent on alcohol and drugs. The defamatory remarks included his statement that if the applicant had to look at himself in the mirror that he would most probably be in a drunken testosterone haze and question whether he was able to see the reflection of a man at all in the mirror. The applicant and respondent in the case used to be close friends and business associates. The applicant sought an interdict from the High Court to have the respondent to remove the comments from Facebook.[122]

The court made a finding that the remarks were defamatory and that he had a clear right to his privacy and reputation and the posting on social media was injurious.[123] The court considered if there were alternative remedies aside from an interdict in exercising its discretion to order the removal of the post. The respondent argued at least two other remedies were available to the applicant aside from an interdict. The respondent argued that the applicant could institute an action for damages, or he could approach Facebook to have the posts removed. The court was not satisfied by the respondent's suggestions and had indicated that an action proceeding would have resulted in drawn out proceedings which would be expensive to the applicant and that there was no assurance that Facebook would comply with the request to remove the post.[124] The court therefore directed its attention to other considerations impacting on the granting of an interdict. The court noted that social media was to be distinguished from electronic news media.[125] The distinction was that news may be circulated on social media and that social media was primarily a platform for social activity and thus interdicting a social post was not likely to disrupt the free flow of news. The court considered that the financial implications of interdicting a print news medium as in stopping a printing press did not apply to electronic social media. With regards to the scope of the order of the court, the court declined to

[121] *Le Roux* supra note 109 at 34.
[122] *H* supra note 31 at 2 -6.
[123] Ibid para 1.
[124] *H* supra note 31 at 26-2.
[125] Ibid para 30 -31.

prospectively restrain the respondent from posting any information on the applicant on Facebook or on other social media sites in the event that future circumstances might justify such publications on social media. [126]

In the *Harvey* case a former employee remained a member of the close cooperation of the employer and therefore continued a fiduciary duty to the close cooperation despite the resignation from employment. The former employee took up employment with a competing company and then shared a post on his Facebook account which effectively advised several of the closed corporation's clients that he had moved on to '*bigger thinking'* and would be operating close by. The case has illustrated that the right to privacy is not absolute, and employers may be entitled to use information which cannot be obtained in any other manner in order to protect its interests and reputation. Employees should not place too much confidence in the shield of privacy particularly where duplicitous conduct is involved. Employers must however be careful in the manner of obtaining information as the admissibility of unlawfully obtained information is subject to the discretion of the court and in certain circumstances can amount to a violation of the right to privacy.[127]

In the *Cantamessa* case an employee was dismissed for making racial remarks on Facebook about the South African government naming them as a troop of '*monkey*s'. The post was made on the employee's personal Facebook page whilst the employee was on a period of leave and using her own Internet sources and electronic devices. The Edcon group had argued that the employees conduct had placed the reputation of the organization at risk and consequently compromised the relationship of trust in the employment contract and more specifically breached the employer's social media policy, disciplinary code and Internet policy.[128]

The employee's argument was based on the fact that she was upset by the conduct of President Zuma in replacing the finance minister and had taken to social media to vent such frustration. The employee defended her posts as not being racially offensive as she submitted that her posts were directed to the South African government and not black people.[129]

[126] Ibid para 40 -45.
[127] *Harvey* supra note 35.
[128] *Cantamessa* supra note 6 at 2 – 5.
[129] Ibid para 8.

The employer was informed about the employees post by a customer who felt that the post was racist. The customer was able to illicit from the employee's Facebook page that she was employed by the Edcon group. Other employees also '*liked*' the employees post and were issued with final written warnings as they were not the authors of the post. The social media post was published in the Sowetan newspaper and received many tweets on Twitter.[130]

At arbitration the commissioner made a finding that the employees post did not negatively impact on the employer and the complaining customer who informed the employer of the post had indicated that she did not view the employer negatively nor did the publication in the newspaper implicate the employer negatively and only one person's comment on Twitter threatened non-payment of their account. The commissioner found that the employees Facebook page whilst confirming her employment with the employer did not necessarily indicate that a reasonable Internet user would be able to find that out.[131]

The commissioner relied on the English case of *Smith v Trafford Housing Trust*. The court in this case found that and employees Facebook page was a medium for personal or social interaction. The court found father that it was not a medium for work related information and views. It was noted that any reader of an employee's profile page would have no doubt about the employee's employment.[132]The court found that the employee's posts are not work related and that there was no basis for the reader of such a post to make any connection between the postings and the employer.[133]

In this regard the commissioner found it 'inconsequential' that few South Africans had associated the employees Facebook post with the employer and that a majority of the employers' customers were reasonable Internet users and did not make a negative association as claimed by the employer.[134]

The commissioner further found that the employee did not breach the employer's social media and Internet policies as she did not use the employer's equipment or Internet facilities and that

[130] Ibid para 6.
[131] Ibid para 10.
[132] Ibid para 11.
[133] *Smith* supra note 53 at 86.
[134] *Cantamessa* supra note 6 at 10.

the policies did not regulate the private use of the Internet by employees outside working hours.[135]

In contending with the breach of the employer's disciplinary code the commissioner noted that it only extended to inappropriate or unacceptable conduct while serving customers and that such conduct could only take place during work hours. The employer thereby conceded that the employee did not breach the disciplinary code. The commissioner accordingly made a finding that the employers social media post read in conjunction with the disciplinary code did not extend to social media posts made outside of working hours.[136] The employee's dismissal was found to be substantively unfair and was awarded 12 months compensation[137].

In the *Edcon Ltd v Cantamessa* case, the Edcon group took the matter on review for many reasons.[138] In this case the Labour Court noted that employers must implement specific policies containing strict parameters of what may be construed as acceptable online behaviour for employees; further that any conduct jeopardizing the trust underpinning the employment contract and bringing disrepute to the employer's establishment may constitute grounds for disciplinary action.[139] The CCMA has noted that social media misconduct must be construed in the same way as any other form of misconduct and must be dealt with in the same way as any other misconduct disciplinary action as mentioned in the LRA.[140] On this basis employees may be dismissed for misconduct that transpires away from the workplace even after hours and even if it does not necessarily relate to an employee's employment but significantly impacts on the employment relationship.[141] In these circumstances an employer may institute disciplinary action against employees for social media misconduct if an employer can establish a legitimate interest in the matter evidencing that the misconduct is disruptive to the business efficiency or its reputation.[142] In cases of where the misconduct complained of transpires outside of work hours and away from the workplace, employers must be able to show a connection between the misconduct complained of and its operational requirements. Should this be the case, employers can fairly discipline employees for off duty or off premises misconduct.[143]

[135] Ibid para 59.
[136] Ibid para 63.
[137] Ibid para 23.
[138] *Edcon* supra note 49.
[139] Ibid para 16.
[140] Ibid para 12.
[141] Ibid para 16.
[142] Ibid para 18.
[143] Ibid para 13.

The court on review for the Edcon group challenged the decision of the CCMA in line with the LRA. The court reconsidered the English case of *Smith v Trafford* again and found that the employees use of the word '*monkey*' could not be separated from South Africa's historical past.[144] The employee of her own admission conceded at arbitration that her comment could have potentially caused harm or offence. The employee's submission that the employer sustained no damage was found to be baseless as the comment certainly exposed the employer to reputational harm. The review court stated that the right to free speech does not extend to statements calculated to cause harm. The court in assessing the employee's right to free speech weighed the employees right to make a criticism against South African government as an expression of anger which is deep rooted in the country's racist past and could not find a place under a constitutionally democratic dispensation and would be accordingly inexcusable.[145] The review court made a finding that the commissioner at CCMA did not properly evaluate the evidence before the arbitration and that the decision given was unreasonable. The review court held that the decision of the CCMA had to be set aside and the employees' dismissal was regarded as being substantially fair.[146]

2.2.3 Dignity – Section 10

Section 10 of the Constitution includes the right to human dignity as a founding value. It is used to interpret the right to equality and also permeates the interpretation of other rights in the Constitution.[147] Aside from being a founding value in the Constitution, it is an independent and an enforceable right. The right implies an expectation to be protected from conditions or treatment which offends the subject sense of his worth in society particularly treatment, which is abusive, degrading, humiliating or demeaning and which would constitute a violation of this right. Conduct treating a subject as non-human or less than human or as an object is intolerable and contrary to the Constitution. Whilst an employer could be a juristic legal personality, it cannot assert an infringement of the right to human dignity. However, where a social media communication degrades or defames a few members or singular members of the employer then the right to human dignity of those representatives must be considered. In assessing a sanction

[144] Ibid.
[145] Ibid para 17.
[146] Ibid para 22-23.
[147] *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) 23.

for social media conduct, the harms caused to the employer and representative members of the employer, must be weighed up against the rights of freedom of expression of an offending employee.

The right assumes that each human being has incalculable human worth and should be treated accordingly regardless of circumstances. The right entails that everyone has the same model worth.[148] In this regard, employees cannot single out or implicate other members of staff in their social media communications in a negative way. It entails an acknowledgement of the intrinsic worth of human beings and the recognition that human beings are entitled to be treated as worthy of respect and concern.[149] Human dignity demands that people are treated as unique individuals rather than as representatives of a group.

Dignity as contained in Section 10 of the Constitution must be understood not only as a fundamental constitutional value but must also be understood as a justiciable and enforceable right to be respected and protected. Dignity as a value can be utilized to interpret almost all rights in the Bill of Rights but mostly when the value of human dignity is offended, '*the primary constitutional breach occasioned may be of a more specific right*'.[150] This means that human dignity as a right may be limited but none the less vital. Whilst the right to dignity may be limited by way of the law of general application,[151] the right to dignity will most likely be depended upon when no other rights specifically protect the interest at hand.[152] In circumstances where employers cannot establish that an employee's social media communications lacks legal protection under the rights to freedom of expression or privacy, employers can consider the infringement of the right to human dignity of other members of staff to justify misconduct and an appropriate sanction. The overall consideration should not only extend to the reputation of the employer's legal personality but also to the image of its members. Some employee social media posts can victimize and degrade individual members of staff thereby indirectly causing the employer reputational harm.

[148] *City Council of Pretoria v Walker* 1998 (2) SA 363 113.
[149] *S v Makwanyane and Another* 1995 (6) BCLR 665 28.
[150] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) (2000) ZACC 35.
[151] Section 36 of the Constitution.
[152] Ibid.

2.2.4 Limitation of rights – Section 36

In the *Zuma* case under the interim Constitution the constitutional court advocated a two-stage approach to the limitation of rights.[153] Under the Constitution the constitutional court has mainly followed the two-stage approach. The first inquiry is whether the provision in question infringes the rights protected by the substantive clauses in the Bill of Rights. If it does, the second enquiry will be whether that infringement is justifiable.[154] This two-stage approach requires a court to firstly consider the substantive rights to determine whether the right was infringed or limited. Secondly it requires the court to ask whether the infringement or limitation is justifiable in terms of section 36 of the Constitution.[155]

In dealing with the justification enquiry the approach to be followed is to determine the limits of a protected right and as to whether the limitation of the right can be justified. If the limitation is justified, then the measure sustains the test of constitutionality. If the limitation is unjustified then the legal provision will be unconstitutional and invalid. The two requirements needed to justify the limitation of the right is that the limitation must be '*in terms of law of general application*' and the limitation must be '*reasonable and justifiable in an open and democratic society based on equality, freedom and human dignity*'.[156] A determination is made as to what the relationship between the limiting measure is and its stated purpose more specifically as to whether they are rationally connected.[157] The enquiry determines if there are clear alternative means available that are less restrictive on the full enjoyment of the right. And then the enquiry determines if there is a legitimate rationally based limiting measure a proportionate limitation on the question taking into account the degree of infringement, the nature of the right, the breath of the measure and the social good it achieves which would be regarded as balancing and proportionality.[158]

In dealing with cases of social media misconduct employers must first make inquiry if it's interception of an employee's social media communications infringes upon the employees right to privacy or freedom of expression. If the employer's interception of such communications

[153] *S v Zuma and Others* (CCT5/94) 1995 ZACC (1).
[154] P De Vos & W Freedman *South African Constitutional Law in context* (2014) 371-376.
[155] *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (7) BCLR 663 26-27.
[156] Section 36(1) of the Constitution.
[157] *South African National Defence Union* supra note 105 at 35.
[158] P De Vos & W Freedman op cit note 154 at 371-376.

amounts to an infringement, the employer's inquiry should consider if the infringement of an employee's right to privacy or freedom of expression is justifiable. An employer who does not have an employment contract in place or who has not implemented social media policies may have to limit and employee's constitutional rights to facilitate the interception of that employee's social media communications in order to establish misconduct and thereby justify dismissal.

2.2.5 RICA: Regulation of Interception of Communications and Prevention of Communication Act (hereafter RICA)

This Act relates to the interception and monitoring of communications in South Africa. Interception of communications are generally prohibited[159] except for a few statutory exemptions.[160] The Act provides that

> '*No person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission'*.[161]

However, the Act makes provision that a person may consent or give written permission to have another party monitor or intercept any data communication unless it is for unlawful purposes.[162] The Act makes specific statutory exemptions barring interception. [163]

The Act has been criticized for not providing sufficient privacy protection to employees in the workplace which is subject to constitutional challenge.[164] These challenges include the authorisation of employers to intercept an employee's social media communications which may infringe on constitutional rights of privacy and freedom of expression. The Act is markedly different from its predecessor the Interception and Monitoring Act.[165] RICA builds and advances on the Interception and Monitoring Act regulating interception of communications and the execution of directions and entry warrants by law enforcement officers. The rationale for RICA is to effectively prevent cybercrimes and prosecute criminals.

[159] Section 2 RICA.
[160] Section 4-11 RICA.
[161] Section 2 RICA.
[162] Section 5 RICA.
[163] Section 3 RICA.
[164] N Bawa 'Telecommunications in South Africa' (2006) *STE Publishers* at 296 – 332.
[165] Interception and Monitoring Act 127 of 1992.

Further critiques on the Act indicate that providers of value-added network services are also providers of telecommunications services (TSP) in the former Telecommunications Act.[166]

Telecommunication in the Telecommunications Act is defined as

> *'The emission, transmission or reception of signal from one point to another by means of electricity, magnetism, radio, or other electromagnetic waves, or any agency of a like nature, whether with or without the aid of tangible conductors'*.[167]

The Telecommunications Act emphasizes stringent obligations on TSP's to intercept, monitor and archive services. These imperatives have been propagated in the Electronic Communications Act.[168]

Sections 3 to 11 of the Act set out the statutory exemptions for the prohibition of unlawful monitoring and interception.[169] There may be instances where an employee would utilize the property of the employer to engage on social media sites making posts which are tantamount to misconduct.[170] In the *S v Kidson* case the court held that the interception of a phone call by a person who is party to the call does not constitute '*third party monitoring*' as one cannot eavesdrop on their own conversation. It was confirmed that secret recordings of conversation constituting '*participant monitoring'* is permissible as evidence.[171] This position became predominant in Section 4(1) when the Act was promulgated. The Act provided that a '*party to the communication*' could include a person listening and not actively conversing.[172]An employer could be construed as a party to the communication.[173] The reason for this is that the parameters of an employee's privacy rights only extend to a legitimate expectation of privacy which may not apply to workplace communications.[174]

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[166] Telecommunications Act 103 of 1996.
[167] Section 1 (xxv) Telecommunications Act 103 of 1996.
[168] Electronic Communications Act 36 of 2005.
[169] Section 3-11 RICA.
[170] *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union obo Van Wyk v Atlantic Oil (Pty) Ltd* 2017 (9) BALR 960 (CCMA).
[171] *S v Kidson* 1999 (1) SACR 338 (W).
[172] Section 1 RICA.
[173] Section 4 RICA.
[174] *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225 (W).

Amongst the many exemptions prevalent in the Act, the two which find application in social media misconduct is when a party to a communication has furnished formal consent allowing interception[175] and when interception transpires in the endeavours of a business.[176]

In a disciplinary hearing involving social media misconduct a crucial issue is whether the employer had the consent of the employee when intercepting the post and as to whether the interception did in fact conform to such consent. A dispute would arise between employers and employees if the question of consent was not agreed upon in the contract of employment.[177] Interception in the case of carrying out a business may only be carried out with the consent of an employer of the business and the interception has to be for evidentiary purposes during an investigation of unauthorised use of a telecommunication system which is mainly used for business purposes.[178] Users (employee's) have to be notified of the interception by the employer.[179] This means that employers may intercept and use employees' communications on social media in disciplinary actions as long as the employer's social media policy and employment contract advises employees of such conduct.[180] It was reiterated in the *Harvey* case[181] that employees must be cautioned that unauthorised usage of business communications systems could mean that employers could intercept indirect employee communications at work.[182]

In the workplace there is a tension between the right of an employer to intercept a communication of an employee and the principle that an employment relationship is premised on trust.[183] The Act does allow for a party to monitor and record direct communications which means that an employee can also intercept any communication with the employer, manager, supervisor, human resources consultant or any person in authority at the workplace for communications that an employee is privy to.[184] Secretly monitoring an employer without their consent or knowledge is legal in terms of the Act and poses a conundrum in sustaining an

[175] Section 5 RICA.
[176] Section 6 RICA.
[177] D Van Der Merwe A Roos & T Pistorius et al *Information and Communications Technology Law* 2nd ed (2008) 27.
[178] Ibid.
[179] Section 6 RICA.
[180] D Van Der Merwe A Roos & T Pistorius op cit note 177 at 28.
[181] *Harvey* supra note 35.
[182] Section 6(2) RICA.
[183] B Conradie G Giles & D Du Toit op cit note 5.
[184] Ibid.

ongoing trustworthy employment relationship. More so, in cases of communications containing confidential information of the employer.[185]

Interception can be legally carried out by means of an interception direction and entry warrant, issued by a judge on the request of a police officer who has a reasonable suspicion that a serious crime has been committed or is about to be committed.[186] The *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* case questioned the constitutionality of Section 16 of the Act. The Pretoria High court had to adjudicate upon the constitutionality of many South African surveillance schemes and the Act itself. The motion propounded the lack of notification of surveillance and sufficient safeguards in relation to the safety and custody of information accumulated through surveillance and the preservation of the confidentiality employed by investigative journalists. The court noted that it was common cause that the Act violated the right to privacy enshrined within the Constitution and considered if the violation was justifiable under S36 of the Constitution. The court found that the Act was unconstitutional in that it did not make provision for post surveillance notification.[187] The implications of this case in relation to the research is that employers may have to implement protocols for the monitoring and surveillance of employee social media communications. Employers may have to notify employees that the social media activities are being monitored and that information obtained from such platforms can be used in disciplinary hearings. Such information can be used to establish grounds for dismissal especially if it undermines the employment relationship. The finding of the court may have a negative impact on the powers of an employer to monitor its employee's social media posts. This is important in cases where employers do not have social media policies in place or regulate interception and monitoring in the employment contract.

The court found that designated judges did not maintain their independence in interception applications and that applicants for such orders did not have to inform the designated judges that the surveillance subject was a lawyer or journalist. The court directed a two-year period within which to rectify the discrepancy declaring bulk surveillance as unconstitutional. The judgement has been referred to the Constitutional Court for confirmation on the order of

[185] F Coetzee 'Section 4 of RICA: The big brother constant and the admissibility of secret recordings' (2020) *Employment Law Alert* 32.
[186] Chapter 3 RICA.
[187] Section 16(7) (a) RICA.

constitutional invalidity.[188]The impact of the case indicates that employers cannot monitor its employee's social media communications as the concept of interception in the Act has presently been mandated for intervention by the legislature. The contraindications of this are that employers may not be able to use intercepted employee social media communications to establish grounds for dismissal.

'Intercept' under the Act refers to

> '*the aural or other acquisition of contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person other than the sender or the recipient of the intended recipient of that communication and includes the – (a) monitoring of any such communication by means of a monitoring device, (b) viewing, examination or inspection of the contents of any indirect communication and (c) diversion of any indirect communication from its intended destination to any other destination'*.[189]

Interception is regulated by the '*Office for Interception Centres*' and is carried out by state intelligence or law enforcement agencies using a '*tap – link*'.[190] The action of interception mainly applies to indirect communications which is the transfer of information in the form of speech, music, data, text, visual messages, signals or radio frequency, really any form of communication which is not done directly.[191] The Act makes a distinction between direct and indirect communications and limits the right to intercept indirect communications.[192]

An employee's social media communication can be construed as an indirect communication. This would limit the rights of the employer to intercept any employee social media

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[188] *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others* 2020 (1) SA 90 (GP).

[189] Section 1 RICA.

[190] Section 32(1) RICA.

[191] Chapter 6 RICA.

[192] Section 1 of RICA reads:

''*indirect communications' means the transfer of information, including a message or any part of a message, whether-*

(a) in the form of -

- *(i) speech, music or other sounds;*
- *(ii) data;*
- *(iii) text;*
- *(iv) visual images, whether animated or not;*
- *(v) signals; or*
- *(vi) radio frequency spectrum; or*

(b) in any other form or in any combination of forms,

That is transmitted in whole or in part by means of a postal service or a telecommunication system'.

communications to establish grounds for dismissal. Essentially indirect communications could refer to any other communication other than face to face communications.

The Act also regulates admissibility of intercepted communications as a form of evidence in court proceedings and disciplinary hearings.[193] This implies that even if an employer obtained intercepted evidence from an employee's social media communication to establish grounds for dismissal based on misconduct, the employer may not be able to use such evidence due to its inadmissibility.

The Act provides that telecommunications service providers and Internet service providers are to collect and store communications related information for considerable periods of time. The collection of personal information can be used for mobile devices.[194] Such mobile devices could be provided to employees by employers alternatively employees may have their own devices which they take and utilize at workplace forums. Whilst employers may not be able to intercept an employee's own device and may face challenges with intercepted social media communications, employers can use employee communications sources from the employee's Internet service provider or telecommunications service.

The Act provides that everyone has the right to any information held by the state or any other person which is required for the proper exercise of the protection of a fundamental right to have right of access to such information.[195] Where employers can substantiate that any of its rights have been violated by an employee, then in terms of the Act, the employer should have access to the employees social media post to establish misconduct.

In the *Sedick and Another v Krisray* (Pty) Ltd case the CCMA was required to determine the fairness of the dismissal of two employees who had allegedly posted derogatory comments on Facebook regarding their employer's family business. The bulk of the posts were made after work hours and not on the employee's personal devices. The employer became aware of the employee's posts on social media after a member of management navigated the employees Facebook pages with the view of sending a friend request. The employees did not prefer the

[193] Chapter 9 RICA.
[194] Section 30 RICA.
[195] Section 32 RICA.

privacy settings on Facebook and the manager was able to peruse their personal profiles on a public forum.[196]

The employees were charged with misconduct for causing disrepute to the employer's establishment in a public domain. Pursuant to a disciplinary hearing the two employees were dismissed accordingly. At arbitration the commissioner considered RICA and considered the issue of the employer's interception of the employee's communication via social media and more in particularly the fact that the employer was not a party to such a communication. RICA provides that the interception of communications shall be deemed lawful when a party is a recipient of the communication or when the party who is a recipient of the communication consents to it being intercepted either during or after its transmission.[197] The commissioner found that a person using the Internet would qualify as a recipient of the comments posted on the employer's Facebook profiles. It was noted that the Internet is a public domain and since the employee communications were not privacy protected the employees had thereby waived their right to privacy rendering the social media posts squarely within the public domain.[198] The commissioner found that the employer in downloading and printing the employee posts had done so legally and was able to rely on such evidence as it was admissible. The commissioner confirmed that the posts were capable of bringing the company's good name and reputation into disrepute and at the dismissal of the two employees was fair.[199]

The implications of this case indicate that an employee's social media communications can be intercepted by an employer. Such interception would not breach the employees right to privacy on the understanding that social media occupies a public platform. On this basis, an employer can use such communications to establish grounds of misconduct and justify dismissal if the employee social media communications compromised the employers good name or was hazardous to its reputation.

[196] *Sedick* supra note 67.
[197] Ibid para 50.
[198] Ibid para 51.
[199] Ibid para 52.

2.3 THE LABOUR RELATIONS ACT 66 OF 1995

This section of the chapter will focus on the rights and duties of the employer and employee under the LRA. The concept of misconduct is discussed and social media misconduct particularly. A distinction is made between social media misconduct of an employee made during and after work hours. The research contemplates the sanction of dismissal for social media misconduct and potential remedies for dismissal. This section will also consider the substantive and procedural fairness requirements in the workplace in cases of social media misconduct.

2.3.1 The employer

Employers often determine the expected conduct and performance anticipated of employees, provided that the conduct required is reasonable and instructions given to employees are reasonable.

Pursuant to an employment contract, employers are expected to allow employees into their service and pay them accordingly as agreed.[200] An employment contract should be entered into freely and voluntarily between the parties. It gives rise to obligations placing an employee under a duty to perform as agreed and affording a right for remuneration from the employer. Conversely the employer has a duty to pay employee for work completed and has a right to expect employee to perform as agreed.

In addition, the employer has a duty to provide safe working environment for employees. In the *Media 24* case, it was understood that employers have the responsibility of protecting employees from online harassment or cyberbullying caused by other employees.[201] The court held that the employer owes an employee a common law duty to take reasonable care of the employee's safety. This duty surpasses physical threats and extends to psychological harm as well.[202] If an employer fails to uphold this duty in the workplace, employers may then be required to compensate victims of such harm where employer neglected the responsibility to protect against such harm. This principle might be extended to social media. In cases, where

[200] Section 29(1)(i) BCEA.
[201] *Media24 Ltd and another v Grobler* 2005 (7) BLLR 649 (SCA) 65.
[202] Ibid.

employers provide employees with Internet access and devices to use social media either during or after work hours, any posts made by an employee that can be classified as social media misconduct and which causes another party harm may render the employer vicariously or consequentially liable for such injuries. Employers who provide employees with unfettered Internet access and devices must do so subject to strict social media policies.

Arguably, it may be contended that social media usage does not fall within the purview of traditional workplace conduct and has no nexus to duties of the employer or employee responsibilities. However, it must be understood that employer protection responsibilities may be extended to the workplace by virtue of social media which relates to multiple employees and workplace relations constituent of the employer's business. The issue of whether conduct complained of transpires during work hours or after work hours is not a determinant factor and will not assist an employer from escaping liability in terms of the EEA, vicarious liability, and common law.

2.3.2 The employee

Employees have the duty to make services available to the employer and remain in employment until such time as the employment contract has been terminated.[203] Employees must perform their duties efficiently and according to an employer's expectation of work performance. In this regard employees must adhere to the reasonable instructions given by an employer.[204]

A duty of good faith is owed by employees to employers and this duty extends to employees furthering the employers work interests and to avoid misconduct. In this context good faith means that the employment relationship is based on the moral character of the employee. This duty of good faith owed by employees to employers includes employees from preferring defamatory, maligning, or harmful comments about the employer or co-employees on social media platforms.[205] It is imperative for employees to avoid harassment or cyberbullying of fellow employees online which may potentially bring the good name and reputation of the

[203] R Davey & L Dahms-Jansen *Social Media in the Workplace* 1st ed (2017) 227.
[204] Ibid.
[205] *Chauke and Others v Lee Service Centre t/a Leeson Motors* 1998 (19) ILJ 1441 (LAC).

employer into disrepute. Employees must adhere to employer policies regarding the disclosure of privileged and confidential information on social media.[206]

An employment contract is a contract none-the-less and the common law principles applicable to the law of contract also finds application to employment contracts which could have significant impact on the duty of good faith owed by an employee and substantive fairness. Whilst fairness in employment contracts is predominantly regulated in terms of the LRA, it may conflict with the common law principles of contract which are separate of each other. Be that as it may, fairness finds a place in employment contract law not only because it is regulated by the LRA but also because it is expected in the Constitutional provisions of fair labour practices on both employers and employees.[207] In the *Everfresh Market Virginia* case, the Constitutional Court in its minority judgement described the role of good faith in the law of contract and stated

> *'Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country'.*[208]

The employee's duty of good faith extends to not committing social media misconduct. If an employee's social media communication causes reputational harm to the employer and clearly infringes on the employer's social media policies, potentially disclosing an employer's confidential information, then such conduct breaches the employee's duty of good faith. Pursuant to an employment contract, an employee owes many duties to an employer which must be performed in good faith. These duties often include conduct which may impact other

[206] R Davey & L Dahms-Jansen op cit note 203 at 227.
[207] A Louw 'The Common Law is …not what it used to be: Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment [Part 3]' (2018) 21 *PER/ PELJ* at 35-41.
[208] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)* Ltd 2012 (1) SA 256 (CC).

staff and members of the public. An employee social media and communication that negatively impact members of staff or the public is not only construed as social media misconduct but also undermines the duty of good faith.

South Africa subscribes to rigid labour laws in regulating dismissals and misconduct.[209] However, since 1995 (promulgation of the LRA), the advancements in technology and increased social media usage has strained labour relations. Dismissals will only be enforceable if they are substantively and procedurally fair.[210] Substantive fairness emerges when the reason for the dismissal relates to employee incapacity, poor work performance, and the operational requirements of employer or employee misconduct.[211] Improper use of social media in the workplace can be seen as insubordination. The misuse of social media can have cost implications for employer and damage workplace electronic systems which fall under ambit of misconduct.

Schedule 8 of the LRA contains a Code of Good Practice on dismissal. This Code contains factors to be considered in determining an employee's guilt for misconduct. They include the employee's awareness that a rule was contravened, the reasonableness of the rule and whether the rule was consistently applied.

In the *Cronje v Toyota* case, the court found that if an employer instituted an electronic communications policy (ECP) and enforced it consistently, any contravention would constitute misconduct on the part of the employee warranting substantive dismissal.[212] The dismissal will only be completely fair once a proper investigation ensues, and a disciplinary hearing is held to comply with procedural fairness standards.

[209] Labour Relations Act 66 of 1995 ('LRA').
[210] S 188 LRA.
[211] J Du Plessis & M Fouche op cit note 62 at 322.
[212] *Cronje v Toyota* 2001 (3) BALR 213, 224-225 (CCMA).

2.3.3 Misconduct during workhours

Social media misconduct may necessitate disciplinary action which may culminate in dismissal. Employers wishing to institute disciplinary action against transgressing employees for such misconduct must bear in mind the rules pertaining to fairness and equity. The issue to be contended with in any disciplinary action pertaining to social media misconduct must constitute a fair reason for the employee to be dismissed. The employer must give due consideration to the employees conduct and as to whether such conduct has damaged the employer's good name and reputation, had a negative impact on the workplace environment or, if there has been a disclosure of confidential information on a social media platform. If this is the case, depending on the circumstances, the employer may be able to establish grounds to dismiss an employee.[213]

Employers must implement disciplinary rules such as a code of conduct in the form of a social media policy, as a positive approach to contend with social media misconduct. The purpose for such implementation is to discipline employees. Effective discipline includes counselling, verbal, and written warnings as forms of progressive discipline yet there are some forms of misconduct so egregious that more drastic measures must be meted out and can manifest in dismissal.[214]

A general rule of misconduct or accumulated instances of misconduct considers if it is adequately serious to justify dismissal if it renders the employment relationship intolerable.[215] Employers must consider if the employee complained of has a history of the same or similar type of misconduct before dismissal can be justified.[216] Should the misconduct complained off be a first-time offence by an employee and is of a serious nature, it may constitute grounds for dismissal.[217] Dismissal for less serious misconduct will only be justified in instances where the employer can establish in the past that the employee was found guilty of misconduct, received warnings and if the employee was notified that further conduct of a similar nature could culminate in a dismissal.[218]

[213] R Davey & L Dahms-Jansen op cit note 203 at 230.
[214] J Du Plessis & M Fouche op cit note 62 at 324.
[215] Ibid.
[216] J Du Plessis & M Fouche op cit note 62 at 324.
[217] Ibid.
[218] Ibid.

If the misconduct complained of is insufficiently serious to justify dismissal it is generally required that other offenses must be related and be of the same kind or similar in nature. Where the present and previous instances of misconduct are related there would be no difficulty in detecting a general pattern of misconduct and it may make the continued employment relationship intolerable. Ultimately the enquiry questions if dismissal is justified in the circumstances of social media misconduct.[219]

A suspicion of misconduct is insufficient to warrant dismissal. Employers do not have to establish misconduct beyond a reasonable doubt. It is sufficient for the employer to simply show on a balance of probabilities that a disciplinary offense has occurred, and the employer must be able to account only on facts known to him at the time of the dismissal.[220]

Social media misconduct in the workplace may manifest in various ways including defaming an employer, employees, directors, customers, clients or suppliers. Such misconduct can manifest as racist remarks tantamount to hate speech or incitement to commit violence. This type of misconduct may also baselessly allege racism on the part of another. Cyberbullying and harassment of colleagues, service providers or contractors and the disclosure of confidential employer information or trade secrets may also be classified as social media misconduct.[221] Unauthorized social media use by an employee during work hours may undermine the employment contract or an employer's social media policy which could potentially harm the reputation of the employer.

A traditional characteristic of misconduct is that it occurs at the workplace during work hours. Social media misconduct can be committed at work during work hours and even after work hours. Traditionally employee conduct after work hours fell out of the purview of the employment contract. Employers did not have a right to discipline employees for off duty conduct in the past, but this position has changed in recent times. Where a nexus can be established between the conduct committed, either on duty or off duty, and the employer's business, the employer may be able to discipline an employee concerned.[222] The establishment

[219] Ibid at 325.
[220] Ibid at 325.
[221] R Davey & L Dahms-Jansen op cit note 203 at 231.
[222] Ibid.

of a nexus between the employees conduct and their employer's business interests is of great importance.[223] Where the employee's conduct on social media is injurious to the employers business interests, this could render such conduct as social media misconduct and sanction dismissal.

2.3.4 Misconduct after workhours

Potential damage to an employer is escalated by social media misconduct as posts online become public and go viral. Conduct negatively impacting on a contract of employment may justify disciplinary action and even dismissal. Employers wishing to take disciplinary action against employees for posts made after work hours must consider the seniority and responsibilities of the employees' position.[224] It must be established if a member of the public could reasonably associate the employees post with the employer.[225] A determination should indicate if the employee's online conduct has negatively impacted on his job performance.[226] The enquiry should also question if the employee's social media post has had a detrimental effect on the efficiency, profitability or continuity of the employer.[227] If this transpires, such a social media post may compromise the corporate culture of the employer.[228] Each case will be determined on its own merits and the development of a general rule of dismissing an employee for social media misconduct cannot be distinguished. There are various factors which influence when an employee should be disciplined for social media misconduct.

The *Gaertner* case indicated that where employees at home make reference to their place of employment on social media, it can be construed as misconduct especially where the communications infringe on another's rights.[229]

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[223] *Cantamessa* supra note 6.
[224] R Davey & L Dahms-Jansen op cit note 203 at 231.
[225] *Cantamessa* supra not 6.
[226] R Davey & L Dahms-Jansen op cit note 203 at 231.
[227] Ibid.
[228] *Edcon* supra note 49.
[229] *Gaertner v Minister of Finance* (2014) 1 BCLR 38 (CC) at para 49 *'[a]s a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that, once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what area one has strayed from the inner sanctum of the home'.*

Firstly, the employee's position and whether the employee identified the employer as his employer on social media must be considered.[230] This extends to whether an employee can reasonably be associated with the employer's establishment. Tenured employees can be recognized with ease within an organization owing to their seniority whereas lower-level employees whose employment is for a shorter period are not easily identifiable. A junior employee can still cause reputational harm to an employer.[231] This depends on whether the employee has associated his social media profile with the employer. As indicated in the *Cantamessa* case, comments made on social media can readily implicate an employer and the employer can potentially incur brand damage and reputational impunity.[232] Comments made by employees who are not easily identifiable in the employ of the employer are unlikely to be associated to the employer. Employers can investigate employee social media comments which propagate discord in the workplace and contribute to the disintegration of trust relationships between the employer and employee and may warrant dismissal as a sanction.

The second factor looks at the extent to which the employee's online conduct affects the good name and reputation of the employer.[233] It has become relatively simple to illicit a person's employment through social media and the Internet especially when an employee volunteers such information and lists his employment on professional websites or on social media profiles.[234] This links the employee's association with the employer and more specifically content posted by employee. This implicates the employer sometimes to public debate and may compel the employer to intervene and question the employee's conduct.[235] Employers must contend with competing interests of public demands advocating for the disciplinary action of an allegedly transgressing employee and the employee's right to a procedurally fair disciplinary hearing and if these considerations are not traversed by the employer, it could result in an employee's unfair dismissal.[236] Employers who act hastily against an alleged employee social media misconduct without establishing a fair reason to dismiss, such an employee may be compelled to reinstate the employee. However, instances of public outcry do not necessitate substantively fair reasons that warrant employee's dismissals. Employee comments that cause damage to employer's good name and reputation and comments made after work hours subject

[230] R Davey & L Dahms-Jansen op cit note 203 232.
[231] Ibid.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid.

to employee's personal capacity may warrant disciplinary action. Dismissal must be determined against other competing sanctions depending on the merits of each case.[237]

Thirdly the extent to which an employee's conduct has a detrimental effect on the efficiency, profitability or continuity of the employer may also sanction disciplinary action.[238] Such a factor could compromise the relationship of trust between the employer and employee. This may be the case even if the conduct complained of occurs after work hours and does not specifically apply to the employer or relate to other employees. In this regard racist, sexist and political comments made on social media may have negative effects in the workplace forum and could render work relations untenable.[239] Such posts could potentially affect the profit motive of the employer and threaten the employer's future business endeavours.[240] Social media posts containing hate speech and incitement to commit violence also have great potential to disrupt the workplace and the question of the comment being made during or after work hours becomes immaterial as the attitude after comment permeates the employment relationship.[241]

2.3.5 Dismissal sanctions

In consideration of dismissals employers must weigh the seriousness of the misconduct of the employee and must have regard to the circumstances of the employee more in particular the amount of time the employee has been in service, any previous disciplinary action against the employee and the personal circumstances of the employee.[242] These considerations must be contrasted against the nature of the job and the surrounding occurrences of the infringement itself.[243]

As a general principle, an employee's conduct which is repugnant to the trust and confidence intrinsic in the employment relationship empowers employers to terminate the relationship.[244]

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[237] Ibid.
[238] R Davey & L Dahms-Jansen op cit note 203 at 233.
[239] Ibid.
[240] *Edcon* supra note 49.
[241] *Custance v SA Local Government Bargaining Council and others* 2003 ZALC 26 para 28.
[242] LRA: Code of Good Practice (Dismissal) Item 3(5).
[243] *Theewaterskloof Municipality v SALGBC (Western Cape Division) & Others* 2010 (11) BLLR 1216 (LC) 15.
[244] Ibid para 23.

It must be perceived as an operational response to risk management in a business. In short dismissal relates to the operational requirements of the employer.[245] For employees who show no remorse for their misconduct such an absence thwarts the employers' prerogative to reinstate such an employee. For offending employees to be rehabilitated, they would have to acknowledge their wrongdoing. If employees are not able to reinforce trust in the employment relationship, they cannot expect employers to uphold the contract accordingly.[246]

Employers must be consistent in the application of business rules. Leniency displayed by the employer resonates a negative connotation about infringing such rules to other employees.[247] Employer must be concerned about deterring other employees from traversing similar forms of misconduct which may result in a breakdown of the trust underpinning the employment relationship.[248]

Employers who require a fair reason to dismiss employees for social media misconduct must consider the public response, whether the employee has made a statement admitting his fault, whether the employees conduct has irreparably damaged the employment relationship and if the dismissal would be an operational risk.[249]

2.3.6 Remedies for unfair dismissal

Notwithstanding social media misconduct, any dismissal must be propitiated by a fair reason[250] and procedure.[251] Dismissals are automatically unfair if the reason it is infringes on an employee's fundamental right is on one of the grounds mentioned in Section 187 of the LRA. In the *NUM* case, the court noted that employers must establish that dismissals have been fair.[252] If the labour court finds that the dismissal was substantively unfair, the primary remedy is the reinstatement of the dismissed employee. Where there is a ruling of the dismissal being procedurally unfair, the usual remedy is compensation equivalent to the employee's 12-month remuneration.[253] In cases of dismissals being held to be automatically unfair, the remedy is

[245] *De Beers Consolidated Mines Ltd v CCMA* 2000 (9) BLLR 995 (LAC) 22.
[246] Ibid para 25.
[247] *Builders Trade Depot v CCMA* 2012 (4) BLLR 343 (LC) 44
[248] Ibid.
[249] R Davey & L Dahms-Jansen op cit note 203 at 236-237.
[250] Section 188(1) (a) LRA.
[251] Section 188(1) (b) LRA.
[252] *NUM & Others v Black Mountain Mining (Pty) Ltd* 2010 (3) BLLR 281 (LC) 36.
[253] Section 193 LRA.

reinstatement of the employee alternatively compensation to a maximum of twenty-four months remuneration.[254]

2.3.7 Disciplinary consistency

There exists a duty for employers to apply discipline uniformly and consistently amongst all employees.[255] The rationale for this principle is to circumvent unjustified and arbitrary selective dismissal and to maintain that all employees are treated equally.[256]A lack of consistency on the part of employers may indicate that employers act unfairly when dismissing employees for social media misconduct.

Consistency is derived from a general principle that discipline must not be capricious.[257] As such, disciplinary consistency is an important factor considered in determining if a dismissal is substantively fair. '*Consistency is not a rule unto itself but rather an element of fairness that must be determined in the circumstances of each case'*.[258]

Of paramount importance is whether employers consistently implement their social media policies and treat all infringements of such policies by various employees consistently. In the *SATWU v Ikhwezi Bus Service (Pty) Ltd* case the court noted that employers may prefer different penalties on employees for similar misconduct in instances where fair and objective reasons for doing so exist.[259] Such differences could emanate in varying personal circumstances of employee's and variance in length of service of each employee together with respective disciplinary records.[260] The facts of each case may differ justifying the application of different sanctions for social media misconduct.

[254] Section 193 LRA and R Davey & L Dahms-Jansen op cit note 203 at 237.
[255] LRA: Code of Good Practice (Dismissals) para 3(6).
[256] *SATWU v Ikhwezi Bus Service (Pty) Ltd* 2008 (10) BLLR 995 (LC).
[257] *NUM* supra note 252 at 36.
[258] *Minister of Correctional Services v Mthembu NO & Others* 2006 (27) ILJ 2114 (LC) 2121.
[259] *SATWU* supra note 256 at 25.
[260] *NUM* supra note 252.

2.3.8 Substantive fairness requirements

The guidelines provided by item 7 of the Code of Good Practice are aimed at establishing substantive fairness which provide that dismissal must be fair.[261] A valid reason for social media misconduct may not necessarily be fair. A fair reason would arise when dismissal is the only fitting sanction, and no alternative sanctions can be entertained. Generally, it is accepted that where the relationship of employment has become intolerable or where the trust relationship between the employer and employee have irretrievably broken-down dismissal would be justified based on a fair reason.[262] In such cases of misconduct employees are usually held blameworthy as they have control in making decisions that transgress the employment contract.

Employers must be consistent in application of its disciplinary rules. Similar cases should be treated alike, and regard must be given to the substance circumstances under which they were committed and the position of an offending employee. Before making a finding of dismissal alternatives ought to be considered by the employer. The employer must determine if there are alternative sanctions and mitigating circumstances before making a finding of dismissal.[263]

Employers must also indicate if dismissal is summary or subject to a period of notice. This is determined by the disciplinary code implemented by the employer and the reason for the dismissal. Summary dismissal is dismissal without a period of notice and generally occurs in cases of serious misconduct. In cases of notice, mitigating factors or the personal circumstances of an offending employee are considered where the employer may impose a dismissal subject to notice under circumstances where the employee is still remunerated for the duration of the notice period.[264]

That requirements for a fair dismissal in cases of social media misconduct include a valid or lawful reason under common law or under an employment contract. A lawful reason is not necessarily a fair reason. It is fair if the employment contract can no longer continue, and dismissal is seen as a last resort. Dismissal as a sanction is justified by repeat incidents of

[261] LRA: Code of Good Practice (Dismissal) (7).
[262] J Du Plessis & M Fouche op cit note 62 at 323.
[263] Ibid.
[264] Ibid.

misconduct unless the misconduct has a criminal element in it or destroys the relationship of trust underpinning the employment contract. There is no fixed rule about the number of warnings that occur prior to dismissal however warnings should be given by employers where an employee commits similar offenses. Employers must treat similar cases of misconduct alike. Before imposing a sanction of dismissal, all surrounding circumstances must be considered together with the employee's discipline record, years of service, the nature of the misconduct and any mitigating factors. The employer bears the onus to establish misconduct on a balance of probabilities and that dismissal is the fair sanction to be imposed.[265]

2.3.9 Procedural fairness requirements

The LRA dictates that an employer follows a fair procedure before dismissing an employee. Employees are given an opportunity to make representations and provide mitigating circumstances to the employer in conformity with the *audi alteram partem* rule. Employees are served with charge sheets, notified of the rights and allowed witnesses and cross examination of witnesses at the disciplinary hearing itself. The chairperson at the disciplinary hearing has to consider mitigating and aggravating factors before making a finding. Employees are afforded opportunities to appeal to higher management.[266]

In the *Avril Elizabeth Home for the Mentally Handicapped* case, the labour court confirmed that disciplinary hearings no longer follow a criminal model at internal disciplinary hearings.[267] The position at present is that employers must conduct an investigation giving employees and their representative's opportunity to make representations toward the allegations made and the employer must notify the employee of its decision.

The Code of Good Practice no longer requires appeal hearings as constituent parts of a fair procedure. However, affording a right of appeal to a higher level of management has become a standard practice and usually followed by most employers. A fair procedure comprises two rules namely *audi alterem partem* and the *nemo iudex in sua causa* rules affording employees opportunities to respond to allegations and in terms of which employees are entitled to

[265] J Du Plessis & M Fouche op cit note 38 at 325.
[266] Ibid.
[267] *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation and Arbitration and Others* 2006 (9) BLLR 833 (LC).

objective, impartial and neutral persons with no knowledge of the case as an impartial chairperson at a disciplinary hearing.

2.4. Summary

Employees have a legitimate expectation to privacy.[268] Where an employee asserts his right to privacy there is no defence of an expectation to the right or that the right should be protected.[269] The right to privacy has a close link to the freedom of expression. An employer can be authorized to intercept and employ social media communications by establishing authorization from a social media policy or contract.[270] In doing so, employers must exercise caution in not negatively impacting on employees right to self-worth or dignity. The primary purpose for such an interception should be to establish grounds for misconduct and dismissal.[271] Where an employer's confidential information is disclosed by an employee on a social media communication without the employers consent this could constitute grounds for misconduct.[272] Employees have the right to freedom of expression which can be used as a defence for social media misconduct however the right is commonly related to the search for truth which is best facilitated in an open marketplace of ideas.[273] The right has a close link with the right to dignity which can be limited. If an employee's social media communication does not fall within the ambit of Section 16 (2) of the Constitution, then an employer's interception of such communications will not be regarded as an infringement of the employee's right to freedom of expression. The duty of good faith owed by an employee to the employer to always act in the best interest of any player supersedes an employee's right to freedom of expression.[274] Employers may found grounds of social media misconduct where the employee brings the employers name into disrepute.[275]

Employers may be able to intercept an employee's social media communications by gaining consent to do so in an employment contract and by adhering to a strict social media policy.[276] An employer can also depend on RICA to intercept employee social media communications

[268] *Bernstein* supra note 33 at 75.
[269] Ibid para 67.
[270] D Bilchitz op cit note 90 at 49-50.
[271] *Khumalo* supra note 95 at 27.
[272] *Dutch Reformed Church* supra note 29 at 79.
[273] *Mamabolo* supra note 102 at 37.
[274] *Democratic Alliance* supra note 114.
[275] *Dewoonarain* supra note 23.
[276] Section 5 RICA

where there is no written employment contract and no adherence to a social media policy.[277] The employer's interception of an employee's social media communications must be for evidentiary purposes.[278] Employees must be notified that the employer intends to intercept their social media communications.[279] In cases where an employee uses an employer's telecommunication system to post publications on social media, then employers would be authorized to intercept an employee's communications at work.[280]In this regard, employers are allowed to intercept an employee's social media communications after work hours when such communications bring the employer into disrepute and compromise the trust in the employment relationship.[281]

[277] Section 6 RICA
[278] D Van Der Merwe A Roos & T Pistorius op cit note 177 at 27.
[279] Section 6 RICA
[280] *Harvey* supra note 35.
[281] *Edcon* supra note 49.

CHAPTER 3: THE INFLUENCE OF SOCIAL MEDIA IN THE WORKPLACE

3.1 Introduction

Social media is not defined in the Constitution or LRA. To establish social media misconduct the concept requires a legal definition. Even though this form of misconduct can be treated like any other form of misconduct under the LRA, social media as a concept continually advances as technology continues to develop. More technologies introduce new social media platforms which display advanced features which can be used by employees to make social media publications. With the ongoing development in technology an introduction of new features in social media, it would be questionable if such technology could be legally defined as social media and social media misconduct. Whilst there are many international ordinary definitions of social media, there is no legal definition in South Africa. There is no distinction made between publications made on social media sites via desktop and mobile technology.[282] Considering that social media has its roots in sociology the concept expands to the online relationships, interactions, and passive sharing of content all of which are unregulated against constitutional standards at labour law standards in the country.[283] There are common features of social media and consequences that flow from its use by employees in the workplace.

Notwithstanding the various features and consequences of social media, a legal definition of the concept would create parameters of certainty of what legally constitutes social media misconduct.[284]

In recent times social media has been proliferated in the workplace as an advanced form of technology used to promote an employer's business interests. The converse is also true in cases where employees use social media by posting publications which vitiate their duty of good faith and undermining the trust in the employment relationship constituting a form of social media misconduct. Whilst social media in the workplace may have many benefits and advantages it's improper use by employees can have dire consequences for an employer. An

[282] M Wolf J Sims & H Yang *Social Media? What Social Media?* (unpublished development paper, Birkbeck, University of London) (2017) at 7 – 8.
[283] D Boyd & N Ellison 'Social Network Sites: Definition, History, and Scholarship.' (2008) *Journal of Computer-Mediated Communication* 211.
[284] L De Nardis '"The Social Media Challenge to Internet Governance"' *Oxford University Press Oxford* (2014) 349.

employer can regulate social media usage in the workplace by regulating such usage through the employment contract.[285] Employers can also establish grounds for social media misconduct when an employee's publication on social media occurs after hours.[286] It is submitted that social media has a great utility in the workplace occupying a greater role in making work more efficient and that labour relations must encourage employees to take greater responsibility for their publications on social media.

3.2 ELUSIVE: DEFINING SOCIAL MEDIA

The concept of social media is not defined in the Constitution or in the Labour Relations Act.

Defining a concept of law is an intellectual exercise which may not serve a particular practical significance but none the less essential to contemplate. The legal profession propagates the shape and form of law. Laws are made up of rules which are underpinned by certain fundamental values or experiences. Legal practitioners ought to imbibe knowledge of such values or experiences. When legal disputes emerge, the disputes are resolved by applying values and judgements. A preponderance of legal disputes is context specific where some instances allow values to promote certain decisions whilst prohibiting others. Ascertaining a legal definition of a concept will enable lawmakers to determine which values to advance and which values to limit. Judges do not adjudicate over legal disputes abstractly. They require a true meaning in the form of a legal definition which can be applied in a legal dispute justifying their judgement in the spirit of justice and fairness. Justice and fairness are values innate in law and can be undermined in the absence of a legal definition.[287]

Social media is perceived as solely pivoting on technology, but it is primarily rooted in sociology.[288] Social media should be considered as a web-based platform to interface virtually with other social users.[289] Users adopt online profiles and participate with online communities where information, ideas and other content can be exchanged.[290] A key feature being that information becomes instantly available to a host of users around the world.

[285] V Du Plessis & M Fourie '*A practical guide to Labour Law'* 6th ed 2006.
[286] *Edcon* supra note 49.
[287] A Johnson 'A definition of the concept of law' (1977) *Mid-American Review of Sociology* (2) 1 47-71.
[288] M Wolf J Sims & H Yang op cit note 282 at 6.
[289] F Cilliers 'The role and effect of social media in the workplace' (2013) 40(3) *NKLR* 572.
[290] A Roos & M Slabbert 'Defamation on Facebook: Isparta v Richter (2013) 6 SA 529 (GP)' 6.

An ordinary definition of the concept can be found in the dictionary.[291] However, different variations of non-legal dictionaries posit alternative definitions.[292] Notwithstanding the above, an accepted legal definition has not been established. Whilst social media has many forms, types and variety of users, an absolute definition is expected but a legal definition is elusive. Judge Willis has indicated that social media has created tensions for the law in ways that could not have been foreseen by the Roman Emperor Justinian's legal counsel, the 17th century Dutch legal authors or even the drafters of the Constitution.[293]

At the time of publishing this research paper, no complex body of rules existed regulating social media in the country nor is there a prevailing piece of legislation explicitly provisioned for social media and its establishment, regulation, administration and its occurrence stands in the eaves of developing law which courts must interpret.[294] Courts have to interpret the common law in areas of defamation, privacy, and employment law to tackle social media legal problems.[295] Obtaining a legal definition may entail investigating social media's sources, the '*social*' and the '*media*' aspects, respectively based on a technocratic definition.[296]

Whilst these definitions are apposite for describing the '*media*' aspect of social media, as '*User Generated Content'*, it emphasises the dependency of Internet-based set of technologies. The '*social*' aspect is superficially catered for by way of reference to '*Web 2.0'* and '*User Generated Content'.*[297] This definition caters appositely for an individual

[291] Merriam-Webster's Learners Dictionary 'Definition of social media' Merriam-Webster 2018, available at *http://www.meeriamwebster.com/dictionary/social%20media/*, accessed on 27 September 2018. '*forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)'.*

[292] Cambridge English Dictionary *'Definition of social media' Cambridge Dictionary 2019, available at https://dictionary.cambridge.org/dictionary/english/social-media, accessed on 31 December 2019.* ***'****websites and computer programs that allow people to communicate and share information on the internet usinga computer or mobile phone'.'forms of media that allow people to communicate and share info rmation using the internet or mobile phones'.*

[293]*H* supra note 31.

[294] V Oosthuizen op cit note 1.

[295] O Ampofo-anti P Marques 'Taking responsibility on social media' (2015) *Student Feature Without Prejudice* 43 – 44.

[296] A Kaplan & M Haenlein 'Users of the world, unite! The challenges and opportunities of Social Media.' (2010) *Business Horizons* 53(1), 59—68, '*a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content'.*

[297] D Boyd & N Ellison op cit note 283*'social network sites as web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with*

user affording the abilities to create and access digital information.[298] Such technocratic definitions introduce elements of '*connectivity*' (list of interconnected users) and '*human*' aspects (profiles). The definition encompasses a hybrid system allowing users the ability to integrate applications and '*interactivity*' allowing users to establish and maintain social contracts.[299]

Conventional social interaction can now be understood as '*social computing*' employing the use of *Information Technologies* (IT) which propagate social interactions unconventionally but arguably in a more efficient way premised on intricate daily human interactions.[300] Introducing the '*human*' element of sociology, a social media definition can envisage '*any technology which supports relationships and collaborations'.*[301]

In South African the position was that if the ordinary meaning or definition of a phrase or word were clear, then that meaning would attribute to it. In cases of vagueness or ambiguity, the ordinary meaning was departed from in lieu of the meaning ascribed to the phrase or word by the legislature. This is the textual approach to interpretation.[302] The position changed in the *Jaga* case where the court established that the ordinary meaning of a word or phrase and the context of the legislature should be interpreted together.[303] This approach was reiterated by the court in the *Natal Joint Municipal Pension Fund v Endumeni Municipality* case where it was noted that interpretation is a unitary exercise where context and provision should be interpreted in unison. In this regard a legal definition would encourage certainty of decisions handed down by the courts apart from the ordinary meaning subject to varying circumstances.[304]

whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system'.

[298] G Kane M Alavi G Labianca & S Borgatti 'What's different about social media networks? A framework and research agenda.' (2014) *MIS Quarterly* 275-304.

[299]A Kaplan op cit note 296 at 59 – 68.

[300] G Oestreicher-Singer & L Zalmanson 'Content or community? A digital business strategy for content providers in the social age.' (2013) *MIS Quarterly* 591-616.

[301]K Kapoor N Rana P Patil & S Nerur 'Advances in Social Media Research: Past, Present and Future.' (2017) *Information Systems Frontiers* 1-28.

[302] K Perumalsamy 'The life and times of textualism in South Africa' (2019) *PER* 65.

[303] *Jaga v Donges* 1950 (4) SA 653 (A).

[304] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 17-26.

A legal definition should envisage interpersonal liaisons and information exchange with *'performance'* at its centre. Focus is given to what mediums are implemented as opposed to what the technology was intended to support.[305]

3.2.1 Shortcomings in attaining a definition

Despite many variations of non-legal social media definitions, many applications, platforms and websites frequently used may not form part of a legal definition. Social media uses '*Apps*' and not websites. Examples include WhatsApp and Facebook, and which hinder a definition. Limiting the term to mean a 'social media site' is too narrow for the purposes of a legal definition.

Users commonly engage through '*Desktop*' and mobile notifications (which are mentioned in variations of an ordinary definition) which do not always appear on the user interface and display characteristics of '*intrusiveness*'.[306] A legal definition of the concept must embrace '*relationships*', '*interactions*' and '*passive sharing*' of content, the creators of which do not deliberately direct to users. These pose as impediments in procuring a legal definition of social media.[307]

3.2.2 Common features and consequences of social media

Variations of social media definitions include concepts of profile creations and visibility of relationships between users.[308] Others include web-based application which provides functionality for sharing, relationships, group conversation and profiles[309] whereas others describe the concept as '*social media sites'*,[310] or a set of information technologies which facilitate interactions and networking.[311]

[305]M Wolf J Sims & H Yang op cit note 282 at 6.
[306] Ibid at 7 – 8.
[307] Ibid.
[308] D Boyd & N Ellison op cit note 283 210-230.
[309] J Kietzmann K Hermkens & B Silvestre 'Social media? Get serious! Understanding the functional building blocks of social media.' (2011) *Business Horizons* 241-251.
[310] M Diga & T Kelleher 'Social media use, perceptions of decision-making power, and public relations roles.' (2009) *Public Relations Review* 440–442.
[311] K Kapoor N Rana P Patil & S Nerur op cit note 301, G Oestreicher-Singer & L Zalmanson op cit 300 at 591-616.

A common denominator in defining social media broadly is Web 2.0 technology. Web 2.0 is a platform for harnessing collective intelligence and providing pervasive network connectivity.[312] Advances in Web 2.0 technology created '*user generated content'* [UGC] which allows users to create and share content freely and cheaply.[313] Social media rests on the utilization of Internet technologies.

Texts, images, and videos can be posted, shared, tagged, and commented on, by the body of online users known and unknown alike. Dangers of '*friending'* in the workplace occur where a user makes an offensive comment on a social media platform in response to a post made on Facebook by a work colleague and where the colleague's listed '*friends*' see the comment and report it. Such conduct jeopardises the employment contract.[314] Posting, sharing, tagging, friending, and commenting on social media have serious consequences for the workplace. It can be considered a form of misconduct that sanctions dismissal if an employee brings its employer's name into disrepute especially when such posts are false, derogatory, defamatory or racial remarks about the employer's establishment. It is of no consequence as to how an employer may come into such posts.[315]

Social media allows users opportunity to create, save and reinvent themselves on a technological platform propagating online solidarity. Social media '*friends*' are often esteemed with the same kinship as friends in the traditional sense. The intrinsic danger of this feature is the threat of being '*catfished*' (a type of deceptive activity where a person creates a sockpuppet social networking presence, or fake identity on a social network account).[316] In short, the sockpuppet is identity for online deception.[317] In the workplace forum this could mean that any undisclosed user could generate a fake profile for a company which sends '*friend*' requests to employees. Employees who readily accept such requests from an unverified stranger allows posts to be made public himself.[318]

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[312] S Asur & B Huberman 'Predicting the future with social media.' (2010) *Paper presented at the Web Intelligence and Intelligent Agent Technology (WI-IAT)* 2010 IEEE/WIC/ACM International Conference.
[313] M Wolf J Sims & H Yang op cit note 282 at 6.
[314] *Hanniker v One and Only Cape Town (Pty) Ltd* 2017 (11) BALR 1191 (CCMA).
[315] *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse v Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* 2014 (7) BALR 716 (CCMA).
[316] FindLaw 'What is 'Catfishing'?' available at *https://consumer.findlaw.com/online-scams/what-is-catfishing.html*, accessed on 20 August 2020.
[317] FindLaw 'What is 'Catfishing'?' available at *https://consumer.findlaw.com/online-scams/what-is-catfishing.html*, accessed on 20 August 2020.
[318] Ibid at 27.

Social media affords a degree of control to users of online profiles. Interconnectivity gives employees a sense of achievement, domination and will.[319] By finding an audience, user's become plagued by deindividuation (losing oneself in the group) becoming empowered by the group and coalesces in '*toxic disinhibtation'*.[320] Social media users can also proliferate accusations, threats, incorrect information and inspire encouragement through group solidarity.[321] What this means is that employees making any posts that are work-related on such platforms could be perceived as threats to reputation of an enterprise.[322]

Social media allows limited control users have over the platform itself. When registering profiles, users unwittingly disclose personal information. A digital footprint is generated which can be 'liked', 'shared' or 'commented' on by groups a user associates with or persons he 'friends'. Platforms are public spaces which lack information security and privilege and potentially hazardous to the work environment. It can be described as the '*disconnect between perceptions of online anonymity and the technically embedded identity infrastructures.*'[323]

3.3 SOCIAL MEDIA, THE LAW AND THE WORKPLACE

Social media is one of many ways to relay information. This creates potential risks for reputational damage to employers. Social media usage is not only limited to social purposes. It has emerged in the workplace and has potential to bring employers name into disrepute and encouraging non-productivity.

In a battle between employers and employees for the exculpation of rights, social media has presented an anomaly, as its existence has not categorically defined the rights of which party to an employment contract should be preferred.

Employees are often under the impression that posts on social media are private subject to privacy settings and believe that the right to privacy will limit such information being disclosed

[319]S Ghoshray 'Employer Surveillance versus Employee Privacy: The New Reality of Social Media and Workplace Privacy' (2013) *NKLR* 616 – 617 and H Lam 'Social Media Dilemmas in the Employment Context' (2016) *Employee Relations* 433.
[320]J Thomas 'There's strength of hate in numbers on social media' available at *https://www.thenational.ae/opinion/comment/there-s-strength-of-hate-in-numbers-on-social-media-1.763908*, accessed on 14 December 2019.
[321] Ibid.
[322] H Lam 'Social Media Dilemmas in the Employment Context' (2016) *Employee Relations* 433.
[323] L De Nardis op cit note 284.

to employers. The Constitution affords the right to privacy and includes '*the right not to have ...the privacy of their communications infringed*.'[324] To establish social media misconduct, employers must consider the provisions of the employment contract and substantiate disciplinary procedures, potentially dismissal, in terms of the procedures set out in the LRA. In some instances, employees may raise the violation of constitutional rights as a defence to such proceedings.

Workplace misconduct is regulated by the LRA. It is undetermined as to whether social media misconduct in the workplace can be dealt with exclusively by the LRA or the law of defamation, and other legal avenues such as vicarious liability. Social media posts by employees have potential to bring employers into liability either through reputational or economic loss and render the employer accountable to third parties who have been defamed on social media by employees offending posts.

A common test categorizing social media misconduct in the job sector is needed. Judge Willis commented that this issue has plagued not only the legal fraternity but also the online world at large.

> '*The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication.* '[325]

Social media at work cannot be limited to employment law but to a much larger demographic locally and internationally.[326] The Internet has broad parameters. The magnitude of harm sustained by a victim of an offending post is relative to the degree of how readily available such information is made online.[327]

[324] Section 14 of the Constitution.
[325] *H* supra note 31 '*The case illustrates the need for the law to develop to deal with the internet and social media disputes. Arguably, however, existing South African laws may already regulate social media disputes, and awareness of these laws among lawyers and the courts is therefore needed.*' at para 8.
[326] *Dutch supra note 29 at* para 71.
[327] S Reddy 'Establishing a test for social media misconduct in the workplace' (2018) *TSAR* 789.

3.3.1 Employment contract and social media: a common law perspective

Employee's obligations arise from employment contracts and common law.[328] Employee duties include making his personal services available to employer, to warrant his competence, to obey the employer, to be subordinate to employer, to maintain bona fides, to exercise reasonable care in using employer's property and refraining from misconduct.[329]

At common law employers may dismiss employees for social media misconduct pursuant to a two-stage inquiry, the first being as to whether the employees post has impacted on the working relationship and second the employment relationship predicated on a platform of good faith and trust which has now become compromised.[330] This enquiry is comparatively different from the LRA's substantive and procedural requirements for dismissal.[331]

First, the principle that an employee's conduct after work hours, can have an impact on the working relationship. It is not a valid defence for an employee to assert he was not present at work, acting in his private time and using his own device.[332] Such conduct may very well compromise the working relationship altogether. In the *Nyembez*i *v NEHAWU* case the Industrial court adjudicated upon a case of an employee's misconduct where an employee had consumed alcohol in excess after work hours. The court found that employees are considered to be employees twenty-four hours out of twenty-four hours at a congress and after-hours consumption of alcohol was as good as consumption during working hours. Such conduct could compromise the employment relationship.[333]According to the courts finding, the same rationale could be applied in cases of social media misconduct. This would mean that an employee's conduct during and after work hours could still have an impact on the employment relationship and social media misconduct could warrant dismissal.

Second, the principle that an employment relationship is predicated on a platform of trust and good faith. Employees can easily abuse such a relationship. Any conduct of an employee that

[328] V Du Plessis & M Fourie op cit note 285.
[329] R Daugherty 'Around the Virtual Water Cooler: Assessing, Implementing and Enforcing company social media policies in light of recent National Labor Relations Board trends' available at *https://mmlk.com/Around-the - Virtual-Water-Cooler-published-AugSept.pdf.*, accessed on 17 October 2019.
[330] B Conradie G Giles & D Du Toit op cit note 5.
[331] Ibid.
[332] *Edcon* supra note 49.
[333] *Nyembezi* supra note 4.

brings about distrust and effectively compromises the employment relationship may warrant a sanction of dismissal. Not every post relating to the workplace compromises the employment relationship and will not necessitate dismissal.[334] Employers must show that damage was sustained because of the employee's social media posts. In the *Edcon* case, the employee of her own accord had conceded at arbitration that her comment could have caused offence. Her assertion that the Edcon group sustained no damage was unsubstantiated as the comment clearly exposed the employer to reputational harm. The court found that the right to free speech does not extend to statements calculated to cause harm.[335]

The court in the *Fredericks* case found the dismissal to be substantively fair for derogatory statements on Facebook about the company and its general manger.[336] However, in the *Mahoro v Indube Staffing Solutions* case, the court found the dismissal to be substantively unfair when the employer failed to establish that the Facebook communication by the applicant to an undisclosed recipient had an adverse effect on the business of the respondent and created an inharmonious working relationship amongst employees.[337]

The *actio inuarium* recognizes action to remedy injury of an employer's dignity or reputation.[338] The conduct complained of must be subjectively and objectively insulting. The objective component was a preventative measure ensuring that the courts would not be inundated with various trivial actions by hypersensitive persons.[339]

The court noted in the *Delange v Costa* case that,

> *'In determining whether or not the act complained of is wrongful the Court applies the criterion of reasonableness … This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e., the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which might wound his self-*

[334] *Robertson* supra note 32.
[335] *Edcon* supra note 49.
[336] *Fredericks* supra note 77.
[337] *Mahoro v Indube Staffing Solutions* 2011(20) KBVA 9 – 11.
[338] *Delange v Costa* 1989 (2) SA 857 (A) 860 – 861 and *Le Roux v Dey* 2011 (3) SA 274 (CC) 143.
[339] Ibid.

esteem, but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for injuria'.[340]

Defamation lies at the crossroad between the right to freedom of speech[341] and the right to human dignity.[342] Social media misconduct giving rise to such defamation has not been dealt with categorically at common law level.

3.4 SOCIAL MEDIA USAGE DURING WORKHOURS AND AFTER: A DISTINCTION

Justice would not be served if employees could not assert privacy rights in the workplace. Enquiries of misconduct determine if employees shared posts using their own or work devices during work hours. The presumption that everything contained in an employer's technological system cannot be deemed as public is not irrebuttable.[343]

The enquiry determines if an employee had a reasonable expectation to privacy.[344] However, once the employee communication enters the public domain, the reasonable expectation to privacy diminishes.[345] This proliferates the boundary between public and private communications in the workplace and propagates the notion that an employee need not be at work when committing social media misconduct. This means that employees not at work, with access to the Internet may make social media posts transgressing private spaces to public domain. Employees working from home must be alive to this.[346]

RICA provides that the monitoring of communications is generally prohibited.[347] However, it does provide that any person may give written permission to monitor or intercept any data communications unless it is for unlawful purposes.[348] RICA includes statutory exemptions to the prohibition of interception.[349]

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[340] Ibid.
[341] Section 16 of the Constitution.
[342] Section 10 of the Constitution.
[343] D Bilchitz op cit note 90 at 49-50.
[344] Ibid.
[345] Supra.
[346] Supra.
[347] S 2 RICA.
[348] S 5 RICA.
[349] S 3 RICA.

The Basic Conditions of Employment Act (BCEA) provides that every employee has the right to discuss his conditions of employment with other employees, his employer or any other person.[350] In the *Daniel Phillip Neethling* case the commissioner concluded that the employer had found information in a folder marked '*personal*' on the employee's work computer in the absence of an Electronic Communications Policy (ECP) permitting employer to do so. It was held that employees were entitled to use their computers for personal purposes and that the evidence obtained from invading the applicant's privacy must be disregarded.[351]

Misconduct determinations must enquire if the posts are '*work-related*'. Any references made to a place of employment or workplace are regarded as '*work-related'*. Specific reference to the employer is unnecessary and the employee is still guilty of misconduct if other users can ascertain the employer's identity through the social media platform.

Mere reference to the workplace does not necessarily attract liability for social media misconduct. It reduces the employee's privacy right from a private domain to a public forum which is accessible by other users thereby limiting the employee's right to privacy. The enquiry must test the contents of the communications and its effect on the employer to determine if it is '*work-related'*.[352] If the employee's social media communication is not work-related the employee cannot be held liable to the employer. The onus vests with the employer to establish that the social media post of the employee refers to the workplace.[353] A balance must be struck between the employees right to privacy in using social media and the legitimate rights of the employer. Employers should be prohibited from interfering with the personal and intimate affairs of its employee's life. This rule should only be relaxed unless the employee's social media communication directly relates to the employee's work, causes reputational harm to the employer or where there has been a violation of criminal law.[354]To establish social media misconduct a determination must be made of the employees' publication has had a negative effect on the workplace or at very least be work-related.

[350] S 78 BCEA.
[351] *Daniel Phillip Neethling v SA Fruit Terminals*, CCMA Durban KN-4881-04, 10 (unreported case).
[352] D Bilchitz 58.
[353] D Bilchitz op cit note 90.
[354] Ibid.

The Internet's characteristics are public by nature and information made available on the World Wide Web is impossible to delete.[355] The *Isparta* case noted that social media users may control access to their privacy settings.[356] Social media users can prefer who accesses their posts. Employee's selection of privacy settings does not infer those posts made on social media platforms become private. They remain in the public domain.[357]

Posting personal information on a public platform does not necessarily indicate the user opting for the world at large accessing such information.[358]The public nature of social media profiles was considered in the *Sedick* case.[359]

Despite privacy settings, social media users agree that information on their profiles are public and once published, any numbers of other users may access same[360]. The findings in the *Harvey* case indicate that our courts are invested in exposing wrongdoers and cannot couch their indiscretions by enforcing the right to privacy.[361] A social media user must know that anyone with access to his online post can communicate same to his employer especially when such posts cause some sort of harm to the employer resulting from the publication. Notwithstanding privacy settings, an employee can still cause harm to employer with an online social media post.[362]

[355] *Isparta v Richter* 2013 (6) SA 529 (GP) 6.
[356] Supra.
[356] *Sedick* supra note 67 at 53.
[356] *Dewoonarain* supra note 23 at 26.
[356] Ibid para 79.
[356] *Isparta* supra note 355 at 6.
[357] A Roos 'Privacy in the Facebook era: a South African legal perspective' 2012 *SALJ* 375 387.
[358] A Roos op cit note 357 at 401.
[359] *Sedick* supra note 67 at 52 '*postings were, to all intents and purposes, available to the public in the same way that blogs and public comments on news media sites, or letters published in newspapers are available'.*
[360] *Sedick* supra note 67 at 50.
[361] *Harvey* supra note 35 at 449.
[362] M Thebe 'Viral racism' De Rebus (2016:1)3, '*When posting on social media, an individual may see this as a social platform that is only seen by those who are their contacts, which is written in their personal capacity and is not linked to their professional lives. All it takes is for one of the contacts to screengrab the post sending it to several others, before long the post is seen by thousands going viral or trending on all social media platforms. It is a misleading notion that individuals can post on social media in their personal capacity as it was evident in the many cases of people losing their jobs due to posts made on social media'.*

3.5 SOCIAL MEDIA IN GENERAL AND ITS UTILITY

Social media usage can be identifiable by considering its utility. The '*social*' properties isolate the fundamental components of social media and may be altered through integration of several applications.[363]

Consideration is given to how users portray themselves virtually as an '*identity*'. These could depict ingenious disguises, personalized profiles, mentioning birthdays, hobbies, personal status's, family relationships and some remaining unimaginative.[364]

User '*conversations'* encourage interaction by way of message broadcasts ignites dialogue online. 'S*haring*' allows content to be transmitted, possibly altered or enhanced.
'*Following*' is contrary to '*sharing*' which is usually preceded by connections. '*Presence'* enables users to ascertain whereabouts of community members and determine if they are working online or offline or in an actual or virtual space.

Employers may not always be able to regulate employee's social media usage but can restrict Internet access, invest in social media interrupting software or ban social media at work to increase productivity and decrease potential risk.[365] Such deterrents can be overcome by employees sourcing connectivity through Wi-Fi hotspots and mobile communication packages.

Since social media is readily available, it encourages indirect communication. To combat indirect communication some employers have implemented access restriction and filters in company electronic systems.[366] These restrictions and filters could negatively impact on employees, bringing down morale and compel employees to utilize alternative methods of sourcing connectivity during work hours through mobile phones, own devices and access enabling tools.[367]

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[363] J Kietzmann K Hermkens & B Silvestre op cit note 309.
[364] Ibid.
[365] T Thompson & N Bluvshtein 'Where Technology and the Workplace Collide: An analysis of the Intersection between employment law and workplace technology' (2008) *Privacy and Data Sec* 283-284.
[366] D Kelleher '5 Problems with social networking in the workplace' available at *https://www.information-management.com/specialreports/2009_165/social_networking_media-10016208-1.html*, accessed on 6 October 2019.
[367] T Thompson & N Bluvshtein op cit note 365.

Employee-owned mobile phones have made employees independent of employers' online access. These circumvent workplace policies implemented by employers attempting to prohibit social media usage during work hours.[368] As a result employers grapple with intercepting employee's social media communications.

In cases where employers provide employees with such devices and mobiles, employers are limited in regulating how employees use them.[369] In this regard, one of the greatest threats to the workplace is that employees can spend hours online without the employer's knowledge.[370]

3.6 THE ROLE & EFFECT OF SOCIAL MEDIA IN THE WORKPLACE

Workplaces rely on social media for the propagation of their business objectives. Social media is a developing concept in labour relations law. Its emergence and continuous metamorphoses could create difficulties in the workplace.[371] Social media in the workplace can have devastating effects on a business alternatively it can enhance the work market.[372]

With the proliferation of technological advancement, business enterprises must implement social media policies during work hours. Investigative university studies on social media indicate that approximately 56 percent of subject participants would reject employment or traverse mediums circumventing corporate policies in the workplace.[373]

There are risks for employers for the social media misconduct of employees[374], and threats to employee interests as it enables employers with a platform to conduct background checks of

[368] Cisco 'The future of work: Information access expectations, demands, and behaviour of the world's next generation workforce' available at *http://www.cisco.com/en/US/solutions/ns341/ns525/ns537/ns705/ns1120/cisco_connected_world_technology_report_chapter2_press_deck.pdf*, accessed 24 November 2019.
[369] T Thompson & N Bluvshtein op cit note 365.
[370] Supra.
[371] D Kelleher op cit note 366.
[372] F Cilliers op cit note 289 at 568.
[373]G Terry '"Can we Tweet?" Seems to be the question' available at *https://www.amchantt.com/Downloads/Linkage%20Q4-11.pdf*., accessed on 14 November 2019.
[374] D Kelleher op cit note 366.

prospective employees.[375] The lack of regulations regarding social media usage in the hiring and firing of employees is highly problematic.[376]

Employment is predicated on productivity and employers who do not implement social media policies could experience difficulty in regulating employee conduct.[377] In terms of affordability and access, more employees utilize social media and without direct regulation they may use their worktime socializing on social media.[378] A great impediment to the workplace is counter-productivity because employee's easily gain online access. Electronic filters barring access to popular social media platforms comes at a price.[379] The workplace requires greater legislated certainty to regulate the use of social media.[380] As technological advancements increase so too, should labour legislation and media policies.[381]

3.7 SOCIAL MEDIA USAGE: TAKING RESPONSIBILITY

The laws in relation to defamation suits operate on a paradigm purposed to protect an individual's interest in their reputation. If a third party wrongfully and intentionally makes publicized comments about you in a way that diminishes your esteem to other persons, then that third party has defamed you.[382] Publication is integral in establishing defamation claims. Social media publication can be understood as '*the process of planning, creating, scheduling and distributing content across various social media platforms'*.[383] Social media users are often ignorant that posts made online are a form of publication which they can be held liable for. It is not only possible to make publications but also to share other users' publications as well.

The courts reiterate that social media users must be held responsible for content they place online.[384] Judge Satchwell confirmed that creators of Facebook pages are akin to individuals

[375]J Wortham 'A pair of social media predicaments' available at *https://gadgetwise.blogs.nytimes.com/2009/11/23a-pair-of-social-media-predicaments/*, accessed on 14 November 2019.
[376] Wortham supra note 375.
[377] D Kelleher op cit note 366.
[378] Supra.
[379] D Kelleher op cit note 366.
[380]W Bennedict 'Social media in Labour and Employment: Privacy, Human Rights, and the formation, management and termination of the Employment Relationship' (2012) *Canadian Bar Association* Alberta 4.
[381] T Thompson & N Bluvshtein op cit note 365.
[382] O Ampofo-anti & P Marques op cit note 295.
[383] C Mikolajczyk 'Social media publishing explained' (2020) NapoleanCat.
[384] O Ampofo-anti & P Marques op cit note 295.

who make notice boards available to the public. The court found that individuals who post comments on Facebook pages are '*little different from persons who have attached a scrappy piece of paper to a felt notice board in a passage with a pin or stub of Prestik.*'[385]

Users have further responsibilities with regard to comments made by other people which appear in their profile. It has been confirmed that users are obligated to remove unlawful posts '*much as a newspaper takes responsibility for the content of its pages.*'[386] There are innate dangers for a user to allow other online users of posting content on their respective profile. The Equality Court in a scathing decision involving the *South Africa Human Rights Commission* case found that remarks publicized on a local celebrity's online profile amounted to hate speech[387] in terms of the PEPUDA.[388] In an understanding reached between the parties the defendant undertook to regularly inspect her Facebook profile removing any publications sounding in hate speech, harassment or threats of violence. Further it was agreed that the local celebrity would publicize a post of her online page distancing herself from any form of hate speech and indemnifying herself that any lude or lascivious posts on her profile would not be tolerated.

In the *Fredericks v Jo Barkett Fashion* case an employee made defamatory remarks against his employer's Facebook profile on pain of dismissal, the court found that '*it was clear that the applicant knew what she was doing and had negatively impacted on the image of the company and its General Manager.*'[389] Notwithstanding that social media posts were made without due diligence culminating in dismissal, arguments of posts made by employees in personal capacities have been received in that such posts did not strictly make reference to employers. The overriding consideration should be that Internet usage should be done responsibly and this responsibility is compounded further in the realm of employment[390]. The capacity under which such posts are made is not the definitive distinction but rather that no posts made go without legal consequences. Our courts have commented that '*having social media profile is like a public noticeboard and you are responsible for the material you share online. To keep your reputation intact it is wise to remember – if you wouldn't put it on the noticeboard, don't put it on the Internet.*'[391]

[385] *Dutch Reformed Church* supra note 29.
[386] Ibid para 103.
[387] *SAHRC v Sunette Bridges* (WP/1213/0618, WP/1213/0763, WP/1213/0732 and WC/1415/0024).
[388] PEPUDA.
[389] *Fredericks* supra note 77.
[390] *Fredericks* supra note 77 para 6.
[391] O Ampofo-anti & P Marques op cit note 295.

The English courts have held that it is not necessary that the remark published has caused actual damage to the company but it is sufficient to establish that the publication has the potential to cause reputational damage.[392] Employees should understand the ramifications of '*private*' online conduct; should be aware of the parameters of acceptable behavioural standards at all times and any undesirable comments publicised on such platforms against employers and other employees sanction disciplinary action. The English courts opine that there should be no reason why employers should not treat such conduct emanating from social media misuse differently to other forms of misconduct. It is probable that our courts will follow the position of the English courts. South African law has been influenced by English law and there is direct evidence in the *Cantamessa* case that the courts have looked toward the English courts for guidelines on how to contend with social media misconduct by importing the judgements from the *Smith v Trafford Housing Trust*[393] and *Weeks v Everything Everywhere Ltd* cases.[394] There is authority that employees may be dismissed for posts made after work hours even if does not relate to the employee's employment but does diminish the trust in the employment relationship as seen in the *Cantamessa* case.[395]

Since social media can be used both at work and privately, employers may encounter hardship in formulating policies for its use. Companies should be cautious of restricting its powers to chastise employees who transgress through online posts.

3.8 Summary

Ascertaining a legal definition of social media will enable lawmakers to determine which values to advance and which rights to limit. This will prevent judges from adjudicating upon social media misconduct matter abstractly.[396] Social media has its roots in technology but primarily in sociology.[397] Some of the common features of social media include Web 2.0 technology creating user generated content and depending on the utilization of the Internet.[398] Social media has arisen in the workplace and has the potential to bring an employer's name into

[392] *Weeks* supra note 59.
[393] *Smith* supra note 53 at 86.
[394] Weeks supra note 59.
[395] *Edcon* supra note 49.
[396] A Johnson op cit note 257.
[397] M Wolf J Sims & H Yang op cit note 282.
[398] S Asur & B Huberman op cit note 312.

disrepute.[399] The onset of social media misconduct has resulted in a battle between employers and employee's for a preference of rights under an employment contract.

Employees must be educated on the fact that any publication made on social media are made on a public platform and are no longer private. Employers may dismiss an employee for social media misconduct by performing two stage inquiry.

First, the employer's must question if the employee's post on social media has impacted on the working relationship. Second, the employer must question if the employee has upheld the duty of good faith or has the misconduct destroyed the trust in the employment relationship.[400] An employee's social media misconduct must be subjectively and objectively insulting to justify dismissal.[401] An overriding consideration questions if an employer implemented a social media policy to regulate instances of social media misconduct.[402] For an employer to establish social media misconduct, it would have to show that the employees publications on social media are work related.[403]

[399] *Sedick supra note 67 at* 52.

[400] B Conradie G Giles & D Du Toit op cit note 5.
[401] *Delange* supra note 338.
[402] *Daniel Phillip Neethling* supra note 351.
[403] D Bilchitz op cit note 90.

CHAPTER 4: THE POTENTIAL RISK TO EMPLOYERS EMANATING FROM AN EMPLOYEE'S SOCIAL MEDIA POSTS

4.1 Introduction and specific sources of liability

It must be borne in mind that there are no special rules which apply to social media and South African courts have been left to develop the common law, laws of defamation, privacy and employment law and other aspects of the law to counter social media misconduct. The law of defamation aims to protect the interests of an individual's reputation.

South African courts reiterate that social media users must take responsibility for content they share online.[404] Employers should be concerned with what employees do on social media as there is an increase on companies depending and relying on social media for entertainment, news, advertising, marketing, jobs, and recruitment.[405] Widespread engagement on social media can give a company leverage to promote and build brand identity.

The best way for employers to mitigate the risk is to establish a firm, concise and widely understood social media policy in the workplace forum. Employees must be made aware of such policies and have a clear conception of what constitutes inappropriate behaviour on social media, and they must further be aware of the consequences of engaging in such behaviour.[406]

Social media misconduct, depending on the nature of the misconduct, can justify dismissal. However, employee conduct on social media equated to misconduct can cause patrimonial loss to employers. If employers sustain patrimonial loss or potential patrimonial loss, such a consideration could justify an employee's dismissal accordingly.

[404] *Fredericks* supra note 77.
[405] *Dutch Reformed Church* supra note 29.
[406] S Bismilla op cit note 60.

(i) Patrimony

This type of loss relates to an impact on any patrimonial interest deemed worthy of protection by the law. It can be considered as a loss in value of a positive asset in a party's patrimony or a negative element creating or increasing such patrimony.[407]

There is no universal definition for a person's 'patrimony'. The concept has been used to describe patrimonial rights which are subjective rights to which monetary value can be allotted. The holder of such rights should have an expectation of acquiring such rights comprising legally enforceable obligations with monetary value. In the *Warneke* case, the court defined patrimony as the *universitas* of rights and duties.[408]

Patrimony comprises the positive and negative elements of a party's patrimony. The positive elements extend to a person's real rights, immaterial property rights and personal rights. The market value and limitation of such rights usually determine the monetary value of such rights. The negative elements of a person's patrimony includes debts and liabilities incurred. Such debts are construed as damage even if the debtor has no assets to satisfy the debt.[409]

(ii) Patrimonial liability

Patrimonial liability can be understood as the reduction in the use of an element of a person's patrimony.[410] This means that the use of a positive element in a person's estate is reduced alternatively that an increase does not occur or is delayed as a negative element occurs or increases.

Patrimonial damages can occur in various ways. Damage can occur by loss of a patrimonial element. If property is destroyed, then the patrimonial rights attached to it diminish as well. Loss of possession of property results in the loss of usage of it.[411] Damage can occur by way of a reduction in the value of a patrimonial element. This occurs where the object of the

[407] J Neethling & J Potgieter op cit note 70 at 230.
[408] *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657.
[409] J Neethling & J Potgieter op cit note 70 at 230.
[410] Ibid.
[411] *Kellerman v South African Transport Services* 1993 (4) SA 872 (C).

patrimonial right is infringed, and the use of the right is also reduced.[412] Damage can also come about with the occurrence or increase of a debt and the occurrence of an expectation of a debt. Where conduct causes an injured party to incur expenses such expenses constitute damages.[413]

An employer can sustain a decrease in productivity or an injury to its reputation which could result in a reduction of its patrimony on account of an employee's social media misconduct. This means that if the employers' property or reputation are destroyed because of an employee's misconduct, its patrimonial rights diminish as well. An employee's social media communications has the potential to negatively impact on an employer's patrimony which could cause an employer to outlay monies to rectify the injury to its patrimony alternatively having to make restitution to third parties on account of such communications. Such outlays of money borne by the employer could constitute damages.

(iii) Types of patrimonial loss

There are various forms of patrimonial loss. Firstly, these include *Damnum emergens and lucrum cessans.*[414] *Lucrum cessans* relate to the loss of profit and a prospective loss of an expected profit whereas *damnum emergens* refers to all other damages.[415] Secondly, property damage and financial loss. There is a distinction between damage in general and physical damage. Physical damage refers to damage sustained to a physical object whereas '*damage*' is a broader concept. Financial loss pertains to damages not arising from physical damage to property or injury to a party's personality.[416] Thirdly, direct and consequential loss. The difference between direct and consequential damage is to determine the limitation of liability. Direct loss flows from the immediate damage caused whilst consequential damage can be understood as the loss emanating from the direct loss.[417] Lastly, general and special damage. General damage is presumed to flow from unlawful conduct which necessitates pleading generally as opposed to special damage referring to loss not subject to the presumption and which has to be specifically pleaded to and established by evidence.[418]

[412] *Rudman v RAF* 2003 (2) SA 234 (SCA) 241.
[413] J Neethling & J Potgieter op cit note 70 at 230.
[414] P Visser and J Potgieter *Law of Damages* (2003) 58.
[415] J Neethling & J Potgieter op cit note 70 at 56-58.
[416] P Visser and J Potgieter op cit note 414 at 60.
[417] Ibid.
[418] H Klopper *Law of third party compensation* (2000) 135.

Prospective damage can be understood to be damage not suffered at the time of assessment.[419] This type of damage could be understood as the frustration of an expected benefit. In the case of an employer, this could be the frustration of an expected right to future business and profit. Prospective damage results in monetary advantage however, the concept is based on the impairment to the claimant's present interests. This could apply to an employer who sustains future expense attributed to a damage causing event such as a defamatory social media post by an employee.[420] Prospective loss could arise from loss of future income[421] and profit.[422] An employee's social media post could be of such a nature that it has the potential not only to defame the employer and impact on its reputation but also deter prospective customer's thereby marginalising income and profit.

An employer employee relationship can be understood as a master and servant dynamic. Where a servant acts within the scope of his employment and commits a delict, his master becomes fully liable for the damage.[423] Fault is not an element that needs to be established on the part of the employer and this is a form of strict liability.[424] Strict liability is liability in the absence of fault and has been applied to employment relationships where employers may be held vicariously liable for delicts committed by employees. This principle has not evolved from our common law but has been received from English law.[425]

In the *Feldman (Pty) Ltd v Mall* case the court explained the rationale for an employer's controversial liability stating that amongst other theories that the best explanation is that the employer's liability is founded on his own fault (*culpa in eligendo*).[426] The court made reference to the employer's fault in the choice of the employee subject to a legal fiction which creates a rebuttable presumption that the employer has been negligent if his employee commits a delict. Other theories include the interest or profit theory, identification theory, the solvency theory and risk or danger theory.[427]

[419] P Visser and J Potgieter op cit note 414 at 95.
[420] *Blyth v Van den Heever* 1980 (1) SA (A) 225.
[421] *Rudman* supra note 412 at 241.
[422] *Transnet v Sechaba Photoscan* (Pty) Ltd 2005 (1) SA 229 (SCA).
[423] *Minister of Police v Rabie* 1986 (1) SA 117 (A) 132.
[424] *Stein v Rising Tide Productions* CC 2002 (5) SA 199 (C) 205.
[425] *Masuku v Mdlalose* 1998 (1) SA (A) 13-14.
[426] *Feldman (Pty) Ltd v Mall* 1945 AD 733 – 738.
[427] Ibid.

Social media misconduct has the ability not only to undermine the trust underpinning the employment relationship, causing the employer to be defamed or bringing the employer into disrepute but the employee's publication can also be regarded as a delict against other employees or members of the public. Such employee posts can be construed as hate speech or defamation. Applying the legal fiction to social media misconduct would infer the employers would be negligent for injurious publications made by their employees on social media and therefore be liable.

The interest or profit theory dictates that an employer bears the onus to establish an employee's misconduct the resultant of which has negatively impacted on the employer's business interest or profits. The interest or profit theory suggests that the employer must bear the burden of the employee services as a corollary to the benefits or potential benefits thereof whereas the identification theory postulates that the employee is merely the employer's arm i.e., when the employee acts, it is the employer acting.[428] The purport of the identification theory determines if the employee can easily be associated with the employer. If so, then the employer is ostensibly liable for any misconduct of an employee which causes harm to a third party. The solvency theory suggests that the employer is liable as he is usually in a better financial position in comparison to the employee.[429] According to this theory, it suggests that there is a higher probability that the employer enjoys a superior financial status in comparison to its employee and on that basis, the employer should be held liable for any damages arising from the employee's misconduct. The risk or danger theory demands the true rationale for the employer's liability for the work entrusted to the employee creates certain risks of harm for which the employer should be held liable on the grounds of fairness and justice as against injured third parties.[430] This theory suggests that because the employee undertakes to provide services for the employer (for which the employer is liable) and for which the employee assumes risks in carrying out such service that the employer reciprocally assumes the risk or danger of any damage sustained by a third party on account of the employees misconduct.

If the interest or profit theory was applied to social media publications by employees, it would imply that employers would have to maintain the employment relationship in order to sustain profits or potential profits. An application of the identification theory would imply that when

[428] J Neethling & J Potgieter op cit note 70 at 390.
[429] Ibid.
[430] Ibid.

employees make publications on social media that they actually echo the sentiments of the employer. An enquiry into social media misconduct in this instance would question if the employee associated or disclosed the employer's credentials on his profile and whether the publication was made during or after work hours. Social media misconduct can be disastrous for financially stable employers. In applying the solvency theory, employees aware of the employer's financial prowess can easily abuse social media publications knowing that the employer bears the responsibility for defamatory publications financially whilst escaping any sanction for such misconduct. An application of social media misconduct under the risk or danger theory implies that employers would be liable for employee publications on social media in the spirit of fairness and justice. This means that employers would be answerable civilly to injured third parties on account of employee social media publications.

4.2 EMPLOYERS CONSEQUENTIALLY LIABLE FOR EMPLOYEE POSTS

The primary enquiry is whether an employee's social media publication constitutes a form of misconduct. The second part of the enquiry will determine if the misconduct warrants a dismissal. Factors that will be considered in the enquiry will determine if the employee misconduct breached the employer's social media polices or confidentiality clauses. A determination will seek to establish if the employee publication is racist or defamatory.[431]

Another factor that must be contemplated in cases of social media misconduct is whether an employee's social media post occurred during working hours or not to determine the extent to which an employer may be liable to a prejudiced party.[432] In the *Edcon* case, the court found that the employee's publication on social media after work hours constituted misconduct and that dismissal was appropriate.[433] The court noted that the publication was made publically and sparked responses from the public of non-payment of accounts and racial boycotts which the employer would become liable for.[434]

In chapter two , it has been established that the right to privacy does exist in the workplace but can be limited in extenuating circumstances.[435] In the *Bernstein* case the court noted that

[431] R Davey & L Dahms-Jansen op cit note 203 at 230-231.
[432] Ibid.
[433] *Edcon* supra note 49.
[434] Ibid.
[435] *Bernstein* supra note 33 at 72.

privacy rights extend to a private realm but as a person interacts communally for business and social interaction, personal space diminishes.[436] It is postulated that the right to privacy has parameters in the workplace and it would be presumptuous to consider all data in a company network as being public.[437] Employee social media communications could be regarded as private only in instances where there is a (reasonable) expectation of such privacy.[438] In cases where employers do not implement social media policies and monitor employee publications on social media, could render employers liable to members of the public for such publications. Employers and employees wishing to defend such publications cannot raise privacy as a defence to escape such liability.[439]

The *Cantamessa* case has rationalized that an expectation of privacy is diminished when social media communications enter a public forum. This indicates that a distinction must be made between an employee's personal and public communications in the workplace. This means that an employee who is not necessarily present at work can be found liable for social media misconduct.[440] As seen in the *Cantamessa* case the employee was in the privacy of her home whilst on leave when committing social media misconduct. The case has illustrated that the employee's social media publication received public response to the extent that it was published in the newspaper. The employer had sustained various complaints from the public ranging to non-payment of accounts, account closures and boycotts.[441] The reaction from the public had far reaching financial implications for the employer extending to public relations, economic loss and race activism groups which the employer had to bear.[442]

It should therefore be born in mind that employees working from home may face difficulty in extrapolating the boundary between personal communications and those which are work related.[443] An employee's social media publication can render the employer patrimonially liable where the publication causes third parties' injury or harm.

[436] Ibid.
[437] D Bilchitz op cit note 90 at 58.
[438] Ibid 64.
[439] S*edick* supra note 67.
[440] *Edcon* supra note 49.
[441] Ibid para 4 – 6.
[442] Ibid.
[443] Ibid.

The *Sedick* case illustrated that where an employee did not mention the employer in their social media communication, it has to be determined if any person in the public associated with the employee could reasonably identify who the employer was.[444] Notwithstanding that the employee posts were made after working hours, the misconduct claim was further compounded by a notable lack of respect for management, gross insubordination and insolence. The preference of an employee's privacy settings on a social media site is not a determinant factor. It simply means that virtually any person on social media would be able to view the post and associate the comments with the employer's establishment.

An employee does not have to categorically mention an employer on a social media post in order to establish grounds for misconduct. Similar to the right to privacy, an employee's right to freedom of expression may also be limited and even though an employee's comment on social media does not specifically mention the employer or other employees, it can be inferred that the comment was directed towards the employer and other staff on a balance of probability.[445]

Employer consequential liability can be understood as loss sustained by third parties as a result of an employee's social media publication. The inquiry determines if an employee's misconduct is work related.[446] When an employee's comments on social media make reference to the place of employment, the comment will immediately be regarded as work related. It is not necessary to have a specific reference to the workplace. If other social media users can identify an employer or an employee's workplace through such a publication on social media, it can be deduced that the post was work related.[447] Reference to the workplace does not necessarily attract liability for misconduct. It does indicate that the employee's privacy rights become diminished. The decisive factor hinges on the content of the publication and how it impacts the employer.[448] If the employee publication ignites public outrage and inspires third party claims against an employer for injury or defamation, the employer can be consequentially liable for such social media misconduct.[449]

[444] *Sedick* supra note 67 at 53.
[445] *Dewoonarain* supra note 23 at 55- 59.
[446] D Bilchitz op cit note 90.
[447] Ibid.
[448] Ibid.
[449] Ibid.

If an employee's social media post is not work related, then an employee cannot be held liable to an employer. The onus rests on the employer to establish that there is a reasonable inference that the employee's social media post refers to the workplace. A distinction must be established between personal privacy of an employee while using the equipment of the employer and the legitimate rights of the employer. Employers must guard against intercepting the employee's information of a personal intimate nature unless such information directly relates to the workplace or if it attracts criminal sanction.[450]

The test thus provides that an employee's publication on social media must have a negative effect on the workplace and the employer's reputation alternatively cause a breakdown of trust in the employment relationship in order for it to constitute a form of misconduct.[451] In this regard there must be a nexus between the social media communication and the effect in the workplace. Only in these circumstances will an employee's rights become limited.

In the *Isparta* case the court noted that social media users may be able to control the publication of their posts by using privacy settings which may be available to a select few associated with such a user. The ability to adjust privacy settings however does not necessarily mean that employee communications become private.[452] The Internet itself is a public domain and any information shared on it may be impossible to delete. Social media networks are there for public domains as well.

The court noted in the *Sedick* case that if an employee places no restrictions in their privacy settings, such profiles can be accessed and viewed freely.[453] The court has held that the nature of public social media profiles are available to the public in the same way that blogs and public comments on news media sites are available or in the same way that letters are published in the newspapers.[454]

In the *Harvey* case the court reiterated that by choosing not to restrict privacy settings on social media, a user agrees that publications on his profile are in fact public with a view for everybody

[450] D Bilchitz op cit note 90 at 58.
[451] M Thebe op cit note 362 at 3.
[452] *Isparta* supra note 355 at 6.
[453] *Sedick* supra note 67 at 21.
[454] Ibid para 50.

to view such publications.[455] Employees may still be able to attract liability despite having private social media profiles. This is a usual occurrence when an employer is made aware of the employee publication on social media and where such post potentially harms the employer's initiative or third parties.

A common misconception by social media users is that individuals may view posts made by a particular user by persons contained in that user's social contact list and in their personal capacity away from their professional lives.[456] However, the construct of social media allows for any one of the listed contacts to transmit such post in many ways to multiple users which could potentially allow such a post to go viral.[457]

Courts will therefore have to look at the publication on social media together with the privacy settings of an individual to establish the severity of damage caused to an employer or a third party.[458] The court will also have to consider if an employer took lawful and reasonable steps to ascertain such information. Such considerations should be included in the social media misconduct test.

Employee social media publications can constitute misconduct but also render employers liable to third parties. Employee social media misconduct publications can cause harm to members of the public who can hold employers consequentially liable. The implication is that an employee's rights to privacy and freedom of expression may be limited to establish misconduct but delictual employee publications can also render employers liable to third parties. A mere mention of the employer does not amount to a misconduct however, much depends on the nature of the employee's post on social media. The test thus provides that an employee's publication on social media must have a negative effect on the workplace and the employer's reputation alternatively cause a breakdown of trust in the employment relationship in order for it to constitute a form of misconduct and to limit the employees right to privacy and freedom of expression.[459]

[455] *Harvey* supra note 35 at 449.
[456] M Thebe op cit note 362.
[457] Ibid.
[458] *Dutch Reformed Church* supra note 29.
[459] *Harvey* supra note 35.

The cases above illustrate that employee social media posts are made publicly[460] similar to publications in the newspaper which employee have no control over.[461] An employee's preference of privacy settings does not mean that the posts are any less public.[462] If the employee's post harms the interests of an employer, misconduct can be established and where the post causes harm to a third party, it could render the employer consequentially liable.

4.3 ESTABLISHING VICARIOUS LIABILITY

The doctrine of vicarious liability has roots based on considerations of public policy impacting an employment relationship. The doctrine dictates that an employer may become liable for unlawful or delictual actions of an employee performed during work hours.[463] The doctrine is regulated by common law and not labour legislation. In essence the doctrine founded the principle that an employer must pay compensation to third parties who sustained injury emanating from the wrongful conduct of an employee.[464] The aim is to protect third parties. However, the doctrine does not preclude an employer from executing recourse against an offending employee. Employers may discipline a transgressing employee for misconduct and can even claim repayment.[465]

The test to determine an employer's liability for an employee's wrongful conduct includes firstly, the existence of an employment contract, secondly a contemplation of whether an employee has acted in the course and scope of his employment and thirdly if the employee has committed a delict.[466] The most problematic requirement is determining if an employee acted in the course and scope of employment. South African courts have dealt with such cases on its merits.[467]

The fact that an employee's wrongful act was expressly forbidden by an employer or constituted a criminal act may not absolve the employer from being found vicariously liable for such

[460] *Isparta* supra note 355 at 6.
[461] *Sedick* supra note 67 at 21.
[462] *Harvey* supra note 35 at 449.
[463] McGregor, Dekker & Budeli op cit note 64 at 42.
[464] Ibid.
[465] Ibid.
[466] Ibid.
[467] Ibid.

action. A crucial determining factor is whether the employee was promoting the interests of employment at the time of the commission of the act.[468]

The implications of vicarious liability in instances of employee social media misconduct are that an employer would have to compensate a third party who sustained injury emanating from such misconduct.[469] Establishing the criteria in the test stated above is problematic since social media misconduct can arise during and after work hours. Straightforward cases would occur when the employee publishes a post on social media during work hours. Problematic cases would emerge when the employee's post occurs after working hours. The claimant would have to aver that the employee's misconduct caused a delict. A delict is a civil wrong against another person. It comprises of five elements namely, conduct, wrongfulness, fault, causation and damages. A delictual claim will only arise when all five elements have been satisfied.[470] The courts would have to consider the merits of each case of social media misconduct and determine to what extent the employer was implicated in the post and if the post was work related.

If these criteria can be satisfied by a claimant, then an employer can be found vicariously liable for the employee's social media misconduct. Employers who exempt vicarious liability in employment contracts and by implementing social media policies cannot escape liability.[471] If the employee post can be identified as promoting the employers' interests when making the post on social media a court may make a finding that the employer is vicariously liable.

The test for vicarious liability has not been absolute and has created anomalies in cases which deviate from the norm. The test as it stood enumerated a method for employers to simply establish that an employee's actions occurred outside the scope of employment and thereby escaped liability. This rendered the common law test uncertain.

4.3.1 The existence of an employment relationship at the time of the commission of a delict

The relationship is evidenced by an agreement by one party pledging their work capacity or energy to another party for remuneration. This is done in such a way that the latter party may

[468] *Feldman* supra note 426 at 756-757.
[469] McGregor, Dekker & Budeli op cit note 64 at 42.
[470] J Neethling & J Potgieter op cit note 70 at 3.
[471] *Feldman* supra note 426 at 756-757.

exercise authority over the former. The *Gibbins v Williams* case found that a contract of service must exist.[472] This is distinguished from a contract of mandate which concerns an agreement in terms of which one party undertakes to render services to another for remuneration with the exclusion of an element of control or authority over the other.[473] Contracts of mandate involving independent contractors do not attract vicarious liability.[474]

The question of control or authority does not relate to factual control but rather the right of control and is an important factor in determining whether a wrongdoer is an employee. This concept has become eroded and is no longer a decisive factor to be considered in the test for vicarious liability.[475] The Appellate Division utilized the '*dominant impression*' test as indicated in the *Smit* case.[476] Later in the *Transnet* case the Supreme Court of Appeals held that to determine the relationship between the parties, a multi-faceted test should be utilized taking into account all relevant factors and circumstances of the specific case.[477]

4.3.2 The employee must commit a delict

This requirement indicates that employers may raise any defence which would ordinarily be available to an employee.[478] Since the employee is also directly liable, the employer and employee are regarded as joint wrongdoers against a prejudiced party. The right of recourse however is only available to the employer.[479] The employer must be able to show that the employee's conduct of publishing a post on social media was done wrongfully in the sense that it was done unlawfully or untruthfully and constituted a form of misconduct. The employer must be able to dissociate itself with the social media post and establish that its occurrence was the fault of the employee which caused an infringement of the trust underpinning the employment contract and causing a third-party damage.

[472] P Boberg The Law of *Delict: Aquilian Liability* (1984) 220 and Gibbins V Williams, Muller, Wright en Mostert Ingelyf 1987 (2) SA (T) 90.
[473] Ibid at 510.
[474] *Pienaar v Brown* 2010 (6) SA 365 (SCA) 368 – 369.
[475] *Gibbins v Williams, Muller, Wright en Mostert Ingelyf* 1987 (2) SA (T) 90.
[476] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 62-63.
[477] *Midway Two Engineering and Construction Services v Transnet Bpk* 1998 (3) SA 17 (SCA) 23.
[478] *De Welzim v Regering van KwaZulu Natal* 1990 (2) SA 915 (N) 921.
[479] *Botes v Van Deventer* 1966 (3) SA 182 (A) 205-206.

4.3.3 The employee must act within the scope of his employment at the time that the delict is committed.

This requirement will be satisfied if the employee acts in the execution of fulfilment of his duties under the employment contract. The employee will act outside of such a scope if he disengages himself completely from his employment and promote his own objectives exclusively. The determination of whether this requirement has been satisfied is subjective and objective.[480] Premised on the subjective and objective tests, if an employee commits a delict outside of working hours the court would have to determine the employee's intention at the time of making the social media post and if the post was closely connected to the endeavours of the employer. If the employee's social media post causes the employer disrepute, the employer can establish misconduct and dismiss the employee, but the employer might not be able to escape liability to a third party. To escape liability to a third party, the employer would have to provide evidence of the employee's duties either though employment contract or accepted work standard and that there was a clear deviation of the employee from his duties.

In the *Rabie* case the court stated that in anomalous cases the test provides that an employer may still be held liable if an employee had abandoned his business responsibilities and committed a negligent act on their own provided that there is a '*sufficiently close connection'* between the actions of the employee and employer's enterprise. This test created an objective and subjective component. Subjectively the test determines the intentions of the employee at the time of committing the act and objectively the test determined if there was a sufficiently close link to the negligent conduct of the employee and the employer's enterprise.[481]

In the *Minister of Safety and Security v Morudu* case the Supreme Court of Appeals reapplied the test in the *Rabie* case. Here, the Supreme Court of Appeals upon exercising the test found that the employee conducted himself to further his own interest and that there was an insufficiently close link between the employee conduct and business of the employer.[482] The court concluded that the employee's conduct was a '*radical deviation from the tasks incidental to his employment'*.[483]

[480] J Neethling & J Potgieter op cit note 70 at 393.
[481] *Rabie* supra note 423.
[482] *Minister of Safety and Security v Morudu and Others* 2016 (1) SACR 68 (SCA).
[483] Ibid.

In the *Booysen* case the Supreme Court of Appeals again applied the test for vicarious liability and found that there was an insufficient connection between the employee's conduct and his duties as a police officer.

It is evident from the various approaches exercised by our courts that the burden of proof on an employer may increase to establish an insufficiently close link to any employees conduct and the business of the employer.[484] Employers wishing to escape such liability must clearly set out the duties of employees and implement preventative measures for dereliction of such duties to be envisaged in a bona fide employment contract.

The implications of the test for vicarious liability in relation to social media misconduct indicates that employers would have a greater onus to establish that an employee's social media post is insufficiently linked to the employer's business.[485] Employers would have to establish the employee social media post fell out of the ambit of the employment contract which regulates the employee's duties.[486] Employers would have to prove that the employee post were contra to the employers' interests. If the employee makes the social media post subject to instruction from the employer and such a post is condoned in the employment contract and employer's social media policy, such an employee post may not be categorised as social media misconduct but may still render the employer vicariously liable if the claimant can establish a sufficiently close link between the employee post and the employer's business interests.[487]

4.4 EMPLOYERS MANAGING RISK: SOCIAL MEDIA POLICIES, SOCIAL MEDIA LITERACY, SOCIAL MEDIA MONITORING AND SOCIAL MEDIA STRATEGY

Social media policies are not categorised or regulated in the LRA as social media has not been legally defined.[488] As stated in chapter two paragraph 2.3, instances of social media misconduct is regulated in the same way as other instances of misconduct which should satisfy substantive and procedural fairness requirements in disciplinary enquiries.[489] The position of the Labour

[484] *Kasper v Andre Kemp Boerdery CC* 2012 (3) SA 20 (WCC) 27.
[485] J Neethling & J Potgieter op cit note 70 at 394.
[486] Ibid.
[487] Ibid.
[488] S Bismilla op cit note 60 at 1.
[489] Chapter 2

Court is that social media and social media misconduct are advancing technologies and legally undefined.[490] The courts in contending with this type of misconduct advise employers to implement social media policies and provide training for employees in this regard.[491] Each social media misconduct case will be determined on its merits. In cases where employers do not implement social media policies (smaller businesses), or where social media policies and training have not been implemented for employees, then social media misconduct may not be established, and dismissal would be unjustified.

A social media policy must be designed to educate employees on how to use social media and its effects in the workplace. It must be introduced to employees by human resources management and should provide guidance on the appropriate use of social media in the workplace.[492] The policy should be educational and must clearly indicate the consequences of social media misconduct. The sanctions for non-adherence to such a policy should also be overt. A social media policy should cater for different capacities whereby employees use social media.[493] Such capacities range from authorized social media usage, professional usage, and private social media usage during work hours using employer's infrastructure and off duty social media usage after working hours using private infrastructure.[494]

The social media policy must address issues of an employee's right to privacy, confidentiality and security and must inform an employee that the employer may utilize social media posts to found grounds of misconduct and may intercept such posts.[495]

> '*The contemporary workforce is woefully underprepared for the challenges ... A social media skills gap of epic proportions has opened up, as social media surges forward while formal training and education programs lack seriously behind.*'[496]

This indicates that whilst social media technology advances that both employers and employees are largely unaware of the risks associated with social media usage and how it can negatively

[490] S Bastille op cit note 60 at 3.
[491] Ibid at 4.
[492] Ibid.
[493] Ibid.
[494] Ibid.
[495] S Bismilla op cit note 60.
[496] R Holmes *The social media skills gap in the workplace has fast become a perilous chasm* available at *http://business.financialpost/entrepreneur/the-social-media-skills-gap-in-the-workplace-has-fast-become-a-perilous-chasm* accessed on 12 August 2020.

impact the employment relationship. To this end, social media training and development is necessary to limit instances of social media misconduct.

Professor of social media studies William Ward at Syracuse University states:

> '*The real problem is that we expect people to know these skills without providing any training... Social media know-how isn't something you pick up as a casual user, and it isn't just older employees who are in the dark-millennial hires need training, too.*'[497]

Social media literacy dictates that an employer wishing to ensure compliance with social media policies must prepare his workforce for changes and opportunities that social media will present by providing training, development and engagement.[498]

Therefore, employees should receive social media literacy and policy training. A majority of employees use social media in their personal lives and must be educated how to continue use without jeopardizing their profession.[499] Such training should focus on social media policies and guidelines by the company, confidential information and intellectual property of the employer, privacy settings and most importantly consequences for social media misconduct.[500]

Businesses who intend to use social media to further the needs of the employer must provide more robust training requirements. A business enterprise should therefore develop a training plan for its organization based on what the company wants to achieve. The business should provide training for employees which could be limited to a few employees or the entire organization. Such a plan needs to be reinforced by always reverting to the training provided and consistently communicating, updating and testing the knowledge of employees as time progresses.[501] A good initiative would be to introduce social media orientation when recruiting employees who are unaware of existing social media policies and who are then made aware of rules and guidelines expected of a business.[502]

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[497] K Tillman *Do Media literacy, Digital Literacy and Social Media Literacy intersect?,* available at *http://www.edelmandigital.com/201/04/01/do-media-literacy-and-socialmedia-literacy-intersect* accessed on 1 April 2019.
[498] Ibid.
499 S Bismilla op cit note 60 at 5.
[500] Ibid.
[501] S Bismilla op cit note 60 at 5 -7.
[502] Ibid.

A good way to reinforce social media policies is to make specific provision for such policies in employment contracts. This will reinforce to an employee that social media usage must be done responsibly and that a misconduct emanating from it could potentially terminate an employment. Codes of conduct, policies and procedures can be reinforced in employment contracts and must include relevant provisions regulating social media usage in the workplace. The social media policy and the conditions within an employment contract must be of a similar nature. The failure to achieve an overlap between social media policies and the conditions of an employment contract can create confusion as to what can be expected by an employee as illustrated in the *Robertson* case.[503]

Employees who intend on leaving a business should be subject to the scrutiny of a social media audit to ensure that any publication by an employee on social media is not detrimental to the organization as a whole. The policing of social media publications by employees could prove to be time consuming and expensive to an employer however it would be a good practice for employers to conduct regular social media audits which can evaluate risk and trends which would enable employers to develop the necessary steps to manage social media in the workplace.[504]

One of the dangers innate in social media is that it occurs in real time and may necessitate an immediate response in cases of negative social media publications by employees. Employees therefore must implement a social media strategy to address such publications should they occur. Such a strategy should consider the interests of the public, the reputation of the employer and how such a publication could affect the employment relationship. It is always advisable for employers to neutralize potential risk of negative social media publications by employees.[505]

[503] Ibid.
[504] Ibid.
[505] Ibid.

4.5 Summary: Analysis and comment

Social media misconduct is dealt by developing the LRA, common law, and by limiting the employee's constitutional rights. The ability of employees to publish information regarding another person on social media has the potential to harm or defame that person or the employer. Many employees may be unaware of this. Social media affords great benefits to many businesses and employers encourage employees to use social media to promote business interests. However, social media usage can be abused by employees resulting in social media misconduct.

To avert risk, employers must implement strict social media policies and training deterring employee from committing this type of misconduct.[506] Employee social media posts can undermine the trust in the employment relationship and potentially defame the employer or cause reputational harm. In such cases, the employer sustains patrimonial loss which could justify the employee's dismissal. However, employee's posts can also defame or cause harm to members of the public. If the employer is associated by such posts employers can be held liable by third parties. Employers may be held strictly liable for delicts committed by virtue of the employee's social media misconduct and vicariously liable.[507] This means that employers would be answerable civilly to injured third parties on account of an employee's social media misconduct.

Employers must establish an employee's social media misconduct on a balance of probability. Once the misconduct is established, the employer must consider if dismissal would be justified subject to substantive and procedural fairness standards. For dismissal to be justified, the employer must consider if the employee breached the employer's social media policy or if the employee's post could be considered as being racist or defamatory. The employer must consider if the social media misconduct transpired during or after work hours and the degree to which the employer was mentioned in the post or could be associated with the post. If the employee's post was made pursuant to an instruction from the employer or if it is work related, the employer could be consequentially liable to third parties but would not be able to establish social media misconduct on the part of the employee. Where the social media post is made by

[506] S Bismilla op cit note 60.
[507] *Masuku* supra note 425.

the employee is not work related and causes harm to a third party for which the employer may be held vicariously liable, could justify the employee's dismissal.

The test to determine and employer's liability for employee's wrongful conduct includes firstly, the existence of an employment contract, secondly a contemplation of weather an employee has acted in the course and scope of his employment and thirdly if the employee has committed a delict. The most problematic requirement is determining if an employee acted in the course and scope of employment.

In contending with social media misconduct, the courts have advised that it is a good practice for employers to implement social media policies and train employees about social media usage and its implications. A non-implementation of such policies and training may preclude an employer from establishing employee social media misconduct altogether.

CHAPTER 5: SOCIAL MEDIA MISCONDUCT IN THE UNITED KINGDOM (UK) AND GERMAY

5.1 Introduction

The United Kingdom and Germany have been selected as contrast jurisdictions in comparison to South Africa. The reason for the selection of these two countries is because both have contributed to the present South African legal system and many parallels can be drawn between the three jurisdictions respectively. The United Kingdom laws have been applied in South Africa since the arrival of the British in the 1800's. Since then, the English law has significantly influenced South Africa's paradigm of constitutionalism and common law.[508] Germany, much like South Africa has seen great atrocities against civil and political rights and the socio-economic rights of its citizens. Pursuant the second World War, Nuremburg trials and the division of the country, Germany adopted a constitutional paradigm based on constitutional supremacy. This allowed Germany to propagate robust constitutional laws and was drawn upon by the drafters of the South African Constitution.[509] On the basis that both the United Kingdom and Germany have influenced and contributed to the present South African legal order, these jurisdictions have been selected to contrast how they contend with social media misconduct and how they can influence South African courts to adjudicate upon social media labour disputes. The laws of privacy and freedom of expression together with social media misconduct is considered in the United Kingdom and German context and a consideration of their case laws.

5.2 THE UNITED KINGDOM (UK)

(i) Privacy and freedom of expression

South African common law has been influenced by English law over the years. South African governance has changed from the Westminster constitutional model of parliamentary sovereignty to a constitutional democracy. However, South Africa retains many structures from the Westminster model whilst maintaining constitutional supremacy. It is for this reason that

[508] P De Vos & W Freedman op cit note 154 at 42.
[509] Ibid at 49.

the United Kingdom was selected as a foreign jurisdiction to contrast how social media misconduct has been contended with and how it can influence South African labour laws. The United Kingdom's laws regulating social media could influence South Africa and potentially influence the development of social media laws within the republic.

The British model is markedly different from South Africa's constitutional democracy based on constitutional supremacy. Unlike South Africa's Bill of Rights, the British government protects citizens' rights to privacy and freedom of expression through its Human Rights Act.[510] The right to privacy is contained in Article 8[511] and the right to freedom of expression is found in Article 10.[512] The rights contained in the South African Bill of Rights can be limited by way of the law of general application[513] whereas in Britain rights, such as privacy can be limited in order to protect the rights and freedoms of others.[514] The British Human Rights Act predominantly asserts the right to freedom of expression and the right may be limited when measured against the reputational rights of others prohibiting the disclosure of information subject to confidentiality.[515] Similar to South Africa, both these rights in the United Kingdom can be limited to protect another's rights especially when the rights exceed the ambit of protection to be metered out. In terms of social media misconduct, an employer in the United Kingdom must establish the misconduct on reasonable grounds, conduct necessary investigations and substantiate that dismissal was fair.[516] The employees' rights to privacy and freedom of expression can be limited to give effect to the employers right to protect its business interests.[517]

(ii) Social media misconduct

In South Africa misconduct and dismissal are regulated in terms of the LRA whereas in the United Kingdom misconduct and dismissal are regulated by the Employment Rights Act.[518] Under this Act, an employer wishing to dismiss an employee for misconduct would have to

[510] Human Rights Act 1998.
[511] Article 8 Schedule 1 Human Rights Act 1998.
[512] Article 10 Schedule 1 Human Rights Act 1998.
[513] Section 36 Constitution.
[514] Article 8 Schedule 1(2) Human Rights Act 1998.
[515] Article 10 Schedule 1(2) Human Rights Act 1998.
[516] *Crisp v Apple Retail (UK) Limited* ET/1500258/2011 14.
[517] Ibid para 27-28.
[518] Employment Rights Act 1996.

establish that the dismissal was fair and subject to a valid reason warranting the dismissal based on an employee's misconduct.[519]

In cases of social media misconduct, where an employee alleges that his dismissal was unfair the employment tribunal investigates the reasonableness of such a post.[520] This means that the employer must believe that the employee committed a misconduct, establish reasonable grounds for the misconduct, engage in a reasonable investigation, and establish that dismissal was the reasonable repercussion for such misconduct.[521] In adjudicating upon an employee's privacy rights and the right to freedom of expression it has been held that both rights may be limited in proportionate cases.[522] The reasonableness enquiry dictates that an employer who suspects an employee's misconduct on social media must conduct an investigation and establish grounds for such misconduct. When this is done the enquiry considers if dismissal is the reasonable sanction for such misconduct. If the reasonableness enquiry is satisfied, then an employee's dismissal could be regarded as being fair. Employees must be alive to the fact that posts made on social media could constitute misconduct where such posts tarnish the image of the employer.[523] Where employees receive social media publication training and are aware of an employer's social media policies and the employee cannot adduce adequate representations to defend their social media publication, then dismissal could be sanctioned due to a lack of justification for such posts by the employee.[524]

Where the employee does not mention the employer in the social media post, but the comments, employee user profile or other content on a social media platform infers the identity of the employer, such information can be construed as being work related.[525] An employment tribunal construes dismissal as a harsh sanction and the only reason why dismissal may be deemed as a reasonably fair sanction is because an employee withstood training and was notified of the employer's social media policy.[526] This stance was reiterated by the employment tribunal in the *Greenwood v William Hill Organisation Ltd* case.[527] The facts of this case were that the claimant had subscribed to a Facebook page frequented by employees of the betting office. The

[519] S 98 (1) (2) Employment Rights Act 1996.
[520] *Crisp* supra note 516.
[521] Ibid para 27-28.
[522] Ibid para 31.
[523] Ibid.
[524] Ibid para 38-39.
[525] Ibid para 39.
[526] Ibid para 40.
[527] *Greenwood v William Hill Organisation Ltd* ET2404408/2016 8.

claimant posted humorous comments regarding the betting industry which were open for comment.[528] The site was not a site associated with the respondent however the claimant was dismissed for social media misconduct for being in breach of the respondent's social media policy. The employment tribunal found that the dismissal was fair.[529]

With regards to privacy rights, employment tribunals acknowledge that employees have a reasonable expectation to privacy, but the right diminishes because the social media post could be shared easily.[530] The onset of an employee's privacy settings is of no consequence as the social media post is made public and can be distributed by employee's contacts which the employee has no control over.[531] For this reason employers need to implement social media policies to regulate social media misconduct. Employees can exercise freedom of expression by publishing on social media and this right can also be limited for purposes of protecting the reputation of an employer.[532]

Employees with a clean track record and committing a first-time offence of social media misconduct can also be subject to dismissal. This may occur where the employer has implemented a social media policy and dismissal may be an appropriate sanction for social media misconduct. The dismissal will be sanctioned if it is a reasonable response. In cases where employees are aware of the social media policy and potential for dismissal, they should understand that the social media posts which are derogatory or insulting towards the employer and fellow employees and a lack of representations justifying such posts can culminate in a dismissal.[533]

In cases where employees are aware of the employer social media policy and assert their right to freedom of speech,[534] the employment tribunal will balance the employee's right to free speech against the employer's right to protect its reputation. In such cases, dismissal will be fair as the employee rights can be limited and the employee was aware of the social media policy.[535]

[528] Ibid para t 2 – 3.
[529] Ibid para 40.
[530] *Crisp* supra *note 516 at* 44-45.
[531] Ibid para 39.
[532] Ibid para 46.
[533] *Plant v API Microelectronics Ltd* ET3401454/2016 4 – 17.
[534] *Greenwood* supra note 527 at 8.
[535] Ibid para 39-40.

(iii) Decided cases

In 2011 the British employment tribunal dealt with the *Crisp* case.[536] Mr Crisp, an employee, was hired as a specialist and underwent training in preserving the company's reputation. Part of the training included methods on how employees appear in public, adhered to the employer's social media policy and employees were specifically advised that any posts made after working hours and which did not categorically refer to the employer could still be construed as affecting the employer's interests. A further constituent of the training required employees to conform to a confidentiality policy. In due course there were discussions between Mr Crisp and his employer regarding a potential relocation to the United States of America where after Mr Crisp made a number of posts on Facebook. Mr Crisp's vulgar and derogatory social media posts were directed at Apple Retails UK (Ltd) and the posts received comments by other online users. Pursuant to investigations, his employer established grounds for social media misconduct, and he was dismissed. The grounds for dismissal included that he brought the employers into disrepute, he attacked Apple's core value image and he had breached the company's social media policy by using vulgarities even if this occurred after work hours.[537]

Pursuant to the posts, the employer suspended Mr Crisp. Realizing the purport of his posts, Mr Crisp removed the posts from Facebook. His employer launched allegations of gross misconduct on his part in defaming the company's reputation.[538] Mr Crisp's defence was predicated on the fact that his Facebook page was private as he had preferred certain privacy settings allowing his posts to only be disclosed to a closed group of contacts and as such his conduct did not defame the employer.[539] He further argued that at no point did he mention the employer's name. Cursory to his defence, Mr Crisp alleged inconsistencies in the way the employer dealt with disciplinary actions alleging that other employees had also made remarks about the employer on Facebook but were not dismissed. Mr Crisp was found guilty of gross misconduct and therefore dismissed.[540]

The chairperson of the disciplinary committee had noted that Mr Crisp's social media posts could have potential to be viewed by a wider audience as opposed to the few who are privy to

[536] *Crisp* supra note 516.
[537] Ibid para 14.
[538] Ibid para 14-23.
[539] Ibid3.
[540] Ibid para 31.

his privacy settings. The chairperson noted that his posts could easily be shared and passed on to other users on social media. The disciplinary committee noted that the employees Facebook friends would also know who he was employed by and there was a potential risk to the damage of the employer's good name and reputation.[541]

The matter went on appeal, yet the dismissal was upheld. Subsequently the matter was taken to the employment tribunal which considered the Human Rights Act of 1998 particularly the right to privacy. The tribunal considered the limitation of the right in contrast to the rights and freedoms of other persons. The right to freedom of expression and its limitation was also considered by the tribunal in contrast to the rights and freedoms of others. The tribunal found that the limitation of such rights must be '*necessary in a democratic society*'.[542]

The tribunal found that the employer did not have ulterior motives in dismissing the employee[543] and reasonably established that the employee had committed misconduct[544] which was unacceptable in consideration of the employer's circumstances.

The 2012 *Teggart v TeleTech UK Limited* case[545] involved an enquiry into a dismissal for gross misconduct on social media. The misconduct complained of transpired after workhours on Facebook when Mr Teggart posted a sexually charged innuendo online specifically mentioning the employer's name. A representative of the employer at whom the comment insinuated appealed to Mr Teggart girlfriend to have him remove the post. In response to the request, Mr Teggart posted yet another sexually offensive post directed at a female employer representative who grew agitated by the posts.

The employer's dignity and work policy provided that it would '*provide a safe working environment, free from harassment and intimidation*' and that harassment and intimidation '*are considered misconduct and if proven may result in immediate dismissal of the offender*'.[546]
Upon completion of an investigation of the claimants conduct, he was suspended and then dismissed. The company's reason for the dismissal was based on admission by the complainant

[541] Ibid para 34.
[542] Ibid para 31.
[543] Ibid para 34.
[544] Ibid para 35.
[545] *Teggart v TeleTech UK Limited* (2012) NIIT 00704_11IT.
[546] Ibid para 14.

that his conduct was of a harassing nature which degraded and humiliated the work environment, and which went against the company code of conduct. The claimant's behaviour demonstrated a lack of respect for others and by mentioning the company name had brought disrepute to the company.[547]

The employment tribunal noted that an employer dismissing any employee for misconduct must demonstrate '*a reasonable belief that the employee has committed an act of misconduct'* and '*dismissal must be within the range of reasonable responses*.[548]

In order to determine the fairness of the dismissal the tribunal considered Schedule 1 of the Human Rights Act 1998. The tribunal noted that the right to freedom of expression comprises duties and responsibilities which could be limited to protect the reputation of others. It was found that the employees conduct did not bring the employer's good name and reputation into disrepute. The tribunal found that there were many flaws in the companies finding and that the company policy required the offending employee to bring the employer into '*serious disrepute*' for it to constitute gross misconduct. As such, the disciplinary committee fell short of indicating how the employees conduct satisfied the '*serious*' qualification of bringing the employers name into disrepute.[549]

The tribunal found that the employee comments directed at a female representative of the employer violated her dignity and confirmed to the company's distinction of harassment as envisaged in its work policy. The tribunal noted that the comments made by the claimant created a degrading and humiliating environment in the workplace and the claimant admitted that his conduct was designed to create a vulgar distaste for the female employer representative of the company. The claimant admitted further that when the female company representative approached his girlfriend requesting the removal of the post on social media, his conduct was to retaliate by making a further offensive comment online. Accordingly, his conduct was regarded as harassment.[550]

[547] Ibid para 25.
[548] Ibid para 2.
[549] Ibid para 5.
[550] Ibid para 8.

The *Smith v Trafford Housing Trust* case[551] focused on an occasion where the claimant made a post on social media pertaining to the church and homosexual civil marriage. The post elucidated that same sex marriages could be regulated by the state however the state should not prefer the imposition of its own rules in places of faith and conscience.[552] Pursuant to the post the claimant was suspended and then demoted to a non-managerial post premised on the fact that he breached the employer's code of conduct when he specifically identified himself as a manager of the employer. The claimant sought damages against the employer in the Chancery division of the High Court of Justice in which the court isolated three pertinent issues. The first being the interpretation of the employment contract, the code of conduct and equal opportunities policy applicable to the claimant. Second a consideration of the code of conduct or equal opportunities policy being contravened and third the quantum of damages sustained by the claimant attributing to his demotion.[553]

In assessing the three issues identified by the court, the court noted that it was important to consider the manner in which the events unfolded. In doing so the court contemplated the nature and purpose of the employer as a Housing Trust incorporated for charity. The court noted that the employer's customer base and staff were diverse in ethnicity, sexual orientation religion and gender. Prior to the demotion the claimant was a housing manager and the employer's code of conduct provided that employees where to '*maintain the highest standards of personal /professional conduct and integrity*', to act in a '*non-confrontational, non-judgmental manner with all customers, their family / friends and colleagues*' and to refrain from promoting their own political and religious views.[554] The court barred employees from bringing the employers name into disrepute inclusive of '*not engaging in unruly or unlawful conduct where you are or can be identified as an employee, making derogatory comments about the Trust, its customers, clients or partners or services, in person, in writing or via any web-based media such as a personal blog, Facebook, YouTube or other such site'*.[555]

However, the Trusts equal opportunities policy provided that directors and managers were responsible for '*fostering a working environment that is relaxed and business-like and free from harassment, intimidation and bullying and in which employees can grow and develop'*.

[551] *Smit* supra note 53.
[552] Ibid para 1-3.
[553] Ibid para 9.
[554] Ibid para 22.
[555] Ibid para 23.

The policy provided that employees had '*a responsibility to treat their colleagues, tenants, third party suppliers and members of the public with dignity and respect being non-judgmental in approach and not engaging in any conduct which may make another person feel uncomfortable, embarrassed or upset*'.[556]

The court held that the claimant's demotion was a breach of the equal opportunities policy and that his dismissal was wrongful.[557] The court noted that the claimant was suspended, underwent disciplinary inquiry, and found guilty of gross misconduct wrongfully and thereafter demoted to a non-managerial position sustaining a salary reduction of forty percent.[558] The breach of the employment contract by the Trust was serious and repudiatory.[559]

This case illustrated that not all negative comments made by employees on social media would necessitate disciplinary action by an employer. An employer must be able to establish that it sustained harm or damage as a result of the negative post by an employee on social media.[560] In short, the employer must show that its reputation has been defamed. The mere identification of the employer by an employee on social media does not necessitate disciplinary action against the employee.

In 2014, the *Game Retail Limited v Laws* case[561] dealt with Mr Law's employment as a loss prevention investigator. Incumbent in his duties, were to investigate losses, fraud and theft and to audit for the employer. The purview of his portfolio extended to a hundred stores in northern England. The employer depended on social media for marketing and communication. Many patrons and store managers had access to social media platforms such as Twitter. Mr Laws initiated his own Twitter account in July 2012 and proceeded to follow the employer online with a view to monitor inappropriate activity.

In 2013 a store manager notified the employer of an inappropriate comment made by Mr Laws on Twitter. Such posts were investigated and resulted in Mr Law's summary dismissal. The matter was referred to the employment tribunal and the dismissal was determined to be

[556] Ibid para24.
[557] Ibid para 106.
[558] Ibid.
[559] Ibid.
[560] R Davey & L Dahms-Jansen op cit note 203 at 267.
[561] *Game Retail Limited v Laws* (2014) UKEAT 0188_14_0311.

unreasonable for the following reasons. The tribunal found that Mr Laws initiated his Twitter account to communicate with acquaintances and not for business purposes, he used his own personal device, his posts were unrelated to his work and posts made by him were made after work hours.[562]

The tribunal concluded that customers and other employees could have potentially viewed the posts made by Mr Laws and could have been offended thereby but the posts made no reference to the employer. In consideration of harassment, bullying and disciplinary policies the tribunal noted that the employee's disciplinary policy did not expressly provide that '*offensive or inappropriate use of social media in private time would or could be treated as gross misconduct'*.[563] For those reasons the tribunal found that Mr Law's dismissal was unreasonable.

On appeal the employer argued that Twitter was unrestricted to a single group of people unless there was a preference of privacy settings.[564] The employer argued that since Mr Laws did not prefer privacy settings when making the posts that the employment tribunal erred in finding that the offensive material posted was of private use and failed to account for the public nature of Mr Law's posts.[565] The employer further contended that it was of no consequence that Mr Law's posts were made after work hours as they were posted and made available for anyone to read at any time. The employer further contended that the employment tribunal overlooked the fact that another of its employees had read the tweets and launched a complaint with a regional manager. The finding of a lack of evidence that a customer or another employee could view the posts and have been offended was incorrect.[566] The employer finally submitted that the finding of Mr Laws posts not being associated with the employer to be incorrect since many of the stores were following Mr Laws on Twitter.

The appeal court displayed concern with the employment tribunal's failure to consider that Mr Law's posts was restricted to followers who were acquaintances. The appeal court noted that Mr Law's failure in utilizing privacy settings on his account had not limited interaction with acquaintances or access to his posts. The appeal court held there is a balance to be found between an employer's desire to remove or reduce reputational risk and the employee's right

[562] Ibid para 13.
[563] Ibid para 14.
[564] Ibid para 16.
[565] Ibid.
[566] Ibid.

to freedom of expression.[567] The appeal court found that the tribunal failed to determine if the Twitter account was private as Mr Laws followed approximately one hundred stores for work purposes and he was followed by approximately sixty five of those stores.[568] In the circumstances the appeal court ruled that the employment tribunal's judgment should be set aside and the matter should be the deferred back to the employment tribunal for a new hearing to be deliberated on appropriate sanctions to be imposed.

5.3 GERMANY

(vi) Online information disclosure and freedom of expression

The German Republic recognizes the right to freedom of expression. The Constitution of the Republic states that:

> '*Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship'*.[569]

The right can be limited in terms of the general laws of the Republic in cases where the expression makes a reference to provisions for the protection of young persons or if the expression relates to a person's personal honour.[570] The limitation of the right can be limited by application of the general laws such as delict, labour law and criminal law.[571]

The *B v R* case involved infringements of the right to freedom of expression and the German Constitutional Court noted that its proportionality and legitimate purpose of the expression must be considered. The legislature is allowed to restrict such an expression on the basis of legal infringement.[572] The Constitutional Court further noted that the right is not unconditional and must be exercised proportionately. Such proportionality indicates that an absence of a legitimate purpose of the expression, the right may be encroached upon.[573]

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[567] Ibid para 46.
[568] Ibid para 47.
[569] Article 5(1) Germany: Basic Law for the Federal Republic of Germany 1949.
[570] Ibid Article 5(2).
[571] Y Burns *Communications Law* 3ed (2015) 122.
[572] *B v R* 2150/08.
[573] Ibid para 100-105.

The German Constitutional Court's position confirms that the freedom of expression expressed on the Internet can be restricted in favour of other person's rights so long as the restriction is proportionate.[574] Germanic constitutional law is indicative that the right to freedom of expression must be legitimate and justifiable in relation to social media misconduct. The right to freedom of expression is positioned on a value judgment and established facts.[575] Employees making disclosures of confidential employer information through social media must be cautious of publishing their opinions and the effect that it can have on an employer.

German lawmakers have enunciated that information technology has become a standard for communication but has nonetheless created a variety of problems for lawmakers.[576] Internet communication disputes cannot pivot solely on constitutional rights such as the right to privacy and freedom of expression which conflict with an individual's right to interact on the Internet.[577] The German federal court however, has indicated that the general right of personality does not only extend to the private intimate sphere but it also extends to the protection of those whom enter the public.[578] This reiterates the constitutional rights to privacy and freedom of expression. It appears that German case law in contending with social media misconduct follows a similar trend as South Africa, Australia, and the United Kingdom.[579] This position emphasizes that employees cannot control the disclosure of information on social media and who it may be shared with. Such information is at risk of being shared at a rapid pace.[580]

There is a school of thought in Germany which contained that personality rights are flexible and subject to further development as these rights have been wielded to reiterate privacy and dignity rights for individuals and business purposes alike.[581] This is indicative that the German legislature supports the protection of employment rights and that personality rights extend to individual and work-related conduct. Other German schools of thought propagate self-

[574] R Uerpmann-Wittzack 'Principles of international internet law' (2010) *German Law Journal* 1245-1253.
[575] O Jouanjan 'Freedom of expression in the Federal Republic of Germany' (2009) *Indiana Law Journal* 867-870.
[576] N English & F Bieker 'Upholding data protection law against multinational corporations: German administrative measures relating to Facebook' (2012) *German Yearbook of International Law* 587.
[577] R Uerpmann-Wittzack op cit note 574 at 1253.
[578] *BAG* (27-07-2017) – 2 AZR 681/16.
[579] *LArbG* Baden-Württemberg (22-06-2016) – 4 Sa 5/16 par 52
[580] *LArbG* Baden-Württemberg (22-06-2016) – 4 Sa 5/16 52.
[581] P Schwartz & K Peifer 'Prosser's *Privacy* and the German right of personality: are four privacy torts better than one unitary concept?' (2010) *California Law Review (Cali L Rev*) 1925 - 1952.

regulation as opposed to indoctrinating social media legislation.[582] However self-regulation is based on a social responsibility to monitor information published on social media and may potentially escape legal ramifications. Germany too, displays a need for further development of rules regarding social media misconduct and the use of the Internet and the present stance is that legislation should be indoctrinated, and self-regulation should be used to support such legislation.[583]

(v) Social media misconduct

Similar to South Africa, German law dictates that the conduct of an employee can establish misconduct.[584] In order for dismissal to be the appropriate sanction, employers must establish whether an employee's conduct has caused a serious breach in the employment contract.[585] The German courts have postulated a three-stage inquiry to determine whether the dismissal is an appropriate sanction for breach of the employment contract.

The first inquiry determines if the employee's conduct culpably violated the employment contract, second, did the violation disturb the contractual relationship such that a prolonged relationship could not be sustained and third a contemplation of the balance of interest between employer and employee.[586] This inquiry is premised on the employee's duty of care towards the employer and this duty must be balanced against the right to freedom of expression.[587] investigations as to privacy settings illustrate with a an employee displayed a duty of care to the employer.

In determining the existence of an employee's duty of care to the employer German courts have also made inquiry into the privacy settings of an employee on social media.[588] German courts have noted that content published on social media cannot simply be removed and the number of friends and employee has on social media must be considered. The inquiry will determine if

[582] L Locklear 'In the world of social media, when does "private" mean private? A critique of Germany's proposed amendments to its Federal Data Protection Act' (2012) The *George Washington International Law Review* 749 - 772.
[583] S Simitis 'Privacy –an endless debate?' (2010) *California Law Review* 1989 - 2004.
[584] S 1(2) Employment Protection Act.
[585] S Reddy op cit note 327.
[586] *ArbG* Duisburg (26-09-2012) – Az 5 Ca 949/12 para 40.
[587] *ArbG* Mannheim (19-02-2016) – 6 Ca 190/15 para 38.
[588] *ArbG* Mannheim (19-02-2016) – 6 Ca 190/15 para 38.

the social media post was made available publicly, what was the status of the employee's privacy settings and the duration of time that the publication was made available online.[589]

The courts consider the method implemented in uploading publications and where the information is distributed to. There is an assumption that the employee discloses information to unknown recipients.[590] Even in cases where employees disclose information to a close list of friends using privacy settings on social media,[591] the publication is not limited or restricted and is available publicly.[592] The information disclosed on social media can be contrasted to information shared over the Internet or email which may be viewed, copied and forwarded to other users on account of its public nature.[593]

Notwithstanding privacy settings a court will still investigate social media misconduct by considering the number of contacts on an employee's profile and as to whether those contacts are other employees.[594] The courts have found that there is an inherent risk in publishing on social media as the posts cannot be deleted and maybe viewed by multiple users on any number of occasions.[595]

The Germanic case law has considered instances when private social media communications enter the realm of work. Employees can refer to their workplace and to effectively implicate the workplace in a social media post, the language must constitute such a nature that it corresponds to the workplace.[596] Where the language used cannot correlate with the workplace the conduct complained of cannot be regarded as a serious offense.[597]

For an employer to establish a social media misconduct the employer must establish that the employee's publication implicated the workplace.[598] In cases where the employer cannot be

[589] Ibid para 24.
[590] *LArbG* Baden-Württemberg op cit note 451 at 52.
[591] *ArbG* Mannheim op cit note 457 at 42.
[592] *ArbG* Dessau-Roßlau (21-03-2012) – 1 Ca 148/11 par 32.
[593] J Bauer & J Gunther 'Kündigung wegen beleidigender Äußerungen auf Facebook' (2013) *Neue Zeitschrift für Arbeitsrecht* 67-70.
[594] *ArbG* Duisburg op cit note 456 at 40.
[595] Ibid.
[596] Ibid.
[597] *LArbG* Baden-Württemberg op cit note 451 at 53.
[598] J Bauer & J Gunther op cit note 462 at 72.

clearly identified the court must balance attempts of identifying who the employer is from the social media post and the offensiveness of the publication.[599]

An employee's overtly insulting publication on social media pertaining to an employment relationship will constitute a gross offence and can warrant a dismissal.[600] Similar to South African labour legislation, German courts have noted that ordinary and extraordinary dismissals based on a breach of the employment contract warrant prior notification of disciplinary action. Where an employee's behaviour can be controlled there is an assumption that the employee's behaviour can be positively influenced by threatening a sanction of dismissal.[601] This means that employees will generally be dismissed in cases where they receive a prior notice relating to social media misconduct and in instances where an employee's future behaviour can be controlled by threat of dismissal, dismissal would be unnecessary.[602]There may be cases where employees receive verbal and written warnings regarding social media misconduct and requests for the employee to refrain from such conduct. These warnings or notifications threaten an employee of disciplinary proceedings should such misconduct persist. In some instances, such notifications could positively influence employees from desisting with questionable social media publications.

The labour laws in Germany allow for termination immediately without notification only in cases where compelling reasons exist.[603] The lack of notification can be condoned as the misconduct complained of has jeopardized the employment relationship significantly that it can no longer continue. Such a dismissal is regarded as in '*extraordinary termination*'.[604] In cases of social media misconduct, the court will consider the impact of the breach of the contract, the degree of loss of confidence, the economic consequences of the breach of the contract, the degree of fault on the employee, the possible risk of repetition and lastly the duration of the employment relationship.[605]

Extraordinary termination is allowed only in instances where it is justifiable for specific reasons and in particular where the misconduct jeopardizes the continuation of an employment

[599] J Bauer & J Gunther op cit note 462 at 72.
[600] *LArbG* Baden-Württemberg op cit note 451 at 36-40.
[601] Ibid para 48.
[602] National Labour Court Hamm 3 Sa 644/12.
[603] S 626 German Civil Code.
[604] *ArbG* Mannheim op cit note 457 at 38.
[605] Ibid.

contract.[606] Such a dismissal pivots on the conduct of an employee and the effect sustained by the employer.

(vi) Social media legislation

In an attempt to regulate advances in social media Germany has enacted legislation to promote law enforcement in social networks. The Network Enforcement Act[607] is applicable to all social networks and makes provision for the sharing of information with other users publicly.[608] The primary purpose of this piece of legislation was to curtail unlawful content being disclosed on social media.[609] The Act however does not define '*unlawful content*' and depends on the definitions of unlawful activities mentioned and constituted within the German Criminal Code of what conduct may constitute unlawful content.[610] Notwithstanding that the Act restricts unlawful content, it also provides that unlawful content comprises information which cannot be justified.[611] Such a categorisation is important in establishing a test for social media misconduct which provides that the conduct complained of must be devoid of any legal justification for making a disclosure online.[612] German law therefore proliferates justification as an important element to establish dismissal for social media misconduct.[613]

The Act makes provision for reporting of unlawful content and has implemented procedures on the receipt of complaints.[614] The Act further makes provisions for blocking and removal of social media misconduct content and places responsibilities on network providers to remove unlawful content within time parameters of 24 hours to 7 days invading circumstances.[615] The Act also imposes regulatory fines for noncompliance with any provisions of the Act between the range of 500,000 euros and 5 million euros.[616]

[606] National Labour Court Hamm, 3 Sa 644/12 par 75-77.
[607] Network Enforcement Act 2017. (Facebook Act).
[608] Article 1 Section 1(1).
[609] Article 1 Section1 (3).
[610] Article 1 Section1 (3).
[611] Article 1 Section1 (3).
[612] Article 1 Section1 (3).
[613] S Reddy op cit note 263.
[614] Article 1 – 3.
[615] Article 1 Section 3(2)-(3).
[616] Article 1 Section 4(2).

The Act has been criticized for purporting to regulate social media misconduct however proliferating procedures sanctioning service providers in the main as opposed to individuals perpetrating such misconduct. The imposition of regulatory fines on service providers for the removal of unlawful content must be weighed up against virtually no consequences for an individual culpable of social media misconduct. The Act also amends the Telemedia Act of 2007, and the amendments enable social network providers to disclose information about data subscribers which is essential for the lodgement of civil claims pursuant to an infringement of the Act. The major sources of Labour in Germany are federal legislation, collective agreements, work agreements and case law. The is no one consolidated labour legislation like South Africa. Labour laws in Germany are promulgated in separate Acts dealing with various labour related issues and supplemented with government ordinances.[617]

(vii) Decided cases

The issue of freedom of expression was considered by the German federal Constitutional Court in the case of *B v R*.[618] The case involved an annual celebration for a well-known Nazi political figure, Rudolf Hess, by neo-Nazi enterprises and right-wing members of Germany's Democratic Party which was held in the city and welcomed five thousand attendees. However, the German Criminal Code was amended in 2004 which prohibited the continuance of the event. The amendments spoke against the disturbance of the peace through approving, glorifying and justifying the National Socialist rule publicly or in assembly.[619] Accordingly, the celebration was banned in 2005 as the celebration disturbed the peace and posed as a danger to public security.

Aside from considering the issue of the amendment to the Criminal Code,[620] the Constitutional Court also considered the German Constitutions proliferation of the right to freedom of expression.[621]

[617]L Jung National Labour Law Profile: Federal Public of Germany 2001. *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles*, accessed 30 July 2021.
[618] *B v R* supra note 572.
[619] *B v R* supra note 572.
[620] S 130(4) German Criminal Code.
[621] Article 5(1) (2) Germany: Basic Law for the Federal Republic of Germany 1949.

The applicant's main argument was that his right to free speech was violated unconstitutionally.[622] Further that the amendment to the German Criminal Code did not categorise any possible avenues as laid out in the Basic Law Act limiting free speech.[623] The applicant sought to eliminate the classification of the general law. It was argued that only the National Socialist Party was immediately disqualified under the general law.[624] He argued further that even communism, posed as a threat to Germany's democracy. The argument asserted that the law, did not prohibit the celebration.[625] The applicant contended that even if the court found the amendment to be constitutional, that the amendments did not apply to the applicant's celebration.[626]

In the ordinary process of the Constitutional Court when an applicant passes away the claim ceases to exist. This rule is subject to exceptions and this case, in particular, came under the purview of such exceptions in light of the fact that the applicant passed away a week prior to the court's judgment.[627] The court noted that the implications of this judgment was significant to many German citizens. The court found that the amendment to the Criminal Code did in fact limit a person's right to freedom of expression.[628] The court noted that the right envisages even the most '*worthless*' or '*dangerous*' opinions. The court found that in this particular instance the limitation of the right was justifiable, and that the applicant failed to qualify the right as a general law.[629] In contrast the court found that the protection of the public peace was premised on solid grounds justifying the limitation of the right to freedom of expression and that the amendments in the Criminal Code did not qualify as general laws. Accordingly, the historical significance of injustice in Germany's history substantiated an exception to the rule. This means that an employee's right to freedom of expression may be limited in cases of social media misconduct and that the limitation is justifiable. This means that in some instances, an employee may not be able to qualify the right to freedom of expression as a constitutional right under Germany's General Law. In essence the right may be limited if it is in the interests or protecting public peace or on another justiciable ground.

[622] *B v R* supra note 572 at 16.
[623] Ibid para 22.
[624] Ibid para 35- 37.
[625] Ibid.
[626] Ibid.
[627] Ibid para 42.
[628] Ibid.
[629] Ibid.

The 2016 *BAG* case involved an employee web developer who was subject to his employer's media policy in April 2015 which provided that all Internet communications would be monitored by the employer.[630] Pursuant to the implementation of the media policy, the employer installed software on all employee computers which critically monitored keyboard strokes and would randomly capture screenshots of information displayed on the employee's computer.[631] In this matter, the information of the employee was analysed by the administrator and the employee was called into a disciplinary meeting where he admitted to using the employer's computer for private communications during work times. The monitored evidence accumulated indicated that the employee had completed a significant amount of private work for his father during work time and his employment was terminated. The employee was successful in challenging the unfair dismissal.[632] The German Federal Labour Court found that the private information of the employee obtained by the administrator was not admissible as the employer had violated the employees' rights of informational self-determination which are regarded as general moral rights.[633]

The court further found that the monitoring and collection of such information violated Section 32(1) of the Federal Data Protection Act. The court held that when the employer introduced its media policy in 2015 and implemented its monitoring software, it did not have a valid reason to suspect that the employee was committing a criminal offence or misconduct. Accordingly, the adoption of the media policy and implementation of the software was unfounded and inappropriate. The court noted that the employee was honest in admitting that he used the computer for private work and that the admission was not a justification for the dismissal without prior notification. The German Federal Labour Court has emphasized that evidence obtained improperly by an employer in clear violation of and employee's data protection rights can render and employee's dismissal as unfair.[634]

[630] *BAG* (27-07-2017) – 2 AZR 681/16.
[631] Ibid para 8 -14.
[632] Ibid.
[633] Ibid.
[634] Ibid.

(viii) Monitoring and interception

In an attempt to conform to the European Union's regulations and directives, Germany adopted the Federal Data Protection Act of 2017.[635] The Act sought to permit employee communications to be intercepted (processed) by an employer where necessary to enable the employer to assess the work capacity of the employee and where such communications were legally obtained, to be used for the termination of the employment contract.[636] In addition, the Act permits employee data to be intercepted to prevent serious harm to another.[637] Under the Act, an employee's employment contract can be terminated if another has been subjected to harm or if the data has a potential to cause harm to another.[638] The interception of employee data must be done lawfully. To enable lawful collection of employee communications, the Act provides that the employer must illicit the written consent of the employee to do so.[639] The principle of transparency underpins the employer's endeavours in intercepting employee communications with a view to terminate employment. For employers to successfully intercept employee communications on social media, they must do so in a transparent fashion.

In South African context employee communication interception must be done in a lawful manner. Online privacy rules and data protection regulations are of paramount importance in social media misconduct cases where employees prefer false identities online and where employers seek to process and intercept such communications.[640] This poses a challenge for employers to intercept employer communications. The adoption of a pseudo cyber name vests with a social media user, in this case an employee, and may prohibit an employer from intercepting and correctly identifying a social media post of an employee tantamount to misconduct.[641] It has been argued that future social media conduct dictates that users elect partial pseudonyms online directing users to disclose their proper identification to a system operator before using a pseudonym on a social media platform.[642]

[635] Act to Adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680.
[636] S 22(1) (b) and S 26(1).
[637] S 22(1) (b) and S 26(1).
[638] S 23(1) (5).
[639] S 26(2).
[640] R Grenzen Kluge 'Klarnamenspflicht bei Facebook (2016) *Smart World - Smart Law?* 107-119.
[641] R Grenzen Kluge 'Klarnamenspflicht bei Facebook (2016) *Smart World - Smart Law?* 107-119.
[642] Ibid.

5.4 Summary: lessons that South Africa can learn

5.4.1 Summary: United Kingdom (UK) social media misconduct

Flowing from the case law in the United Kingdom, certain factors can be extrapolated regulating social media misconduct in the workplace. These factors include -
(a) The seriousness of the comments made on social media[643],
(b) Whether an employer implemented social media policies at work[644],
(c) Whether social media communications have the potential to cause an employer reputational harm or disclose confidential information[645],
(d) The existence of reasonable grounds to establish social media communications tantamount to misconduct[646],
(e) Whether employers conducted reasonable investigations[647],
(f) Termination of employee if the employee's social media communications are work related by establishing if the employee's profile mentions the employer or lists with whom the employee is employed[648], and
(g) The justification for publication on social media[649].[650]

In investigating cases of social media misconduct an employee's disciplinary record is of no consequence and a finding of misconduct in this regard could sanction a dismissal.[651] In the United Kingdom social media misconduct limits an employee's reasonable expectation to privacy notwithstanding privacy settings on social media platforms as posts can be easily conveyed and cause the employer harm.[652] The United Kingdom places great emphasis on the implementation of social media policies by an employer and contemplates the degree of awareness and acknowledgement by an employee and any special training attached to it. In contrast to South Africa the Code of Good Practice in the LRA provides that an employee can only be guilty of misconduct if a rule in the workplace has been transgressed and if the

[643] *Teggart* supra note 545.
[644] *Greenwood* supra note 527.
[645] *Smit* supra note 53 at 86.
[646] *Game Retail Limited* supra note 561 at 16.
[647] *Teggart* supra note 545.
[648] *Crisp* supra note 516.
[649] *Plant* supra note 533.
[650] S Reddy op cit note 327.
[651] *Smit* supra note 53 at 86.
[652] *Game Retail Limited* supra note 561 at 16.

employee was aware of such a rule. Social media policies therefore play a pivotal role in regulating social media misconduct in South Africa coupled with reasonableness.[653]

5.4.2 Summary: Germany social media misconduct

A bona fide attempt to regulate social media misconduct has been made by Germany. The country has embraced creating new laws for advancing technology. Guidelines considered by German lawmakers could assist South Africa in implementing social media legislation.

The guidelines assisting lawmakers in dealing with social media misconduct include the following:

(i) The extent of fault in an employee's conduct and the likelihood of repetitive conduct in the subsistence of the employment contract.
(ii) A consideration of a legitimate purpose for the expression made and investigation into a breach of the employees' duty of care.
(iii) Whether the employee's misconduct diminished the employer's confidence.
(iv) The duration of publication of online and extent of availability to contacts in the employee's social media profile.
(v) Has the publication insinuated the employer, mentioned the employer outright or perpetuated a threat to the employer.[654]

South Africa can utilize the German guidelines to develop the law on social media misconduct and perhaps formulate a legal definition for the concept. South African lawmakers must go a step further in their development of the concept by introducing and regulating sanctions occasioned by this form of misconduct. The best possible way for the South African legislature to contend with this form of misconduct would be to enact a single piece of legislation regulating all forms of social media and social media misconduct. This would also include a criteria for which forms of social media misconduct justifying dismissal. These sanctions should target actual perpetrators of such misconduct with dismissal aside from less serious forms of social media misconduct warranting regulatory fines and suspensions. The German

[653] Ibid.
[654] S Reddy op cit note 327.

guidelines reiterate the need for employers to cautiously intercept and monitor employee publications on social media before alleging misconduct and instituting disciplinary measures.[655]

[655] Ibid.

CHAPTER 6: OVERVIEW, CONCLUSION AND RECOMMENDATIONS

6.1 OVERVIEW

In chapter one a contextual background was provided. The chapter indicated that social media and social media misconduct have not been legally defined. The research questioned the justification of dismissals for social media misconduct in the workplace. An employee's constitutional rights to privacy and freedom of expression were considered as defences against claims of social media misconduct and the extent to which those rights could be limited. The research considered the LRA as the labour legislation regulating employment and dismissal and how social media misconduct has been dealt with by our courts on the basis of reasonableness and substantive and procedural fairness. At common law the chapter questioned if an employee's social media post after work hours could constitute misconduct warranting dismissal and the degree to which and employee linked himself to his employer in such a post. The employment relationship is supported by the duty of good faith and trust and the research postulates that if an employee's social media misconduct undermines the trust underpinning the employment contract that dismissal would be justified.

In chapter two focus was on labour relations and social media misconduct. The research considered an employee's constitutional rights to privacy, freedom of expression, dignity, labour relations and limitation of those rights. The research considered the LRA and how it regulates employment contracts and the duties of the employer and employee respectively. The research traversed the grounds for dismissal under the LRA and how dismissals had to be conducted subject to substantive and procedural fairness requirements. Misconduct was considered with reference to when dismissals would be justified and how unfair dismissals could be contended with. The chapter also contemplate RICA and how it applied to employer's wishing to intercept and monitor employee social media posts. In this regard, recent cases involving social media misconduct were traversed to determine when dismissal would be justified for social media misconduct.

Chapter three considered the influence of social media in the workplace. The chapter considered the need for a legal definition for social media and social media misconduct postulating a possible legal definition. Employment contracts are considered in terms of the LRA and common law and the nuances between social media misconduct during and after

workhours. The research also contemplates the utility of social media and how it has found application in the workplace.

The research in chapter four considered the various forms of employer liability. Consideration was given to patrimonial liability and potential liability of an employer for employee social media misconduct. Social media policies and training were considered in relation to social media misconduct and how a lack of such policies could render employers liable when such misconduct caused harm to third parties. To that end, the research contemplated when an employee's post on social media misconduct could render an employer vicariously liable to third parties in terms of delict.

Chapter five focused on how social media misconduct has been dealt with by the employment tribunals in the United Kingdom. Historically South Africa's apartheid era shares many commonalties with the atrocities of Nazi Germany. Both countries have adopted constitutional models based on constitutional supremacy and the research considered how Germany has contended with social media misconduct. The research considered what lessons could be adopted into South African labour relations from the United Kingdom and Germany in respect of social media misconduct.

The aim of this chapter is to provide an overview of the research traversed, answering the primary and secondary research questions and providing recommendations on when social media misconduct would justify dismissals.

Owing to the rapid rate in which social media has grown in the workplace,[656] the research sought to give insight into how employers should implement social media policies and training. The focus was on when social media misconduct could be established by and employer and when its occurrence would justify dismissal. The research investigated the LRA and established how social media misconduct has been treated similarly to other forms of misconduct which justify dismissal.[657] The research contemplated the employment contract specifically the duties of the employer and employee. It has been established that social media misconduct is different

[656] B Singh op cit note 58 at 16.
[657] *Weeks* supra note 59 at 15.

from conventional forms of misconduct which traditionally occurred during workhours and that social media misconduct can occur even after work hours.[658]

The research has shown that social media misconduct is not specifically regulated by the LRA and that this form of misconduct is dealt with in the same way as other forms of misconduct and dismissal flowing from such misconduct must be substantively and procedurally fair. The courts in this regard had emphasised that employers must implement social media policies and training to employees.

The research has shown that an employee's social media misconduct can breach the fiduciary duty owed to the employer in furthering the employers interests[659] and that the misconduct simply has to display a potential to damage the employers reputation or cause harm to a third party rendering an employer consequentially liable.[660] The research has shown that social media misconduct must be established on a balance of probabilities.[661] For this type of misconduct to constitute a dismissal, it must be shown that it has impacted the trust underpinning the employment relationship[662] and that the misconduct has damaged the employers reputation.[663]

It is possible for employer's to be vicariously liable for the delicts committed by their employees for harm sustained by third parties.[664] Social media misconduct could be construed as the delict. The onset of this form of liability encourages employers to implement preventative measures to sanction conduct of employees from transgressing civil wrongs against public constituents.[665]

[658] *Edcon* supra note 49.
[659] J Du Plessis & M Fouche op cit note 62 at 23.
[660] *Weeks* supra note 59 at 22.
[661] M McGregor A Dekker & M Budeli op cit note 64 at 173.
[662] *Dewoonarain* supra note 23.
[663] *Sedick* supra note 67.
[664] J Neethling & J Potgieter op cit note 70 at 390.
[665] A Van Niekerk M Mcgregor & B Van Eck op cit note 71 at 87.

6.2 CONCLUSION

The aim of the research was to determine is social media misconduct justified dismissal. In this regard the research considered the LRA's stance on misconduct. The research has shown social media misconduct is different forms of misconduct and that whilst an employer may be able to establish an employee's social media misconduct, dismissal will only be justified in certain instances. To that end, the research has considered the employment dynamic in relation to social media misconduct and for dismissal to be justified, an employer would have to prove any of the following factors. A breakdown in the trust supporting the employment relationship, or that the misconduct has rendered the employment relationship intolerable. Additional factors include an employee's breach of the employer's social media policy or that the misconduct served as a delict to a third party who can hold the employer consequentially liable for. The answers to the proposed research questions are dealt with in more detail hereunder.

6.2.1 Under what circumstances will social media misconduct in the workplace warrant a dismissal?

The LRA provides that employees must not be dismissed unfairly or subjected to unfair labour practices.[666] The Act provides that dismissals that are substantively and procedurally fair will be justified. At common law, the employment contract is predicated on a duty of good faith and trust. In cases of dismissal, it must be tested whether an employee's conduct has destroyed the trust in the employment relationship and rendered the continued relationship intolerable.[667] Where this occurs, employers may dismiss employees.[668] If an employee's social media misconduct destroys the trust in the employment relationship and hinders a continued employment relationship, then dismissal would be justified.

[666] Section 186(3) LRA.
[667] B Conradie G Giles & D Du Toit op cit note 5.
[668] *Theewaterskloof Municipality* supra note 243 at 10.

6.2.2 When will social media usage during workhours constitute a form of misconduct and to what extent should it constitute a dismissible offence?

Dismissal should only take place in serious cases of misconduct[669] and must be consistently applied in similar cases.[670] Social media misconduct results in a fault-based dismissal which requires employers to investigate and establish grounds for dismissal.[671]

The LRA provides that dismissal will be unfair if the employer cannot establish on a balance of probabilities that the dismissal was for a fair reason[672] and followed a fair procedure.[673] Dismissal for social media misconduct must consider if an employee's misconduct has damaged the employer's good name or reputation, impacted negatively on the work environment and disclosed confidential information on social media.[674] In such cases, employers can justify an employee's dismissal.[675] Generally dismissal is justified in cases on misconduct if the misconduct renders the employment relationship intolerable.[676] A suspicion of misconduct does not justify dismissal. An employer must establish social media misconduct on a balance of probabilities to justify an employee's dismissal.[677] Cyberbullying and harassment of colleagues, service providers or contractors and the disclosure of confidential employer information or trade secrets may also be classified as social media misconduct and may warrant dismissal depending on the merits of each case.[678]

6.2.3 Can an employee be dismissed for posts made on social media after working hours, on a private or business social media account?

Misconduct traditionally occurred during workhours, but social media misconduct can occur after work hours. Where an employer can establish a link between the employee's social media post and its own business, then the employer may discipline the employee.[679]

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669 *Commuter Handling Services (Pty) Ltd v Mokoena & Others* 2002 (9) BLLR 843 (LC) 30.
670 LRA: Code of Good Practice (Dismissal) 36.
671 LRA: Code of Good Practice (Dismissal) para 4(1).
672 Section 186(1) LRA.
673 Section 188(1) LRA.
674 J Du Plessis & M Fouche op cit note 62 at 322.
675 R Davey & L Dahms-Jansen op cit note 203 at 230.
676 J Du Plessis & M Fouche op cit note 62 at 324.
677 Ibid at 325.
678 R Davey & L Dahms-Jansen op cit note 203 at 231.
679 *Cantamessa* supra note 6.

If members of the public could associate the employees after hour's social media post with the employer, then the employer could dismiss the employee.[680] If the employee's social media post has had a negative impact on his job performance or detrimentally impacted on the efficiency, profitability or continuity of the employer's business then dismissal may be justified.[681] If the employer allows this to transpire then such a social media post may compromise the corporate culture of the employer.[682]

The development of a general rule to dismiss an employee for social media misconduct cannot be determined as each of social media misconduct must be determined on its own merits.
The factors which influence whether an employee should be disciplined for social media misconduct include the employee's position in the business and whether the employee identified the employer as his employer on social media or if he can reasonably be associated with the employer's establishment, the extent to which the employee's online conduct affects the good name and reputation of the employer, the extent to which employees conduct has a detrimental effect on the efficiency, profitability or continuity of the employer may also sanction disciplinary action and the extent to which employees conduct is incompatible with the corporate culture of the employer.[683] An employer could be construed as a party to the communication.[684] The reason for this is that the parameters of an employee's privacy rights only extend to a legitimate expectation of privacy which may not apply to workplace communications.[685] Employees must be made aware that social media posts are published in a public domain during and after work hours and a preponderance of the factors above could establish misconduct which justifies an employee's dismissal.

[680] Ibid.
[681] R Davey & L Dahms-Jansen op cit note 203 at 231.
[682] *Edcon* supra note 49.
[683] R Davey & L Dahms-Jansen op cit note 203 at 231.
[684] Section 4 RICA.
[685] *Protea Technology Ltd* supra note 174.

6.2.4 To what extent can an employer monitor and intercept employee social media communication notwithstanding incorporation of social media policies?

RICA was dealt with in chapter two of the dissertation. RICA prohibits interception[686] with the exception of few statutory exemptions.[687] The Act allows for a person such as an employee to consent in writing to another party such as an employer to monitor and intercept communications provided it is not for unlawful purposes.[688] Such written consent can be in the form of an employment contract and subject to an employer's social media policies. The Act has been criticized for not providing sufficient privacy protection to employees in the workplace forum which is subject to constitutional challenge.[689] Exemptions in relation to social media misconduct is when a party to a communication has furnished formal consent allowing interception[690] and when interception transpires in the endeavours of a business.[691] However, the Act has been declared unconstitutional in the *Amabhungane* case in 2020 subject to confirmation of the Constitutional Court and the monitoring and interception of employee social media posts by an employer can also be regarded as being invalid.[692]

Social media policies are not regulated in the LRA. Dismissals for social media misconduct must satisfy substantive and procedural fairness requirements in disciplinary enquiries. South African courts advise employers to implement social media policies and to provide training for employees in this regard. In cases where employers do not implement social media policies (smaller businesses), or where social media policies and training have been breached by employees, then dismissal may be justified so as long as it conforms to substantive and procedural fairness requirements. Social media policies could also seek consent from employees to have their social media posts monitored and intercepted. The constitutionality of obtaining such consent to monitor and intercept employee social media posts may be challenged.

Employers wishing to mitigate risk should establish a firm, concise and widely understood social media policies which employees are made aware of. Employees should understand

[686] Section 4-11 RICA
[687] Section 2 RICA.
[688] Section 5 RICA.
[689] N Bawa op cit note 164.
[690] Section 5 RICA.
[691] Section 6 RICA.
[692] *Amabhungane Centre for Investigative Journalism NPC and Another* supra note 188.

through these policies, what constitutes proper work behaviour, and that inappropriate social media conduct could be construed as misconduct justifying dismissal.[693]

6.2.5 Does the authorised or unauthorised social media usage at the workplace expose employers to potential consequential liability to third parties?

Employees acting in the course and scope of their employment and committing delicts, such as social media misconduct, may result in their employers becoming liable to third parties for such damage.[694] Fault is not an element that needs to be established on the part of the employer and this is a form of strict liability.[695] Strict liability is liability in the absence of fault and has been applied to employment relationships where employers may be held vicariously liable for delicts committed by employees. The aim would be compensating third parties who sustain injury or damage as a result of an employee's social media post. Should this materialize, employers can establish grounds of the employee's misconduct and depending on the merits of the case, justify the employee's dismissal.

A claimant would have to prove the existence of an employment contract and establish that the employee's social media misconduct occurred during the course and scope of employment. This criteria is problematic since social media misconduct can arise during and after work hours. The courts would have to consider the merits of each case of social media misconduct and determine to what extent the employer was implicated in the post and if the post was work related. If these criteria can be satisfied by a claimant, then an employer can be found vicariously liable for the employee social media misconduct. In such cases the employee's dismissal can be justified as the employer incurs liability on account of the employee's misconduct.

6.2.6 What guidelines can be adapted and implemented by employer to reduce risks emanating from social media misconduct?

By considering the social media misconduct in the United Kingdom and Germany some guidelines can be incorporated in South African law to counter the risks of social media

[693]S Bismilla op cit note 60.
[694] *Rabie* supra note 423.
[695] *Stein* supra note 424.

misconduct. Dismissal will culminate in cases where employers have robust social media policies which regulate employee social media publications made even after work hours. This determination considers whether the employee was using the employers Internet services and devices, the nature of the publication and whether the employee publication eroded at the relationship of trust in the employment contract.[696] These factors would assist employers to reduce the risk of social media misconduct occurring. One of the biggest risks to employers would be employees who make posts on social media using their own devices and own Internet services. This can occur after work hours. This means that employer social media policies must not only regulate employee social media conduct during work hours but also after work hours. To reduce risk, employer social media policies can insist on employee's specifically excluding their employment details on social media platforms. This would reduce risks of liability owed by the employer to third parties and where such policies are breached by the employer could constitute misconduct justifying dismissal.

Employers wishing to dismiss employees for social media misconduct must ensure that their employment contracts have strict clauses regulating confidentiality and non-disclosures by employees. Employers must implement social media policies notifying employees of dismissal in cases of social media misconduct. Such policies will also provide for lesser sanctions if applicable. If employers do not implement such policies, dismissal may be construed as a harsh sanction in cases of social media misconduct.

6.3 Recommendations

In consideration of the research conducted and the present stance on justified dismissal for social media misconduct the following recommendations are submitted hereunder.

6.3.1 Establishing a test for social media misconduct

Whilst employment law and dismissals have been regulated by the LRA in South Africa, social media misconduct has emerged as a specified form of misconduct which is not specifically regulated by the LRA. Social media misconduct can be contrasted to other forms of misconduct

[696] R Davey & L Dahms-Jansen op cit note 203 at 228.

not specifically mentioned in the LRA such as absenteeism, fraud and theft. These forms of misconduct fall under the concept of misconduct and are thereby regulated by the LRA. However, social media misconduct should be treated differently on the basis that its meaning evolves with the advancements in technology and lacks legal definition. Accordingly, social media misconduct can transform and assume multiple meanings in the future. It is therefore recommended to establish a legal definition of social media to specifically categorise misconduct associated with it. This can be realised with the introduction of a Code regulating social media in South Africa. Disciplinary enquiries regarding dismissal for social media misconduct must be determined in terms of the LRA's substantive and procedural fairness requirements, the common law, constitutional considerations and case law. Enquiries into social media misconduct require the merits of each case to be considered to determine if dismissal is a reasonable sanction. From the case law and jurisprudence from foreign jurisdictions, the determination of social media misconduct considers if dismissal is reasonable in light of the facts of each case. This criteria is not pronounced in the LRA's substantive and procedural fairness criteria. Employees have constitutional rights to privacy and freedom of expression and should be allowed to express themselves on social media. However, those rights are not absolute and may be limited. It is postulated that reasonableness should be incorporated in a test for determining when social media misconduct warrants dismissal.

6.3.2 LRA and employment contracts to regulate social media policies

Perhaps, South Africa could import the German stance of social media posts being made for a legitimate purpose into our law, failing which employers should impose restrictions limiting employee's rights. Employers must adopt social media policies and if need be, afford training to employees regarding the use of Internet applications and in particular social media misconduct. This should be regulated by the Code which would require employers to incorporate such policies and training in the contract of employment. In consideration of the vast number of employees frequenting social media platforms, the occurrence of social media misconduct could accelerate. It is postulated that the regulated implementation of social media policies and social media training ought to be enacted in legislation dealing with social media. Such legislation should make mandatory implementation of such policies and training. Employees should not publish anything online that they would not prefer to be placed on a

billboard.[697] Employers should notify their employees of this as well by reiterating their social media policies and perhaps implementing training programmes to facilitate employees understanding of social media conduct in and out of the workplace.

6.3.3 The development of a South African social media legislation

An amendment to the LRA or future social media laws need to reiterate the responsibility of employers in implementing social media policies and regulate ways on how this form of misconduct should be dealt with.[698] At present, the LRA may be inadequate to contend with social media misconduct enquiries. It is recommended social media laws should be enacted by catering for social media misconduct and regulating appropriate sanctions including when dismissal would be justified.

6.3.4 A legal definition for social media and social media misconduct

Labour legislation must reinforce the technical definitions of social media and social media misconduct. This would bring about legal certainty on how this form of misconduct should be dealt with. The research conducted has postulated a legal definition of social media which could possibly be drawn upon for the advent of social media laws. The case law in South Africa and abroad indicates that the enquiry into social media misconduct must consider an employee's conduct in contrast to the harm sustained by an employer. The disciplinary measures must ensure that the employee has transgressed the employment contract resulting in a breach of trust in the employment relationship to warrant dismissal. The disciplinary measures must contemplate the employee's social media misconduct during and after work hours and categorise the privacy settings of the employee's social media profile. This is necessary as South Africa does not have specific prevailing social media legislation.[699]

An adoption of social media legislation similar to Germany could benefit South African labour laws in defining what constitutes acceptable and unacceptable employee social media posts. A lack of legal certainty on social media misconduct could have a detrimental impact in labour disputes. The disadvantage of introducing new social media legislation could result in an over-

[697] J Wortham op cit note 375.
[698] L Dancaster 'Internet abuse: a survey of South African companies' (2001) *ILJ* 862-868.
[699] F Cassim op cit note 96 at 302-304.

regulation limiting the use of social media and even the Internet. South Africa has a robust labour legislation in the LRA, and astute lawmakers could alternatively develop the existing labour legislation to regulate how social media misconduct could be better regulated.[700]

6.3.4.1 An extrapolated definition

This dissertation endeavours an extrapolated definition of social media with a purview of categorizing social media misconduct. Such categorization would seek to distinguish this form of misconduct from its contemporaries and meter out robust sanctions wherever and whenever they may occur.

A postulated definition of social media:
[1] A form of electronic media communication using any or all of the following:

(a) Computer technology
(b) mobile device technology
(c) websites,
(d) Internet,
(e) Internet-based applications [apps],
(f) social networking
(g) web -based services
(h) microblogging
(i) interactive dialogues
(j) any highly accessible and scalable communication techniques[701]

Premised on ideological and technological foundations of Web 2.0 tech promoting interactivity and networking in real time with known or unknown audiences where users can

(i) create
(ii) generate
(iii) exchange
(iv) edit[702]

user generated content online such as:

[700] S Reddy op cit note 327.
[701] J Kietzmann K Hermkens & B Silvestre op cit note 309 and M Wolf J Sims & H Yang op cit note 282.
[702] M Wolf J Sims & H Yang *op cit note 282 at* 6.

(v) communities,

(vi) groups

(vii) share information

(viii) ideas

(ix) personal messages

(x) Videos

(xi) Images

(xii) Blogs

(xiii) message boards

(xiv) podcasts

(xv) texts

(xvi) tweets

(xvii) wikis

(xviii) vlogs

(xix) testimonials[703]

(xx) any message categorized in section 1 of the Regulation of Interception of Communications and Provision of Communication related information Act as a form of indirect communication allowing users to:

(k) construct a public or semi-public profile within a bounded system,

(l) articulate a list of other users with whom they share a connection,

(m) view and traverse their list of connections and those made by others within the system.

(n) tag, like, comment, share, post, friend and/or unfriend.[704]

[703] A Kaplan & M Haenlein op cit note 296 '*a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content'.*

[704] Section 1 of RICA reads '*A message or any part of a message, whether –*

(a) In the form of –

(i) Speech, music, or other sounds;

(ii) Data;

(iii) Text;

(iv) Visual images, whether animated or not;

(v) Signals; or

(vi) Radio frequency spectrum; or

In any other form … that is transmitted … by means of a postal service or a telecommunication system'.

6.3.5 Employer liability reduced for employee after work hour social media posts

Employer social media policies should contemplate a restriction of social media access to employees during work hours and afford employees access only to those websites pertinent to the business of the employer. This could increase productivity and provide a respite to employees who could frequent social media sites after workhours.[705] Employers could also implement web filtering software acquiring employers with the ability to time manage access to web based applications alternatively restrict all social media communications during work hours.[706]

Employers must emphasize that any social media posts made during or after work hours must not compromise the trust underpinning the employment relationship. Such posts made by employees should be sensitive on how it would impact on the business of the employer, other employees and as to whether it breaches the employer's confidential information policies.

As a good practice, employers must remind employees about business confidentiality and if need be, have employees endorse non-disclosure and confidentiality clauses in their employment contracts. The employment contract should be made subject to the employer's social media policy which would denote the extent of employee's Internet access and social media platforms during and after work hours. This would also regulate what employee posts would be permissible and those which could compromise the employment relationship.[707]

Whilst it could be expensive and time consuming, employers should make attempts to periodically monitor employee posts made on social media. Employers must appraise their employees that this will be done, and any breaches of business policy could necessitate disciplinary action and potentially dismissal.

It is evident that as technology advances that an advancement in law is needed to contend with issues pertaining to it.[708] Social media misconduct cases raise various issues spanning infringements of freedom of expression and privacy rights to defamation and vicarious liability

[705] D Kelleher op cit note 366.
[706] Ibid.
[707] Ibid.
[708] *Sedick* supra note 67 at 45.

of employers. Such cases must be considered as a whole in light of any right violations and competing interests. Emphasis will be placed on the reasonableness of the employee social media post and the type of effect experienced by the employer. Employees are entitled to express themselves on social media so as long as such expressions are reasonable and responsible. Employee social media posts must be justified in respect of the employment contract.[709]

Misconduct and dismissal must still be regulated by the LRA even in social media misconduct cases. Each misconduct case must consider the balancing of rights between the employer and employee. It is apparent that existing labour laws need to accommodate for social media misconduct to circumvent limitations of privacy and freedom of expression rights of employees.

Pursuant to a test for the reasonableness of an employee's social media post, competing interests of employers and employees must be balanced in the spirit of fairness. This together with the employer's social media policy will categorise whether social media misconduct has occurred. These policies will regulate appropriate sanctions and dictate when an employer may dismiss and employee for social media misconduct. A social media misconduct inquiry must consider the extent to which an employer has been implicated in the employee's publication and the effect the publication has had on the employment relationship. These could include a breakdown of trust in the employment paradigm or a lack of confidence in the employee's capabilities.[710]

Employers who monitor employee social media profiles must identify the employees profile settings and determine the extent of how and employees' hazardous publications could be readily communicated to other users. Employers would have to ensure that any employee publications were elicited lawfully without limiting the employee's right to privacy. If an employer can satisfy these criteria, it can establish grounds for social media misconduct.[711]

[709] S Reddy op cit note 327.
[710] Ibid.
[711] Ibid.

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UNIVERSITY OF
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INYUVESI
YAKWAZULU-NATALI

Mr Alankar Rathnesh Maharaj (203501361)
School Of Law
Howard College

Dear Mr Alankar Rathnesh Maharaj,

Protocol reference number: 00009869
Project title: The justification of dismissals emanating from social media misconduct in the workplace.

Exemption from Ethics Review

In response to your application received on 29/10/2020 , 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
Research and Higher Degrees Committee
School Of Law