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THE LEGITIMACY OF DISMISSALS FOR OFF-DUTY MISCONDUCT IN SOUTH AFRICAN LABOUR LAW

by

T. PHULU

Student no: 21531995

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ABSTRACT

The main aim of this thesis is to solve the uncertainties brought about by dismissals for off-duty misconduct. First, it should be acknowledged that the world as we know it has changed and continues to evolve. Dismissals have been significantly impacted by the use of social media outside the workplace. The legalisation of the use of cannabis by an adult person has also brought uncertainties in the way dismissals are handled, especially in cases where an employee consumes cannabis off-duty. These two aspects have significantly influenced dismissals for off-duty misconduct in South Africa, with employees alleging that their rights to privacy, dignity and freedom of expression are infringed.

The thesis reveals that regardless of these modern changes, off-duty misconduct dismissal is still governed by the generic provisions of the Labour Relations Act 1995 and its Code of Good Practice: Dismissal. The thesis underscores the lack of clarity regarding the regulation of dismissals for off-duty misconduct in South Africa. Furthermore, despite the judiciary's establishment of tests (the nexus test and the breakdown of the employment relationship), challenges in adjudicating off-duty misconduct cases persist.

This thesis analyses the South African legal framework governing dismissals for off-duty misconduct. The research investigates the evolution of South African dismissal law, tracing its development from the pre-democratic era to the post-democratic era. This investigation scrutinises the shifts in the legal landscape regarding dismissals for off-duty misconduct. The analysis encompasses a range of legal instruments pertinent to South Africa, including legislation, international law, common law, and judicial precedent.

The current need for a Code of Good Practice for off-duty misconduct dismissal is highlighted. This rationale is prompted by a comparative examination of other countries where, despite the absence of specific codes addressing off-duty misconduct, a proactive stance has been adopted to safeguard employees' off-duty rights by enacting relevant legislation. These chosen states have statutes regulating employees' off-duty conduct and clarifying which conduct is protected and in which circumstances.

Consequently, the thesis proposes a Code of Good Practice: Dismissal for Off-duty Misconduct. This Code would assist in the uniformity of application of relevant aspects in determining the fairness of dismissals for off-duty misconduct, thus alleviating labour suits concerning this type of dismissal. The Code would also provide employers with guidelines on how to draft off-duty misconduct policies without infringing employees' constitutional rights.

LIST OF ABBREVIATIONS

(Pty) Ltd	–	(Proprietary) Limited
A	–	Appellate Division of the Supreme Court of South Africa
ABA J. Labor Employ. Law	–	ABA Journal of Labor and Employment Law
Acad. Manag. Perspec.	–	Academy of Management Perspectives
ADA	–	Americans with Disabilities Act of 1990
AILJ	–	Alternative Industrial Law Journal
AJ	–	Acta Juridica
AJLL	–	Australian Journal of Labour Law
ALSB J. Employ. Labor Law	–	ALSB Journal of Employment and Labor Law
Alt LJ	–	Alternative Law Journal
Alta.L.Rev.	–	Alberta Law Review
Am.J.Comp.L.		American Journal of Comparative Law
Ann. Rev. Organ. Psychol. Organ. and Behav.	–	Annual Review of Psychology and Organizational Behavior
Assembly Bill (AB) 2188	–	"Discrimination in Employment: Use of Cannabis"; California Bill establishing workplace protections for individuals who engage in cannabis consumption
AU Data Protection Convention	–	African Union Convention on Cyber Security and Personal Data Protection 2014; the Malabo Convention
AUMA	–	Adult Use of Marijuana Act of 2016
BALR	–	Butterworths Arbitration Law Reports
BBC	–	British Broadcasting Corporation
BCEA	–	Basic Conditions of Employment Act 75 of 1997
BCLR	–	Butterworths Constitutional Law Reports
BHRC	–	Butterworths Human Rights Cases
BLLR	–	Butterworths Labour Law Reports

BMW	–	Bayerische Motoren Werke
BPC	–	California Business and Professions Code
Brexit	–	The United Kingdom's withdrawal from the European Union on 31 January 2020
Bus. Law.	–	The Business Lawyer
Bus. Soc.	–	Business & Society
BYU L.Rev.	–	Brigham Young University Law Review
C187	–	Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)
Cal.App. 1 Dist	–	Court of Appeal, First District, Division 1, California
Cal.App.5th	–	California Appellate Reports, Fifth Series
Cal.Rptr.3d	–	California Reporter Third Series
California Labor Code	–	California Labor Code 2019
California Penal Code	–	California Penal Code of 1872
Can. J. Hum. Rights	–	Canadian Journal of Human Rights
Career Dev. Int.	–	Career Development International
CC	–	Constitutional Court
CCMA	–	Commission for Conciliation, Mediation and Arbitration
CEACR	–	Committee of Experts on the Application of
CILSA	–	The Comparative and International Law Journal of Southern Africa
Colo. App.	–	Colorado Court of Appeals
Comp.Lab.L.J.	–	Comparative Labor Law Journal
Contemp. Manag. Res.	–	Contemporary Management Research
CRS	–	Colorado Revised Statutes
D	–	Durban and Coast Local Division
D.Colo.	–	United States District Court, D. Colorado
d/b/a	–	doing business as
Deakin LR	–	Deakin Law Review

DIREITO GV L. Rev.	–	DIREITO GV Law Review
DM	–	Direct message
DMV	–	Division of Motor Vehicles
EAT	–	Employment Appeal Tribunal
ECHR	–	European Convention on Human Rights 1950
ECTA	–	Electronic Communications and Transactions Act 25 of 2002
ECtHR	–	European Court of Human Rights
EEA	–	Employment Equity Act 55 of 1998
EEOA	–	Equal Employment Opportunity Act of 1972
EHRR	–	European Human Rights Reports
Emory L.J.	–	Emory Law Journal
ERA	–	Employment Rights Act 1996 (c 18)
ET	–	Employment Tribunal
EU	–	European Union
Fed. Supp.	–	Federal Supplement
FINRA	–	Financial Industry Regulatory Authority
FMLA	–	Family and Medical Leave Act of 1993
fNIRS	–	Functional near-infrared spectroscopy
Front. Psychol.	–	Frontiers in Psychology
Fundamina	–	Fundamina: A Journal of Legal History
Ga.L.Rev.	–	Georgia Law Review
GC	–	General Counsel

General Data Protection Regulation	–	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
Gmail	–	Google Mail
GN	–	Government Notice
GP	–	General practitioner
GSJ	–	South Gauteng High Court, Johannesburg
H.R.L.Rev.	–	Human Rights Law Review
Harassment Code	–	Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace 2022
Harv. Bus. Rev.	–	Harvard Business Review
Harv. Law Rev.	–	Harvard Law Review
Harv. Negot. L. Rev	–	Harvard Negotiation Law Review
HBLJ	–	Houston Business and Tax Law Journal
HC	–	High Court
Hofstra Labor Empl. Law J.	–	Hofstra Labor & Employment Law Journal
House Bill 1152	–	Colorado Bill prohibiting employer adverse action regarding employees' marijuana use
HRC	–	Human Rights Committee
Hum. Commun. Res.	–	Human Communication Research
IC	–	Industrial Court
ICCPR	–	International Covenant on Civil and Political Rights 1965
ICR	–	Industrial Cases Reports
ICT	–	Information and communications technology
IJLMA	–	International Journal of Law and Management
ILJ	–	Industrial Law Journal

ILO	–	International Labour Organization
IMPA	–	Interception and Monitoring Prohibition Act 127 of 1992
Inc.	–	Incorporated
Ind. Int'l & Comp. L. Rev.	–	Indiana International & Comparative Law Review
Insight Afr.	–	Africa Insight
Int. Labour Rev.	–	International Labour Review
IRLR	–	Industrial Relations Law Reports
J. Bus. Entrepr. Law	–	Journal of Business, Entrepreneurship and the Law
J. Forum Comm. Franchis.	–	Journal of the Forum Committee on Franchising
J. Ind. Relat.	–	Journal of Industrial Relations
J. Institutional Econ.	–	Journal of Institutional Economics
JAL	–	Journal of African Law
JOL	–	Judgments Online
JSAL	–	Tydskrif vir die Suid-Afrikaanse Reg/Journal of South African Law
Juta's Bus. Law	–	Juta's Business Law
K.L.J.	–	King's Law Journal
Ky LJ	–	Kentucky Law Journal
La.L.Rev	–	Louisiana Law Review
LAC	–	Labour Appeal Court
Law Democr. Dev.	–	Law, Democracy and Development
LC	–	Labour Court
LLC	–	Limited Liability Company
LN	–	LawNow
LRA	–	Labour Relations Act 66 of 1995
Manage Sci	–	Management Science
Masaryk Univ. J. Law Technol.	–	Masaryk University Journal of Law and Technology

Mediterr. J. Soc. Sci.	–	Mediterranean Journal of Social Sciences
MEIBC	–	Metal and Engineering Industries Bargaining Council
META	–	Model Employment Termination Act of 1991
MHSA	–	Mine Health and Safety Act 29 of 1996
MIBC	–	Motor Industry Bargaining Council
Miss.L.J.	–	Mississippi Law Journal
MLR	–	McGeorge Law Review
MNE Declaration	–	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy
Mobilization	–	Mobilization: An International Quarterly
MR	–	Master of the Rolls (English law); Management Review (journal)
MULR	–	Melbourne University Law Review
MVG	–	Most Valuable Guest
N.Y.	–	New York Official Reports
Nat'l Att'ys Gen. Training & Res. Inst. J.	–	National Attorneys General Training & Research Institute Journal: Emerging Issues
NE	–	Nursing Ethics
Ne. J. Legal Stud.	–	North East Journal of Legal Studies
Nedlac	–	National Economic Development and Labour Council
NEHAWU	–	National Education Health & Allied Workers Union
NLR	–	Nebraska Law Review
NLRA	–	National Labor Relations Act of 1935
NLRB	–	National Labor Relations Board
NO	–	Nomine officii (by virtue of one's office)
North. Ky. Law Rev.	–	Northern Kentucky Law Review

Notre Dame Law Rev	–	Notre Dame Law Review
NRLB ALJ	–	NLRB Administrative Law Judge Decisions
NUM	–	National Union of Mineworkers
obo	–	on behalf of
OHSA	–	Occupational Health and Safety 85 of 1993
OSHA	–	Occupational Safety and Health Administration
P.3d	–	Pacific Reporter, Third Series
PELJ	–	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad
PEPUDA	–	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Pers. Individ. Dif.	–	Personality and Individual Differences
PSQ	–	Political Science Quarterly
R	–	Regulation
RICA	–	Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002
S. Afr. J. Inf. Manag.	–	South African Journal of Information Management
SA Merc LJ	–	South African Mercantile Law Journal
SA	–	South Africa; South African; South African Law Reports
SACTU	–	South African Congress of Trade Unions
SADC	–	Southern African Development Community
SALGBC	–	South African Local Bargaining Council
SALJ	–	South African Law Journal
SAPS	–	South African Police Service
SATAWU	–	SA Transport and Allied Workers Union
SCA	–	Supreme Court of Appeal (South Africa);

Scientia Milit.	–	Scientia Militaria: South African Journal of Military Studies
STD	–	Sexually transmitted disease
Syracuse J.Int'l L.& Com.	–	Syracuse Journal of International Law and Commerce
t/a	–	trading as
Temp. J. Sci. Tech. & Envtl. L.	–	Temple Journal of Science, Technology and Environmental Law
THC	–	Tetrahydrocannabinol
The 1979 Act	–	Industrial Conciliation Act 94 of 1979
The 1988 Act	–	Labour Relations Amendment Act 127 of 1988
The Acas Code	–	Advisory, Conciliation and Arbitration Service Code of Practice on disciplinary and grievance procedures 2015
The SADC Model Law	–	SADC Model Law on Data Protection 2013
THRHR	–	Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal for Contemporary Roman-Dutch Law
Transnat'l.Law.	–	The Transnational Lawyer
Trib. Jurid.	–	Tribuna Juridică/Juridical Tribune
U. Kan. L. Rev	–	University of Kansas Law Review
UDHR	–	Universal Declaration of Human Rights 1948
UK	–	The United Kingdom of Great Britain and Northern Ireland
UN	–	United Nations

Univ. Pa. J. Bus. Law	–	University of Pennsylvania Journal of Business Law
Univ. Penn. J. Labor Employ. Law	–	University of Pennsylvania Journal of Labor and Employment Law
US Capitol	–	United States Capitol, the seat of Congress
US Capitol riot	–	The violent attack on the US Congress on January 6, 2021
US Constitution	–	United States Constitution 1787
US	–	United States
USA	–	United States of America
Utah L.Rev.	–	Utah Law Review
Va. Law Rev.	–	Virginia Law Review
Vestnik Saint Petersburg UL	–	Vestnik of Saint Petersburg University Law
W	–	Witwatersrand Local Division, Johannesburg
WARN Act	–	Worker Adjustment and Retraining Notification Act of 1988
WHO	–	World Health Organization
WLR	–	Weekly Law Reports
World Sci. News	–	World Scientific News
ZALC	–	South Africa, Labour Court
ZALCCT	–	Cape Town Labour Court, Cape Town
ZALCJHB	–	Johannesburg Labour Court, Johannesburg

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS RELEVANT TO THE THESIS

Publications

Phulu T "The conflict between the employee's right to disconnect and the employer's prerogative to dismiss for off-duty misconduct: A comparative study of South Africa, USA and UK" (2023) *Dirrito Mercati Lavori* Journal available at https://www.ddllmm.eu/dlm-int-n-2-2023/

Conference Contributions

Phulu T "The conflict between the employee's right to disconnect and the employer's prerogative to dismiss for off-duty misconduct: A comparative study of South Africa, USA and UK" (International Association of Labour Law Journals seminar, Naples, Italy, at the Federico II University, 5 May 2023).

Phulu T "Balancing employer and employee rights in the post-covid-19 digital age: is codifying the "right to disconnect" the answer?" (Society for Law Teachers Southern African Law Teachers Conference, Sun City Resort, 15-19 January 2024).

Phulu T "Shaping equitable labour law landscapes: The global Influence of Intersectionality and the role of the ILO" (how legalisation of private use of cannabis has deepened intersectional discrimination in South African labour spaces) Australian and New Zealand Law History Society Annual Conference, University of Southern Queensland, 30 November – 1 December 2023.

Phulu T "Employee Rights in the Digital Age: The Cancel Culture and Employee Rights in South Africa." International Labour and Employment Relations Association (ILERA) 10th Africa Congress, Livingstone, Zambia 3-4 April 2024.

Phulu T "Cannabis Legalisation and Employment Law in South Africa: A Comprehensive Analysis of Off-Duty Cannabis Use and Workplace Dismissal**."** International Labour and

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CHAPTER 1

INTRODUCTION

1.1 Introduction

The regulation of labour relations and fair labour practices in South Africa arose from various sources, including Roman-Dutch common law[1] and the standards of the International Labour Organization (ILO).[2] Initially, South African labour relations were governed by the employment contract at common law.[3] This contract was based primarily on contractual freedom, and the employer could force the employee to agree to nearly anything.[4] During this time, employees could be dismissed for any reason and at the discretion of their employers.[5] The common law also did not grant employees any say in management decisions directly affecting their working

1 See *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 58 (*Smit*), where it was stated that the contract of employment was widely referred to as a "dienstcontract" or "huur en verhuur van diensten" in Roman-Dutch labour law. The "dienstcontract" included a wide range of workers, including domestic servants, craftsmen, apprentices, sailors, and a variety of other workers, and it also governed the rights of the employer and the employee (*Smit* at 59).

2 See ILO, https://www.ilo.org/global/lang--en/index.htm, accessed 23 January 2022, where it is cited that the International Labour Organization (ILO) promotes social justice and globally recognised human and labour rights with the foundational idea that social justice is necessary for universal and sustainable peace. See also Coleman (1991) *Comp.Lab.L.J.* 182.

3 Coleman (1991) *Comp.Lab.L.J.* 182.

4 Van Niekerk *et al* (2019) 4.

5 O'Regan (1997) *ILJ* 890. See further Olzak *et al* (2003) *Mobilization* 30, where they state that in 1960, South African official policies and regulations on race relations were particularly intransigent as they sought to entrench the racial divide.

conditions and legitimate interests.[6] A pivotal aspect of the employment contract at common law was the obligation placed on the employee to carry out lawful commands from the employer about the agreed-upon services.[7] Significantly the common law did not provide for fair labour practices in the employment relationship.[8] So, to combat the imbalance in South African labour law, there was a need for a legal framework that established reasonable standards of employment and strong bargaining power for employees.[9] Against this background, the Wiehahn Commission of Inquiry into employment legislation was established in 1977 to stabilise labour relations and foster economic growth.[10]

The Wiehahn Commission was largely responsible for the significant development of South African labour legislation during the 1970s.[11] The Commission proposed various laws to regulate fair labour practices. As a result of the Commission's investigation, the late 1970s saw the establishment of the Industrial Court (IC) through the Industrial Conciliation Amendment Act 94 of 1979 (the 1979 Act). The IC was given jurisdiction to hear unfair labour practice cases.[12] An unfair labour practice was defined as any practice that, in the IC's eyes, constituted an unfair labour practice.[13] This included disputes about unfair dismissals. Under its jurisdiction to determine unfair labour practices, the IC laid down guidelines for dismissing employees, thus playing a significant role in developing modern labour law in South Africa.[14]

Currently, the Bill of Rights, entrenched in the Constitution of the Republic of South Africa, 1996 (the Constitution), forms the cornerstone of South African democracy. It establishes the rights of all persons in the country and asserts the democratic principles of human dignity, equality, and freedom.[15] According to the Constitution, the

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6 Conradie (2016) *Fundamina* 179.
7 *Smit v Workmen's Compensation Commissioner* at 60.
8 Conradie (2016) *Fundamina* 179.
9 Du Toit (2006) *ILJ* 1321.
10 Du Toit (2006) *ILJ* 1321.
11 Brassey (1987) 70.
12 O'Regan (1997) *ILJ* 891.
13 Section 1(f) of the 1979 Act.
14 Smit and Van Eck (2010) *CILSA* 61. See also para 2.2.3.1 below.
15 Section 7(1) of the 1996 Constitution. The Constitution is South Africa's supreme law. This supremacy has significant implications for labour law. To begin, all (labour) laws must be interpreted in conformity with the Constitution to protect the Constitution's ideals. Second, the Bill of Rights includes provisions not just for general constitutional rights but also for specific labour and employment rights, barring the legislature from unreasonably infringing on the

state must respect, defend, promote, and carry out the rights enshrined in the Bill of Rights.[16] When interpreting a provision of the Bill of Rights, a court must apply, or if necessary, develop the common law to the extent that legislation does not give effect to a right in the Bill of Rights.[17]

Regarding labour and employment relations, the Constitution provides that "everyone has the right to fair labour practices."[18] In addition, the Labour Relations Act 66 of 1995 (LRA) seeks to give effect to the Constitution.[19] The LRA governs the relationship between the employer and the employee.[20] In individual labour law, the LRA primarily regulates unfair dismissals and unfair labour practices. It states that everyone has the right not to be unfairly dismissed or be subjected to an unfair labour practice.[21] The key requirement stated in the LRA is that dismissals must be substantively and procedurally fair.[22]

The LRA provides no detail on what substantive and procedural fairness entail, except for stating that a fair reason relates to conduct, capacity or operational requirements.[23] Under the LRA, though, the National Economic Development and Labour Council (Nedlac) issued a Code of Good Practice: Dismissal (the Code).[24] This Code

individual rights enshrined in the Bill of Rights. The Constitution also serves as a reference for interpreting labour law, since section 39(2) states that all legislation must be read to "promote the spirit, purport and objects of the Bill of Rights." See also Gobind (2015) 23, who comments that following 1994, labour law was enacted as a result of significant consultation with the government, employees, and employers, as well as the establishment of organisations aimed at fostering sound and cooperative employee relations.

16 Section 7(2) of the Constitution.

17 Sections 8(3) and 39(3) of the Constitution.

18 Section 23(1) of the Constitution.

19 Section 1 of the LRA provides that the LRA's objective is to give effect to and regulate the basic rights provided by section 23 of the Constitution.

20 Botha and Mischke (1997) *JAL* 134 believe that the LRA brought a key moment in South Africa's frequently turbulent history of labour legislation. The LRA is significant for several reasons: it embodies the spirit of the new South African regime; it is the result of intensive negotiation and consultation with all major players in South African industrial relations (making it a document of political compromise); and it is also one of the first examples of the "new look" style of South African legislation-writing, employing plain language with a minimum of legalese and a relatively easy-to-follow layout. The LRA also includes a series of flow charts that visually depict the processes to be followed to settle some frequent disputes.

21 Section 185 of the LRA.

22 Item 2(1) of the Code of Good Practice: Dismissal.

23 Section 188(1) of the LRA.

24 Section 203 of the LRA. The Code was issued under General Notice 1774 of 2006.

addresses some of the essential principles of dismissals for misconduct and incapacity.[25]

Despite being a recognised ground for dismissing an employee, misconduct is not defined by the Code. Even so, it is commonly defined as unacceptable behaviour, especially by a professional person, in this case, an employee.[26] It affects all businesses in every sector and workplace. It also permeates every company level and is equally widespread among blue-collar and white-collar employees.[27] Although unavoidable, it can be discouraged by employers. So it is often dealt with by organisations in disciplinary codes and defined human resources and industrial relations procedures.[28]

Although misconduct is one of the valid grounds for dismissal, the Code states that it is not appropriate to dismiss an employee for a first offence unless the misconduct is sufficiently serious to make a continuing employment relationship intolerable.[29] Examples of serious misconduct in the Code are gross dishonesty, wilful damage to the employer's property, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, a client or a customer, and gross insubordination.[30] Each case of misconduct should be judged on its merits.[31]

Most courts have held that gross misconduct can break down the employment relationship. So in *Mothiba v Exxaro Coal (Pty) Ltd t/a Grootgeluk Coal Mine*,[32] the Labour Appeal Court (LAC) held that dishonest acts, such as theft, fraud, and misrepresentation, can strike at the heart of the employment relationship,if the employer can prove that the misconduct occurred, a sanction of dismissal is

25 Item 1(1) of the Code.
26 Oxford *Learners Dictionary* "misconduct", https://www.oxfordlearnersdictionaries.com/definition/english/misconduct#:~:text=Definition%20of%20misconduct%20noun%20from%20the%20Oxford%20Advanced,%28formal%29%20unacceptable%20behaviour%2C%20especially%20by%20a%20professional%20person accessed 4 April 2023.
27 Coetzer (2013) *ILJ* 58.
28 Coetzer (2013) *ILJ* 58.
29 Item 3(4) of the Code.
30 Item 3(4) of the Code.
31 Item 3(4) of the Code.
32 (2021) 42 *ILJ* 1910 (LAC).

warranted.[33] In *Autozone v Dispute Resolution Centre of Motor Industry & others*,[34] the LAC held that

> "where the offence in question reveals a stratagem of dishonesty or deceit, it can be accepted that the employer will probably lose trust in the employee, who by reason of the misconduct alone will have demonstrated a degree of untrustworthiness rendering him unreliable and the continuation of the employment relationship intolerable or unfeasible."[35]

Instances of misconduct that fall short of dishonesty can be serious enough to warrant dismissal.[36] The courts have held that employers must demonstrate why they believe that the employee's misconduct destroyed the employment relationship.[37]

In *Thango v Nsibanyoni NO and Others (Thango)*,[38] the LC held that gross insubordination constitutes gross misconduct for which an employer can dismiss an employee.[39] The court added that an employee's act of gross insubordination could completely undermine the employment relationship.[40] In *Edcon Ltd v Pillemer & others*,[41] the court emphasised that when dismissing an employee for misconduct, an employer must provide evidence to support the claim that dismissal was an acceptable sanction.[42] This decision would need proof, such as the breakdown of the employer-employee relationship. As a result, the employer must assess the impact of the misconduct on the employment relationship before dismissing an employee for misconduct.[43]

Dismissals for misconduct must be dealt with under the Code's guidelines. These apply equally to off-duty misconduct even though the Code does not mention this category of misconduct. Case law still shows that off-duty misconduct can have

33 *Mothiba v Exxaro Coal (Pty) Ltd t/a Grootgeluk Coal Mine* para 6.
34 (2019) 40 *ILJ* 1501 (LAC).
35 *Autozone v Dispute Resolution Centre of Motor Industry & others* para 12.
36 *Impala Platinum Ltd v Jansen and others* [2017] 4 BLLR 325 (LAC) para 12.
37 *Impala Platinum Ltd v Jansen and others* para 12, *Nedcor Bank Ltd v Frank and* Others (2002) 23 *ILJ* 1243 (LAC), *Association of Mine Workers and Construction Union obo Tlhaganyane v Beesnaar N.O and Others* (JR 2970/19) [2023] ZALCJHB 20, *Brauns and Others v Wilkes N.O and Others* (JA 47/22) [2024] ZALAC 1.
38 (JR122/2018) [2021] ZALCJHB 417 (28 October 2021).
39 *Thango* para 59.
40 *Thango* para 72.
41 (2009) 30 *ILJ* 2642 (SCA).
42 *Edcon Ltd v Pillemer NO & others* para 6.
43 *Edcon Ltd v Pillemer NO & others* para 6.

serious implications for employees, as several cases have led to dismissals.[44] Applying the guidelines for general misconduct to off-duty misconduct creates challenges, as the unique nature of off-duty misconduct introduces complexities that are not seamlessly accommodated within the general framework of the Code. The Code's provisions on substantive fairness of dismissal for misconduct are overbroad and inadequately account for the unique circumstances arising in dismissals for off-duty misconduct.[45] These application shortcomings are extensively discussed in paragraph 1.2 below.

1.2 Problem Statement

Off-duty misconduct requires special consideration, for it is unacceptable behaviour that takes place away from work, in other words, outside the employer's premises and working hours.[46] Dismissal for off-duty misconduct can potentially violate an employee's off-duty rights to privacy, dignity and freedom of expression. Generally, an employee's behaviour while off-duty is off-limits to the employer if it does not negatively affect the employer in any substantial way. However, when off-duty misconduct impacts the employer's interests and poses a risk to the business, the employer may discipline and dismiss an employee for this conduct.[47]

In determining whether discipline and dismissal for off-duty misconduct are justified, apart from the general guidelines set out in the Code, two aspects have come to the fore.[48] The first is determining whether the employee's conduct is connected to the employer's business interests. The courts call this a nexus. Establishing a nexus also implies determining culpability. If the employee is found guilty after a disciplinary

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44 *Visser v Woolworths* [2005] 11 BALR 1216 (CCMA) (*Woolworths*); *Dolo v CCMA & others* [2010] JOL 26442 (LC) (*Dolo*); *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2016] 1 BLLR 1 (LAC) (*Simmers*); *Dikobe v Mouton NO and others* [2016] 9 BLLR 902 (LAC) (*Dikobe*); *Edcon Ltd v Cantamessa and* others [2020] 2 BLLR 186 (LC) (*Cantamessa*); *Sedick & another v Krisray (Pty) Ltd* (2011) 32 *ILJ* 752 (CCMA) (*Sedick*); *Mthembu and others v NCT Durban Wood Chips* [2019] 4 BALR 369 (CCMA) (*Mthembu*).

45 Items 3 and 7 of the Code.

46 Harrison and Sanders (2014) 332.

47 Nel (2016) *CILSA* 87; Raligilia (2014) *S. Afr. J. Labour Relat.* 38. See *National Education Health & Allied Workers Union on behalf of Barnes v Department of Foreign Affairs* (2001) 22 *ILJ* 1292 (BCA) 1294, where it was held that the general norm is that employers have no jurisdiction or competency to discipline employees for non-work-related conduct that occurs after working hours. See further *Mould v Roopa NO & others* (2002) 23 *ILJ* 2076 (LC) 2087, where the court held that employers can only discipline the employee if the employee's conduct has a bearing on the employment relationship.

48 Van Niekerk *et al* (2019) 308.

hearing, it would be considered appropriate to impose a disciplinary sanction.[49] Whether dismissal is warranted depends on whether the employment relationship became intolerable. Intolerability can be influenced by the breakdown of the employment relationship between the parties.[50] The judiciary formulated these two tests during the resolution of off-duty misconduct cases because the LRA and its accompanying Code lack explicit directives on how to address off-duty misconduct dismissals.

In a conventional sense, off-duty misconduct is unacceptable behaviour an employee displays outside working hours. Common examples are dishonest conduct, including criminal offences such as theft and fraud; assault; and sexual harassment.[51]

In addition to the conventional forms of off-duty misconduct, as alluded to above, which present specific difficulties, contemporary forms of off-duty misconduct have exacerbated the challenges in this field of law. Contemporary forms of misconduct include the use of social media by employees while they are off-duty and in their personal space. This development creates challenges in the workplace as the use of social media has recently grown exponentially.[52] An equally controversial issue is the consumption of cannabis away from the workplace after working hours. This problem has arisen from the recent legalisation of the personal use of cannabis in South Africa by the Constitutional Court (CC) in *Minister of Justice and Constitutional Development*

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49 *City of Cape Town v South African Local Government Bargaining Council and others* [2011] 5 BLLR 504 (LC) para 21. See also *Cantamessa* para 15, where the court commented that to establish the presence of business interests, the main principle is first to determine whether the employee's misconduct has a connection with the employer's business. See further *Biggar v City of Johannesburg (Emergency Management Services)* (2017) 38 *ILJ* 1806 (LC) (*Biggar*) para 19, where the court commented that to support disciplinary action against an employee, the employer must prove that there is a sufficient and legitimate interest in the employee's conduct outside the workplace. The onus will be discharged if the court is satisfied that there is a close connection between the employer's legitimate interest and the employee's conduct.

50 Nel (2014) *CILSA* 87.

51 *Foschini Group (Pty) Limited v CCMA and Others* (J5079/00) [2001] ZALC 52 (10 April 2001) (*Foschini*); *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale & others* (1994) 15 *ILJ* 277 (LAC) (*SA Polymer Holdings*); *Custance v SA Local Government Bargaining Council & others* (2003) 24 *ILJ* 1387 (LC) (*Custance*); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others* [2002] 6 BLLR 493 (LAC) (*Crown Chickens*); *Woolworths*; *Dolo*; *Simmers*; *Dikobe*.

52 Dakus (2020) 26 observes that by linking people regardless of time or location, technology has radically transformed how society runs. As new technology, such as cell phones and social media grow more popular and vital in modern life, there is concern that people may become more unable to disconnect from them. This continual degree of connectedness is particularly problematic in the employer-employee relationship since it confuses the separation of professional and personal work hours.

and Others v Prince and Others (*Prince)*,[53] a step that has inevitably led to labour-related cases arising from it. Consequently, there is a critical need to confront this matter and establish clear guidelines that offer transparency regarding dismissals related to off-duty cannabis use.

Employers have rationalised employee dismissals for off-duty social media activity by asserting a connection between the employee's social media posts and the employer's business. This connection encompasses the risk of harming the employer's reputation and various other business interests.[54]

It is essential to acknowledge that employees have opinions extending beyond the boundaries of their professional roles. As members of society, they inherently possess viewpoints on a wide array of contemporary matters. In this digital age, social media platforms have emerged as a powerful base on which these diverse perspectives can be readily articulated, shared, and discussed.

Social media is also an important factor in the workplace. Democracy can be expanded in two distinct ways, depending on how social media is used there.[55] First, it may improve employee communication when union organising efforts are underway. Secondly, it may, in a sense, counteract the problems of access to employees by a union banned from campaigning on an employer's property.[56] Even without a union organising a campaign, social media provides a platform for employees to discuss their working conditions.[57]

In *Case and Another v Minister of Safety and Security and others*[58] the CC remarked:

> "….. to strip entire categories of speech of constitutional protection by virtue of their content not only flies in the face of the common sense understanding of

53 2018 (6) SA 393 (CC).
54 *Cantamessa*; *Sedick*; *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* (2013) 7 BALR 689 (MIBC) *(Dewoonarain)*; *Robertson v Value Logistics* (2016) 37 *ILJ* 285 (BCA) (*Robertson*); *Makhoba v Commission for Conciliation, Mediation and Arbitration and others* [2021] JOL 53703 (LC) (*Makhoba*); *Mthembu*.
55 Millier (2008) *Ky LJ* 541.
56 Millier (2008) *Ky LJ* 541.
57 Millier (2008) *Ky LJ* 541.
58 1996 (5) BCLR 609 (CC).

> the meaning of the guarantee of freedom of expression, but would seem also to be antithetical to the fundamental purpose of that guarantee." [59]

This importance of freedom of expression was also reiterated in *S v Mamabolo (E-TV and Others Intervening)*,[60] where the court described freedom of expression as an important aspect in an open and democratic society.[61] Like everyone else, employees should be free to express themselves on social media. However, their right to express themselves on various social networks off-duty sometimes poses problems in the workplace.[62] Notably, employers are increasingly concerned about employees tarnishing the company's image on social media. Still, the lengths to which some employers will go to safeguard their company image is disquieting. They place a lot of weight on their perceived threats to their public reputation.[63]

Employers have sought to safeguard their reputations by enforcing tight social media policies that govern their employees' online speech and behaviour.[64] These regulations have been dubbed "legal weapons" that employers deploy to "enhance controls over their employees."[65] According to preliminary research, social media rules adopted by Australian businesses universally prioritised corporate interests above employees' rights.[66] The same can be said about South Africa. According to Pen,

> "Further, such action is entirely punitive; it offers no recourse for rehabilitation, a central tenet of the justice system. It is also likely that this mode of employment-centred justice will disproportionately impact workers in already-insecure or precarious employment — those who are readily replaceable and lack the economic or political capital to enforce their workplace rights. Ultimately, social media-driven sackings validate the regulatory power that employers have over employees' private lives and centre corporations in the organisation of civil society." [67]

This statement reveals employment issues and power imbalances created by dismissal for off-duty social media misconduct. There is the obvious threat of an employee's constitutional right to freedom of expression being trampled on, especially

59 *Curtis v Minister of Safety and Security and others* para 23.
60 2001 (3) SA 409 (CC).
61 *S v Mamabolo (E-TV and Others Intervening)* para 41.
62 Ireton (2013) *HBTLJ* 146.
63 Pen (2016) *Alt LJ* 272.
64 McCallum (2000) 50.
65 McCallum (2000) 50.
66 McCallum (2000) 50.
67 Pen (2016) *Alt LJ* 274.

when an employee, while off-duty, posts something unrelated to the company on their social media wall and is dismissed as a result.[68] It is submitted, therefore, that in this era of evolving employment dynamics, the fine line between an employee's freedom of expression on social media and their professional obligations to their employer has become an arena filled with complexity and contention.

Turning to dismissal for the use of cannabis off-duty, while all adults, including those in employment, have the right to consume cannabis, employees sometimes are dismissed for testing positive for cannabis at work, days after use.[69] This is because cannabis has been shown to remain present in a person's urine for days and weeks following consumption.[70] Employers justify these dismissals by citing an employee's failure to comply with workplace zero-tolerance policies against drug and alcohol abuse.[71]

Slavković contends that given the fast-evolving regulations about cannabis legalisation, cannabis is commonly believed to be a harmless pleasure that should not be controlled or regarded as unlawful.[72] Cannabis is also now used to treat various ailments. The World Health Organization (WHO) suggested that cannabis should be removed from Schedule IV to the United Nations (UN) Single Convention on Narcotic Drugs, 1961, but be retained in Schedule I to the 1961 Convention.[73] This is because data has shown that cannabis can assist in the treatment of a variety of medical conditions.[74]

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68 See *Cantamessa.*

69 See *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd* (2022) 43 *ILJ* 2025 (LC) (*Enever*); *Mthembu*; *National Union of Metalworkers of SA on behalf of Nhlabathi & another v PFG Building Glass (Pty) Ltd & others* (2023) 44 *ILJ* 231 (LC) (*Nhlabathi*). See also Liquori (2016) *Nat'l Att'ys Gen. Training & Res. Inst. J.* 4.

70 Liquori (2016) *Nat'l Att'ys Gen. Training & Res. Inst. J.* 4. Liquori explains that cannabis contains a compound called tetrahydrocannabinol, which metabolises quickly into a compound and can remain in the user's body for weeks after cannabis use. Certain tests, such as urinalysis, only detect the metabolites, meaning that these tests cannot indicate impairment but only the presence of metabolites.

71 See *Mthembu.*

72 Slavković (2022) *Vestnik Saint Petersburg UL* 775.

73 WHO news, https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses, accessed 16 December 2023.

74 WHO news, https://www.who.int/news/item/04-12-2020-un-commission-on-narcotic-drugs-reclassifies-cannabis-to-recognize-its-therapeutic-uses, accessed 16 December 2023.

Critically, the dismissal of employees for testing positive for cannabis that was consumed privately, outside work hours and away from the workplace, raises questions about the possible infringement of an employee's constitutional right to privacy. The court in *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd* (*Enever*)[75] noted with concern that this dismissal could infringe employees' right to privacy because of the difficulty of determining whether an employee is under the influence of cannabis.[76] The court highlighted:

> "Intoxication, in basic and practical terms, refers to the undesirable conduct and impaired bodily consequences resulting from the ingestion of alcohol, drugs, or substances. However, the legal philosophy surrounding intoxication differs from this definition. Alcohol or drug intoxication is legally defined based on an individual's blood alcohol or substance level, which can only be accurately established by testing methods such as urine, breathalyser, or blood samples. What is the protocol for an employee who arrives at work after using cannabis in a private setting prior to or outside of the workplace? How can you assess whether he or she is under the influence of drugs while working? Undoubtedly, firms like the respondent deploy biological blood and urine testing to determine if an employee has ingested alcohol or drugs. As previously said, cannabis remains in the circulation for a longer duration compared to alcohol. Consequently, employers apply realistic physical tests to readily determine whether an employee is under the influence of alcohol or other intoxicating drugs. These tests include observing bloodshot eyes, slurred speech, and instability, among other indicators. However, it is difficult to determine whether an employee who tests positive for cannabis use is now experiencing the effects of the drug. This necessitates the implementation of a scientifically verified assessment to determine if an employee is under the influence of drugs while on duty, therefore making them accountable for potential disciplinary measures."[77]

Generally, the problem with off-duty misconduct is that the line between on-the-job misconduct and off-duty misconduct is often blurred for both conventional and contemporary forms of off-duty misconduct. Dismissal for off-duty misconduct creates a conflict between an employer's rights to dignity (reputation) and privacy and an employee's rights to privacy, dignity, and freedom of expression.[78] Furthermore, in South Africa, employers assume the additional responsibility of attending to the health concerns of their employees, encompassing both physical and mental well-being.[79] This mandate necessitates proactive measures to forestall health hazards, furnish

75 (2022) 43 *ILJ* 2025 (LC).
76 *Enever* para 26.
77 *Enever* paras 27–28.
78 Johns (2017) *Harv. Negot. L. Rev.* 25.
79 Section 24 of the Constitution. Section 8 section 14 of the Occupational Health and Safety Act.

avenues for healthcare access, and propagate wellness initiatives within the organisation.[80] Nonetheless, amid the discharge of these obligations, employers must navigate a delicate balance, respecting employees' aforementioned rights. Conflicts were highlighted by cases such as *Dikobe v Mouton NO and others* (*Dikobe*)[81] and *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (*Simmers*),[82] which pertain to conventional misconduct. And cases on contemporary forms of off-duty misconduct such as *Edcon Ltd v Cantamessa and others (Cantamessa)*[83] and *Makhoba v Commission for Conciliation, Mediation and Arbitration and others* (*Makhoba*)[84] have drawn attention to the breach of employee privacy and freedom of expression, as the subsequent chapters of this thesis discuss. These cases illustrate that unfair dismissals may follow when the boundary between employees' professional and personal lives is not clearly defined.

Turning to the Code's provisions regulating misconduct, one must notice that the Code provides a foundation for determining the substantive fairness of dismissals for misconduct.[85] Its expansive nature, though, creates ambiguity when used in off-duty misconduct cases, as these dismissals' complex and distinct nature requires more defined criteria.

The Code provides that to establish guilt for misconduct, an employee must have violated a work rule relevant to the workplace.[86] It is argued that establishing guilt for off-duty misconduct is inherently complicated by the blurred boundary between personal life and professional obligations. The subjective nature of discerning an individual's intentions in off-duty conduct has led to inconsistent verdicts. The difficulty arises in determining which misconduct is inherently connected to the employer, particularly within the realm of off-duty misconduct. The absence of clear guidelines for determining a connection between off-duty conduct and the workplace raises concerns about the fairness of these dismissals because the criteria for establishing a meaningful connection can be subjective and open to diverse interpretations.

80 Section 14 of the Occupational Health and Safety Act.
81 [2016] 9 BLLR 902 (LAC).
82 [2016] BLLR 1 (LAC).
83 [2020] 2 BLLR 186 (LC).
84 [2021] JOL 53703 (LC).
85 Items 3 and 7 of the Code.
86 Item 7 of the Code.

The Code also requires employers to have disciplinary policies that outline anticipated employee behaviour but states that some rules or standards may be so well established and known that it is unnecessary to communicate them.[87] It is submitted that although established policies may be considered self-evident in some contexts, this argument becomes more pertinent in off-duty misconduct. The contention here is that off-duty conduct should ideally remain outside the purview of the employer's authority unless this conduct directly and significantly compromises the interests and reputation of the company. Consequently, any form of disciplinary action for off-duty misconduct should be justifiable only when clear, explicit off-duty misconduct regulations are in place. Without these specific guidelines, dismissals based on off-duty misconduct should be considered inherently unfair.

Progressive discipline, which is a generally accepted practice approved by the courts, is encouraged by the Code.[88] However, its application by adjudicators in dismissals for off-duty misconduct seems unclear. This uncertainty arises from instances in case law where employees have been dismissed for first-time off-duty misconduct offences that had no direct connection to the employer, and the courts subsequently upheld these decisions.[89] These instances represent a deviation from the established principle of progressive discipline. It is imperative to assert that this departure from the principle of progressive discipline is problematic and warrants a critical reconsideration.

Progressive discipline is crucial in high-unemployment contexts such as South Africa, aligning with the objectives of the LRA to advance social justice.[90] Obviously, the purpose of implementing dismissal laws is to address workplace misconduct effectively while ensuring equitable treatment. This kind of discipline promotes job preservation by acknowledging that off-duty misconduct may not directly impact job performance and advocates for progressive disciplinary actions instead of immediate dismissal. By allowing employees to learn from their mistakes and modify their

87 Item 3(1) of the Code.
88 Items 3(2) and 3(3) of Code.
89 See the comprehensive discussion of *Cantamessa* in Chapter 5 of this thesis.
90 Section 1 of the LRA.

behaviour, progressive discipline contributes to their personal and professional development while safeguarding valuable staff.

According to the Code, dismissing an employee for a first offence is inappropriate unless the misconduct is serious and so grave that it makes a continued employment relationship intolerable.[91] A notable deficiency in the Code is its lack of precision regarding off-duty misconduct. It fails to furnish specific instances or guidelines that clearly define which forms of off-duty misconduct would reach the threshold of making the continued employment relationship intolerable. This lack of clarity within the Code raises questions and concerns about its practical application in real-world off-duty misconduct cases, leaving room for interpretation and inconsistency in decision-making.

Furthermore, the Code considers dismissal a fair sanction if it is based on a violation that causes the employment relationship to break down.[92] A significant challenge emerges when there is an absence of clear indicators pointing to such a breakdown in the employment relationship in off-duty misconduct situations. The absence of clarity on the type of behaviour that leads to a breakdown of the employment relationship in off-duty misconduct has resulted in uncertainty and varied interpretations by the courts. The author submits that a lack of defined norms or criteria for determining a breakdown in the employment relationship in off-duty misconduct may lead to inconsistencies in decision-making since courts may use different criteria to determine the seriousness of the misconduct and its influence on the employment relationship. And employers may struggle to establish whether off-duty misconduct leads to a breakdown in the employment relationship and merits dismissal. For their part, employees may be unclear about which off-duty acts may result in their job being terminated.

Against this background, it is submitted that employers may exploit the lack of clarity as an excuse to dismiss employees for reasons unrelated to employees' off-duty behaviour. It is also asserted that when employees believe that the process of

91 Item 3(4) of the Code.
92 Item 7(b)(iv) of the Code.

establishing intolerable off-duty misconduct and breakdown of the employment relationship is vague and subjective, this belief may harm employee morale and undermine faith in the employer's decision-making process. More importantly, a lack of clarity may lead to the lack of consistent precedents in off-duty misconduct cases, making it challenging to develop a coherent body of legal rulings that can guide future cases.

Given the complexities surrounding off-duty misconduct cases and their impact on the employment relationship, there is a pressing need for an independent regulatory structure dedicated specifically to addressing these issues. An effective framework should offer clear guidelines for establishing guilt in cases of off-duty misconduct, delineating the threshold for dismissal-worthy misconduct, and specifying factors to consider. This framework should also strive to find a delicate balance between safeguarding corporate interests and upholding the rights of employees.

1.3 Research Questions

In line with the problem statement, the following four research questions are posed.

1.3.1 How does the current legislative framework govern dismissals for off-duty misconduct?

1.3.2 Is the current legislative framework adequate to ensure the fairness of dismissals for off-duty misconduct?

1.3.3 Are there any lessons for South Africa from the regulation of off-duty misconduct in the United States of America (USA) and the United Kingdom (UK)?

1.3.4 Which legislative amendments are required to ensure fairness to both the employer and the employee in dismissals for off-duty misconduct, considering the conflicting rights that require protection?

1.4 Significance of The Study

Inadequacies within the legal framework governing dismissals related to off-duty misconduct can significantly encroach on employees' private lives. The rapidly evolving landscape of technology, coupled with the legalisation of private cannabis use, further complicates the already convoluted terrain of handling off-duty misconduct

cases. As elucidated, the potential for dismissals rooted in off-duty behaviour can lead to a potential clash between the rights of employees and employers. Given the inherently contentious nature of these dismissals, the pressing need for a robust and well-defined framework that can effectively harmonise and balance these competing rights has become increasingly paramount.

This research is the driving force behind developing a much-needed framework in the form of a comprehensive Code. The primary objective of this proposed Code is to instil a sense of uniformity and coherence in adjudicating off-duty misconduct-related dismissals. It aims to address the existing disparities and ambiguities, providing a structured and equitable foundation to guide decision-makers in handling these cases consistently, thus ensuring fairness and clarity in the often-contentious realm of off-duty misconduct dismissals.

Beyond its immediate labour-related implications, the proposed Code carries broader significance in South Africa. In a country with high unemployment rates, this Code fosters social cohesion by providing clear and fair guidelines for both employees and employers. This development, in turn, contributes to a more stable and harmonious work environment, which is essential for economic growth and social well-being.

1.5 Limitations of The Study

According to the LRA, three types of dismissals are justifiable: dismissal for conduct, dismissal for capacity, and dismissal for operational grounds.[93] Dismissal for misconduct is the focus of this study. And although dismissal for general misconduct is included throughout the thesis, the primary emphasis of this thesis is on dismissal for off-duty misconduct.

Only international instruments related to misconduct and workplace safety are considered in the discussion of the ILO. The structures of the ILO and its legislative procedure are not explored in depth in this thesis.

In the comparative chapters on the USA and the UK, only three states of the USA are discussed. These are California, New York, and Colorado.

93 Section 188(1) of the LRA.

This research considered relevant legal sources available until 13 December 2023.

1.6 Research Methodology

The thesis adopts a doctrinal study of law. A doctrinal study of law is a practical area of study that provides sources of practical reasons that can be used to justify a judgment of legal reasoning.[94] The doctrinal study relies on both primary and secondary sources. This doctrinal study also focuses on the qualitative study of the laws regulating off-duty misconduct. Against this background, the research focuses on domestic law, such as the Constitution and the statutes such as the LRA, case law, documents, and books, as well as international law, such as ILO Conventions and Recommendations, and European Union (EU) legislation.

The thesis also employs a comparative study of the legal frameworks of other jurisdictions. The comparative approach entails paying close attention to the similarities and disparities between the legal systems considered.[95] The regulation of dismissals for off-duty misconduct in the UK and USA is studied. The comparative study is conducted to analyse how off-duty conduct is regulated and how employees' rights are balanced with employer's rights in dismissals for off-duty misconduct. Through a comparative analysis, practical recommendations from foreign legal systems can be adopted to enhance South African regulations governing dismissals related to off-duty misconduct.

These two jurisdictions were chosen because the UK and the USA operate under common law legal systems, similar to South Africa. It is submitted that this shared legal foundation can facilitate a more meaningful comparison of legal principles and precedents. Many South African labour laws have roots in British legal traditions, making a comparison relevant.

Furthermore, both the UK and the USA have diverse and well-established bodies of labour law jurisprudence. This diversity allows for various comparative insights, from statutory regulations to court decisions. The UK and the USA are also global economic

94 Hutchinson and Duncan (2012) *Deakin LR* 8.
95 Reitz (1998) *Am.J.Comp.L.* 620.

powers with diverse labour markets. Their labour laws often address complex misconduct-related issues, making them valuable sources of best practices and lessons learned. Colorado, New York, and California stand out for their legislative frameworks tailored to address off-duty misconduct dismissals, particularly concerning modern issues like social media engagement and off-duty cannabis use. These states have crafted unique laws recognising the complexities of personal conduct outside of work hours and its implications for employment.

1.7 Framework of The Study

Chapter 1 provides a general review of the research and a brief description of the study's significance. The problem statement and research limitations are outlined. The research methodology employed in the thesis is discussed.

Chapter 2 examines the development of South African labour legislation and the emergence of fair labour practices in the pre-democratic and post-democratic eras. The chapter also discusses the development of dismissal law. The Constitution, the LRA, the common law, and ILO instruments are considered.

Chapter 3 explores the dispute resolution methods CCMA commissioners and bargaining council arbitrators use when evaluating the fairness of off-duty misconduct dismissals. It also investigates the LC's reasonable decision-maker test to assess its applicability to off-duty misconduct cases. Furthermore, the chapter examines the judiciary's role in adjudicating off-duty misconduct dismissals, providing an overview of the judicial tests applied in conventional off-duty misconduct cases. The primary question addressed in this chapter is whether the existing legal framework effectively regulates conventional forms of off-duty misconduct.

Chapter 4 seeks to establish whether the current legal framework adequately regulates dismissals for off-duty social media misconduct. The chapter also aims to determine whether a balance is being struck between the employer's rights to privacy, dignity (reputation), and freedom of expression and the employee's rights to privacy, dignity, and freedom of expression when dismissing an employee for off-duty social media misconduct.

Chapter 5 seeks to establish whether the current legal framework adequately addresses dismissal for off-duty cannabis use. The chapter examines the impact of dismissals for off-duty cannabis use on the employee's fundamental rights. It considers the effectiveness and impact of zero-tolerance policies in the context of dismissals for off-duty cannabis use. Although these measures are designed to preserve a drug-free workplace, the practical repercussions for employee off-duty behaviour are scrutinised.

Chapter 6 undertakes a comparative analysis of the regulation of off-duty misconduct in three states in the USA, as well as the measures used to strike a delicate balance between protecting employee's rights when effecting dismissals for off-duty misconduct.

Chapter 7 compares South African regulations concerning off-duty misconduct with the approaches employed in the UK. The chapter scrutinises the methods each jurisdiction employs to delicately balance employees' rights during dismissals for off-duty misconduct and draws lessons for South Africa.

Chapter 8 summarises the findings of the research. This chapter provides a comprehensive set of recommendations to guide the effective management and resolution of off-duty misconduct cases. These recommendations are designed to enhance clarity, fairness, and legal compliance in dealing with these cases, ensuring that both employers and employees are protected while upholding the integrity of the workplace environment. The chapter also introduces a Code of Good Practice: Dismissal for Off-duty Misconduct for consideration.

CHAPTER 2

THE LEGISLATIVE FRAMEWORK FOR OFF-DUTY MISCONDUCT

2.1 Introduction

As stated in Chapter 1, the South African legislative framework governing dismissals for misconduct does not recognise off-duty misconduct as a separate form of misconduct. Instead, dismissals for off-duty misconduct are governed by provisions that apply to misconduct in general. For the reasons highlighted in Chapter 1, the use of the general framework is regarded as insufficient to regulate dismissals for off-duty misconduct. Despite the rejection of using this framework, it represents what is in place and what must be applied.

Accordingly, this chapter discusses the legislative framework governing dismissals for misconduct in general, which applies equally to dismissals for off-duty misconduct. This discussion is needed to illustrate the problems with the framework. Before examining the current legislative framework, this chapter describes the legislative framework of the pre-democratic era because the IC, under its unfair labour practice jurisdiction, considered cases of off-duty misconduct. Exploring the dismissal laws in the pre-democratic era is instrumental in understanding the historical foundations that have contributed to the development of existing dismissal laws. This historical context

also sheds light on how post-democratic era dismissal laws have evolved to address off-duty misconduct cases specifically.

The discussion then moves to the democratic era, where the Constitution, international law, and the LRA 1995 (including the Code)[96] are explored. This chapter sets the scene for analysing and evaluating the legal framework in Chapters 3 to 5 of this thesis to illustrate the problems associated with applying the current legal framework on dismissals for off-duty misconduct.

The main question this chapter seeks to answer is how the current legislative framework governs dismissals for off-duty misconduct. To answer this question, it is essential to understand the historical development of South African labour law and the concept of dismissal. A discussion of the legislative framework governing dismissal law in the pre-democratic and the post-democratic eras follows.

2.2 South African Legislative Framework in the Pre-Democratic Era

2.2.1 The Pre-Democratic Era (Before the 1970s)

From 1907 to 1922, the mining industry in South Africa was marked by rising union activity and labour strife.[97] When mine owners placed black workers in roles historically reserved for white workers, the anger culminated in the Rand Revolt, a strike that turned violent.[98] Employers were willing to negotiate with white labour unions after this deadly tragedy.[99]

This negotiation led to the establishment of the Industrial Conciliation Act 11 of 1924 (the 1924 Act), opening an era of statutory bargaining between white unions and employers. Black workers were excluded.[100] The employment contract primarily regulated all employment relationships during this period.[101] Employers could thus

96 The Code of Good Practice: Dismissal appears in Schedule 8 to the LRA 1995 (the Code).
97 Conradie (2016) *Fundamina* 179.
98 Coleman (1991) *Comp.Lab.L.J.* 182.
99 Coleman (1991) *Comp.Lab.L.J.* 182.
100 O'Regan (1997) *ILJ* 890. See further Smit and Van Eck (2010) *CILSA* 60, who are of the view that this Act entrenched racial discrimination in labour legislation and that the objective of this Act was to safeguard the interests of white skilled employees.
101 Coleman (1991) *Comp.Lab.L.J.* 182.

dismiss any employee on notice, for good reason or bad, and the labour market was almost entirely regulated by race.[102] The law regulating the employment relationship was unfair.[103] Significantly, no legislation governed dismissals: the employment contract regulated them all.[104]

The Nationalist government replaced the 1924 Act with the Industrial Conciliation Act 28 of 1956.[105] This Conciliation Act made collective bargaining and conflict resolution more formal.[106] It reinstituted the race-based job reservation system and established collective bargaining forums.[107] Job reservation still kept specific jobs for white employees only, allowing them to work for satisfactory wages.[108] Black workers were still excluded from the legal definition of "employee"[109] and barred from participating in the industrial council and conciliation boards.[110]

2.2.2 The Pre-Democratic Era (from the 1970s to the 1990s)

The employment contract continued to control employment in the early 1970s.[111] Racial regulations dominated most aspects of the labour market.[112] Wages established through collective bargaining and extended to black workers were often

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102 O'Regan (1997) *ILJ* 890. See further Olzak *et al* (2003) *Mobilization* 30, where they state that in 1960, South African official policies and regulations on race relations were particularly intransigent as they sought to entrench the racial divide.

103 Conradie (2016) *Fundamina* 179.

104 Conradie (2016) *Fundamina* 179.

105 Coleman (1991) *Comp.Lab.L.J.* 182.

106 Section 77 of the 1956 Act.

107 Section 10 of the 1956 Act. See Coleman (1991) *Comp.Lab.L.J.* 182, where it is explained that the Mines and Works Act 12 of 1911 outlined a race-based job reservation system.

108 Coleman (1991) *Comp.Lab.L.J.* 182.

109 Section 1(1) of the 1956 Act defined an employee as "any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer."

110 Section 18 of the Conciliation Act.

111 Van Eck *et al* (2004) *SALJ* 904 state that early in its development, it was recognised that South African employment law was based on common-law principles of contract. This meant that a contract of employment could be validly terminated simply by following the contractually agreed-upon notice time, regardless of the reason or motive for termination. See further Van Niekerk (2004) *ILJ* 853, where it was stated that when dismissing employees, it did not matter whether the employer's cause for terminating employment was reasonable or not. Van Niekerk adds (at 853): "The reason for dismissal was generally only significant in challenges to summary dismissals, but even then the insufficiency of the proffered reason for dismissal, measured against the standard of a material breach of the contract, had the consequence only of an order for the payment of damages in the sum that the employee would have earned had the required notice been given."

112 O'Regan (1997) *ILJ* 890.

lower than those of white workers.[113] This discrimination appeared in the mines and many state firms and companies, where job reservation prevailed.[114] The terms of the employment contract and the applicable notice period governed the termination of the contract.[115]

In 1973, South Africa fell into a recession. Worker unrest erupted.[116] Black workers protested at being excluded from industrial councils. Their dispute-resolution mechanism was ineffective,[117] so black unions called work stoppages to force employers to address their problems.[118] Strikes reignited international concern over low wages in particular and the plight of black workers in general.[119] This international focus increased pressure on the South African government.[120] Employers responded by negotiating recognition agreements and participating in collective bargaining.[121] They also began speaking out against apartheid in the workplace, supporting equal rights for black workers and advocating for improved living conditions in black townships.[122]

The 1970s strikes triggered debate over the international community's role in South African politics.[123] Several codes of conduct for multinational firms operating in South Africa followed.[124] These codes pressured the South African government and paved the way for a changed labour relations system.[125] Multinational corporations began recognising and negotiating with black unions in conformity with the European Community Code and the Sullivan Principles.[126] In this context, the government

113 O'Regan (1997) *ILJ* 890.
114 O'Regan (1997) *ILJ* 890.
115 Van Niekerk (2004) *ILJ* 853.
116 Coleman (1991) *Comp.Lab.L.J.* 184.
117 Coleman (1991) *Comp.Lab.L.J.* 185.
118 Coleman (1991) *Comp.Lab.L.J.* 185.
119 Vose (1985) *Int. Labour Rev.* 449.
120 Vose (1985) *Int. Labour Rev.* 449.
121 Coleman (1991) *Comp.Lab.L.J.* 185.
122 Coleman (1991) *Comp.Lab.L.J.* 185. See further Sithole and Ndlovu (2006) 263, where they state that the Natal Strikes created an enabling environment for the resurgence of the political unionism of the South African Congress of Trade Unions (SACTU), which began in the 1950s.
123 Coleman (1991) *Comp.Lab.L.J.* 185.
124 Coleman (1991) *Comp.Lab.L.J.* 185. Coleman mentions that some of the codes included the European Code (which was based on principles of collective bargaining and recognition of trade unions) and the Sullivan Principles.
125 Coleman (1991) *Comp.Lab.L.J.* 185.
126 Coleman (1991) *Comp.Lab.L.J.* 185. See further Taylor (1996) *Transnat'l.Law.* 617, who explains that the Sullivan Principles were a voluntary employment policy that advocated for

established the Wiehahn Commission to recommend updating the country's labour laws.[127]

In 1977, that Commission was tasked with reviewing and recommending labour legislation on issues such as employer-employee relations, working conditions, and job promotion.[128] It alluded to the need for legislation on fair labour practices.[129] On its recommendation, the Industrial Conciliation Act 94 of 1979 (the 1979 Act) was passed.[130]

The 1979 Act included black workers in its definition of "employee."[131] All workers were entitled to full trade union rights, freedom of association, and collective bargaining.[132] Race-based employment reservations vanished. A manpower committee was constituted to investigate labour policy.[133] Significantly, the IC was

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equal treatment of employees and focus on black worker's growth. The principles, developed in 1977 by Rev. Leon Sullivan, a black civil rights activist and member of General Motors board of directors, advocated for fair employment practices, equal pay for equal work, job training and development, and improvement in workers' lives.

127 See Roos (1987) *AJ* 98, where it is explained that in 1977, the Wiehahn Commission was constituted as a matter of urgency to investigate South African labour laws. The development of black unions and rising worker militancy, possibly best exemplified by the Durban strikes of December 1973, prompted its appointment. See further O'Regan (1997) *ILJ* 891, where she states that the important element of the Wiehahn Commission's proposals was its recommendation that the racist principle underlying South African labour legislation be abolished. Brassey (1987) 70 states that the "Wiehahn Commission as the progenitor of the unfair labour practice called for a legal regime under which fair employment guidelines could be developed progressively." According to the Commission, the IC had to be given extensive and flexible powers so that it could "create a body of case law that would contribute to the establishment of fair employment rules through judicial precedent."

128 Vose (1985) *Int. Labour Rev.* 449. See further Sithole and Ndlovu (2006) 625, where they explain that the Wiehahn Commission investigated every facet of South African labour relations as part of its objectives. The final report(s) included recommendations on work reservation and collective bargaining procedures. See also Hayson and Thompson (1986) 218, who state that the Wiehahn Commission explicitly recommended that farmworkers be brought into line with industrial workers. Reichmann and Mureinik (1980) *ILJ* 2 contend that the Wiehahn Commission is one of the reasons why Black unions grew.

129 The Wiehahn Commission *Interim Report* 1979 3. See also Landman (2004) *ILJ* 805, who observes that industrial action, by developing black trade unions as a force for political enfranchisement, began strangling the economy in the 1970s. Professor Nic Wiehahn urged the government of the day to form a commission to explore labour policy, with a focus on the ways and means by which a foundation for the formation and extension of sound labour relations could be established. The Wiehahn Commission's first interim report addressed discrimination against black workers and job reservation.

130 The Wiehahn Commission *Interim Report* 1979 28.

131 Section 1(c)(i) of the 1979 Act defined an employee as "any individual employed by or working for an employer, receiving or eligible to receive remuneration, and any other person who, in any way, aids in the operation or management of an employer's business."

132 Section 3 of the 1979 Act.

133 Section 2 of the 1979 Act. Suchard (1982) *Insight Afr.* 93–94 notes that the revised definition of an "employee" included only urban blacks and excluded migrant workers and frontier

established to interpret labour laws and adjudicate unfair labour practice cases.[134] Besides these specific recommendations, and as a harbinger of change, the Wiehahn Commission advocated removing all racially discriminatory aspects of labour laws.[135]

2.2.3 The Industrial Court's Adjudication of Unfair Dismissals

The IC was placed under the jurisdiction of the Department of Manpower (previously the Department of Manpower Utilisation) and authorised to consider and adjudicate cases of unfair labour practices,[136] a concept introduced into South African law by the 1979 Act, which defined it as any labour practice which in the opinion of the IC was an unfair labour practice.[137] Applying this open-ended definition, the IC was left to determine which type of employer conduct could constitute such a practice.

By establishing the IC, the legislature gave effect to the overall Wiehahn strategy to move as much conflict as possible from the shop floor to the courtroom. The court was empowered to make decisions based on fairness and equity.[138] The IC significantly developed the concept of unfair labour practices. Crucially, one form of employer conduct that the IC found to be encompassed within the concept of an unfair labour practice was unfair dismissals. Dismissals were also encapsulated by the broad definition of an unfair labour practice in the Labour Relations Amendment Act 83 of 1988 (the 1988 Act).[139]

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commuters. This criterion reduced the number of black unregistered unions that already existed (if they desired to register), leading to pressure on the minister to widen the definition by ministerial proclamation. As a result, in 1979, the only persons still barred from joining registered trade unions were foreign blacks from countries that had never been part of South Africa. Because blacks could now join registered trade unions, they were no longer barred from the industrial council system, and all population groups could not engage and become interested in labour matters within a formal framework. However, racial mixing in labour unions was still forbidden at the time, although the minister could issue exemptions.

134 Section 2(1) of the 1979 Act.

135 The Preamble to the 1979 Act. See also Wiehahn Commission *Interim Report* 1979 10-13.

136 Section 5(e) of the 1979 Act.

137 Section 1(f).

138 Section 8 of the 1979 Act. See also Roos (1987) *AJ* 98.

139 The definition of "unfair labour practice" was amended by the Industrial Conciliation Amendment Act 95 of 1980; the Labour Relations Amendment Act 51 of 1982 and the Labour Relations Amendment Act 83 of 1988. The Labour Relations Amendment Act 1988 contains the most extensive amendments. Section 1(h) states that "unfair labour practice" means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee, and shall include the following: (a) The dismissal, by reason of any disciplinary action against one or more employees, without a valid and fair reason and not in compliance with a fair procedure: (b) the termination of an employee's employment on grounds other than disciplinary action; (c) the unfair unilateral suspension of an employee or employees; or (d) the unfair unilateral amendment of the employee's contract of employment (e) employing unconstitutional, deceptive, or unjust means for recruiting members by any trade union,

An important case in this regard was *Metal & Allied Workers Union & others v Natal Die Casting Co (Pty) Ltd* (*Metal & Allied Workers Union*).[140] In this case, the union challenged the company's dismissal of its employees after they participated in a strike[141] because the employer refused to bargain in good faith.[142] Even though the dismissals were lawful, the IC ruled that the employer's act of dismissing those employees constituted an unfair labour practice.[143] The Supreme Court supported the IC decision, Goldstone J holding that,

> "In my opinion, the approach of applicant's counsel to labour relations demonstrates a lack of appreciation of the nature and purpose of the Act (the 1988 Act). It assumes that any lawful act, no matter how unfair or inequitable, may not be queried or interfered with by the industrial court."[144]

The principle of substantive and procedural fairness was introduced during the IC era. A significant case was *Van Zyl v Duhva Opencast Services (Edms) Bpk* (*Van Zyl*).[145] It introduced the concept of substantive and procedural fairness in dismissals for misconduct. It also acknowledged that an employer's disciplinary powers extended to conduct committed outside the workplace.[146]

In *Van Zyl*, an employee was dismissed after assaulting his supervisor outside work hours in a mining compound.[147] The union claimed that the company lacked legal

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employers' organization, federation, member, office-bearer, or official associated with any trade union, employers' organization, or federation, office-bearer or official of any trade union, employers' organization or federation: Provided that the refusal of a trade union in accordance with the provisions of such trade unions constitution to admit an employee as a member, shall not constitute an unfair labour practice; (f) the refusal or failure by any trade union, employers' organization, federation, member, office-bearer or official of any trade union, employers organization or federation to comply with any provision of this Act; (g) any act whereby an employee or employer is intimidated to agree or not to agree to any action which affects the relationship between an employer and employee; (h) the incitement to, support of, participation in or furtherance of any boycott of any product or service by any trade union, federation, office-bearer or official of such trade union or federation; (i) any employers unfair discrimination against any employee purely on the basis of race, gender, or creed.

140 (1986) 7 *ILJ* 520 (IC).

141 See *Metal & Allied Workers Union* 542–543, where it was stated that to determine whether a failure to bargain in good faith constituted an unfair labour practice, the court had to analyse the "totality of all the facts" and ask several important questions. The employer failed to bargain in good faith because it expressed a willingness to implement a bonus but did not negotiate about it. It also refused to provide realistic information about its financial situation.

142 *Metal & Allied Workers Union* 544.

143 *Metal & Allied Workers Union* 544.

144 *Marievale Consolidated Mines Ltd v National Union of Mineworkers and Others* 1986 (2) SA 472 (W) 498.

145 (1988) 9 *ILJ* 905 (IC).

146 *Van Zyl* 909.

147 *Van Zyl* 909.

authority to initiate disciplinary action against the employee.[148] The test used by the court was whether the conduct was work-related in the sense that it impacted the workplace.[149] The significance of the assault lay in the fact that the victim was the assailant's immediate supervisor, thereby establishing culpability. The assault also occurred in front of a fellow employee, and it was reported that the employees' relationship with the residents of the mining compound was adversely affected.[150] It was held that a conflict between co-workers outside working hours resulted in an intolerable relationship that justified dismissal.[151] The IC held that dismissal could be justified even if the attack happened after hours, especially if the conduct was related to the workplace and affected the employment relationship.[152]

The IC considered several further cases of off-duty misconduct. In *National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd* (*NUM v East Rand Gold*),[153] an employee was dismissed for assaulting a co-worker on a company bus carrying them to a nearby township.[154] Although the event occurred outside the workplace and after hours, the IC found that the employee was guilty of misconduct, and dismissal was a fair sanction because all the employees aboard the bus were still performing their duties.[155] The court held that an employer was responsible for safeguarding employees while travelling.[156]

The IC attempted to establish guidelines for determining the fairness of dismissals for off-duty misconduct in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another* (*Hoechst*).[157] The employee in *Hoechst* was found guilty of illegally

148 *Van Zyl* 909.
149 *Van Zyl* 909.
150 *Van Zyl* 910.
151 *Van Zyl* 910.
152 *National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd* (1986) 7 *ILJ* 739 (IC) 743D. Apart from substantive fairness, the IC also gave effect to procedural fairness. Under the jurisdiction of the IC, it was considered an unfair labour practice to dismiss an employee without following a fair procedure. In *Commercial Catering & Allied Workers Union of SA & another v Wooltru Ltd t/a Woolworths* (1989) 10 *ILJ* 311 (IC), the IC held that dismissals should be preceded by fair procedures. In this case, the IC could not reinstate an employee who was dismissed for a fair reason after fair procedures were followed.
153 (1986) 7 *ILJ* 739 (IC).
154 *NUM v East Rand Gold* 743E.
155 *NUM v East Rand Gold* 743E.
156 *NUM v East Rand Gold* 743E–F.
157 (1993) 14 *ILJ* 1449 (LAC).

possessing a co-worker's car radio tape deck and was dismissed.[158] The incident that led to the employee's possessing the radio deck occurred outside the workplace.[159] The LAC commented that the fact that the misconduct happened away from the workplace did not stop the employer from disciplining its employees for this conduct.[160] The court held that illegally possessing a co-worker's radio deck had no bearing on the essence of the work done by the dismissed employee or his ability to perform his duties.[161] As a result, it was held that there was insufficient evidence to show that the misconduct harmed the employer's business.[162] The court added that the employee's conduct did not affect the employer-employee relationship. The court also remarked that this was a dispute between two employees that criminal or civil proceedings could resolve.[163] The court made the following significant remarks:

> "In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties'."[164]

The key takeaway from this case is that assessing an employer's authority to discipline an employee for off-duty misconduct not explicitly addressed in a disciplinary code is a multifaceted and complicated process. It necessitates a comprehensive evaluation of numerous factors, focusing on how the misconduct affects various aspects of the employer-employee relationship. The central question concerns whether the employee's misconduct was significant to the workplace and significantly harmed or irreparably damaged this relationship. Consequently, each case should be evaluated on its merits, accounting for the unique circumstances and context.

158 *Hoechst* 1450.
159 *Hoechst* 1457.
160 *Hoechst* 1457.
161 *Hoechst* 1449.
162 *Hoechst* 1458.
163 *Hoechst* 1459.
164 *Hoechst* 1459. See also *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC) 589G–H.

It is worth noting that the IC played a pivotal role in shaping the adjudication of off-duty misconduct dismissals in South Africa. Its rulings and jurisprudence laid the foundation for standards governing these dismissals in the post-democratic era.[165] Its decisions could have helped in drafting a framework that included guidelines for determining the fairness of dismissals for both on-the-job and off-duty misconduct.

2.3 South African Legislative Framework in the Post-Democratic Era

2.3.1 The Constitution

Over the years, South African labour law has evolved as quickly as the socio-economic and political climate.[166] Before democracy prevailed, South African labour law depicted discrimination based on colour. Since then, statutes have been enacted and amended to meet the demands of a constitutional democracy.[167]

The post-democratic era saw the emergence of the Constitution. The Constitution, which came into force on 4 February 1997, is the supreme law of South Africa, and any law that conflicts with it will be declared invalid.[168] The Constitution also requires that legislation be interpreted and developed by its letter, spirit, and intent.[169] According to Adler, industrial relations changes in the 1990s had to look forwards and backwards.[170] One main aim of the post-democratic legislative frameworks was to align labour policy with the new Constitution's Bill of Rights provisions, which strove to eradicate discriminatory features of the previous labour relations regime while expanding current rights to all employees. The second aim was to reform and repeal old laws and create an order suitable for a modern democracy at the end of the twentieth century.[171]

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165 Especially its decision in *Hoechst.*

166 Grogan (2019) 2.

167 Marschall (2009) 30. See further the Declaration on Apartheid in South Africa 1964, where the International Labour Organization (ILO) condemned the policy of apartheid implemented by the government of South Africa as a violation of the Declaration of Philadelphia 1944. The Declaration of Philadelphia 1944 affirmed the right of all human beings, irrespective of race, creed or sex as well as freedom from forced labour, freedom of association, and freedom of choice of employment and occupation.

168 Sections 1 and 2 of the Constitution.

169 Section 39 of the Constitution.

170 Adler (1998) *Law Democr. Dev.* 2.

171 Adler (1998) *Law Democr. Dev.* 2.

The Constitution states that everyone has the right to fair labour practices.[172] Olivier and others suggest that the term "everyone" must be interpreted in alignment with the principles of equality outlined in the Constitution.[173] The Constitution requires everyone to be treated equally before the law and to receive equal protection under the law. Given the constitutional provision of equal protection, "everyone" should be given the broadest interpretation possible.[174]

The CC in *National Education Health & Allied Workers Union v University of Cape Town & others* (*NEHAWU*)[175] held that the concept of a fair labour practice is incapable of precise definition and that defining the concept is neither necessary nor desirable.[176] The court added that this concept should gather meaning from the decisions of the specialist tribunals on a case-by-case basis.[177]

An important point made by the court was that the right to fair labour practices equally protects employers. It was held that, "there is nothing in the nature of the right to fair labour practices to suggest that employers are not entitled to that right."[178] In *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* (*NUMSA*),[179] Smalberger JA held that, "fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment."[180] In *Rand Water v Stoop & another (Rand Water)*,[181] the LAC held that the Basic Conditions of Employment Act 75 of 1997 (BCEA) was created to promote the right to fair labour practices for both employees and employers equally.[182] According to the court, if the employee could sue for breach of contract, so could the employer.[183]

172 Section 23(1) of the Constitution.
173 Section 9 of the Constitution.
174 Olivier *et al* (2006) 94.
175 (2003) 24 *ILJ* 95 (CC).
176 *NEHAWU* para 33.
177 *NEHAWU* para 34.
178 *NEHAWU* para 37.
179 1996 (4) SA 577 (A).
180 *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* 589C–D.
181 (2013) 23 *ILJ* 576 (LAC).
182 *Rand Water* para 36.
183 *Rand Water* para 36.

According to Cheadle and Davis, the definition of a fair labour practice should be evaluated using the employment axis — "practices that flow from the employment relationship." If the practice does not emanate from this relationship, it is not a labour practice.[184]

In *re Certification of the Constitution of the Republic of South Africa, 1996 (re Certification of the Constitution)*,[185] it was held that the primary development of the law relating to fair labour practices will, in all likelihood, occur in the LC in the light of labour legislation.[186] It was also stated that the CC will play an important oversight role, as labour legislation will always be subject to constitutional scrutiny to ensure that the rights of employees and employers enshrined in the Constitution are respected.[187]

In the context of individual labour law, labour practices include conduct relating to an employee's security (for example, suspension and dismissal), unfair treatment in connection with employment opportunities (for example, promotion, demotion, probation training and benefits), and disciplinary action, short of dismissal.[188] And in the context of collective labour law, labour practices will involve trade union organisation and membership, as well as collective bargaining.[189] The LRA, the

184 Cheadle and Davis (2005) 18. In *National Union of Commercial Catering & Allied Workers v Commission for Conciliation, Mediation & Arbitration, Western Cape & another* (1999) 20 *ILJ* 624 (LC) para 17 the court held that Item 2(1)(c) of Part B of Schedule 7 to the LRA 1995 should be given a wide interpretation rather than a limited one. See also Fudge (2017) *J. Ind. Relat.* 380, who observes that the conventional employment relationship is both contractual and heavily controlled by governmental standards and/or institutions or collective groups responsible for working people. Lopes (2018) *J. Institutional Econ.* 7 expresses the view that labour, a human endeavour that employees typically desire to have significance, is exchanged for compensation and responsibilities. Beyond the significant disparity in the essence of this exchange, the employment relationship is established between two fundamentally disparate entities: an individual who will perform the labour on a personal basis, and an employer, an impersonal (collective and institutional) organisation driven by economic objectives.

185 1996 (10) BCLR 1253 (CC).

186 *In re Certification of the Constitution* para 29.

187 *In re Certification of the Constitution* para 67.

188 Le Roux (2012) *AJ* 45.

189 Le Roux (2012) *AJ* 45.

BCEA,[190] and the Employment Equity Act 55 of 1998[191] (EEA) all seek to give effect to the constitutional right to fair labour practices.[192]

2.3.2 The Labour Relations Act and its Objectives

The LRA aims to promote "economic development, social justice, labour peace and the democratisation of the workplace."[193] It is the main piece of legislation regulating unfair labour practices and dismissals and must be interpreted in accordance with its primary objectives.[194] Three of these objectives are:

(a) to give effect to and regulate the fundamental rights conferred by the Constitution;
(b) to give effect to the obligations incurred by the Republic as a member state of the ILO; and
(c) to provide for the effective resolution of disputes.[195]

Unlike the position during the pre-democratic era, dismissals do not fall under unfair labour practices in the current era. The LRA distinguishes the concept of dismissals from an unfair labour practice.[196] In terms of the LRA, every employee has the right not to be unfairly dismissed, and every employee has the right not to be subjected to an unfair labour practice.[197] The intention is to address the three objectives; this chapter discusses only two. The discussion of dispute resolution is reserved for the subsequent chapter.

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190 Section 2 of the BCEA states that, "The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are—(a) to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution—(i) by establishing and enforcing basic conditions of employment; and (ii) by regulating the variation of basic conditions of employment; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation."

191 Section 2 of the EEA states that, "The purpose of this Act is to achieve equity in the work-place by—(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce."

192 Le Roux (2012) *AJ* 45.

193 Section 1 of the LRA. See *NEHAWU* para 42, where the CC emphasised that one of the LRA's key values is job security. The constitutional right to fair labour practices depends on this right. This right aims to ensure the continuance of a fair working relationship between the employee and the employer

194 See the Preamble to the LRA.

195 Section 1(a)–(d) of the LRA.

196 Section 185 of the LRA.

197 Section 185(a)–(b) of the LRA.

2.3.2.1 Promotion of Section 23(1) of the Constitution

As stated above, the LRA gives effect to the constitutional right to fair labour practices by providing employees with the right not to be subjected to unfair labour practices and the right not to be unfairly dismissed.

The LRA defines dismissal as meaning that "an employer has terminated employment with or without notice."[198] The LRA requires that dismissals must be substantively and procedurally fair.[199] With respect to substantive fairness, the LRA recognises three fair reasons for a dismissal: conduct, capacity, and operational requirements.[200]

As discussed in Chapter 1 of this thesis, apart from the fairness requirements set out in the LRA, it does not specify what substantive and procedural fairness entails. These aspects are engaged within the Code.[201] The Code is written in general terms and acknowledges that each case is unique, and deviations from the Code's norms may be permitted in appropriate circumstances.[202]

The Code addresses five primary aspects of substantive fairness. The first is that employers should have disciplinary codes and guidelines in place, which set out the type of conduct expected and the consequences for non-compliance.[203] It highlights the importance of employers' establishing clear disciplinary rules that define expected employee behaviour, considering the size and nature of the company. The item also emphasises the need for explicit and accessible rules while recognising that some widely accepted norms may not require explicit communication. [204]

The second aspect is an endorsement of the principle of progressive discipline.[205] This makes it clear that employers should not instantly resort to dismissal. The Code

198 Section 186 of the LRA.
199 Section 188 of the LRA and item 2(2) of the Code. See also Grogan (2019) 279. This aligns with the requirements set out in ILO C158 discussed in para 2.3.3.2.
200 Section 188(1)(a) of the LRA.
201 Item 2(1) of the Code states that a dismissal will be regarded as unfair if it is not effected for a fair reason and a fair procedure is not followed.
202 Item 1(1) of the Code.
203 Item 3(1) of the Code.
204 Item 3(1) of the Code.
205 Item 3(2)–(3) of the Code.

recommends informal advice and correction for less severe infractions.[206] For consistent inappropriate behaviour, a progressive approach involving warnings of varying severity is suggested, with termination only considered for serious misconduct or repeated policy violations.[207]

The third aspect to consider is the provision that allows for the dismissal of an employee for a first offence, particularly in cases where the misconduct is deemed intolerable and of a serious nature.[208] The Code further elaborates on this by offering specific instances of what constitutes gross misconduct. This indicates that the severity and intolerability of the employee's actions play a crucial role in determining the appropriateness of immediate dismissal for a first offence.[209]

The fourth aspect is that the decision-maker should consider various factors when evaluating the fairness of dismissals in misconduct cases.[210] These factors include the employee's circumstances, the nature of the job, the specific circumstances surrounding the misconduct, and the seriousness of the misconduct itself.[211]

The fifth aspect involves the considerations that a Commissioner must weigh in determining the fairness or unfairness of a dismissal.[212] These factors include whether the employee breached a workplace rule or standard. If the employee did so, four aspects require consideration: the reasonableness of the rule or standard, the employee's awareness or should-have-known status regarding the rule, the employer's consistent application of the rule, and whether the dismissal was a fair sanction for the violation.[213]

The application of these items to conventional forms of misconduct and contemporary forms of misconduct will be analysed in Chapters 3 to 5 of this thesis. For the purpose of this thesis, conventional misconduct encompasses behaviours or actions that

206 Item 3(2)–(3) of the Code.
207 Item 3(2)–(3) of the Code.
208 Item 3(4) of the Code.
209 Item 3(4) of the Code.
210 Item 3(5) of the Code.
211 Item 3(5) of the Code.
212 Item 7 of the Code
213 Item 7 of the Code.

breach established workplace rules or standards, irrespective of timing. These forms of misconduct are usually well-documented and addressed in existing workplace policies. In contrast, contemporary misconduct arises from modern societal shifts or emerging issues, potentially not previously addressed in traditional workplace policies. For procedural fairness, an employer considering dismissal must follow critical requirements. First, the employer should investigate to ascertain whether valid grounds for dismissal exist.[214] Once grounds are established, the employer must inform the employee of the charges clearly and comprehensively.[215] The employee should have the opportunity to respond to the allegations and be given adequate time to prepare their response, with the option of seeking assistance from a trade union representative or colleague. After the investigation and deliberation, the employer should communicate the final decision to the employee, ideally in writing.[216] According to Grogan, this is the starting point for establishing procedural fairness.[217]

The Code further emphasises that employers should retain records for each employee, including the nature of any disciplinary infractions, the employer's actions, and the reasons for the actions.[218]

2.3.2.2 Giving Effect to International Law

As indicated earlier, one of the objectives of the LRA is to give effect to obligations incurred by the Republic as a member of the ILO.[219] Constitutional provisions showcase the importance of international law.[220] The Constitution states that when interpreting the Bill of Rights, a court or tribunal must consider international law.[221] The

214 Item 4(1) of the Code.
215 Item 4(1) of the Code.
216 Item 4(1) of the Code.
217 Grogan (2017) 277. See Mischke (1997) *Juta's Bus. Law* 175, who states that this requirement is an application of the natural justice rule that both sides have the right to be heard (the principle of *audi alteram partem*), and it is regarded as an important aspect of the pre-dismissal procedure. The LC held in *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others* (D1141/11) [2014] ZALCD 55 (28 October 2014) para 74 that adherence to natural justice is required for procedural fairness. It is the employer's responsibility to ensure that an employee's dismissal is procedurally fair. It was also held in *SAMWU obo Abrahams v City of Cape Town* (2008) 29 *ILJ* 1978 (LC) that when taking disciplinary action against employees, the employer should follow any relevant disciplinary code and collective bargaining agreements.
218 Item 5 of the Code.
219 Section 1(b) of the LRA.
220 Section 39(1) and section 233 of the Constitution.
221 Section 39(1)(b) of the Constitution.

Constitution further provides that, "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[222]

The dismissal provisions provided for in the LRA are aligned with international law. This alignment ensures that workers' rights and protections in the context of termination are consistent with global norms, promoting fairness and equitable treatment in the workplace. The LRA contributes to a more just and harmonised labour environment by adhering to international standards. According to the ILO's Convention on Termination of Employment[223] (C158), an employee's employment should not be terminated unless there is a valid reason for this termination.[224] C158 states that a reason is valid only if it is connected with the employee's capacity, conduct or based on the operational requirements of the undertaking, establishment, or service.[225]

The Termination of Employment Recommendation[226] (R166) identifies additional procedures that may be followed before or at the time of termination.[227] These procedures include giving reasons for termination.[228] R166 endorses the use of progressive discipline. The provision indicates that an employee's employment "should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning."[229]

222 Section 233 of the Constitution.
223 C158, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158, accessed 1 August 2021.
224 C158, Article 4.
225 C158, Article 4.
226 R166, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R166, accessed 1 August 2022.
227 R166 para 12.
228 R166 para 12. Paragraph 13 states that an employee has the right to receive a written statement from his or her employer detailing the reason or reasons for termination upon request.
229 R166 para 7.

Even though South Africa has not ratified C158, its principles have been considered by South African judges in unfair dismissal cases.[230] However, C158 and R166 regulate dismissals in general. Neither instrument independently recognises or gives direction on adjudicating dismissals for off-duty misconduct.

The Promotion Framework for Occupational Safety and Health Convention 187 (C187), which focuses on workplace safety, is also relevant to this thesis. It is important to note that there were initially four categories of Fundamental Principles and Rights at Work (Fundamental Principles) until 2022. In 2022, the ILO added health and safety to these Principles. Consequently, the implications of C187, which address dismissal for off-duty cannabis use, will be considered in Chapter 5 of this thesis.

2.4 Conclusion

The chapter's main aim was to establish how the current legal framework governs dismissals for off-duty misconduct. In establishing this aim, the following conclusions can be drawn.

First, South African dismissal laws have evolved significantly, reflecting the country's transition from the pre-democratic apartheid era to the post-democratic period. During the apartheid regime, labour laws were often discriminatory and biased against certain racial groups, leading to unequal treatment in employment matters. With the advent of democracy and the enactment of the LRA, South Africa underwent a transformative shift towards a more inclusive and equitable labour landscape.

Secondly, despite significant growth in the legislative framework governing labour practices, the current system regulating dismissals for misconduct in South Africa remains largely generic, applying broadly to both on-the-job misconduct and off-duty misconduct. This generic approach may inadequately address the considerations required for off-duty misconduct cases, where the boundaries between personal and professional life are often blurred.

230 *Mahlangu v CIM Deltak, Gallant v CIM Deltak* (1986) 7 *ILJ* 346 (IC) 356G; *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC) 839–840, where the court held that the C158 is important in the interpretation and application of the LRA.

Lastly, the regulation of dismissals for off-duty misconduct may result in unfairness and possible infringement of employees' rights. Subsequent chapters will analyse these aspects, providing a deeper understanding of how the existing legal framework governs off-duty misconduct in both conventional and contemporary contexts.

CHAPTER 3

ADJUDICATION OF DISMISSALS FOR OFF-DUTY MISCONDUCT

3.1 Introduction

The preceding chapter provided a thorough exploration of the legislative framework that governs dismissals. It became evident that this framework does not distinguish between the treatment of dismissals for on-the-job misconduct and off-duty misconduct. This chapter focuses on the dispute resolution process of conventional forms of off-duty misconduct, notably arbitration at the CCMA and review at the LC.

According to a study of case law on conventional off-duty misconduct, the commonest forms of off-duty misconduct are dishonest conduct, including criminal offences such as theft and fraud; assault; and sexual harassment, as discussed below.

This chapter examines the dispute resolution process within the CCMA and LCs, focusing primarily on assessing the fairness of off-duty misconduct determinations through these channels. The chapter also investigates the practical application of the nexus and the breakdown of the employment relationship tests. During the case law analysis, the chapter evaluates whether the current legal framework applies seamlessly to conventional off-duty misconduct cases. The analysis is based on how guilt is established and the criteria that decision-makers employ to determine dismissal as a fair sanction in these cases. In conclusion, a determination is made as to whether the entire legal framework adequately applies to conventional off-duty misconduct.

3.2 Dispute Resolution

3.2.1 The Role of the Commission for Conciliation, Mediation and Arbitration

The LRA provides for the processes of conciliation and arbitration to resolve disputes.[231] The CCMA is an independent authority primarily responsible for the dispute resolution process outlined in the LRA.[232] The CCMA was established because the primary goal of unfair dismissal legislation is to safeguard individual employees against the arbitrary termination of their employment.[233] As a result, these dispute-resolution mechanisms were established to address the shortcomings of the previous statutes.[234]

The LRA outlines the procedure for employees to challenge unfair dismissals.[235] The CCMA facilitates the resolution of labour disputes with efficiency and minimal formality,

231 The Preamble to the LRA and section 115(1) of the LRA.
232 Section 113 of the LRA.
233 Cassim (1984) *ILJ* 276.
234 Steenkamp and Bosch (2012) *AJ* 121 comment that the drafters of the LRA Bill recognised that applying the old Act's conciliation processes needed intelligence and skill and that the conciliation process was tangled in procedural complexities. These problems were exacerbated by a lack of resources and people who were underpaid and undertrained. To many, the IC was merely a name. It was not a part of the formal judicial hierarchy and lacked the stature of a high court. Its employees lacked job security, and their remuneration packages were low.
235 Section 191 of the LRA.

initially attempting conciliation to mediate the conflict. If conciliation fails, the matter proceeds to arbitration, where the commissioner evaluates the fairness of a misconduct-related dismissal. The LRA specifies that the employee must prove the dismissal, and the employer must prove its fairness.[236]

In determining the fairness of a dismissal, any person determining whether a dismissal for misconduct is unfair should consider the Code.[237] As alluded to in para 2.3.2.1 above, the Code is applied in two stages. In the first stage, the decision-maker must consider whether the employee violated a work rule, thus establishing guilt. After this is established, the commissioner will determine whether dismissal was a fair sanction. These two stages are discussed below.

3.2.2 Determining Fairness during Arbitration

3.2.2.1 Establishing Guilt

As stated in the paragraph above, to establish guilt, it must be determined that the employee breached a workplace rule that was relevant to the workplace, even if that rule may not have been formally documented.[238] The responsibility of demonstrating that an employee contravened a workplace rule falls squarely on the employer. Ideally, these rules should be clearly outlined in the organisation's disciplinary policies or codes, providing a structured framework for evaluating employee behaviour, though the Code acknowledges that some rules do not have to be explicitly documented.[239]

However, having clear and written rules in place is important for ensuring fairness, consistency, and transparency in employment relationships. This set of rules provides employees with a clear understanding of the expected standards of conduct and the consequences of misconduct, fostering a sense of procedural fairness. Without these written rules, employees may argue that they were unaware of certain expectations, potentially making it difficult to establish guilt.[240]

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236 Section 192 of the LRA.
237 Items 7 of the Code.
238 Item 3(a)–(b)(ii) of the Code.
239 Johns (2017) *Harv. Negot. L. Rev.* 4.
240 Johns (2017) *Harv. Negot. L. Rev.* 5.

During the process of establishing guilt the decision-maker must also consider the unique circumstances surrounding the off-duty misconduct, as well as its relevance and impact within the workplace.[241] This approach should be firmly rooted in a commitment to ensuring a fair and impartial assessment of the situation, considering factors such as the nature of the misconduct and its potential consequences on aspects such as workplace harmony, safety, and reputation.[242]

3.2.2.2 Establishing Whether Dismissal is a Fair Sanction

After guilt is established, the decision-maker moves to the second stage of the inquiry. During this stage, the central question is whether, when all relevant factors are considered, the employee's misconduct has reached a level where continued employment becomes untenable or whether the cumulative impact of the misconduct justifies dismissal as the only reasonable recourse.[243] In making this determination, the presiding officer is tasked with exercising a value judgement to assess the appropriateness of the sanction.[244] This evaluation necessitates examining both the employer's overall response to the misconduct and any specific sanctions outlined in the organisation's disciplinary code for this misconduct. Dismissal as a sanction is regarded as suitable when it aligns with what is conventionally regarded as constituting serious misconduct.[245]

It is argued that this second stage analysis emphasises the importance of context and proportionality in dismissals. It acknowledges that not all forms of misconduct warrant the same response and emphasises the need for a balanced assessment that considers the gravity of the misconduct, its impact on the employment relationship, and whether the prescribed disciplinary action is commensurate with the offence.[246] Ultimately, this approach seeks to ensure fairness and consistency in employment-related decisions while allowing for flexibility in addressing varying degrees of misconduct. Furthermore, this process aligns with the principle that, in general, it is

241 Item 3(1) of the Code.
242 *City of Cape Town* para 15.
243 Items 3 and 7 of the Code.
244 Item 95 of the CCMA Guidelines.
245 Item 96 of the CCMA Guidelines.
246 *National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine* (1995) 16 *ILJ* 1371 (A) 1375D–E.

not justifiable to terminate an employee's contract after a first offence unless the misconduct is sufficiently severe and intolerable, such as instances of blatant dishonesty, deliberate harm to the employer's property, reckless endangerment of others' safety, physical assault on colleagues or clients, or flagrant insubordination.[247]

In *National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine*,[248] the Appellate Division referred to Cameron, Cheadle and Thompson *The New Labour Relations Act: The Law after the 1988 Amendments* where it was asserted that:

> "A fair reason in the context of disciplinary action is an act of misconduct sufficiently grave as to justify the permanent termination of the relationship. Fairness is a broad concept in any context, and especially in the present. It means that the dismissal must be justified according to the requirements of equity when all the relevant features of the case - including the action with which the employee is charged - are considered."[249]

Arguably, employers' policies must articulate clear and comprehensible standards of behaviour presented in a format that employees can easily understand. The communication of policies ensures that employees are well-informed about the expectations placed upon them and are equipped with a clear understanding of the consequences of misconduct, whether it occurs within or outside the workplace. By adhering to these principles, employers can mitigate potential disputes, enhance fairness, and maintain a harmonious work environment while safeguarding their own interests and the rights of their employees.

If, after dispute resolution, the commissioner determines that an unfair dismissal has occurred, appropriate remedies should be granted.[250] These remedies are briefly discussed below.

247 Item 3(4) of the Code.
248 (1995) 16 *ILJ* 1371.
249 *National Union of Mineworkers v Free State Consolidated Gold Mines (Operations) Ltd - President Steyn Mine; President Brand Mine; Freddies Mine* 1375D–E.
250 Section 193 of the LRA.

3.2.3 Remedies

The LRA allows the arbitrator to order employee reinstatement from a date no earlier than the dismissal date.[251] Remedies such as re-employment and compensation may also be awarded.[252]

According to the language of the LRA, reinstatement is the first and most essential legislative remedy for unfair dismissal, followed by re-employment.[253] The distinction between reinstatement and re-employment is often blurred, and neither term is defined in the LRA.[254] An order of reinstatement restores the employer-employee contractual relationship as if it had never been broken in the first place.[255] By contrast, a re-employment order establishes a new relationship that may or may not be the same as the old one. It symbolises the end of one employment relationship and the start of another.[256]

The courts have consistently tended to order reinstatement in disputes where there is neither evidence of intolerable behaviour nor a breakdown in the employment relationship. In *Booi v Amathole District Municipality & others* (*Amathole*),[257] the CC held that the phrase "intolerable" in workplace relationships implies a degree of intolerability that goes beyond working relationship issues or sourness. The CC clarified that this stringent criterion is a protective measure within the LRA's reinstatement injunction, allowing employees to have their terminated employment contracts reinstated and be returned to their pre-dismissal positions.[258]

In *Amathole,* the CC referred to *Amalgamated Pharmaceuticals Ltd v Grobler NO & others,*[259] where the LC, in a significant ruling, emphasised that merely lacking trust in

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251 Section 193(1) of the LRA.
252 Section 193(4) of the LRA.
253 Section 193(2) of the LRA.
254 Kubjana and Manamela (2019) *Obiter* 331. Section 193(4) of the LRA states: "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."
255 *Steel Engineering & Allied Workers Union of SA & others v Trident Steel (Pty) Ltd* (1986) 7 *ILJ* 418 (IC) 437F.
256 *National Union of Mineworkers v Haggie Rand Ltd* (1991) 12 *ILJ* 1022 (LAC) 1027E–J.
257 (2022) 43 *ILJ* 91 (CC).
258 *Booi v Amathole District Municipality & others* para 40; section 193(2) of the LRA.
259 (2004) 25 *ILJ* 523 (LC).

the individual respondents, without additional evidence or cause, could not provide a sufficient basis to conclude that the employment relationship had irreparably broken down.[260] The court further stated that penalising the individual respondents with unemployment, even if coupled with some form of compensation in the absence of any misconduct on their part, would constitute a grave injustice.[261]

Also cited in *Amathole* was *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others,*[262] where Froneman J held that if specific behaviour did not merit dismissal as a disciplinary remedy, it is unclear why the same conduct would be a viable cause for denying reinstatement.[263]

Furthermore, the preference for reinstatement extends to review cases where it is deemed unreasonable for an arbitrator to conclude that the employee committed any misconduct directly linked to their employment.[264] In these instances, reinstatement is regarded as a suitable solution, reflecting the judiciary's commitment to preserving the employment relationship when the circumstances warrant it and when allegations of employee misconduct remain unsubstantiated.

3.2.4 Determining Fairness of Dismissals during Review at the Labour Court

Should either party be dissatisfied with the outcome of the arbitration process, the LRA provides for the review of arbitration awards.[265] The LRA states that any party to a dispute who alleges a defect in any arbitration procedures conducted by the CCMA may apply to the LC for an order setting aside the arbitration result.[266] A review application can be based on the following defects: that the commissioner engaged in misconduct in connection with the commissioner's duty as an arbitrator, committed a significant irregularity in the conduct of the arbitration procedures, exceeded the commissioner's authority; or either party illegally obtained an award.[267]

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260 *Amalgamated Pharmaceuticals Ltd v Grobler NO & others* para 13.
261 *Amalgamated Pharmaceuticals Ltd v Grobler NO & others* para 13.
262 (2010) 31 *ILJ* 273 (CC).
263 *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* para 29.
264 *Dikobe v Mouton NO & others* (2016) 37 *ILJ* 2285 (LAC) (*Dikobe*), discussed below, illustrates this.
265 Section 145 of the LRA.
266 Section 145(1) of the LRA.
267 Section 145(2) of the LRA.

The LC must then decide whether the arbitrator's decision was reasonable. It should be noted that South African courts no longer use the reasonable employer review test.[268] The test used by the LCs is the reasonable decision-maker test that the CC stated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (*Sidumo*).[269] In line with the *Sidumo* judgment, evaluating whether an employee should be dismissed for misconduct involves two inquiries. First it should be determined whether misconduct occurred by evaluating whether a reasonable workplace rule was breached and whether the employee was aware of it.[270] The second consideration is whether dismissal is an appropriate penalty for the misconduct.[271]

The CC in *Sidumo* articulated several factors that must be considered when determining the fairness of the sanction of dismissal. These factors encompass the significance of the violated rule, the rationale behind the dismissal, the employee's grounds for challenging it, the harm caused by the employee's actions, and whether additional training could prevent future misconduct.[272] The court held that the commissioner is expected to consider all the applicable circumstances.[273] After considering all the facts and the parties' conflicting interests, the commissioner must decide what is equitable. Ultimately, the question is whether the commissioner's decision is one that a fair decision-maker could not reach.[274]

In *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and others* (*Ekurhuleni*),[275] the LAC applying the review test held that, "Commissioners must evaluate all relevant facts, including the dispute's nature, the union's remedies, and arbitration evidence. A comprehensive analysis of all the

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268 The reasonable employer test originated in English law. Section 57(3) of the Employment Rights Act 1996 (c 18) (ERA) in the UK states that the determination of whether the dismissal was fair or unreasonable, having regard to the reasons given by the employer, shall be based on whether the employer behaved fairly or unreasonably in dismissing the employee in the circumstances. In *British Leyland (UK) Ltd v Swift* [1981] IRLR 91, the Court of Appeal held that the key question to be asked was whether it was reasonable for the employer to dismiss the employee. If it was not, then the dismissal would be regarded to be unfair.

269 (2007) 28 *ILJ* 2405 (CC).

270 *Sidumo* para 281.

271 *Sidumo* para 270.

272 *Sidumo* para 78.

273 *City of Cape Town* para 15.

274 *City of Cape Town* para 15.

275 [2022] 4 BLLR 324 (LAC).

material facts often reveals the merits of each case."[276] Furthermore, in *CUSA v Tao Ying Metal Industries & others*,[277] the CC, referring to the *Sidumo* test, emphasised that it is crucial for a commissioner to consistently engage their critical thinking in evaluating the merits of a case to determine dismissal as a fair sanction.[278] The CC implied that when a commissioner genuinely considers the relevant issues, they are less likely to arrive at a decision that an irrational or unreasonable commissioner might reach.[279]

It should be pointed out that *Sidumo* is consistent with the substantive provisions of the Code.[280] According to both *Sidumo* and the Code, commissioners must evaluate whether the employee violated an employer's policy that constituted a legitimate or reasonable rule or standard and whether, all relevant factors considered, dismissal was a fair sanction.[281]

In addition to the Code and review tests, there are judicial tests that help decision-makers evaluate the fairness of dismissal in cases of off-duty misconduct. These judicial tests are now discussed.

3.3 Off-Duty Misconduct Tests Developed by the Judiciary: The Two-Pronged Inquiry

As discussed in paragraph 3.1, the fairness of dismissals linked to off-duty misconduct is evaluated using two distinct tests: the nexus test for establishing guilt and the breakdown of the employment relationship test to determine the fairness of the dismissal. The nexus test closely examines the degree to which the off-duty misconduct is linked to the workplace and its detrimental impact on the work environment.[282] This test aims to assess whether there is a substantial connection between the employees' actions outside work and their role within the company.[283]

276 *Ekurhuleni* para 13.
277 [2009] 1 BLLR 1 (CC).
278 *CUSA v Tao Ying Metal Industries & others* para 77.
279 *CUSA v Tao Ying Metal Industries & others* para 77.
280 Item 7 of the Code.
281 *Sidumo* and item 7 of the Code.
282 Johns (2017) *Harv. Negot. L. Rev.* 3.
283 Eccles *et al* (2007) *Harv. Bus. Rev.* 3.

Conversely, the second stage focuses on determining whether dismissal is an appropriate and reasonable response, considering the seriousness of the off-duty misconduct and whether it warrants a measure as severe as dismissal.[284] This assessment ensures that the disciplinary action aligns with the gravity of the misconduct, maintaining a balance between the employees' rights and the employer's interests. These two tests are explored below.

3.3.1 The Nexus Test

The courts define the nexus as the connection between an employee's off-duty conduct and the workplace. This nexus can take many different shapes.[285] The *Merriam-Webster Dictionary* defines a "nexus" as a connection or causal link.[286] This thesis defines a "nexus" as a connection between the employee's conduct and the employer's legitimate business interests.[287] For example, the employee's behaviour may have harmed the employer's business interests, such as bringing the employer's name into disrepute, thus harming the employer's reputation.[288]

According to Arbitrator Bard, "The right of management to discharge or suspend an employee for conduct away from his or her place of employment depends entirely

284 *Sidumo* and item 7 of the Code.

285 See *City of Cape Town* para 21, where the arbitrator stated that for an employee to be dismissed for off-duty misconduct, there must be a sufficient nexus between the employer's business and the employee's conduct. See also Chitimira and Lekopanye (2019) *DIREITO GV L. Rev.* 3.

286 See "nexus", https://www.merriam-webster.com/dictionary, accessed 12 July 2021.

287 Johns (2017) *Harv. Negot. L. Rev.* 3.

288 Eccles *et al* (2007) *Harv. Bus. Rev.* 3–4 give categories of definition and asserts that the extent to which a business is susceptible to reputational risk is determined by three factors. The first question is whether its reputation outweighs its genuine nature. The second factor is how much external beliefs and expectations change, which may either enlarge or (less likely) close this difference. The third factor is the level of internal coordination, which may also have an impact on the distance. Recognising that reputation is a matter of perception is the first step towards effectively managing reputational risk. A company's overall reputation is determined by its reputation in specific categories among its various stakeholders (investors, customers, suppliers, employees, regulators, politicians, non-governmental organisations and the communities in which the firm operates) product quality, corporate governance, employee relations, customer service, intellectual capital, financial performance, handling of environmental and social issues. A strong favourable reputation among stakeholders across several categories will translate into a strong positive reputation for the organisation as a whole. See *Dolo v Commission for Conciliation, Mediation & Arbitration & others* [2010] JOL 26442 (LC) para 19.

upon the impact of that conduct upon the employer's operations."[289] The test, known as the "nexus test" or "nexus requirement", is also used in South African courts and by the CCMA.[290] Labour court judges use this test to examine the relationship and connection between the employee's conduct and the employer's business when deciding off-duty misconduct cases.[291] If the employee's off-duty behaviour did not harm or negatively impact the employer's business interests, the employer has no right to discipline the employee because there will be no nexus.[292]

The need to institute disciplinary action is strengthened if the off-duty misconduct involving an employee is reported in the press, particularly if the misconduct involves a serious crime.[293] Arbitrators are also more likely to find the necessary nexus when the employee's position is one of high public visibility, regardless of the severity of the off-duty misconduct.[294]

Although off-duty misconduct damages an employer's business interests, such as its reputation, the damage to a company's reputation is challenging to establish. Decision-makers will determine this damage by judging the circumstances of each case.[295] Even so, without any objective measurement of actual harm, determining whether an employee's conduct has harmed the company's reputation is a highly subjective question.[296]

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289 *City of New Hope v International Union of Operating Eng'rs Local* 49, 89 Lab. Arb. (BNA) 427, 430, as quoted in Kearney (1993) *Notre Dame Law Rev.* 137. See also Kanamugire (2014) *Mediterr. J. Soc. Sci.* 430.

290 See *Edcon Ltd v Cantamessa and others* [2020] 2 BLLR 186 (LC) para 16, where the court stated that it was important to find the connection between the employee's conduct and the workplace to find liability.

291 *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another* (1993) 14 *ILJ* 1449 (LAC) para 146 (*Hoechst*). Even though the acts of racism did not occur at work, the court found a sufficient nexus between racism and employment in *Biggar v City of Johannesburg (Emergency Management Services)* (2017) 38 *ILJ* 1806 (LC) 1810. Even though the racist remarks were made outside the workplace, outside normal working hours, and not in the performance of tasks, the court was convinced that they had tainted the workplace atmosphere.

292 *Cantamessa* para 11.

293 *Dolo* para 25. See also *Cantamessa* para 4.

294 See *Cantamessa* para 16. The court added that the success of a business depends largely on how it markets itself to the general public. As a result, having a good name is an essential asset or quality of Edcon to the general public. The court remarked that Ms Cantamessa's post was highly visible to Edcon customers because she had stated on her Facebook profile that she was an Edcon employee. See also Kearney (1993) *Notre Dame Law Rev.* 135.

295 Kearney (1993) *Notre Dame Law Rev.* 135.

296 Kearney (1993) *Notre Dame Law Rev.* 135.

It is essential to recognise the fundamental similarities among the Code, judicial tests, and review tests when assessing guilt in cases involving off-duty misconduct. Shared objectives guide these components throughout their application. In this initial stage of inquiry, the Code and the nexus test focus primarily on one critical aspect: evaluating whether the employee can be considered guilty of the alleged misconduct.[297]

The following cases provide a comprehensive illustration of how the judiciary has adeptly discerned a connection or nexus between an employee's off-duty conduct and the vested business interests of the employer in conventional off-duty misconduct cases.

In the case of *Dikobe v Mouton NO & others*, an off-duty casino employee was seen entering the establishment with a customer who used Most Valuable Guest vouchers (MVG vouchers).[298] These vouchers were typically given to VIPs to encourage longer stays and promote gambling.[299] The employee, "in violation of a work rule" (employees of the casino could not be in possession of vouchers), handled the vouchers that belonged to a guest, resulting in his dismissal.[300]

At arbitration, the dismissal was found to be substantively fair.[301] The arbitrator reasoned that it had been established that the employee was in possession of vouchers that he was not authorised to possess according to company policy and that he used them to purchase a drink for a guest and himself, thereby establishing guilt.[302] On review, the LC confirmed this decision.[303] The LC held that the rule was indeed breached, so the employee was guilty.[304]

On appeal, the LAC held that the rule was presumably meant for on-the-job employees and so did not apply to off-duty employees.[305] The court added that an off-duty

297 Item 7(a)–(b)(iii) of the Code.
298 (2016) 37 *ILJ* 2285 (LAC) para 1.
299 *Dikobe* para 1.
300 *Dikobe* para 2.
301 *Dikobe* para 12.
302 *Dikobe* para 12.
303 *Dikobe* para 3.
304 *Dikobe* para 26.
305 *Dikobe* para 26.

employee could enter the casino bar and transact like any other guest.[306] The LAC could not establish guilt because, in its opinion, there was no violation of the work rule. The LAC then made a significant remark about work rules and commented that the employee's dismissal was unfair because the employer failed to show the presence of a clear work rule as the disciplinary code did not provide for it.[307] Nor was there proof that the regulation was conveyed to the employees. The LAC stated: "Although not all regulations must be in writing, the employer will have a greater burden to prove the presence of a non-written rule."[308] The court added that even if a rule had been breached (which in this case it had not been), the rule was unreasonable, and the employee's seventeen-year clean record should have been considered.[309] The employee was reinstated.[310] In reinstating the employee, the LAC commented:

> "In the absence of evidence to demonstrate intolerability or impracticability as contemplated by section 193(2) of the Labour Relations Act 66 of 1995, no lawful reason exists not to order reinstatement."[311]

This case exemplifies the challenge that adjudicators face when distinguishing between conduct related to an individual's job and behaviour unrelated to their employment. In this instance, the CCMA and the LC could not clearly distinguish between "on-the-job" and "off-duty" actions. Their verdict rested on the premise that the employee transgressed a workplace regulation. The LAC held a contrary perspective, asserting that the employee's actions occurred while he was off duty, thus negating any violation of workplace rules and an associated nexus with the employer's business interests. In essence, the CCMA and the LC found the employee culpable, but the LAC disagreed, ultimately resulting in conflicting judgments.

Determining the nexus between off-duty misconduct and business interests is a multifaceted and often subjective challenge, leading to inconsistent outcomes in dismissal cases. Although the Code provides that employees can be found guilty of breaking unwritten rules, the case of *Dikobe* underscores the critical importance of employers' establishing clear, reasonable, and effectively communicated off-duty

306 *Dikobe* para 26.
307 *Dikobe* para 16.
308 *Dikobe* para 16.
309 *Dikobe* para 26.
310 *Dikobe* para 27.
311 *Dikobe* para 27.

policies. These policies should define acceptable conduct and make a genuine connection between the employee's off-duty conduct and the employer's business interests.

In off-duty misconduct cases, a significant challenge arises in establishing guilt, particularly when the alleged misconduct is not directly connected to the workplace. This situation creates a grey area where employees may be found guilty of off-duty misconduct without clear guidelines or company policies explicitly addressing this behaviour. The *Dikobe* case sheds light on the inherent difficulty of drawing a definitive line between on-the-job and off-duty conduct. This distinction can vary significantly, because of industry norms, specific circumstances, and interpretations by different adjudicators. It is therefore submitted that achieving greater consistency in these cases would require not only a concerted effort from employers to set clear guidelines but also legislative reforms to provide more precise definitions and standardised criteria for evaluating off-duty misconduct. These reforms could go a long way to streamlining the decision-making process and ensuring fair and equitable outcomes in establishing guilt for off-duty conduct.

For employers, the uncertainty surrounding the establishment of a sufficient nexus makes it challenging to make informed decisions about employees' guilt in off-duty conduct. Without clear guidelines, employers may struggle to determine when this conduct can be deemed to have a connection to the workplace. For their part, employees also struggle with uncertainty, as they may be unclear about which forms of off-duty conduct are linked to the workplace and could potentially affect their employment. This lack of clarity can impact their job security and create anxiety about potential repercussions for actions outside the workplace.

Employees have faced dismissal for off-duty assault, constituting another category of off-duty misconduct. This was the charge faced by the employee in *Foschini Group (Pty) Limited v CCMA and Others* (*Foschini*).[312] The employee stabbed an employee of a nearby store several times while she was on the ground.[313] The stabbing incident

312 (J5079/00) [2001] ZALC 52 (10 April 2001).
313 *Foschini* para 2.

took place five doors away from the entrance to the applicant's shop, on the pavement in Hennenman, a small town in the Free State.[314] The altercation leading to the attack began in the morning between the third respondent and the victim. Following the argument, the victim sought to call the police, and during the ensuing confrontation, the victim fell to the ground after the first stab-wound.[315] A witness for the applicant testified that the victim was subsequently stabbed multiple times while lying on the ground.[316]

At the CCMA, the arbitrator found the employee not guilty.[317] The arbitrator's decision was primarily based on the fact that the incident did not occur on the employer's premises, and the victim was not a colleague of the employee.[318]

On review, the LC held that the fact that the assault did not occur on the applicant's premises was of minor significance.[319] The court concluded that there was indeed a connection between the employee's off-duty misconduct and the employer's business interests.[320] The LC highlighted several other factors that further demonstrated the link between the employee's conduct and the employer's business.[321] This connection was regarded as crucial in establishing guilt. Consequently, the court found that the employee's conduct had a tangible impact on the employer's business, solidifying the existence of a nexus in this case.[322]

The court referred to *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale & others (SA Polymer)*,[323] where the LAC significantly remarked:

> "criminal conduct on the part of an employee off the employer's premises and not during working hours does not preclude the employer from assessing such conduct in the context of the actual or potential effect in the workplace and to the personnel and the property of the employer. The fact that the conduct is not directed at or against fellow employees is equally immaterial. Whether such conduct had the effect of destroying or seriously damaging the relationship of the employer and employee, depends on a number of factors. These include

314 *Foschini* para 7.
315 *Foschini* para 7.
316 *Foschini* para 7.
317 *Foschini* para 3.
318 *Foschini* para 3.
319 *Foschini* para 4.
320 *Foschini* para 10.
321 *Foschini* para 10.
322 *Foschini* para 10.
323 (1994) 15 *ILJ* 277 (LAC).

> the nature of the criminal conduct, the nature of the work or services performed by the employee, the potential effects which the conduct may have on the employer's business, and in particular its profile in the eyes of its clients and the public, and the impact which the conduct may have on the relationship between the employer and the employee, and between the employee and his co-workers. These are broad outlines and are not intended to be exhaustive."[324]

In *Custance v SA Local Government Bargaining Council & others* (*Custance*),[325] an employee was dismissed for physically and verbally assaulting a fellow employee and calling him a "kaffir."[326] At arbitration, the employee argued that the employer had no right to discipline him because the conduct occurred off duty.[327] On review, the LC cited *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others*[328] and held that the racial slurs revealed deep-seated bigotry that had no place in a democratic society.[329] The employee was deemed to have committed misconduct by partaking in such speech.[330]

What is particularly noteworthy in this case is that the court emphasised that it is not the location or timing of the offensive words that matter most.[331] Instead, according to the court, what carried weight was the employee's mind-set that persisted even when the employee was off duty.[332] According to the court, this mind-set could directly impact the employment relationship when the employee is on duty.[333]

The court's finding that the off-duty mind-set of the employee can affect their on-duty conduct and thereby establish guilt solidified the principle that employers have a legitimate interest in ensuring that their employees should not engage in behaviour that is inconsistent with the values and standards of the workplace, even outside working hours.[334]

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324 *SA Polymer Holdings* Labour Court Digest 1994 (3) Part 4 at 226, as quoted in *Foschini* para 14.
325 (2003) 24 *ILJ* 1387 (LC).
326 *Custance* para 13.
327 *Custance* para 13.
328 (2002) 23 *ILJ* 863 (LAC); (2002) 23 *ILJ* 863 (LAC).
329 *Custance* para 29.
330 *Custance* para 28. See *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 *ILJ* 340 (LAC), [2000] 3 BLLR 243 (LAC).
331 *Custance* para 28.
332 *Custance* para 28.
333 *Custance* para 28.
334 *Custance* para 28.

The comparison between the decisions in *Foschini*, where the employee assaulted a third party, and *Custance*, where the employee assaulted a fellow employee, highlights a significant aspect. While *Foschini* involved an off-duty incident with a non-employee, and *Custance* centred on an off-duty assault against a fellow employee, these cases underscore the potential for employee dismissal irrespective of the target of the assault during off-duty hours. In the application of the nexus test to determine guilt, the courts in both cases concluded that the employee's conduct, which was assault, was related to the workplace; hence, they were guilty of misconduct. Furthermore, the courts found the misconduct severe enough to warrant the breakdown of the employment relationship, thus justifying dismissal in both cases. However, the author agrees with Grogan's point of view that an employee should only be dismissed if the off-duty assault was committed against a co-worker.[335]

In support of Grogan, it is contended that assault against co-workers establishes a sufficient nexus to justify the guilt of the employee, as co-workers are integral parts of the employer's organisation. Assaulting a co-worker, even off duty, disrupts the workplace environment, compromises fellow employees' safety, and directly impacts the employer's interests. This clear and tangible nexus between the employee's conduct and the employer's business interests strengthens the case for dismissal.

In *Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation & Arbitration & others* (*Real Time*),[336] an employee occupying the position of a general worker was dismissed because of an altercation with a co-employee just outside the workplace after working hours, resulting in his disciplinary hearing and subsequent guilty verdict for gross misconduct.[337] He then filed an unfair dismissal dispute with the CCMA, which proceeded to arbitration, where the arbitrator found his dismissal procedurally and substantively fair.[338]

On review, the LC found that the altercation between the employee and a co-worker, which occurred outside the appellant's work premises after working hours, could not

335 Grogan (2019) 414.
336 (2022) 43 *ILJ* 1642 (LAC).
337 *Real Time* para 7.
338 *Real Time* para 7.

be considered a violation of any workplace rule and could not justify a verdict of guilt.[339] The LC also noted that there was no evidence to suggest that the incident impacted the appellant's business operations.[340] Consequently, the court considered it unreasonable for the arbitrator to conclude that the employee had engaged in any misconduct related to his employment.[341] This case illustrates that off-duty assault against a fellow employee should not automatically warrant disciplinary action. The implication is that the circumstances surrounding the assault need to be carefully considered before taking any punitive measures. It recognises that not all situations are the same, and a blanket policy for disciplinary action may not be appropriate. This could be based on the understanding that personal matters outside of work may sometimes spill into conflicts, and it may not always be fair or justified to penalise an employee for actions that occur outside of work hours.

The case of *South African Police Service and another v Van der Merwe NO and others* (*SAPS*)[342] dealt with criminal behaviour towards a fellow employee and a third party. Here, a South African Police Service (SAPS) employee, who was an inspector, was dismissed for assaulting a fellow employee and defrauding a friend off duty.[343] An arbitration ruling found the dismissal unfair and ordered re-employment.[344] The CCMA commissioner relied on SAPS regulation 20(z), which read, "An employee will be guilty of misconduct if he or she, amongst other things, commits any common law or statutory offence."[345] The commissioner's interpretation of SAPS regulation 20(z) was that the provisions of the regulation would come into effect only once an employee was found guilty by the criminal court of having committed the common law criminal offence. As no convictions occurred, the employee was found not guilty.[346] On review, the LC emphasised that regulation 20(z) encompassed behaviour both within and outside the employment relationship, aiming to maintain public trust and uphold ethical standards.[347] The LC further held that failure to regulate off-duty criminal conduct could

339 *Real Time* para 17.
340 *Real Time* para 17.
341 *Real Time* para 17.
342 [2013] 3 BLLR 320 (LC).
343 *SAPS* para 1.
344 *SAPS* para 10.
345 *SAPS* para 10.
346 *SAPS* para 10.
347 *SAPS* para 18.

harm public confidence in the police.[348] So the LC found the employee guilty of misconduct.[349]

The author observes that *SAPS* stands out as a distinctive legal precedent, primarily because of its involvement with a law enforcement agency and its profound implications for public trust and ethical standards. In the realm of law enforcement, officers are vested with a special responsibility to uphold justice and maintain law and order.[350] This duty extends beyond official working hours, making off-duty conduct equally significant and establishing a nexus between police officers' off-duty behaviour and SAPS.[351] The case emphasises that the behaviour of police officers, both on and off duty, carries immense weight in terms of public perception and trust in law enforcement. By addressing off-duty misconduct, the case aims to safeguard the public's trust in law enforcement and uphold the criminal justice system's legitimacy, making it a pivotal reference point for professions where public trust is paramount.

In summary, it is observed that the inconsistencies in establishing the presence of a nexus in off-duty misconduct cases in South Africa do raise questions and may reflect a certain degree of confusion or lack of clarity in legal interpretations. These inconsistencies can perplex employers and employees as they create uncertainty regarding the boundaries of acceptable off-duty behaviour and the potential implications for employment.

In some cases, as highlighted in the *Custance* and *Foschini* cases, the courts have found a nexus between off-duty misconduct and employment, leading to dismissals being considered fair. By contrast, the *Real Time* case saw the courts determining that no such nexus existed, resulting in a different outcome.

This disparity in outcomes suggests that there may be differing judicial interpretations of what constitutes a sufficient connection between off-duty conduct and the employment relationship. The lack of uniformity in these decisions can make it

348 *SAPS* para 18.
349 *SAPS* para 24.
350 *SAPS* para 18.
351 *SAPS* para 18.

challenging for employers to predict how similar cases will be decided and for employees to understand the boundaries of acceptable behaviour outside work.

3.3.2 The Breakdown of the Employment Relationship Test

The Code outlines a general principle regarding the dismissal of employees for a first offence.[352] It suggests that, in most cases, it is not considered appropriate to terminate an employee's contract for a first offence unless the misconduct is severe. The severity of the misconduct should be such that it renders the continuation of the employment relationship intolerable.[353]

Moreover, the Code then provides examples of misconduct that could be deemed serious enough to warrant immediate dismissal. These include gross dishonesty, wilful damage to the employer's property, wilful endangerment of the safety of others, physical assault on the employer, a colleague, a client, or a customer, and gross insubordination.[354] These are instances where the breach of trust or threat to the safety and harmony of the workplace is so significant that it can be argued that the employment relationship has fundamentally broken down.

In *Amathole*, the court held that the term "intolerable" suggests a level of "unbearability," and it should necessitate more than just a claim that the working relationship is challenging, tense, or strained. Consequently, the court emphasised that it is crucial to distinguish "intolerability" within the employment relationship from mere "incompatibility" between the parties.[355]

The concept of intolerability within the employment relationship is linked to the duty of good faith. An intolerable situation often arises when one or both parties fail to act in good faith. In the context of an employment relationship, therefore, it is essential to note that the duty to act in good faith is reciprocal.[356] The covenant of good faith and fair dealing is an implicit commitment arising from the employment contract. Employees and employers must conduct themselves honestly and fairly and act in

352 Item 3(4) of the Code.
353 Item 3(4) of the Code.
354 Item 3(4) of the Code.
355 *Amathole* para 40.
356 Brown (1982) *J. Forum Comm. Franchis.* 22.

good faith.[357] An employee has a common-law responsibility to tender his or her services. Employees are also expected to provide services satisfactorily and according to contractual conditions.[358] The covenant of good faith and fair conduct is crucial because it intends to stabilise the imbalance of contractual power between these two parties.[359] The covenant of good faith was first articulated by the New York Court of Appeals in 1933 where it was stated that;

> "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."[360]

Repeated common law adjudication has extended the idea of good faith performance to an established norm between an employer and employee.[361] The need for contractual good faith stems from the reality that formal contract provisions are seldom capable of defining the extent of what is necessary for acceptable performance on their own.[362] Employers and employees use the good faith doctrine to carry out objectives or preserve reasonable expectations.[363]

Under the common law, employees are considered agents of their respective employers. An employee's primary duties include working in good faith and safeguarding fellow employees' safety. As such, they are obliged to further the employer's interests.[364] Marens and others argue that the employment relationship is structured by intertwined fiduciary responsibilities that both employees and employers have to each other.[365] According to the *Merriam-Webster Dictionary*, the term "fiduciary" refers to any scenario in which one individual legitimately invests faith and trust in another.[366] Fiduciary duties emanate from the common law of agent and principal. Under common law, employees are described as a subspecies of agents whose acts are especially linked with the principal. Employees have always held

357 Manamela (2020) *Obite*r 970.
358 Manamela (2020) *Obiter* 970.
359 Brown (1982) *J. Forum Comm. Franchis.* 22.
360 *The Kirke La Shelle Company v The Paul Armstrong Company* 263 N.Y. 79, 87 (1933).
361 Brown (1982) *J. Forum Comm. Franchis.* 22.
362 Brown (1982) *J. Forum Comm. Franchis.* 22.
363 Burton (1980) *Harv. Law Rev.* 376.
364 Marens *et al* (1999) *Bus. Soc.* 3.
365 Marens *et al* (1999) *Bus. Soc.* 3.
366 See "fiduciary", https://www.merriam-webster.com/dictionary/fiduciary, accessed 20 November 2022.

fiduciary obligations to their principals.[367] They are obliged to act honestly when promoting the interests of the employer.[368]

The chief obligation in the fiduciary relationship is the duty of trust and loyalty, which compels the agent to act entirely for the advantage of the principal in all situations associated with his or her agency. In other words, while working within the scope of the agency, the agent must consider the principal's interests rather than his or her own.[369] Based on this relationship, the employer has a reasonable expectation that the employee will not unreasonably act in any manner that violates its privacy, such as disclosing confidential information.[370]

Trust and confidence are necessary components of an employment relationship.[371] Many aspects can prejudice employers' interests, such as the employee's undermining the relationship of trust and confidence.[372] From the moment they start working together, the employer and the employee owe each other a duty of trust.[373] Both parties share this duty of trust in the employment relationship.[374] According to Riley, these reciprocal obligations are at the heart of the employment relationship and contingent on the parties' mutual trust and confidence.[375] Riley adds that an employer cannot be expected to continue to accept the services of a disloyal employee who has acted to harm the employer's business interests.[376]

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367 Bodie (2017) *Geo.L.J.* 823.
368 Van Niekerk *et al* (2019) 279.
369 Bodie (2017) *Geo.L.J.* 823.
370 Prothroe (1978) *Alta.L.Rev.* 25.
371 Van Niekerk *et al* (2019) 279.
372 Van Niekerk *et al* (2019) 279.
373 See *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (SCA) 20B–D, where it was held that South African law is the same as English law in the sense that in every contract of employment, there is a duty that the employee will not unreasonably conduct itself in a manner that is likely to destroy the relationship of trust between the parties. See further Louw (2018) *PER* 42, where it was stated that the common law contract of employment contains an implied duty of trust and confidence, and this duty is in line with the notion of imposing mutual duties of respect on contracting parties. This duty is in line with the constitutional values of *ubuntu.*
374 See also *City of Cape Town v South African Local Government Bargaining Council and others* [2011] 5 BLLR 504 (LC) para 21, where the court mentioned that an employee who occupies a position of trust should not be engaged in conduct that will undermine the trust in her. See also Raligilia (2014) *S. Afr. J. Labour Relat.* 38.
375 Riley (2012) *MULR* 526.
376 Riley (2012) *MULR* 526.

Conversely, when the employer's behaviour has breached this relationship of trust, the employee may be in a compromised position where they feel vulnerable, unsupported, or even exposed to potential harm.[377] Such circumstances can lead to significant stress and anxiety for the employee, affecting their mental and emotional well-being. In these cases, the employee's ability to perform their job effectively may be severely impaired, and their continued association with the employer may not be tenable or conducive to a healthy working environment.[378]

Maintaining a delicate equilibrium between safeguarding the employer's legitimate interests and ensuring the well-being and rights of the employee is crucial. When trust and confidence within the employment relationship reach an irreparable state, it becomes imperative for both parties to explore amicable separation or resolution options. Such an approach respects the employee's dignity and rights while enabling the employer to sustain a productive and harmonious workplace environment.

Recognising the significance of the *ubuntu* philosophy in workplaces is essential. Grounded in African wisdom, *ubuntu* promotes interconnectedness, compassion, and mutual respect among individuals. Within employment dynamics, this concept underscores the critical importance of trust and reciprocity between employers and employees.[379] It encourages both parties to interact with empathy, integrity, and a shared commitment to well-being. Embracing the principles of *ubuntu* empowers organisations to cultivate lasting and harmonious employment relationships built upon mutual trust and respect.

The duty of maintaining harmony in an employment relationship is so important that it has been incorporated in the Code as a standard measure to determine the substantive fairness of misconduct dismissals.[380] According to the Code, the justification for dismissing an employee for a first offence hinges on whether the misconduct at hand renders the employment relationship intolerable.[381] This item

377 Riley (2012) *MULR* 526.
378 Riley (2012) *MULR* 526.
379 Molose etal (2018) *EBER* 8
380 Item 7 of the Code.
381 Item 3(4) of the Code.

underscores the significance of trust in the employment relationship, as it gives gross dishonesty as an example of serious misconduct.

Because of the employee's subordinate position to the employer, the employee must obey all lawful commands, refrain from insubordination, be respectful and courteous to the employer, and serve the employer honestly and faithfully.[382] Dishonesty on the part of employees is also regarded as a ground for dismissal as it would, in most instances, constitute a breakdown of the employment relationship.[383]

The author contends that the duty of trust and good faith in the employment relationship is inherently linked to considering dismissal for off-duty misconduct. This duty obliges both employers and employees to act in a manner that upholds the principles of honesty, fairness, and mutual respect. It is submitted that in the context of off-duty misconduct, the duty of trust and good faith becomes particularly relevant when assessing whether the employment relationship can be sustained in the light of the employee's actions outside the workplace.

It is further submitted that *ubuntu* reinforces the notion that the duty of trust and good faith extends beyond mere contractual obligations—it encompasses a shared commitment to nurturing a positive and respectful work environment grounded in mutual respect. By embracing these principles, employers and employees can navigate issues of off-duty misconduct with sensitivity, fairness.

Employers are interested in maintaining a work environment free from disruptions, conflicts, and behaviour that could harm the organisation or its reputation. At the same time, employees have a legitimate expectation that their behaviour outside work, within legal boundaries, should not unduly impact their employment status.[384] Off-duty misconduct presents a challenge, requiring a delicate balance between the legitimate concerns of the employer and the rights of the employee.[385] It is argued that employers must consider whether the misconduct genuinely breaches the duty of trust and good

382 Bosch (2006) *ILJ* 31.
383 Item 3(4) of the Code.
384 Aloisi and De Stefano (2020) *Int. Labour Rev.* 3.
385 Item 3(4) of the Code.

faith and whether the impact on the workplace is significant enough to justify dismissal. In essence, the duty of trust and good faith is a guiding principle when evaluating whether dismissal for off-duty misconduct is a fair and proportionate response. This duty reminds employers and employees of their responsibilities within the employment relationship and encourages a thoughtful and considerate approach to resolving issues related to off-duty conduct.[386]

The subsequent section examines case law where the breakdown of the employment relationship served as a basis for justifying dismissal as a fair disciplinary measure. The first set of cases deals with dishonest conduct on the part of the employee, which can be defined as untrustworthy, deceitful, or insincere behaviour intended to mislead another person,[387] which can undeniably lead to the deterioration of the employment relationship. Grogan asserts that even dishonest conduct perpetrated before employment can warrant dismissal if the conduct leads to a breakdown of the employment relationship.[388]

While the Code considers gross dishonesty as an example of serious misconduct,[389] It emphasises that each case should be judged on its own merits.[390] An important consideration will be whether the act of dishonesty referred to in the Code should specifically pertain to dishonesty directed at the employer or whether any form of general dishonesty, regardless of the target, warrants dismissal.

In *Visser v Woolworths,*[391] an employee was arrested for theft from a department store owned by a Woolworths competitor.[392] Woolworths dismissed her because of her arrest before she was convicted.[393] The commissioner acknowledged that an employer need not wait for the outcome of criminal proceedings.[394] The dismissal was

386 Item 3(4) of the Code.
387 Newaj (2016) *THRHR* 430.
388 Grogan (2019) 417.
389 Section 3(4) of the Code.
390 Section 3(4) of the Code.
391 [2005] 11 BALR 1216 (CCMA).
392 *Woolworths* 1218.
393 *Woolworths* 1220.
394 *Woolworths* 1220.

found to be unfair because the employer did not prove that the employment relationship was so broken that the employee could not trusted.[395]

This ruling signifies the importance of substantiating the severance of the employment relationship as a prerequisite for employee dismissal. In essence, the commissioner's decision emphasises that mere allegations or claims of a severed relationship should not be regarded as sufficient grounds for termination. Instead, the burden of proof lies on the employer to demonstrate that the employment relationship has genuinely and significantly deteriorated to a point where continuation was untenable.[396] In practical terms, employers cannot arbitrarily dismiss employees based solely on unsubstantiated assertions that the employment relationship has broken down because of off-duty misconduct.

In *Dolo v Commission for Conciliation, Mediation & Arbitration & others (Dolo*),[397] a casino table supervisor was dismissed for fraud after she and her boyfriend engaged in illegal acts against her boyfriend's employer for some time.[398] She then decided to testify against her boyfriend in a court case in exchange for immunity from prosecution.[399] She was later charged by her employer and dismissed as a result.[400] She challenged her dismissal for misconduct and stated that it occurred outside her workplace.[401] The commissioner held that the employer could no longer trust her to handle money or supervise other employees who handled money.[402] The LC agreed, finding that her employer had the right to dismiss her.[403] It found that although the employer was not directly affected by the employee's conduct, the employer was justified in dismissing the employee because the employment relationship had broken down. The employer could not possibly trust the employee again.[404]

395 *Woolworths* 1221.
396 *Woolworths* 1221.
397 [2010] JOL 26442 (LC).
398 *Dolo* para 4.
399 *Dolo* para 4.
400 *Dolo* para 5.
401 *Dolo* para 7.
402 *Dolo* para 27.
403 *Dolo* para 28.
404 *Dolo* para 27.

It is submitted that the fairness of dismissal as a sanction for an employee's involvement in a criminal offence depends on various factors, including the nature of the offence, its relevance to the employment relationship, and the specific circumstances of the case. The nature and severity of the criminal offence play a crucial role in determining the fairness of dismissal. Sometimes, a criminal offence may directly relate to the employee's job responsibilities or involve fraud, violence, or actions that severely undermine the employment relationship. In these instances, dismissal may be considered a fair and proportionate response, especially if the offence significantly impacts the employer's trust in the employee.

It is further submitted that before resorting to dismissal, employers should consider whether alternative sanctions, such as suspension without pay or demotion (provided that the demotion aligns with company policy) might be more appropriate in addressing the misconduct. The choice of sanction should be proportionate to the offence and aimed at correcting the employee's behaviour.

It is also submitted that employers, especially those in the public eye (such as in *SAPS* above) or with a solid public image, may consider the potential impact of an employee's criminal offence on their reputation and public trust. In these cases, dismissal may be seen as necessary to maintain public confidence in the organisation. Consequently, it can be assumed that the fairness of a dismissal for a criminal offence is context specific. Employers must carefully assess each case, considering different mitigating factors, to determine whether dismissal is a fair and justified response. Hence employers need to balance their legitimate interests with the rights of employees.

In *City of Cape Town v SALGBC and Others* (*City of Cape Town*),[405] the employee was found guilty of presenting a fake Namibian driver's licence to the South African licensing authorities for conversion to a South African licence. The employer dismissed the employee because of this conduct.[406] The arbitrator found that, although the employer's disciplinary action was justified because of the dishonest conduct, it was

405 (C353/16) [2017] ZALCCT 35 (2 August 2017).
406 *City of Cape Town* para 8.

unfair to dismiss her.[407] The dismissal was found to be procedurally fair but substantively unfair,[408] because the fraud was committed off duty nine years beforehand and did not relate to her duties. So no relationship of trust was irretrievably broken.[409]

The arbitrator further found that even though the employee was dishonest to the licensing board, this dishonest conduct was not directed at the employer, and the employer did not suffer any loss or direct prejudice.[410] The arbitrator added that where a disciplinary offence involves off-duty conduct, the employer should address its interests by considering other alternatives short of dismissal.[411] It was then recommended that the employer impose a lesser sentence on the employee, and reinstatement was ordered (though not retrospectively).[412]

On review, the LC disagreed that dismissal was not an inappropriate sanction, considering that the employee had committed fraud.[413] The LC reasoned that the fraud perpetrated was characterised by a high level of dishonesty and corruption, and the employee continued to benefit from her criminal conduct.[414] Even though the conduct was off duty, the court found dishonesty to be a serious form of misconduct that broke down the employment relationship between the parties, thereby holding that dismissal was justified.[415]

In arriving at its decision that dismissal was a fair sanction, the court cited several cases that dealt with the dismissal of employees for on-the-job misconduct whose dishonesty was directed at the employer. Citing these cases, the court explained that, "in several other cases, it has been concluded that dismissal is permissible where the misconduct contained elements of dishonesty."[416] The court cited *Kalik v Truworths*

407 *City of Cape Town* para 8.
408 *City of Cape Town* para 7.
409 *City of Cape Town* para 6.
410 *City of Cape Town* para 10.
411 *City of Cape Town* para 10.
412 *City of Cape Town* para 6.
413 *City of Cape Town* para 31.
414 *City of Cape Town* para 31.
415 *City of Cape Town* para 23.
416 *City of Cape Town* para 24.

(Gateway) & others (Kalik),[417] where the employee took a make-up tester from the store at which she worked without permission,[418] and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others (Hulett Aluminium)*,[419] where the employee was found guilty of unauthorised removal of scrap metal from the employer's premises.[420]

Although these legal precedents provide valuable insights into addressing dismissals linked to dishonest behaviour, it is imperative to discern a critical distinction. Notably, cases such as *Kalik* and *Hulett Aluminium* involved instances where the dishonesty happened during work hours and was targeted at the employer and occurred on the job. In these contexts, a compelling argument can be made for the fairness of dismissal as a disciplinary measure. By contrast, when dishonest off-duty conduct is not directed at and does not directly impact the employer, the appropriateness of dismissal comes into question, raising the need for further clarification and evaluation.

The LC decision in the *City of Cape Town* case is criticised for its perceived lack of comprehensive consideration. The court failed to consider critical mitigating factors, including the employee's impeccable prior record, the non-directivity of the misconduct toward the employer, and the occurrence of the incident outside the workplace, spanning nearly a decade. Consequently, there is a prevailing concern that the LC's ruling may substantially influence future decisions featuring analogous facts and circumstances, thus raising questions about the legitimacy of dismissals based on off-duty misconduct. Given the contextual considerations, the imposition of dismissal as a punitive measure appears over-severe. The court's findings in *SA Polymer Holdings* may be interpreted to mean that off-duty dishonesty does not automatically break the employment relationship.[421]

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417 (2007) 28 *ILJ* 2769 (LC).
418 *Kalik* para 2.
419 (2008) 29 *ILJ* 1180 (LC).
420 *Hulett Aluminium* para 8.
421 The LAC made crucial remarks in *SA Polymer Holdings* Labour Court Digest 1994 (3) Part 4 at 226, as quoted in *Foschini* para 14, that "criminal conduct on the part of an employee off the employer's premises and not during working hours does not preclude the employer from assessing such conduct in the context of the actual or potential effect in the workplace and to the personnel and the property of the employer. The fact that the conduct is not directed at or against fellow employees is equally immaterial. Whether such conduct had the effect of destroying or seriously damaging the relationship of the employer and employee, depends on a number of factors. These include the nature of the criminal conduct, the nature of the work or

Regarding dismissal as a fair sanction for off-duty dishonest conduct, the author strongly argues that dismissing an employee for off-duty dishonest behaviour may, in some circumstances, be seen as an invasion of privacy, especially if the dishonesty is not directed at the employer. Although dishonest behaviour is not endorsed, it is essential to recognise that an act of off-duty dishonesty could be seen as an off-duty transgression, from which an employee has the potential to reform. Dismissing these employees raises concerns about companies intruding into their employee's personal life. Furthermore, it is asserted that dismissal for off-duty dishonest misconduct without considering rehabilitation and remedial action may deny the employee the opportunity to modify their behaviour or address personal concerns that may have contributed to the misconduct.

In addition, it is argued that since determining dismissal as a fair sanction hinges on evaluating the lasting impact of the misconduct on the employment relationship, the time factor is crucial. If the dishonesty happened long ago and has not perpetuated any adverse consequences for the employer or workplace, dismissing the employee may seem disproportionate. Alternative disciplinary actions, such as warnings, may be more reasonable.
In essence, the application of guidelines for determining dismissal as a fair sanction in these cases proves the need for a case-specific approach. The nature and severity of the dishonesty and its ongoing repercussions must be carefully weighed against the employee's overall conduct and history to determine a fair and proportionate disciplinary outcome.

Another form of conventional off-duty misconduct worthy of discussion is sexual harassment. In 2022, a new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (the Harassment Code) came into effect in South

services performed by the employee, the potential effects which the conduct may have on the employer's business, and in particular its profile in the eyes of its clients and the public, and the impact which the conduct may have on the relationship between the employer and the employee, and between the employee and his co-workers. These are broad outlines and are not intended to be exhaustive."

Africa.[422] This Code, issued under the EEA, supersedes the previous Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005[423] and provides a more detailed interpretation of the prohibition in the EEA.[424]

Harassment, characterised as unwelcome behaviour undermining dignity is tied to prohibited grounds by the EEA. It encompasses diverse forms of abuse, spanning from violence to psychological and gender-based mistreatment.[425] Criteria for identifying harassment involve discerning unwarranted conduct from acceptable workplace behaviour.[426] Crucial considerations include whether the complainant communicated the unwelcomeness and if the harasser should have reasonably known that the conduct was unacceptable. Harassment may arise from both violent and non-violent acts.[427]

Sexual harassment is a form of unfair discrimination prohibited on the grounds of sex, gender, or sexual orientation. [428] Item 5 of the Harassment Code explains ways in which an employee may indicate that sexual conduct is unwanted and emphasises that previous consensual participation does not necessarily make the conduct acceptable. The nature and extent of sexual harassment encompasses physical, verbal, or non-verbal conduct. Examples include physical conduct of a sexual nature, strip searching, sexual attention, and implied or express threats of reprisal.[429]

Workplace sexual harassment is linked to negative consequences such as decreased job satisfaction, poor organisational engagement, withdrawal from work, and poor

422 See R1890 in *Government Gazette* 46056 of 18 March 2022, https://www.gov.za/sites/default/files/gcis_document/202203/46056reg11409gon1890.pdf, accessed 8 December 2023.

423 See GN 1357 "Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace" in *Government Gazette* 27865 of 4 August 2005.

424 Section 6(1) of the EEA states that it is prohibited to engage in unfair discrimination against an employee, either directly or indirectly, in any employment policy or practice, based on various grounds such as race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, political opinion, culture, language, or birth. Section 6(2) allows for affirmative action and distinctions, exclusions or preferences on the basis of an inherent requirement of a job. Section 3 specifies: "Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)."

425 Item 4 of the Harassment Code.

426 Item 4 of the Harassment Code.

427 Item 4 of the Harassment Code.

428 Item 5 of the Harassment Code.

429 Item 5 of the Harassment Code.

physical and mental health.[430] Accordingly, it is clear that perpetrating sexual harassment in the workplace is gross misconduct. However, the complications that arise in the adjudication process appear when an employee is dismissed for sexual attention that takes place outside the workplace. This situation can be regarded as the "externalisation" of sexual harassment.[431]

The following case highlights the absence of an unequivocal delineation of this misconduct. It is important to note that this case was adjudicated under the previous Code (Code of Good Practice on Handling Sexual Harassment Cases in the Workplace). Still, it is worth mentioning that there are no substantive differences between the two Codes, particularly concerning matters related to sexual harassment.

In the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (*Simmers*), an employee, Mr S, made unwelcome sexual advances toward his employer's consultant, Ms M, during a business trip to another country.[432] Mr S, who worked as an installation manager for Campbell Scientific Africa (Pty) Ltd (CSA), was on a trip to Botswana with a contractor and Ms M to inspect a location for equipment installation. They dined together as a group, and after dinner, while waiting in a parking lot, Mr S asked Ms M if she wanted a romantic encounter that night. She declined and mentioned having a boyfriend. Mr S then stated his availability if she changed her mind, which she did not.[433] Following this incident, Ms M reported it to Mr S's employer, leading to his disciplinary hearing and subsequent dismissal on the grounds of sexual harassment.[434]

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430 See Hardies (2019) *Pers. Individ. Dif.* 3, who states that sexual harassment is linked to the physical well-being of the target, including depression, anxiety symptoms, as well as emotional weariness, headaches, sleep issues, gastrointestinal distress, and upper respiratory problems. See also Botes (2017) *JSAL* 763, who argues that sexual harassment infringes on the victim's fundamental rights to human dignity, privacy, and bodily integrity.

431 Item 4 and 5 of the Harassment Code provide criteria for identifying harassment in the workplace.

432 *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2016] 1 BLLR 1 (LAC) para 4 (*Simmers*). The decision of the LC was reported as *Simmers v Campbell Scientific Africa (Pty) Ltd and others* [2014] 8 BLLR 815 (LC).

433 *Simmers* para 4.

434 *Simmers* para 12.

At the CCMA, the commissioner held that Mr S's dismissal was fair. The commissioner stated that his "behaviour could not be rehabilitated" and that any future employment relationship between the parties was impossible.[435]

On review, though, the LC found that the words uttered did not constitute sexual harassment but sexual attention.[436] The LC explained that according to Ms M's evidence during arbitration, Mr S was standing a metre away from her and did not attempt to touch her or pursue his approaches beyond this dialogue. The LC stated that the conduct was "once-off" and occurred outside the workplace and outside working hours.[437] The court added that a fair sanction would have been some form of corrective discipline, including a written or final written warning for inappropriate conduct.[438]

On appeal, the LAC disagreed with the LC and found the dismissal to be fair.[439] The LAC held that the appellant was entitled to dismiss Mr S for misconduct because his conduct related to and impacted his employment relationship with his employer.[440] The court found that the misconduct occurred within the context of a work-related social event.[441] The LAC further held that the dismissal was fair because a continued relationship between Mr S and his employer was no longer possible.[442]

On closer inspection, it is evident that the LAC's decision was influenced by the decision of *SA Broadcasting Corporation Ltd v Grogan NO & another (SA Broadcasting Corporation Ltd)*.[443] In *SA Broadcasting Corporation Ltd*, the court held that sexual harassment in the workplace committed by older men who are in positions of power had become a problem.[444] The other case that influenced the court's decision was *Motsamai v Everite Building Products (Pty) Ltd (Motsamai)*,[445] where Waglay DJP

435 *Simmers* para 8.
436 *Simmers* para 11.
437 *Simmers* para 13.
438 *Simmers* para 17.
439 *Simmers* para 26.
440 *Simmers* para 26.
441 *Simmers* para 26.
442 *Simmers* para 34.
443 (2006) 27 *ILJ* 1519 (LC).
444 *SA Broadcasting Corporation Ltd* para 51.
445 [2011] 2 BLLR 144 (LAC).

emphasised the severity of sexual harassment by stating that the harshness of the wrong (being the sexual harassment) is compounded when the victim suffers at the hands of his or her supervisor.[446]

In *Simmers*, the LAC held that workplace harassment produces an objectionable and frequently scary work environment that damages the victim's dignity, privacy, and integrity and presents a barrier to genuine equality in the workplace. As a result, the court described it as "the most heinous misconduct that plagues a workplace."[447] Citing *Hoechst*, the LAC held that the employer had the right to discipline Mr S for misconduct relating to and affecting his employment relationship with the employer.[448]

Regarding dismissal as a fair sanction, the LAC upheld the CCMA decision and determined Mr S's dismissal to be reasonable because of the nature of the misconduct. It held that Mr S's lack of remorse led to little potential for rehabilitation and that a future employment relationship was not viable.[449]

It is submitted that the CCMA and the LAC erred in finding that Mr S's conduct permanently harmed the employment relationship to an extent that it was irreconcilable. This issue derives from the fact that the LAC's judgement was based on precedents dealing with workplace sexual harassment conducted by a senior employee against a junior employee. In these circumstances, dismissal may be necessary to protect the victim. The conditions of the current situation, as *Simmers* shows, are significantly different. The analysis of whether the misconduct described in this scenario can be regarded as having irreparably broken the employment relationship hinges on several crucial considerations.

First, the fact that the misconduct occurred outside normal work hours, during a non-employer-sponsored meal, and at a venue chosen by the employees themselves suggests a clear distinction between the off-duty conduct and the employer's business operations. This distinction implies that the employer had limited control or influence

446 *Motsamai* para 20. See also *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 2848 (LC) paras 15 and 16.
447 *Simmers* para 21.
448 *Simmers* para 26, citing *Hoechst*
449 *Simmers* para 35.

over the circumstances of the misconduct. However, it is crucial to consider the power dynamic at play, as it can significantly impact the level of control or influence the employer has over the circumstances of the misconduct. The argument here is that the severity of the sanction should align with the gravity of the misconduct. When the misconduct is relatively minor and has little impact on the employment relationship, dismissal may be perceived as overly harsh and disproportionate. A fundamental concern centres on the right to privacy in employee's personal lives.

Secondly, it is essential to consider mitigating circumstances. Arguably in line with the Code and the review test, mitigating factors must be considered in determining the fairness of a dismissal. In *Simmers,* several mitigating factors should have been considered in order to arrive at a lesser penalty. The employee's misconduct constituted a single, off-duty incident involving verbal advances with no physical contact or aggressive behaviour. The context of the misconduct occurred outside working hours during an event not sponsored by the employer. Legal precedents that typically addressed workplace sexual harassment involving different power dynamics did not align with the circumstances of this case. These factors collectively suggest that the dismissal as a disciplinary sanction may not have been proportionate to this relatively isolated off-duty misconduct.

Although the breakdown of employment relationship inquiry is not unique to off-duty misconduct cases, the author contends that the measurement of a breakdown in the employment relationship can vary between off-duty conduct and on-the-job conduct because of the contextual differences and considerations inherent in each scenario.

It is therefore submitted that the key differentiators between assessing on-the-job conduct and off-duty conduct in terms of a breakdown in the employment relationship include:

- the direct relevance of the behaviour to the workplace;
- the presence of clear expectations and policies, the significant privacy considerations and the potential infringement of personal privacy in off-duty conduct matters;

- the challenge of determining proportionate responses in cases of personal off-duty conduct due to its nature; and

- the inherent subjectivity in evaluating employees' mind-sets outside the workplace, particularly their personal beliefs and attitudes.

These differences underscore the need for a straightforward approach to measuring a breakdown in the employment relationship, recognising the contextual disparities between on-the-job and off-duty scenarios.

Following a thorough analysis of case law on the application of judicial tests to off-duty misconduct cases, it is imperative to evaluate the effectiveness of the current legal framework in regulating dismissals for conventional off-duty misconduct. This evaluation aims to determine whether this framework adequately aligns with the constitutional right to fair labour practices and the LRA objectives outlined in paragraph 2.3.2. In the context of these considerations, the subsequent paragraph assesses the sufficiency of the existing legal framework in achieving these fundamental objectives.

3.4 Adequacy of the Current Legal Framework in Regulating Conventional Off-Duty Misconduct

As mentioned in paragraph 3.3 earlier, a connection exists between the Code, judicial tests, and review tests, collectively constituting the comprehensive legal framework governing off-duty misconduct. Although these legal frameworks provide a solid foundation for regulating misconduct, the following deficiencies have been identified in their regulation of off-duty conventional cases.

3.4.1 Adequacy in Establishing Guilt

First, one of the fundamental challenges in off-duty misconduct cases is establishing guilt. Guilt is established by a sufficient nexus or connection between the employee's off-duty conduct and the employer's business interests.[450] The legal framework requires that the off-duty conduct must have a discernible impact on the employer's business or reputation.[451] However, the legislative framework of off-duty misconduct

450 Item 3(1) of the Code.
451 The Code and case law.

cases notably lacks precise and unequivocal guidance in establishing a nexus between an employee's extracurricular behaviour and the employer's interests. This absence of clearly defined directives within the legal system has created a climate in which judicial decisions are rendered with an inherent variability and lack of consistency concerning the delineation of demarcation lines. Consequently, the absence of a direct link between the conduct and the employer's business interests complicates the assessment of guilt and, subsequently, the fairness of dismissal.

Another significant challenge in determining culpability relates to the Code's provision for dismissal, even when no comprehensive written policies are in place.[452] This challenge is exacerbated by court rulings that uphold dismissals in off-duty misconduct cases, even when the off-duty misconduct in question is not explicitly governed by a company's established policies or regulations. This situation raises complex issues surrounding the fairness and consistency of these dismissals, as they may lack a solid legal foundation or standardised criteria to establish employees' guilt.

Although many employers have disciplinary policies and codes of conduct for on-the-job behaviour, these policies may lack clear rules governing off-duty conduct. This policy gap can disadvantage employers and employees when addressing off-duty misconduct cases. Without clearly articulated policies addressing off-duty conduct, employees may encounter uncertainties when their actions fall outside the scope of existing rules. This predicament creates challenges in evaluating whether the employee has violated a valid and reasonable work rule, leading to ambiguity in disciplinary matters. In addition, the absence of written policies can hinder an employer's ability to provide clear guidance to employees regarding expected off-duty behaviour. Furthermore, adjudicators may rely on their own interpretations and judgments, leading to varying decisions in similar cases. This unevenness undermines the predictability and fairness of the legal framework.

3.4.2 Adequacy in Determining Dismissal as a Fair Sanction

Turning to the second stage of determining whether dismissal was a fair sanction, the criticism of dismissal as a fair sanction when there is a weak nexus stems from the fact that if a nexus is mistakenly established during the initial stage of inquiry, the

452 Item 3(1) of the Code.

subsequent dismissal becomes inherently unfair. This outcome underscores the critical significance of accurately and carefully establishing a clear nexus between the employee's off-duty conduct and the genuine business interests of the employer.

This situation further emphasises the need for careful consideration of all relevant factors, including the nature of the misconduct, its potential implications for the workplace, and the employee's overall track record. Striking the right balance between protecting the employee's rights and safeguarding the employer's interests requires a diligent approach specific to off-duty misconduct cases.

It may validly be asked whether an employee's off-duty conduct, especially when it has no direct relevance to the employer or the workplace, should be interpreted as intolerable and, therefore, warrant dismissal. This matter presents complexity when considering that the South African legislative framework does not provide explicit guidance on the boundaries of intolerable off-duty conduct. Although the LRA does provide protections and standards for both employers and employees, it does not comprehensively outline the specific parameters for evaluating off-duty misconduct. The lack of clear legislative guidelines leaves room for interpretation, often necessitating case-by-case assessments to determine the appropriateness of dismissal as a sanction. This legal ambiguity highlights the need for consistent judicial interpretations and precedents to clarify and ensure fairness in employment relations. The Code proposed in Chapter 8 of this thesis will provide a thorough definition and examples of intolerable off-duty conduct.

Consequently, it is argued that when off-duty misconduct has little relevance to the employer, progressive discipline should be implemented. Progressive discipline involves a step-by-step approach to addressing misconduct, where the severity of the response matches the nature and gravity of the misconduct. This approach allows for an evaluation of off-duty behaviour, considering various factors, and provides opportunities for employees to rectify their actions before facing severe consequences such as dismissal.

Progressive discipline is a structured and fair approach that benefits employers in several ways. It promotes consistency in addressing misconduct, fosters employee

awareness of consequences, allows room for improvement, retains valuable talent, contributes to a healthier workplace culture, reduces turnover and associated costs, enhances employee relations, and ultimately leads to cost savings.[453] By offering employees opportunities to rectify their behaviour and align with company expectations, progressive discipline strikes a balance between accountability and support, resulting in a more productive and harmonious work environment while protecting the interests of both employees and employers. Consequently, the Code proposed in Chapter 8 of this thesis offers guidelines on how progressive discipline can be implemented in off-duty misconduct cases.

Another area of concern within the existing legal framework lies in the absence of a unified consensus on how to prove that the employee's conduct has led to an irretrievable breakdown of the employment relationship. This situation raises questions about the standards and methodologies that employers should follow when presenting evidence to substantiate their claims of employment relationship deterioration because of employees' off-duty behaviour. The absence of a unified consensus also burdens the judiciary tasked with establishing its own criteria or relying on precedents that may not always align with evolving societal norms and expectations. This legal uncertainty can lead to protracted legal battles and inconsistencies in legal outcomes.

To address this challenge, it is imperative to establish a transparent and standardised framework for evaluating irretrievable breakdowns resulting from off-duty misconduct. This framework should consider the nature and severity of the conduct, its impact on the employer's legitimate interests, and any relevant contractual or statutory provisions. Clarity is imperative to ensure fairness and consistency in legal proceedings and provide clear guidance to employers and employees navigating these matters. Addressing this concern involves the need for more specific guidelines and criteria to assist employers in effectively demonstrating the alleged breakdown of trust arising from employee conduct, thereby promoting transparency and equity in employment dispute resolution. Against this background, the proposed Code gives

453 Chelliah and Pitsis (2010) *Contemp. Manag. Res.* 93.

examples of elements that decision-makers can use to establish the breakdown of trust in off-duty misconduct cases.

3.5 Conclusion

The central inquiry addressed in this chapter revolves around the adequacy of the legal framework for conventional off-duty misconduct. In this regard, the following conclusions can be drawn:

First, the comprehensive legal framework governing off-duty misconduct, encompassing the Code, judicial tests, and review tests, is a critical foundation for addressing these complex issues. As shown throughout this discussion, though, significant deficiencies exist in its regulation of off-duty conventional cases.

One of the primary challenges lies in establishing a sufficient nexus between an employee's off-duty conduct and the employer's business interests. Though essential for fair and just outcomes, this requirement can be inherently subjective and open to varying interpretations. The lack of clear legislative guidelines defining the criteria for a strong nexus exacerbates the issue, leading to inconsistency in adjudicators' decisions.

The challenges are compounded by the absence of comprehensive written policies addressing off-duty behaviour. Clear rules governing off-duty conduct are often lacking, leaving employers and employees uncertain. This quandary hinders employees' understanding of expected behaviour and limits employers' ability to provide clear guidance.

The consequences of these deficiencies become apparent in the second stage of determining dismissal as a fair sanction. If a nexus is mistakenly established during the initial inquiry, the subsequent dismissal can be profoundly unjust. This outcome underscores the imperative of precise and careful assessments when linking off-duty conduct to genuine business interests. Inaccurate determinations can result in disproportionate and unfair penalties.

In navigating the complex terrain of off-duty misconduct, finding the right balance between protecting employee rights and safeguarding employer interests is paramount. Achieving this balance demands a diligent approach that considers all relevant factors, from the nature of the misconduct to its potential workplace implications and the employee's overall track record.

CHAPTER 4

DISMISSAL FOR OFF-DUTY SOCIAL MEDIA MISCONDUCT

4.1 Introduction

The preceding chapter established that the current legal framework introduces uncertainty, particularly when assessing employees' guilt and whether dismissal constitutes a justifiable penalty for conventional forms of off-duty misconduct. Despite the Code, the review test, and judicial assessments, it was noted that inconsistencies and uncertainties still linger in the decision-making process surrounding dismissals for conventional off-duty misconduct.

This chapter investigates a contemporary manifestation of off-duty misconduct: the termination of an employee's contract because of off-duty social media activity. The primary aim of this chapter is to evaluate the relevance of the current legal framework in addressing this form of misconduct. To achieve this aim, the chapter explores constitutional rights, notably the right to privacy, dignity, and freedom of expression. It also assesses the implications of social media-related dismissals on these fundamental rights.

In limiting employee's off-duty rights, the limitation clause of the Constitution comes into play. So this chapter analyses how the limitation clause influences the curtailment of employee rights in a contemporary world characterised by technology and the prevalence of social media.

Furthermore, this chapter explores the characteristics and classifications of off-duty social media transgressions. In the context of the current pervasive use of technology, employees sometimes exhibit behaviour that deviates from their employee's anticipated conduct, leading to a multitude of cases on off-duty social media misconduct.[454]

It is imperative to begin by thoroughly analysing social media platforms, given the pervasive role of social media in contemporary society, where individuals use these platforms to communicate, share content, and express themselves. Understanding the dynamics of social media is essential in off-duty misconduct cases, for it provides

[454] Ortis-Ospina "The Rise of Social Media", https://ourworldindata.org/rise-of-social-media, accessed 10 May 2023.

insights into how employees' online behaviour can impact their relationship with employers, making it a crucial aspect to consider in the decision-making process.

4.2 An Overview of the Nature of Social Media and Social Network Sites

The Internet is a developing field of human interaction where distance and geography are no longer critical.[455] The distinction between private and public boundaries of social interaction has become somewhat muddled by the inability to conceptualise boundaries in cyberspace.[456] Nowadays, people can express themselves through different ways on social media sites on the job and off duty.[457] Employers should analyse the power of social media and social media misconduct critically and carefully since social media postings may substantially influence the employer-employee relationship.[458] Employees are sometimes dismissed for social media misconduct because it is often said to have the potential to damage the employer's reputation.

Social media is defined as 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 pictures and videos.[459] Examples of social media networks include Facebook, Twitter (now renamed as X), Instagram, Pinterest, YouTube, and TikTok.[460]

These social network sites are web-based services that enable individuals to create a public or semi-public profile, articulate a list of other users with whom they share

455 Papadopoulos (2009) *Obiter* 30–43.

456 Papadopoulos (2009) *Obiter* 30–43. See also Reddy (2018) *JSAL* 789, who observes that the Internet grew in popularity and brought a new legal phenomenon known as online liability. Reddy adds that this obligation arises from the usage of online speech and argues that the problem revolves around employees who use social media to express themselves in ways that may be harmful to their business. The issue is that social media interaction may occur at any time and from any location, eliminating the requirement to be physically present at work. This, in turn, presents privacy concerns, with employees claiming that their social media postings are personal and unrelated to their jobs.

457 Lukács (2017) *Masaryk Univ. J. Law Technol.* 185.

458 Phungula (2022) *ILJ* 2242.

459 *Merriam-Webster Dictionary* "social media", https://www.merriam-webster.com/dictionary/social%20media, accessed 2 February 2022.

460 Storm "10 Types of Social Media & How They Benefit Your Business in 2024", https://www.webfx.com/blog/social-media/types-of-social-media/, accessed 16 December 2023.

a connection, and view their list of connections and those made by others within the social network system.[461] The nature and nomenclature of these connections may differ from one site to the next. There are many social network sites, each with a range of diverse sets of interests and activities. Although the essential technical characteristics of social network sites are constant, the communities that emerge around them are diverse.[462] Most sites facilitate preserving pre-existing social networks, while some link strangers based on shared hobbies, political beliefs, or activities. Some networks appeal to a wide range of consumers, while others draw users based on similar ethnic, sexual, religious, or national identities.[463] The degree to which sites integrate new information and communication capabilities, such as mobile connection, blogging, and photo or video-sharing, also varies.[464]

Mutula lists five main types of social networks:

- personal networks,
- status-update networks,
- location networks,
- content-sharing networks, and
- shared interest networks.[465]

Users of personal networks may construct elaborate online profiles and communicate with other users, focusing on social relationships. Examples are Facebook and

461 Boyd and Ellison (2007) *J. Comput.-Mediat. Commun.* 210.
462 Boyd and Ellison (2007) *J. Comput.-Mediat. Commun.* 210.
463 Boyd and Ellison (2007) *J. Comput.-Mediat. Commun.* 210; McGoldrick (2013) *H.R.L.Rev.* 15.
464 Boyd and Ellison (2007) *J. Comput.-Mediat. Commun.* 210. See also Ireton (2013) *HBTLJ* 146, who states that technological advancements in recent years have resulted in substantial changes in the way people interact, convey information, and exchange knowledge. This is shown by the widespread usage of technology gadgets such as smartphones and tablets, as well as debates on social media platforms such as Facebook and Twitter (now renamed as X). Although many of these gadgets began as leisure devices, their prominence in everyday life has led to growing use. Businesses have also used these social media platforms both externally, to advertise, and internally, to enhance knowledge sharing. These possibilities come with a variety of disadvantages, including distraction from job duties and a resulting loss of productivity. See Adler (1998) *Law Democr. Dev.* 65, who also believes that individuals can openly communicate numerous parts of themselves, including their private lives as well as their ideas via the use of online forums such as personal blogs, social media accounts, Tweets, and other similar platforms.
465 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.

Myspace.[466] Status-update networks are social networks that enable members to submit brief status updates to connect with other users quickly. An example is Twitter (X).[467] Location networks rely on global positioning system (GPS) technology. They are intended to broadcast one's real-time location, either as a public script or as an update seen by authorised contacts: for example, Foursquare, and Loopt.[468] Content-sharing networks are intended for exchanging material such as verbal and text-based conversations, music, photos, and videos. Examples are YouTube and Flickr. Finally, shared interest networks are established around a set of people's shared interests. LinkedIn is one example.[469] Among social media networks, Facebook is the most popular social networking site in South Africa and worldwide.[470]

Much like any other individuals, employees are free to engage with various social media platforms. So dismissals related to social media postings present a complex interplay of conflicting rights. On one side is the employees' right to privacy, dignity, and freedom of expression. On the other is the employer's right to protect their privacy, reputation and freedom of expression, among other things.

4.3 Employee and Employer Rights in the Contemporary Workplace

Chapter 2 of the thesis discussed the constitutional right to fair labour practices. This constitutional right, enshrined in the foundational legal framework of South Africa, is an indispensable cornerstone on which the dynamics and principles governing the employment relationship are built. The discussion of this right began by elucidating its historical and legal significance and tracing its evolution.

This chapter centres primarily on the core principles of privacy, dignity, and freedom of expression within the context of the employment relationship. The Preamble to the Constitution firmly establishes it as the supreme law of the land, with its adoption driven by the overarching goal of constructing a society grounded in democratic principles, social equity, and the safeguarding of essential human rights.[471]

466 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.
467 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.
468 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.
469 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.
470 Mutula (2013) *S. Afr. J. Inf. Manag.* 3.
471 Section 2 of the Constitution.

The Constitution accentuates the pivotal role played by the Bill of Rights within the framework of South African democracy.[472] It underscores the democratic values of human dignity, equality, and various freedoms, extending these rights to every individual residing within the borders of South Africa. This legal framework provides the foundation for assessing labour practices, ensuring their alignment with the tenets of democracy and the protection of individual rights.

Within the workplace, the protective umbrella of the Bill of Rights extends to employers and employees. It is contended that employers, though retaining the authority to terminate employees' employment for off-duty misconduct that demonstrably harms business interests, must do so in a manner that respects and upholds the rights of employees. Conversely, employees maintain the right to express themselves freely on social media but should exercise this right without infringing the legitimate interests of their employers. Balancing these rights is essential to fostering a fair and equitable working environment.

It is further argued that ensuring the protection of employees' rights to dignity, privacy, and freedom of expression is imperative for various compelling reasons. These rights are grounded within international and national legal frameworks, ensuring adherence to established legal norms. Furthermore, their preservation contributes significantly to individual well-being, stimulates freedom of expression and innovation, guards against unwarranted intrusions into people's personal lives, upholds the sanctity of human dignity, fosters workplace equality and inclusivity, bolsters employee retention and morale, fulfils ethical and societal obligations, and forms a bulwark against potential employer abuses of power.[473]

A direct correlation between an employee's off-duty social media misconduct and the employer's business interests must be established to justify dismissals for off-duty social media misconduct. These business interests can encompass factors such as reputational damage and profit reduction resulting from customer boycotts.[474] When employers' actions infringe upon employees' rights, the judiciary comprehensively

472 Section 7 of the Constitution.
473 Segrin *et al* (2016) *Hum. Commun. Res.* 137.
474 Grogan (2019) 413.

evaluates the violation.[475] So enforcing the employer's legitimate interest in an employee's extracurricular conduct must be executed judiciously to prevent undue encroachment on their constitutional rights to privacy, dignity, and freedom of expression.[476] The rights in question are discussed below.

4.3.1 Right to Privacy

To lay the foundation for a comprehensive understanding of the rights held by employers and employees, it is essential to begin with an introductory exploration of the legal landscape of overall privacy protection in South Africa.

From an international perspective, the Universal Declaration of Human Rights 1948 (the UDHR), which protects geographical and communications privacy, is an international privacy benchmark.[477] According to the UDHR, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."[478] The UDHR adds that everyone has the right to legal protection against such interference or attacks.[479]

Regionally, the Preamble to the African Union Convention on Cyber Security and Personal Data Protection 2014 (the AU Data Protection Convention, or the Malabo Convention) notes that the African Union should be committed to building an Information Society and to protecting the privacy of its citizens in their daily or professional lives while guaranteeing the free flow of information. This Convention's main objective is member states' commitment to establish a legal framework to strengthen fundamental rights and public freedoms without prejudice to the data flow principle.[480]

In Southern Africa, the Southern African Development Community (SADC) promulgated the SADC Model Law on Data Protection 2013 (the SADC Model Law). The SADC Model Law's primary objective is to ensure the harmonisation of

475 Grogan (2019) 413.
476 See *Saal v De Beers Consolidated Ltd* [2000] 2 BALR 171 (CCMA).
477 South Africa ratified the UDHR in 1948.
478 Article 12 of the UDHR.
479 Article 12 of the UDHR.
480 Article 8(1) of the AU Data Protection Convention.

information and communications technology (ICT) policies.[481] It also recognises that ICT developments impact the right to privacy and protection of personal data.[482] It seeks to balance the benefits of using ICTs and the protection of personal data.[483] Within the workplace, upholding and honouring the rights of employees and employers, all protected by the Constitution, is crucial.

Locally, the Constitution states that everyone has the right to privacy, which includes the right not to have

(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.[484]

The right to privacy is also protected by different pieces of legislation in South Africa. one of them is the Monitoring Prohibition Act 127 of 1992 (IMPA). The primary goal of the IMPA is to address the monitoring and interception of telephonic and postal communication. It is intended to protect confidential information from illegal eavesdropping.

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) also gives effect to the right to privacy. The ECTA defines "personal information" comprehensively.[485] So it includes "information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person."[486]

The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (RICA) was drafted in response to the growing diversity and innovations in communication technology, as well as the globalisation of

481 The Preamble to the SADC Model Law.
482 The Preamble to the SADC Model Law.
483 The Preamble to the SADC Model Law.
484 Section 14 of the Constitution.
485 See section 1 paras (a)–(h) of the ECTA.
486 Section 1(a) of the ECTA.

the telecommunications business and the convergence of the telecoms, broadcasting, and information technology industries. The primary goal of RICA is to make it illegal to intercept direct or indirect communication unless it is intercepted by a party to the communication or if the author of the communication consents.[487] So RICA governs nearly every aspect of telecommunications interception and monitoring, both in the workplace and in private. The broad restriction in the RICA states: "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."[488]

The discussion below explores the employees' and the employers' right to privacy and its connection to dismissals for off-duty social media misconduct. The discussion of dignity and freedom of expression follows the same format.

4.3.1.1 Employees' Privacy Rights

As natural persons, employees enjoy the right to privacy provided by the Constitution.[489] Privacy is defined as a "safe zone," in which one can explore who they are or want to be, their likes, dislikes, ideas and humour.[490] According to Pagnattaro, when employees leave work, it is reasonable to assume they want to be left alone.[491] Pagnattaro argues that if employees fulfil their obligations, their employer should not hold them accountable for their moral, social, or political actions.[492]

According to the CC in *Bernstein and Others v Bester and Others NNO*,[493] privacy, which the Constitution protects, is accepted in the genuinely personal realm. As a person enters community interactions and activities such as business and social contact, the extent of personal space reduces accordingly.[494] There are two facets to

487 See the Preamble to RICA.
488 Section 2 of RICA.
489 Section 14 of the Constitution.
490 Laidlaw (2017) *Laws* 3. See also Levine (2009) *ALSB J. Employ. Labor Law* 66, who believes that privacy discussions are often conducted according to the respective areas of laws that govern the different forms in which privacy can be violated.
491 Pagnattaro (2003) *Univ. Penn. J. Labor Employ. Law* 267.
492 Pagnattaro (2003) *Univ. Penn. J. Labor Employ. Law* 267.
493 1996 (2) SA 751 (CC).
494 *Bernstein and Others v Bester and Others NNO* para 75.

the fair expectation of privacy: a subjective expectation and logical reasonableness.[495] In general, the right to privacy has been centred on the person seeking protection having a reasonable expectation of having that right respected.[496] Pagnattaro argues that,

> "When there is no legitimate business-related reason for the employer to use an employee's off-duty conduct as the basis for an adverse employment decision, the employer should not be allowed metaphorically to 'open wide the back door' of an employee's reasonable expectation of privacy. As it stands now, there is no uniform standard in the United States to determine when an employer can use an employee's off-duty conduct as the basis for an adverse employment decision".[497]

Levine makes an important observation that employee privacy is based on employees' reasonable expectation of privacy in the workplace. Where there is no reasonable expectation of privacy, there is no privacy. Where there is some reasonable expectation of privacy, there should be some level of privacy protected by law.[498] The notion that employees have no expectation of privacy in the workplace or should have no reasonable expectation of privacy in the workplace is pervasive and an effective weapon in the hands of employers.[499]

Solove, a renowned information privacy scholar, has made significant contributions to the study and advancement of privacy in the context of the Internet and social networking sites. His research centres on the limitations of current privacy legislation in tackling contemporary Internet issues. He advocates moving away from the binary concept of privacy, rooted in the outdated notion that individuals forfeit their right to privacy when in public.[500] He believes that privacy law should acknowledge an individual's societal expectations of privacy and impose those expectations on

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495 The reasonable expectation of privacy is a component of privacy law that governs whether and when a person has a legal right to privacy. See also *Bernstein and Others v Bester and Others NNO* paras 75–77. In this case, the CC applied the United States approach to privacy. According to the CC, the US approach to the scope of the right to privacy includes a two-stage test. An employee would have to demonstrate that he or she had a "subjective expectation of privacy" that society has acknowledged as objectively reasonable. See also Currie and De Waal (2013) 298, who explain that the subjective component explains the permissibility of privacy waivers. For example, an employee may not have an expectancy of privacy if they consented to have their privacy invaded by the employer.

496 Frayer (2001) *Bus. Law.* 860.

497 Pagnattaro (2003) *Univ. Penn. J. Labor Employ. Law* 683.

498 Levine (2009) *ALSB J. Employ. Labor Law* 64.

499 Levine (2009) *ALSB J. Employ. Labor Law* 64.

500 Solove (2007) 190.

others.[501] Widman defines public communications as those that anybody may see, which means that social media users cannot have a reasonable expectation of privacy inside those conversations since they are public.[502]

In *Gaertner and Others v Minister of Finance and Others (Gaertner)*,[503] the CC held that the scope of personal space shrinks as a person advances into communal relations and activities such as business and social interaction.[504] The CC remarked that this limited personal space does not imply that once people are active in social or business relations, they no longer have a right to privacy. The right is diminished rather than obliterated.[505]

On social networks, users enjoy a sense of privacy in the information they publish because their profiles are tied to specific social groups, such as their university, high school, or town, and only users in that social group can access members' profiles.[506] This sense of privacy and familiarity motivates users to share personal information and photographs and update their "status"[507] to regularly let friends know what they are doing.[508] An excellent example of these social media issues is when an employee likes[509] an unpleasant post on his private Facebook page. Then another person photographs this like and sends it to the employee's manager or employer, who is not an employee's friend on Facebook. This behaviour may be considered an invasion of privacy since the employee liked the post, knowing that only his or her friends or followers could view it. In this scenario, the employee has a legitimate expectation of privacy in not having the conduct (the like) broadcasted.

501 Solove (2007) 190.
502 Widman (2013) *Temp. J. Sci. Tech. & Envtl. L.* 214.
503 2014 (1) SA 442 (CC).
504 *Gaertner and Others v Minister of Finance and Others* para 38.
505 *Gaertner and Others v Minister of Finance and Others* para 49.
506 Millier (2008*) Ky LJ* 541.
507 A Facebook status is a social network update tool that allows users to share their views, locations, or significant information with their Facebook friends directly from their profile.
508 Millier (2008) *Ky LJ* 541.
509 Facebook,https://www.facebook.com/help/110920455663362?helpref=uf_permalink, accessed 1 January 2023. The website explains that clicking the like button under a Facebook post lets others know you like it without writing a comment. Anyone who sees the post may see that you liked it, just like a remark.

Regarding privacy and the workplace, Gondwe believes that employees do not waive their rights to privacy when they sign an employment contract.[510] So any threat to an employee's privacy, whether at work or at home, is cause for concern for the employee and the employer.[511] Most organisations have created policies addressing employees' use of social media and potential misuse of company systems and equipment. In general, it has been observed that these policies do not cover all the relevant components and protections required to produce precise, enforceable standards, especially in cases of off-duty misconduct.[512]

Any restrictions on social media behaviour outside work must be weighed against an employee's right to privacy before implementation.[513] To establish whether an employer has violated an employee's privacy, the courts must consider whether the employer's legitimate business interests were negatively affected and decide whether these outweigh the employee's right to privacy.[514]

Cilliers contends that employers should not use information obtained from social media sites, such as Facebook, in recruitment and disciplinary hearing processes unless this information reasonably influences the decision to recruit an employee or has a reasonable implication for the employee's continued employment.[515] Cilliers crucially observes that it should be understood that people lose their inhibitions online and say things they would not usually say, look at things they would not necessarily want others to know they were looking at, and reveal things about themselves that would usually be private.[516] Nagle and Chandran observe that while people lose their inhibitions on social media, they may be unaware that using social media generally leaves a lasting technological record.[517]

One of the issues before the court in *Protea Technology Ltd and Another v Wainer and Others (Protea Technology)*[518] was determining whether the employer's

510 Gondwe LLD Thesis, University of Stellenbosch (2011) 5.
511 Craig (1999) 24.
512 Cilliers (2013) *North. Ky. Law Rev.* 549.
513 Lasher and Steslow (2012) *Ne. J. Legal Stud.* 94.
514 Keller (2012) *North. Ky. Law Rev.* 3.
515 Cilliers (2013) *North. Ky. Law Rev.* 584.
516 Cilliers (2013) *North. Ky. Law Rev.* 584.
517 Nagle and Chandran (2017) *ABA J. Labor Employ. Law* 431.
518 *Protea Technology Ltd and Another v Wainer and Others* [1997] 3 All SA 594 (W).

telephone recordings of the employee's chats violated the IMPA.[519] The court held that an employer was not entitled to intercept an employee's private calls. When the employee was engaged in matters that concerned the employer and his business, the employee lost the right to privacy.[520] Although this is not a case of off-duty misconduct, its contents help one understand the boundaries of an employee's right to privacy and how the courts draw the line between the employee's private space and public space. The judgment can be interpreted to mean that an employee's private off-duty calls should not be intercepted or used against the employee if the calls do not concern the employer's business interests.

It is, therefore, essential to redefine the concept of privacy in today's world, where postings made by the employee on their social media private page restricted to friends only may be photographed and circulated to the public. The court in *Heroldt v Wills (Heroldt)*[521] held that according to Facebook's policy, Facebook makes every attempt to protect a user's information, but these privacy settings are not fool proof.[522] The court also remarked that when hearing cases of social media misconduct, courts should consider that although items uploaded on social media travel quickly, they can also be deleted easily.[523] The court added that the situation differs vastly from newspapers because newspapers will probably be printed in hardcopy and disseminated.[524] This finding supports the idea that some off-duty postings on social media should be met with lesser penalties because an employee who made those postings can easily delete them and offer a public apology on the same platform.

Smith and Partners in Sexual Health (Non-Profit) (Smith)[525] is an excellent illustration of a case in which an employer violated an employee's right to off-duty privacy. In this instance, the chief executive officer of an organisation gained unauthorised access to

519 *Protea Technology* at 607.
520 *Protea Technology* at 607. The same sentiments were echoed in *National Union of Metalworkers of South Africa and another v Rafee NO and others* [2017] JOL 37705 (LC), where the court upheld the dismissal of an employee who refused to hand over his cell phone to the employer to prove that he had deleted photos of the employer's production line. In arriving at this decision, the court weighed the employee's right to privacy and the employer's business interests.
521 2013 (2) SA 530 (GSJ).
522 *Heroldt* para 14.
523 *Heroldt* para 22.
524 *Heroldt* para 22.
525 (2011) 32 *ILJ* 1470 (CCMA).

an employee's personal Google Mail (Gmail) account while she was on leave. He discovered e-mails between the employee, former employees and people not affiliated with the organisation.[526] These emails discussed things related to work.[527] During the employee's disciplinary process, the employee asserted that her emails had been obtained in a manner that violated both her right to privacy and RICA.[528]

The CCMA found that there was a violation of RICA and that the information gathered violated the constitutional right to privacy.[529] The CCMA also held that the employee's dismissal was procedurally and substantively unfair.[530] Notably, a balance must be struck between an employee's privacy and the right to protect their personal information and an employer's right to gather, use, and disclose that information in the interest of the workplace.[531]

It is argued that the right to privacy assumes particular significance when examining off-duty social media usage. Modern employees often use social media platforms as individuals to express personal thoughts, opinions, and aspects of their private lives. It is submitted that this blurred line between personal and professional life can lead to a challenging intersection of rights. As discussed earlier, there has been a pervasive perception that employees have no reasonable expectation of privacy in the workplace, with employers exercising control over employees' actions and expressions. Employers can effectively wield this perception in the context of off-duty social media activities, potentially infringing employees' privacy rights.

In addition, it is essential to note that the right to privacy extends beyond the physical workplace to encompass digital spaces, including social media. However, these rights may conflict with an employer's desire to monitor or act on the employee's off-duty social media conduct. This situation poses complex questions about an individual's intent, the direct relevance of their online behaviour to the workplace, and the

526 *Smith* 1470.
527 *Smith* 1470.
528 *Smith* 1472.
529 *Smith* 1474.
530 *Smith* 1474.
531 Bester and Els (2021) *Scientia Milit.*13.

permissible limits on an employer's intervention, highlighting the need for a careful approach in balancing privacy rights with legitimate employer interests.

4.3.1.2 Employers' Privacy Rights and the Right to Monitor Employees

The interpretation of the South African Constitution may reasonably suggest that the term "everyone" encompasses employers, implying that employers, too, possess a legitimate entitlement to preserving their privacy. Furthermore, the courts extended the right to privacy to juristic entities such as firms in *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another (Financial Mail).*[532] In this case, the applicant secretly filmed its meeting with the respondent company's executives.[533] The respondent applied for an urgent interdict to prevent the applicant, Financial Mail, from releasing the recorded material.[534] The court granted the interdict because the conduct in question violated the company's right to privacy. In addition, the interdict stated that any significant public interest could not justify publishing material gained by unlawfully recording a board meeting.[535] Hence, it was held that a company had the right to be protected from the unlawful invasion of its privacy.[536]

Businesses often invoke privacy issues to constrain various modes of communication among employees.[537] The employers commonly seek to prohibit employees from unlawfully sharing messages related to organising activities with colleagues or external organisers through email systems or on internet platforms. They argue that these limitations are indispensable to safeguarding the privacy of computer systems provided by the company.[538]

To safeguard privacy, including information security, employers frequently implement policies that explicitly assert their authority to monitor specific activities on and off the workplace premises. An employee's privacy rights may be limited if a valid and well-

532 1993 (2) SA 451 (A).
533 *Financial Mail* at 481.
534 *Financial Mail* at 481.
535 *Financial Mail* 460.
536 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).
537 Craver (2005) *La.L.Rev.* 1060.
538 Craver (2005) *La.L.Rev.* 1063.

founded employer interest exists for this restriction or if it is generally justifiable by the limitation clause of the Constitution.[539] This principle offers significant flexibility, enabling courts to assess each case's circumstances and determine whether a limitation on privacy rights is warranted. The employer's capacity to restrict an employee's privacy typically stems from two categories of reasons: those related to business necessities and those linked to liability concerns.[540] The former scenario pertains to work process requirements, where the limitation of an employee's privacy is deemed essential for the efficient operation of business activities. The latter scenario concerns the employer's responsibility as the property owner, particularly in ensuring the workplace safety of individuals and assets.[541]

An increasing trend in monitoring is the adoption of electronic monitoring, which uses software to oversee employees' Internet usage.[542] However, employers must balance maintaining employee productivity, respecting privacy rights, and preserving a boundary between work and personal life.[543] Monitoring should be minimal and align with "business necessity," addressing performance issues as part of the employer's performance management system. Moreover, the more non-work-related email usage occurs, the greater the likelihood of employees' encountering malicious software in attachments and embedded links, potentially compromising network security. As the employer has invested in the equipment and associated support, it is within the employer's purview to ensure that these resources remain uncompromised by negligent email practices.[544]

Although employers possess the authority to monitor employees' off-duty activities, exercising this right can potentially infringe on employees' privacy rights. Given the potential conflict between an employee's right to privacy and the rights of the employer to monitor the workplace, it is essential to balance the rights of employers against those of the employees.[545]

539 Section 36 of the Constitution.
540 Orlandić (2020) *Strani Pravni život* 89.
541 Orlandić (2020) *Strani Pravni život* 89.
542 Smith and Tabak (2009) *Acad. Manag. Perspec.* 38.
543 Smith and Tabak (2009) *Acad. Manag. Perspec.* 38.
544 Smith and Tabak (2009) *Acad. Manag. Perspec.* 42.
545 Everett *et al* (2004) *Journal of Individual Employment Rights* 296.

It is argued that balancing employees' right to privacy, especially in off-duty situations, with the legitimate monitoring needs of employers is a central concern in modern labour relations. The key lies in establishing clear, transparent policies that respect the employee's rights and the employer's interests, ensuring both parties can coexist harmoniously. This approach honours the right to privacy while fostering a work environment where all stakeholders can thrive.

4.3.2 Right to Dignity and Good Reputation

The ILO's Declaration of Philadelphia 1944 states:

> "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[546]

This affirmation is the same as the one in the ILO Constitution. The ILO Constitution states that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."[547]

The ILO's Committee of Experts on the Application of Conventions and Recommendations 2020 (CEACR) acknowledged sexual harassment as one of the expressions of sex discrimination since it undermines equality at work by calling into question the integrity, dignity, and well-being of workers.[548] Consequently, the ILO considers sexual harassment a violation of the right not to be discriminated against based on sex and, thus, a hindrance to the achievement of equality of opportunity and treatment in the workplace.

The UDHR is the first and chief international legal instrument to recognise human dignity. Its Preamble states that the "recognition of the inherent dignity and the equal

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546 The ILO's Declaration of Philadelphia 1944, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_698989/lang--en/index.htm, accessed 12 January 2023.

547 See Article II(a) of Annex to the ILO Constitution, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO, accessed 12 January 2023.

548 The ILO's Committee of Experts on the Application of Conventions and Recommendations of 2020, https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm, accessed 12 January 2023.

and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." In *Qwelane v South African Human Rights Commission and Another* (*Qwelane*),[549] the CC held that the UDHR recognises the inherent dignity and equality amongst the human family.[550] This signifies that the UDHR acknowledges the intrinsic worth and equality of all individuals, regardless of their background, characteristics, or beliefs. The court's emphasis on dignity reinforces the significance of respecting and upholding the inherent worth of every human being. This principle is central to human rights and anti-discrimination efforts.[551]

Human dignity is the cornerstone of the South African Constitution, which was written in response to the country's apartheid past. The Constitution states that everyone has inherent dignity and the right to have their dignity respected and protected.[552] As a result, the dignity and worth of all people as members of society must be respected.

Case law also reinforces respect for people's dignity. In the case of *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others*,[553] the judge observed that employees have a right to be treated with dignity by their employers, and that the Constitution at its core preserves the dignity of persons in an employment relationship.[554] The judgment in *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others* reinforces the constitutional commitment to upholding human dignity in the workplace, serving as a cornerstone for promoting respectful and fair labour practices. It highlights that treating employees with dignity is a moral imperative and a legal obligation deeply embedded in the constitutional framework.

4.3.2.1 Employees' Right to Dignity

Because employees spend most of their day at work, the workplace atmosphere plays a significant part in an employee's life.[555] Tiwari and Sharma comment that technological advances are becoming more mechanical and less humanistic in their

549 2021 (6) SA 579 (CC).
550 *Qwelane* para 57 and section 9 of the Constitution. See Article 19 of the United Nations' International Covenant on Civil and Political Rights 1965 (ICCPR).
551 *Qwelane* para 57. See Article 19 of the ICCPR.
552 Section 10 of the Constitution.
553 (2010) 31 *ILJ* 1600 (LAC).
554 *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others* para 26.
555 Tiwari and Sharma (2019) *Front. Psychol.* 1.

operations, impacting dignity.[556] Edlund and others identify four categories of conduct that degrade people's dignity and enhance the feeling of having one's dignity violated at work:

(i) improper management and abuse;
(ii) encroachments on the employee's right to autonomy,
(iii) an excessive workload, and
(iv) inconsistencies in employee participation.[557]

In the case of *Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration & others (Standard Bank of SA)*,[558] the court summarised the value of work to human life by stating that employment plays a vital role in a person's sense of self-worth, emotional well-being, and sense of identity.[559] Hence, the conditions that a person works in play a significant part in forming the full compendium of psychological, emotional, and physical aspects of a person's integrity and self-respect.[560] The judge then ruled that human dignity is what gives a person their worth as a human being and necessitates that they be treated with respect.[561] In the case of *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass & Aluminium 2000 CC (Chemical Energy*),[562] Nicholson JA stated that employers are obliged to treat their employees reasonably or fairly, particularly in the light of the constitutionally protected right to dignity.[563]

In the case of *Heroldt*, the respondent was the subject of an urgent application brought by the applicant.[564] This motion sought to interdict and prohibit the respondent from posting defamatory statements about the applicant.[565] If the respondents did not comply with the order, they risked being imprisoned for 30 days.[566] The High Court

556 Tiwari and Sharma (2019) *Front. Psychol.* 1.
557 Edlund *et al* (2013) 851.
558 (2008) 29 *ILJ* 1239 (LC).
559 *Standard Bank of SA* para 65.
560 *Standard Bank of SA* para 65.
561 *Standard Bank of SA* para 65.
562 (2002) 23 *ILJ* 695 (LAC).
563 *Chemical Energy* para 48.
564 *Heroldt* para 1.
565 *Heroldt* para 1.
566 *Heroldt* para 3.

determined that the content of these utterances constituted defamatory speech.[567] According to the court's decision, the party responsible for making such defamatory comments had to take them down if they were requested to do so by the party that had been wronged.[568] Furthermore, the court found that the respondent's defamatory comments and unsubstantiated charges against the applicant had harmed the applicant's dignity and that this violation had occurred because of the respondent's actions.[569] The court in this case cited *Khumalo and Others v Holomisa (Khumalo)*,[570] where the relationship between privacy and dignity was emphasised. The CC in *Khumalo* held that,

> "The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity. No sharp lines can be drawn between reputation, *dignitas* and privacy in giving effect to the value of human dignity in our Constitution."[571]

It is submitted that preserving an employee's interest in the security of their employment while upholding the right to dignity and promoting autonomy is an essential component of fairness in South African labour relations. It underscores the need for a balanced approach where both employers and employees have their interests safeguarded. This balance ensures that job security is not unduly compromised and that employees are treated fairly, aligning with the principle of fairness that underpins South African labour relations.[572] This notion highlights the importance of finding equitable solutions that protect the rights and interests of all parties involved in the employment relationship.[573]

4.3.2.2 Employers' Right to Dignity (Reputation)

This thesis assumes that an employer's right to reputation is synonymous with the right to dignity.[574] Employers spend time building and managing their brand and their reputations.[575] Because an employer has a financial stake in the company's

567 *Heroldt* para 43.
568 *Heroldt* para 44.
569 *Heroldt* para 44.
570 2002 (5) SA 401 (CC).
571 *Khumalo* para 27.
572 Van Niekerk (2012) *AJ* 116.
573 Van Niekerk (2012) *AJ* 116.
574 Marens *et al* (1999) *Bus. Soc.* 3.
575 Kearney (1993) *Notre Dame Law Rev.* 135.

reputation, the employer has the right to defend that reputation as a legitimate commercial interest.[576]

Employer branding involves the strategic process through which an organisation shapes how it is perceived by potential job candidates and its existing workforce, aiming to establish itself as an appealing workplace.[577] In the competitive market environment, every entity, whether directly or indirectly connected, forms a specific image and reputation. This perception, reflected in opinions about the organisation, is crucial in shaping its overall image.[578]

Employer branding represents a deliberate and systematic endeavour to cultivate the organisation's image as a desirable workplace for its current employees and prospective stakeholders.[579] To attain the status of an employer of choice, a company must adhere to well-defined principles and priorities, fostering trust among its employees while consistently meeting their needs and expectations.[580]

To protect its brand, an employer has a prerogative to safeguard its reputation. Ásványi defines "prerogative" as a right or privilege that belongs to a particular institution, organisation, or individual. In the employment relationship, the phrase "prerogative" typically refers to the right to govern an organisation. More specifically, the employer has the right to organise its work arrangements to guarantee the most efficient functioning of its organisation.[581] Arguably, this prerogative includes the right to dismiss employees for misconduct.

An employer's interest lies in ensuring that the business grows, expands, and is profitable, and these results often depend on the business's good name and brand image.[582] A tarnished reputation can result in adverse consequences, including reduced customer trust, diminished competitiveness in the market, loss of clientele,

576 Magatelli (2012) *J. Bus. Entrepr. Law* 102.
577 Lievens and Slaughter (2016) *Ann. Rev. Organ. Psychol. Organ. Behav.* 409.
578 Backhaus and Tikoo (2004) *Career Dev. Int.* 502–503.
579 Backhaus and Tikoo (2004) *Career Dev. Int.* 502–503.
580 Backhaus and Tikoo (2004) *Career Dev. Int.* 503.
581 Ásványi (2017) *Jura: A Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak Tudomanyos Lapja* 268.
582 Zelga (2017) *World Sci. News* 309.

and even financial setbacks.[583] A damaged reputation reverberates throughout the enterprise, affecting the employer's ability to thrive and achieve its goals.

Employers frequently take disciplinary actions against employees for their online posts because of their perceived threat to the company's reputation. The adjudication process is influenced by the notion that published statements have more significant potential for harm, especially concerning business reputation, akin to the principles applied in defamation cases.[584]

Employers are justified in dismissing employees for social media off-duty behaviour that brings or has great potential to bring their name into disrepute.[585] Concerns have been expressed regarding the type of information that an employee may reveal in social media postings, which could harm the employer's reputation.[586] As a result, an employee must also act reasonably, avoid activities likely to harm the employer, and operate only within the boundaries of the employee's actual authority.[587]

4.3.3 Freedom of Expression

The International Covenant on Civil and Political Rights 1966 (ICCPR),[588] which South Africa ratified, expressly addresses the right to freedom of expression, which is seen as a cornerstone of democracy.[589] The UDHR also guarantees freedom of expression, opinion, and information.[590] This combination indicates that freedom of expression is considered an essential human right and a requirement of every democracy worldwide.[591] Given the degree to which freedom of expression respects other rights, this right is fundamental to liberal democracy in South African courts.[592] Freedom of

583 Gheorghe (2017) *Trib. Jurid.* 64.
584 Benson *et al* (2020) *MS* 1803.
585 See *Edcon Ltd v Cantamessa & others* (2020) 41 *ILJ* 195 (LC) para 15.
586 Magatelli (2012) *J. Bus. Entrepr. Law* 102.
587 Cooney *(*2009) *Miss.L.J.* 855.
588 United Nations' International Covenant on Civil and Political Rights 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights, 23 June 2023.
589 Article 19 of the ICCPR.
590 Article 19 of the UHDR.
591 Van Vollenhoven (2015) *PELJ* 2302.
592 See *S v Mamabolo (E-TV and Others Intervening)* 2001 (3) SA 409 (CC) para 58.

expression is not the entitlement of any political system or ideology but a general human right guaranteed in international law and national law.[593]

Section 16 of the Constitution provides for freedom of expression in the following manner:

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

The Constitution specifies that the right to freedom of expression does not extend to

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[594]

These limitations balance the fundamental right to freedom of expression with the need to prevent activities that may incite violence, discrimination, or harm to others.

4.3.3.1 Employees' Freedom of Expression

With technological advances, employees now express themselves in different ways on Internet sites.[595] Social media users have become accustomed to the open flow of information and vast opportunities for self-expression in the digital realm of online social networks.[596] Users create online communities on social media to share information, ideas, personal messages, and other content, such as videos.[597] As in all spheres of life, this advance affects the employment relationship.[598]

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593 Van Vollenhoven (2015) *PELJ* 2302.
594 Section 16(2) of the Constitution.
595 Lukács (2017) *Masaryk Univ. J. Law Technol.* 188.
596 Millier (2008) *Ky LJ* 541.
597 *Merriam-Webster Dictionary* "social media", available at https://www.merriam-webster.com/dictionary/social%20media, accessed 6 April 2022.
598 Wragg (2015) *ILJ* 2 observes that it is critical to research how to protect employees' free speech rights better while still protecting genuine business interests, such as the protection of spontaneous and disliked trivial speech. Some businesses dismiss employees because of unpleasant remarks. It is, therefore, vital to emphasise that after a message is sent, the author has little or no influence over who sees it or how far it is spread. Naturally, companies may be concerned about harm to their economic interests if the employee offends others. There is evidence of companies dismissing employees not only for critical online expression of the

Technological advances have significantly changed how individuals communicate and transmit information and knowledge.[599] This is evident from the growing usage of technology devices such as smartphones and tablets and through interactions on social media platforms such as Facebook and Twitter (X).[600] Because rapid technological improvements allow employees to express their thoughts to a broader audience in various formats, companies and employees emphasise the problems of freedom of expression even more. McGinley and McGinley-Stempel observe that courts have hesitated to interpret statutes broadly in this era of rapidly changing technology and new social media sources.[601]

It should be noted that freedom of expression rarely occurs in a vacuum but is shaped by its environment. Statements against an employer that qualify as "insubordination, disobedience, or disloyalty" on the part of an employee will not be protected by the law if they are made off duty and on social media.[602] In *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Divine World Ministries (Dutch Reformed Church)*,[603] the court made a vital remark regarding freedom of expression on social media:

> "Expression may often be robust, angry, vitriolic, and even abusive. One has to test the boundaries of freedom of expression each time. The court must be aware of the issues involved, the context within which the debate takes place, the protagonists in the dispute or disagreement, the language used and the content of which is said, written and published and about whom it is published."[604]

Thornthwaite warns that although individuals engaging in social media often perceive these platforms as personal and private spheres, it is crucial to acknowledge that they also possess a partially public nature. The use of social media by both employers and employees has the potential to erode the traditional boundaries that legal frameworks, customs, and practices have defined between professional and personal life. This

organisation but also for using social media to communicate opinions that employers do not want associated with their organisation. Sometimes, the expression has little or no direct link to the employer's organisation. Defining how the statement impairs the employee's ability to execute their work objectively may also be challenging.

599 Ireton (2013) *HBTLJ* 146.
600 Ireton (2013) *HBTLJ* 146.
601 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 80.
602 Nel (2016) *CILSA* 203.
603 [2012] 3 All SA 322 (GSJ).
604 *Dutch Reformed Church* para 23.

phenomenon extends the implied responsibilities of employees beyond the confines of the workplace.[605]

Papandrea points out that when an employee is speaking not as an employee but as a citizen on a matter of public concern, he or she may be subject to only those speech restrictions that are connected to the employer.[606]

Papandrea's perspective highlights the importance of distinguishing between an employee's private citizen role and their employee role when it comes to freedom of expression in the employment relationship. Even when employees express their personal opinions on issues of public concern, though, they may still be subject to restrictions imposed by their employers. These restrictions usually stem from employment policies or contractual agreements and reflect the employer's authority to manage the workplace.

4.3.3.2 Employers' Freedom of Expression

The employer's freedom of expression, like that of any individual or entity, is a constitutionally protected right allowing them to express their thoughts, opinions, ideas, and viewpoints without censorship or interference from the government. In the context of employment, this means that employers have the right to communicate their views, policies, and messages within the boundaries of the law.[607]

Employers hold the authority to institute and enforce comprehensive workplace policies that serve as essential frameworks for regulating the behaviour and expressions of their employees.[608]

These policies play a pivotal role in shaping the work environment and ensuring that it remains conducive to productivity, respect, and compliance with legal and ethical standards. Workplace policies often include provisions explicitly prohibiting

605 Thornthwaite (2013) *AJLL* 164.
606 Papandrea (2010) *BYU L.Rev.* 2119.
607 Feldman (1950) *LLJ* 288.
608 O'Brien (2001) *Dick.L.Rev.* 575. See also Item 3(1) of the Code.

expressions, statements, or behaviour that could be considered offensive, discriminatory, or harmful to fellow employees.

It is argued that by establishing and enforcing these policies, employers demonstrate their dedication to creating a harmonious and equitable work environment while mitigating legal and reputational risks associated with workplace misconduct. These policies also underline the importance of fostering diversity and inclusion, increasingly recognised as essential components of a successful and socially responsible workplace.

Although employers and employees have constitutionally protected rights, it should be noted that these rights are not absolute and can be limited by the limitation clause of the Constitution, as discussed below.[609]

4.4 Limitation of Rights in South Africa: Section 36 Of The Constitution

Any Bill of Rights provides, in some fashion or another, a means by which the state can legally restrict some of its fundamental rights in certain situations. Giving the state this power has at least two primary justifications.[610] It is imperative to highlight that all the rights enshrined in the Bill of Rights, including those concerning dignity, privacy, and freedom of expression, considered in this chapter, are subject to limitations.

Although these rights are fundamental, the Constitution acknowledges that they can be reasonably restricted or regulated in certain circumstances. This recognition underscores the importance of striking a balance between the protection of individual rights and the broader interests of society, ensuring a balanced approach to applying these rights.

When applied to dismissing employees for off-duty social media misconduct, this clause necessitates carefully balancing the employer's legitimate interests, such as safeguarding their reputation and workplace harmony, and the employee's rights. The clause emphasises the principle of proportionality, meaning that limitations on rights,

609 Section 36 of the Constitution.
610 *Equity Aviation Services (Pty) Ltd v SATAWU & others* [2009] 10 BLLR 933 (LAC) para 53 (*SATAWU*).

including dismissal, should be proportionate to the harm or risk involved. The limitation clause becomes critical during legal scrutiny as decision-makers assess whether the employer's actions align with constitutional or legal principles and whether the limitation imposed was reasonable and justified within the specific circumstances, ultimately impacting the fairness of the dismissal.

Before limiting a right, the following factors must be considered, as required by the limitation clause: the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose.[611]

A right in the Bill of Rights may be restricted only by a law of general application "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."[612]

In South Africa, the "essence" of a right often denotes a specific aspect that may be restricted, and the importance of different aspects of the right varies, depending on the circumstances. [613] The significance of the intended limitations implies that the value of the restrictions influences the relative importance of the parties' interests and rights.[614] The individual or organisation enforcing the restriction must establish a valid reason.[615]

The nature and extent of limitations, outlined in the limitation clause, specify how invasive the restriction is on activities and interests protected by the right.[616] According to the limitation clause, if the restriction cannot achieve its intended purpose, it cannot be justified as necessary. Less restrictive ways to achieve the purpose are related to the proportionality factor, which states that when two or more suitable ways of

611 See also *SATAWU*.
612 Section 36(1) of the Constitution.
613 *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; *North Central Local Council and South Central Local Council v Roundabout Outdoor (Pty) Ltd and Others* 2002 (2) SA 625 (D) 634.
614 Section 36(1)(b) of the Constitution.
615 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 37.
616 Section 36(1)(c) of the Constitution.

effectively furthering the goal of a restriction exist, the one that interferes less intensively with the right to be restricted must be chosen.[617]

In the case of *S v Makwanyane and Another* (*Makwanyane*),[618] the CC held that the restriction should be established through universally applicable law, and assessing fairness and reasonableness involves a process of proportionality. This process entails considering multiple factors and conducting a balancing exercise to determine whether the restriction is justifiable and reasonable within a democratic society that values human dignity, equality, and freedom.[619]

In *Islamic Unity Convention v Independent Broadcasting Authority and Others* (*Islamic Unity Convention*),[620] the CC underscored the recognition that freedom of expression, while a fundamental right, can impede the exercise and enjoyment of other crucial rights, notably the right to dignity. The court acknowledged that this right is not absolute, acknowledging the need for limitations as outlined in the Constitution.[621] This perspective aligns with the understanding that protecting the right to dignity is paramount, even in the context of expressive freedoms, and should be balanced with broader state interests such as national unity and reconciliation.

The author argues that the limitation clause holds considerable significance in the context of dismissals for off-duty misconduct. The rights of employees must not be unduly curtailed in a manner that infringes upon their rights to privacy, dignity, or freedom of expression. Given the paramount importance of these rights, both the legislative and judicial branches are responsible for implementing safeguards to prevent any inadvertent violation of fundamental rights in dismissing employees for off-duty misconduct. When addressing suspicions of off-duty misconduct, the disciplinary actions taken must adhere to legal and fair procedures, considering factors such as the nature and extent of the limitation, the specific circumstances of the misconduct, and the potential impact on the employee's protected rights. This

617 Section 36(1)(e). See also *S v Williams and Others* 1995 (3) SA 632 (CC) para 86.
618 1995 (3) SA 3921 (CC).
619 *Makwanyane* para 102.
620 2002 (4) SA 294 (CC).
621 *Islamic Unity Convention* para 19.

approach ensures that the rights of the employees are duly protected while the integrity of the disciplinary process is maintained.

After establishing the constitutional framework essential for addressing off-duty social media misconduct, the subsequent section considers the approach taken by adjudicators in managing this specific category of misconduct.

4.5 Types of Off-Duty Social Media Misconduct

According to Chitimira and Lekopanye, social media misconduct is employees' improper and/or unlawful use of social media to the detriment of their employers, employer's businesses, or other people.[622] In other words, off-duty social media misconduct means an off-duty act on social media that constitutes a potentially reasonable ground for dismissal since it is related to company interests. Employees can be dismissed for off-duty social media postings directed at the employer and those directed at third parties. The following discussion centres on two categories of off-duty social media misconduct. The first pertains to derogatory and racist social media posts targeting the employer, while the second pertains to similar posts targeting third parties. Following this discussion, a detailed analysis examines establishing guilt and evaluating the fairness of dismissal in these specific types of off-duty misconduct cases.

4.5.1 Derogatory and Racist Postings Directed at the Employer

This type of social media misconduct occurs when employees publish degrading or insulting remarks about the employer on social media sites.[623]

Cases of unfair dismissals for derogatory posts against the employer have been brought before the CCMA and bargaining councils as the initial step in the dispute-resolution process. Employees often allege that their dismissals were unfair and cite violations of fundamental rights, while employers defend their decisions by citing various reasons such as defamation and loss of clientele. The cases discussed below are critical examples of the legal and ethical considerations surrounding dismissals for

622 Chitimira and Lekopanye (2019) *DIREITO GV L. Rev.* 6.
623 Chitimira and Lekopanye (2019) *DIREITO GV L. Rev.* 6.

off-duty social media misconduct in South Africa. They highlight the complexities of balancing the rights and interests of both parties while upholding the principles of fairness and equity.

In *Media Workers Association of SA on behalf of Mvemve and Kathorus Community Radio* (*Kathorus Community Radio*),[624] the applicant was dismissed for failing to apologise on social media after making malicious comments on Facebook, criticising the employer's board for defending its station manager and implying that the manager was a criminal. These comments were brought to the employer's attention, and the employee was charged and eventually dismissed. The employee challenged the substantive fairness of the dismissal.[625] At arbitration, the commissioner found that the employee "tarnished the respondent's image by posting unfounded allegations on Facebook without first addressing them internally."[626] Tarnishing the image of the employer was regarded as having a link to the employer's business and having an impact on the employment relationship. As a result, the employee's dismissal was deemed substantively fair.[627]

In *Fredericks v Jo Barkett Fashions (Fredericks)*,[628] the applicant was dismissed for publicly harming the employer's reputation. The applicant had used her Facebook account to make derogatory remarks about the employer's General Manager.[629] The remarks had the potential to impact staff and important clients negatively. As a result, the employee was charged and dismissed. She claimed that the dismissal was unfair because it violated her right to privacy.[630] The commissioner deemed the dismissal fair and determined that the employee's actions were unjustified and constituted misconduct.[631]

624 (2010) 31 *ILJ* 2217 (CCMA).
625 *Kathorus Community Radio* para 2.
626 *Kathorus Community Radio* para 5.7.
627 *Kathorus Community Radio* para 6.
628 [2011] JOL 27923 (CCMA).
629 *Fredericks* para 4.
630 *Fredericks* para 5.
631 *Fredericks* para 6.

In the case of *Sedick & another v Krisray (Pty) Ltd* (*Sedick*),[632] two employees were dismissed for making negative statements on Facebook about their employer.[633] The comments were highly offensive and racist, targeting both their supervisor and a specific ethnic group.[634] The employees challenged the fairness of their dismissals at the CCMA, claiming that their comments had not brought the employer's name into disrepute because neither the company nor specific individuals had been mentioned.[635] In addition, the employees alleged that their privacy rights had been violated.[636] However, the employees had not limited their Facebook privacy settings, making their updates visible to anyone, including those not on their friend list.

In the award, the CCMA found that the employees' privacy had not been breached because the employees had not restricted their Facebook privacy settings, and the updates could be viewed by anybody, including those with whom they were not Facebook "friends."[637] The CCMA concluded that the employer had the authority to access the wall posts because of the employees' open Facebook profiles. The CCMA also found that it was highly likely that the employer's identity would be revealed and that although actual damage to the employer's reputation could not be demonstrated, the risk of damage was sufficient to support dismissal.[638] The CCMA decision in this case was based on the fact that there was a direct nexus or link between the employees' conduct and the employer's business, as the posts were directed at the employer.[639] There was also a considerable risk of reputational harm because the employer was criticised in the post.[640]

In *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith*[641] (*Dewoonarain*), an Indian receptionist was dismissed after she wrote on Facebook: "Working for and with Indians is pits; they treat their own like dirt."[642] She attempted to

632 (2011) 32 *ILJ* 752 (CCMA).
633 *Sedick* para 42.
634 *Sedick* para 28
635 *Sedick* para 28.
636 *Sedick* para 42.
637 *Sedick* para 57.
638 *Sedick* para 57.
639 *Sedick* para 57.
640 *Sedick* para 57.
641 (2013) 7 BALR 689 (MIBC).
642 *Dewoonarain* para 12.

explain her actions by claiming that she was exercising her constitutional right to freedom of expression.[643] The employer testified that because it operated in an area where everyone knew each other, the comment would negatively influence the workplace.[644] Even though the employee did not address the company, other employees, or the manager by name, it was stated that the insulting comment was directed at them and, therefore, constituted misconduct.[645] This was because, on a balance of probabilities, the comment was directed at the company, as the management and other employees were Indians, and she was employed at the company when the comment was placed on Facebook.[646] As a result, there was a nexus between the employee's conduct and the company. In addition, there was potential damage to the company's reputation, so the dismissal was justified.[647]

In *Chemical, Energy, Paper, Printing, Wood and Allied Workers Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers (Dietlof v Frans Loots)*,[648] the applicant claimed on Facebook that the respondent had behaved in a discriminatory way towards two long-serving employees when he (the owner) purposefully kissed the white female employee on the cheek and hugged the black female employee.[649] During her testimony, the applicant claimed that the social media post did not mention or relate to the business.[650]

In giving evidence, the employer stated that although its name was not mentioned, the phrasing and form of remarks suggested that the comments could immediately be connected to the respondent.[651] The photographs posted on Facebook seemed to have been taken on the respondent's property, and the activities detailed in that post were the same as those held during the respondent's event.[652] Even though the respondent had no social media policies, the commissioner determined that the

643 *Dewoonarain* para 13.
644 *Dewoonarain* para 26.
645 *Dewoonarain* para 55.
646 *Dewoonarain* para 59.
647 *Dewoonarain* para 59
648 [2016] 10 BALR 1060 (CCMA).
649 *Dietlof v Frans Loots* para 5.
650 *Dietlof v Frans Loots* para 11.
651 *Dietlof v Frans Loots* para 14.
652 *Dietlof v Frans Loots* para 14.

applicant's dismissal was procedurally and substantively fair.[653] The commissioner commented that "falsely accusing a supervisor or co-worker of racism was as heinous as racism itself. The dismissal was deemed to be fair."[654]

It is worth noting that in all these cases, the employers lacked a specific policy addressing off-duty social media use by their employees.
The cases discussed are now analysed.

4.5.1.1 Assessing the Fairness in Establishing Guilt and in Determining Whether Dismissal is a Fair Sanction

In all five cases discussed above, the dismissals were found to be fair. The critical legal principles in these cases revolve around the employee's actions affecting the employer's reputation and the absence of a reasonable expectation of privacy thereby establishing a nexus between the employee's conduct and the employer's business.

In all these instances, a key factor in proving culpability and evaluating the fairness of a dismissal hinged on the recognition that the employees' actions were explicitly aimed at the employer, thereby presenting a tangible risk of harming the employer's reputation. This element played a pivotal role in establishing a direct link between off-duty conduct and the employer's concerns, emphasising the necessity of mitigating potential harm to the employer's image. Moreover, these judgments highlight the importance of demonstrating that off-duty misconduct transcended personal matters and had distinct repercussions for the employer.

In the five cases discussed above, the employees mounted a defence by invoking their constitutional right to privacy.[655] In the *Kathorus Community Radio* case, the employee additionally cited the right to freedom of expression as a defence. For their part, the employers expressed apprehension about potential damage to their reputation because of derogatory and racist social media posts. Their argument centred on the infringement of their constitutional right to reputation (dignity). It is crucial to note that

653 *Dietlof v Frans Loots* para 28.
654 *Dietlof v Frans Loots* para 28.
655 These were *Kathorus Community Radio*; *Dietlof v Frans Loots*; *Dewoonarain*; *Frederick*; *and Sedick.*

harm to reputation is considered within the scope of the employer's constitutional rights, as detailed in paragraph 4.3.2.1 above. In a meticulous assessment of these competing rights, the CCMA ruled in favour of the employers. This verdict signifies that when offensive social media content is specifically aimed at the employer, the right to protect the employer's reputation is deemed more substantial in legal weight compared to the employee's rights to privacy and freedom of expression. This decision signifies the importance of maintaining the employer's public image and the legal principle that the right to privacy and freedom of expression may be constrained when it jeopardises the employer's reputation.

From the case law analysis above, the author submits that the decision to dismiss an employee for off-duty social media posts that target the employer is well-founded. This perspective is based on the understanding that publicly defaming the employer constitutes a breach of the fundamental principle of good faith in the employment relationship. Such conduct can tarnish the employer's reputation and have adverse implications for the perception of the employer among its clientele.

The rationale behind this argument stems from recognising that an employer's reputation is a valuable asset that can significantly impact business operations and relationships. Adverse publicity or defamatory remarks directed at the employer through social media platforms can result in severe consequences, including loss of customers' trust and decreased business opportunities. This could even influence the employer's financial stability.

Moreover, it is further submitted that labelling derogatory social media posts aimed at the employer as gross insubordination is a valid perspective. Such posts can be seen as disregarding the hierarchical structure and authority in the workplace. The act of publicly criticising the employer goes beyond mere expression of dissatisfaction; it challenges the employer's legitimate authority and the boundaries of acceptable behaviour within the employment relationship.

Against this background, it is worth noting that employees have alternative channels to address their grievances or conflicts with their employers. Rather than airing grievances on social media platforms, internal mechanisms such as open

communication, grievance procedures, and direct dialogue with supervisors can offer more constructive avenues for dispute resolution. Employees can contribute to a healthier and more cooperative work environment by opting for more private methods.

Although the CCMA's decisions in these cases are supported, the absence of a specific social media policy in the discussed cases has drawn criticism for several reasons. First, the presence or absence of a social media policy should play a crucial role in determining the fairness of dismissals related to social media misconduct. Social media policies provide clear guidelines for employees and employers, ensuring a shared understanding of acceptable conduct. Without such a policy, employees may lack awareness of the boundaries that govern their social media behaviour.

A well-structured social media policy can proactively address potential misconduct, setting expectations for employees and reducing the likelihood of harmful actions occurring in the first place. The absence of such a policy can be viewed as a gap in the employer's risk management and proactive measures to safeguard its reputation.

In addition, the lack of a social media policy can result in inconsistent decisions across different cases, creating an environment of uncertainty for both employees and employers. The assumption that employees should inherently know the boundaries of acceptable social media behaviour may not hold true, particularly given the evolving nature of social media platforms and their influence on the workplace.

It is worth mentioning that the LCs have not yet had the opportunity to hear cases related explicitly to dismissal for derogatory and racist postings directed at employers. However, LCs have had the opportunity to adjudicate cases where employees faced dismissal because of derogatory and racist comments directed at third parties, as elaborated below.

4.5.2 Derogatory and Racist Postings Directed at Third Parties

The fairness of dismissals for off-duty social media misconduct is further complicated by the involvement of the public or third parties in an employment relationship. This external dimension escalates the perceived seriousness of the alleged misconduct,

potentially putting the employer under pressure to impose the harsh sanction of dismissal on the employee.[656] This was the issue in the cases below.

In *Gordon v National Oilwell Varco (Gordon)*,[657] a case heard by a bargaining council, the applicant was dismissed for posting racist comments on social media. When his mother was wounded in an ambulance hijacking, the applicant commented on Facebook: "My mother has been in the hospital since yesterday night after her ambulance was kidnapped by sh*t 'kaffirs' looking for a ride to their f*****g knife stabbing. I'm becoming tired of his country. Will things ever be right again? I doubt it; maybe I should simply leave the country."[658] The employer had a social media policy governing employees' behaviour at work, which the employee signed when he began working for the company.[659] In his defence, he said that the comments were made in despair.[660] Nonetheless, the commissioner determined that the racist remarks, notably the use of the word "kaffir", were not appropriate and that the applicant's dismissal was fair.[661] It should be noted that these comments were not directed at the employer but were about criminality in the country. Furthermore, the comments were made during a state of desperation and frustration.

In *Dyonashe v Siyaya Skills Institute (Pty) Ltd* (*Siyaya*),[662] the applicant was dismissed for making racist remarks on Facebook and bringing the employer's name into disrepute. "Kill the Boer, we need to kill them," the employee wrote.[663] The employer highlighted that "kill the Boer" was an upsetting racial statement that the applicant had placed on his public Facebook profile.[664] The applicant, for his part, contended that "kill the Boer" did not, in his opinion, refer to killing white people but rather to killing the

656 Phungula (2022) *ILJ* 2242. This is now prevalent in social media postings concerning the private lives of celebrities. See also Kemp "Katlego Maboe and That STD: No Place to Hide for TV Personality" (*City Press*, 24 October 2020), https://www.news24.com/citypress/news/katlego-maboe-and-that-std-no-place-to-hide-for-tv-personality-20201025, accessed 17 December 2023: it was reported that a prominent celebrity allegedly cheated on his wife and infected her with an STD, causing reproductive troubles. This was disclosed through a social media post by the wife in October 2020. Because of the controversy, he was dismissed from most of his television gigs.

657 [2017] 9 BALR 935 (MEIBC).

658 *Gordon* para 9.

659 *Gordon* para 14.

660 *Gordon* para 13.

661 *Gordon* paras 55 and 61.

662 (2018) 39 *ILJ* 2369 (CCMA).

663 *Siyaya* para 1.

664 *Siyaya* para 16.

system that oppressed one race.[665] He said that since he had white friends and individuals close to him, he did not believe white people would view this as racist and offensive.[666]

At the CCMA, the commissioner determined that there was a link between the applicant's behaviour and his employment with the respondent, and his conduct compromised his employment eligibility.[667] The dismissal was found to be fair, and the commissioner ruled that the absence of a specific policy regulating off-duty social media misconduct did not negate the fairness of the dismissal, as the CCMA Guidelines provided adequate guidance.[668] According to the commissioner, the test to be used in the CCMA Guidelines was "whether the employer could have imposed the sanction of dismissal in the circumstances because the misconduct on its own rendered the continued employment relationship intolerable."[669] This aligns with the principles expressed in the Code.[670]

In the case of *Cantamessa,* Ms Cantamessa published an unpleasant post about the South African president and government on her Facebook account, calling them stupid monkeys running the country down.[671] The post was made while she was off duty and using her personal equipment.[672] This post was made on a private Facebook account and was viewable only by a few individuals. However, it was leaked.[673] After receiving a complaint from one member of the public who was also a customer, Edcon suspended the employee, held a disciplinary enquiry, and summarily dismissed her.[674] Apart from this one customer who threatened to close his Edgars account, no other

665 *Siyaya* para 24.
666 *Siyaya* para 28.
667 *Siyaya* para 46. See the CCMA Guidelines, https://www.worklaw.co.za/SearchDirectory/PDF/Codeofgoodpractice/CCMA-Guidelines-Misconduct-arbitrations_Feb2015.pdf, accessed 10 September 2022.
668 *Siyaya* paras 53–56.
669 *Siyaya* para 59.
670 The CCMA Guidelines was compiled by the CCMA to guide commissioners in the arbitration process, notably in respect of how they should conduct arbitration proceedings, evaluate evidence, assess the procedural fairness of a dismissal, assess the substantive fairness of a dismissal, and determine the remedy for an unfair dismissal. A copy of the guidelines is annexed to the LRA. The guidelines align with the Code in assessing procedural and substantive fairness. It specifically states at clauses 58 and 75 that commissioners must have regard to item 4 and item 7 of the Code.
671 *Cantamessa* para 5.
672 *Cantamessa* para 10.
673 *Cantamessa* para 19.
674 *Cantamessa* para 5.

customers made similar threats, and there was no proof that this customer indeed closed his account.[675] The basis for the dismissal was that Ms Cantamessa was a senior employee who had violated employer policy, and her actions posed a risk of reputational harm to Edcon.[676] However, at arbitration, her dismissal was found to be substantively unfair, and she was awarded twelve months' compensation.[677]

Applying the nexus test, the commissioner made the following findings: Ms Cantamessa's Facebook post had little to do with her job or Edcon.[678] A reasonable Internet user would not have linked Edcon to the case merely because her Facebook post stated that she worked for Edcon.[679] There was no violation of Edcon's policy, because it only applied if she used Edcon's equipment and services in publishing the Facebook post,[680] and it only specified how employees should act "while at work."[681] There was no conclusive or compelling proof that it had a negative financial or other effect on Edcon.[682] The CCMA found no nexus between the employee's conduct and the employer's business interests, hence the dismissal was found to be unfair.[683]

On review, the LC rejected the commissioner's findings and found a nexus, thereby establishing guilt.[684] The court stated that it was immaterial whether the posting was made outside or during working hours.[685] It also stated that Ms Cantamessa's Facebook page suggested she worked for Edcon.[686] As a result, the nexus was established that she was a buyer for Edcon and had revealed that she worked for Edcon, and this disclosure imposed a risk on Edcon.[687]

675 *Cantamessa* para 10. See also "Retailability (PTY) Ltd", https://retailability.co.za/, accessed 17 December 2023. Edcon Limited was a South African retail company situated in Johannesburg. Edgars, a department store, was one of its subsidiaries.
676 *Cantamessa* para 8.
677 *Cantamessa* para 8.
678 *Cantamessa* para 8.
679 *Cantamessa* para 8.
680 *Cantamessa* para 8.
681 *Cantamessa* para 8.
682 *Cantamessa* para 8.
683 *Cantamessa* para 8.
684 *Cantamessa* para 11.
685 *Cantamessa* para 11.
686 *Cantamessa* para 11.
687 *Cantamessa* para 11.

Regarding the fairness of dismissal as a sanction, the LC found that it was indeed fair to dismiss Ms Cantamessa. The LC held that the aggravating circumstances overshadowed her extensive 20-plus years of experience with an unblemished record.[688] These aggravating factors, as determined by the court, included her actions amounting to the promotion of racial hatred and constituting an incitement to disrupt racial harmony both within the workplace and the broader public.[689] The LC explained that her misconduct was grave and exacerbated by her seniority as she had previously held a managerial position. Furthermore, it had the potential to harm Edcon's business significantly. According to the LC the use of derogatory language revealed a deeply ingrained racism that has no place in a democratic society.[690]

Another case based on public outcry was *Cliff v Electronic Media Network (Pty) Ltd (Cliff).*[691] The case involved M-Net's termination of Mr Gareth Cliff's position as brand ambassador after public outrage over his social media posts. However, the High Court (HC) found the termination unlawful.[692] Even though this was not referred as an unfair dismissal, but rather as a breach of contract as he was contracted to be a judge on the television show "Idols",[693] this case has significant consequences for the workplace. Even though Mr Cliff was not an employee in the strict sense of the word, he was a brand ambassador for M-Net.[694]

Mr Cliff tweeted, "People just don't get free speech at all."[695] He posted this in the light of backlash received by Ms Penny Sparrow for her Facebook comment in which she called black people monkeys.[696] His post outraged the public as he appeared to support Ms Sparrow's views.[697] This sparked anger and a barrage of criticism on social media, with some people mistaking this for support of Ms Sparrow's views

688 *Cantamessa* para 21.
689 *Cantamessa* para 21.
690 *Cantamessa* para 21.
691 [2016] ZAGPJHC 2.
692 *Cliff* para 35.
693 "Idols" is a South African television programme based on the successful British show "Pop Idol" that aired on Mzansi Magic and earlier on M-Net. The show is a competition to find South Africa's greatest young vocalist. The show's basic structure is that thousands of aspiring artists from all over South Africa audition in front of the judges.
694 *Cliff* para 9.
695 *Cliff* paras 8–9.
696 *Cliff* para 8.
697 *Cliff* para 9.

rather than freedom of expression.[698] Mr Cliff was accused of being racist,[699] and his position as brand ambassador was terminated as M-Net claimed that his tweet was detrimental to their brand.[700] However, the HC held that the termination of Mr Cliff's brand ambassadorship was founded on baseless allegations of racism[701] and found that M-Net's actions caused him reputational and financial harm.[702]

In *Makhoba v Commission for Conciliation, Mediation & Arbitration & others* (*Makhoba*),[703] the employee was dismissed for posting a racist comment on the Facebook page of *Eyewitness News*, stating, "Whites mz b all killed."[704] After a disciplinary hearing, he was found guilty of misconduct despite initially denying posting the comment and claiming his Facebook page had been hacked. [705] During arbitration, though, he admitted to posting the comment but argued that the employer had not provided him with its social media policy. He also contended that the incident occurred outside working hours and was not related to anyone at the company.[706] He further claimed that he had used his personal Facebook account, and did not use the employer's equipment, to make the post.[707]

In determining whether the employee was guilty of misconduct, the commissioner asserted that the employee's location, specifically being at home when making the racist remark, was inconsequential.[708] The commissioner also characterised the nature of the misconduct as severe. However, there was no reference to the nexus between the off-duty conduct and the employer. The case was treated as though it were an instance of on-the-job misconduct, with the commissioner asserting that when an employer had a vested interest in an employee's behaviour, the employer had the authority to take disciplinary action against that employee.[709]

698 *Cliff* para 9.
699 *Cliff* para 9.
700 *Cliff* para 9.
701 *Cliff* para 24.
702 *Cliff* para 25.
703 (2022) 43 *ILJ* 166 (LC).
704 *Makhoba* para 2.
705 *Makhoba* para 3.
706 *Makhoba* para 3.
707 *Makhoba* para 3.
708 *Makhoba* para 4.
709 *Makhoba* para 4 (quoting the commissioner's findings in para 18 and para 22).

In finding that the sanction of dismissal was appropriate, the commissioner explained that the gravity of the incident leading to the charges was unquestionable. According to the commissioner, the applicant publicly posted a social media comment advocating for the killing of all white people. The commissioner added that in a nation like South Africa, plagued by centuries of racial strife, such a statement represents an exceptionally offensive and deeply racist form of misconduct.[710]

On review, the LC, upon determining whether the employee was guilty of misconduct, found that the employee had a ten-year tenure with the company and was aware of the company's disciplinary code, which clearly stated that racism could result in dismissal. As a result, the court held that the employee was guilty of misconduct, and the dismissal was upheld.[711]

On the question of whether dismissal was a fair sanction, the LC ruled that it was crucial to recognise the extreme seriousness of offences related to racism and racial hatred.[712] The LC stated that employers must ensure a safe working environment for all employees, regardless of race, protecting them from physical or emotional harm. Furthermore, the LC emphasised that employers could be held accountable if they do not act appropriately against employees engaged in such behaviour.[713]

The cases discussed above examined complicated concerns between employee rights and employer interests, guided by the limitation clause. In *Cantamessa*, *Gordon* and *Siyaya*, the employees' freedom of expression conflicted with the employer's business interests. Despite no immediate injury to the employer's business, the court upheld the dismissals because of possible reputational damage. It is important to note that a private individual wrote these statements on a personal Facebook page without intending to violate the employer's policies.

These cases are now critically analysed.

710 *Makhoba* para 4.
711 *Makhoba* para 29.
712 *Makhoba* para 29.
713 *Makhoba* para 29.

4.5.2.1 Assessing the Fairness in Establishing Guilt and in Determining Whether Dismissal is a Fair Sanction

The cases raise the question of whether the absence of a dedicated policy governing off-duty conduct should impact the determination of guilt and the fairness of dismissal. In this context, the courts' decisions imply that the employer's interest in safeguarding its reputation and commercial interests can outweigh the employee's freedom of expression, even when no formal policy explicitly addresses off-duty conduct.

In *Cantamessa,*[714] Cele J quoted *Hoechst*:[715]

> "In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between the employer and the employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying or of seriously damaging the relationship of employer and employee between the parties'."

The author observes that although companies may have the authority to penalise employees for off-duty behaviour that is not covered by policies, the fairness of dismissal in these situations is consequently called into question and criticised.

In the *Makhoba* case, the establishment of guilt and the fairness of dismissal revolved around the employee's off-duty misconduct, a racist social media post. It is important to note that the employer's policy only applied to on-the-job conduct and did not explicitly cover off-duty behaviour. The establishment of guilt, in this case, is more complicated because of the absence of a specific policy addressing off-duty conduct.[716] Although the racist comment posted on social media is objectively offensive, harmful and violated the employer's on-the-job policy regarding workplace

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714 *Cantamessa* para 12.

715 (1993) 14 *ILJ* 1449 (LAC) 1459F–H per Joffe J, sitting with Labuschagne and Mullins, Assessors, and quoting *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC) 589G–H.

716 *Makhoba* para 3.

conduct, there may be ambiguity about whether the same policy should extend to off-duty behaviour.

Cantamessa, *Gordon*, *Makhoba*, *Fredericks*, and *Siyaya* exemplify cases where an employee's private social media post, causing no significant reputational damage to the business, led to the dismissal, prompting concerns about the fairness of such actions.

When the fairness of dismissal as a punitive measure is addressed, the absence of a well-defined policy regulating off-duty conduct weakens the employer's position. This absence complicates arguments that the employees' actions violated company standards.

In this context, the fairness of dismissal becomes more contentious, given the absence of a clear policy governing off-duty behaviour. Justifying termination based solely on an employee's social media post, especially when directed at a third party, becomes challenging without explicit guidelines.

The justifiability of the limitation clause in the context of off-duty social media posts depends on various factors. The impact of such posts on the workplace, especially when directed at a third party, needs to be carefully assessed. It involves weighing the potential harm or disruption caused by the posts against the employee's fundamental rights, such as freedom of expression and privacy. In addition, the absence of a clear policy governing off-duty conduct further complicates the justification for invoking the limitation clause. So a nuanced evaluation is necessary to determine whether the limitation clause is justifiable in these circumstances, striking a balance between protecting the employer's interests and respecting the employee's rights.

The principle of proportionality is integral to the limitation clause.[717] It suggests that limitations on rights, including dismissal, should be proportionate to the harm or risk involved. When off-duty social media postings target a third party, the employer must show that the employee's actions warranted such a severe response.

717 Section 36(1)(a)–(e) of the Constitution.

Consequently, it is argued that employers should consider alternative measures to address the issue rather than resorting to instant dismissal. One viable option could involve issuing a formal written warning to the employee and requiring a public apology for the inappropriate posts, offering a more proportionate and corrective response. In addition, the employer could take proactive steps to distance itself from the employee's views through a public statement, thus mitigating potential damage to its reputation.

It is worth mentioning that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA) plays a role in adjudication of dismissals for off-duty social media misconduct. The PEPUDA aims to promote equality and prevent unfair discrimination across various spheres, including employment. Section 10 of PEPUDA acknowledges the right to freedom of expression and association. This section, however, is subject to limitations that are justifiable in an open and democratic society based on human dignity, equality, and freedom.

The CC in *Qwelane* held that merely hurtful expressions, particularly when understood in daily usage, do not qualify as hate speech. It is commonly accepted that the ban on hate speech is directed at more than just offensive speech and that offensive speech is protected under freedom of expression.[718] The CC emphasised that tolerance for expression or speech that offends is required in a functioning democracy.[719] The court explained that the word "hurtful" in section 10(1)(a) of the PEPUDA was an impermissible infringement of freedom of expression.[720]

This decision underscores the importance of distinguishing between offensive expressions and actual hate speech, implying that the mere fact of hurtful language may not suffice for dismissal. Instead of immediate dismissal, employers confronted with such situations should consider a more measured approach. If the tone of communication is disturbing and contravenes company policies, it is undoubtedly appropriate for the employer to institute disciplinary action and progressive discipline should be applied.

718 *Qwelane* para 79.
719 *Qwelane* para 79.
720 *Qwelane* para 103.

Given the CC ruling in the *Qwelane* case, it is essential to define the term "hurtful" clearly and establish a distinction between hurtful speech and hate speech within legislative frameworks and corporate policies related to the dismissal of employees for off-duty social media misconduct. In line with the CC perspective, it should be acknowledged that hurtful speech, while subject to limitations, can still find a place within a democratic society.

It is submitted therefore that the evaluation of dismissals for social media misconduct in subsequent cases should consider the CC's decision to invalidate section 10(1)(a) of the PEPUDA. Notably, removing the term "hurtful" from the definition of hate speech signals a broader interpretation of hate speech, emphasising potential societal harm. In the realm of social media, employers must now consider a broader range of consequences beyond individual emotional distress. This shift requires a more balanced assessment of social media misconduct's context, language, and societal impact, ensuring that dismissals align with evolving legal standards surrounding hate speech. Employers should therefore adopt a thorough and informed perspective to navigate these cases and promote fairness and equity in the workplace.

4.6 Adequacy of the Legal Framework in regulating off-duty Social Media

4.6.1 Adequacy of the Legal Framework in Establishing Guilt

As discussed earlier, in the context of dismissals related to social media misconduct, there are specific challenges within the existing legal framework that pertain to off-duty social media misconduct.

First, the current legal framework concerning off-duty social media conduct and its connection to the employer's business primarily emphasises the need for a link or nexus between the two.[721] In the context of the interplay between off-duty conduct and on-the-job conduct, the distinction between these realms becomes increasingly blurred, making it challenging to ascertain which forms of off-duty social media conduct should be considered relevant to the workplace. This challenge is compounded in the modern digital landscape, where online and offline spheres are inherently interconnected. Consequently, there is a discernible and pressing need for more

721 Item 3(1) of the Code.

precise guidelines and criteria that define this critical link or nexus. This situation necessitates a coherent and standardised framework for assessing such cases.

The complexities of online communication and the wide-ranging nature of social media platforms introduce a substantial challenge in determining guilt and establishing a nexus in cases of social media misconduct. These challenges stem from the fact that various decision-makers can interpret identical online activities differently, leading to disparate and inconsistent outcomes. In these cases, what one person views as a clear breach of workplace standards, another may see as innocuous or unrelated.[722] This inconsistency emphasises the critical need for standardised and clear guidelines to ensure fairness and coherence in evaluating social media misconduct cases. Without such guidance, the subjective nature of these assessments can lead to arbitrary or biased decisions, potentially undermining the principles of fairness and justice in the workplace. Establishing guilt becomes particularly challenging when employees engage in social media misconduct seemingly unrelated to their workplace or colleagues. For instance, if an employee makes offensive comments unrelated to the employer on a personal social media account, discerning the direct relevance of this behaviour to their employment can be less apparent.[723]

The provision in the Code that permits discipline and dismissal for conduct not explicitly regulated by company policy is a contentious issue regarding off-duty social media misconduct.[724] Courts have, on occasion, established guilt when employees' social media activities were not explicitly addressed by company policies and were seemingly unrelated to their employers.[725] Despite the inclusion of a limitation clause in legal frameworks that permits the employer to take action when an employee's off-duty behaviour causes significant harm to the company's interests or the workplace environment even in the absence of explicit policies, this approach raises concerns about the potential for employers' overreach into employees' private lives. Determining guilt based on off-duty social media activity can lead to uncertainties, with interpretations of what constitutes harmful behaviour varying among different

722 The CCMA found no nexus and the LC found a nexus in *Cantamessa.*
723 See, for example, *Cantamessa* and *Makhoba*.
724 Item 3(1) of the Code.
725 See, for example, *Cantamessa* and *Makhoba*.

stakeholders. It is therefore argued that without specific guidelines or policies governing off-duty social media behaviour, it may be unjust to automatically label specific actions as grounds for dismissal, especially when they appear unrelated to the employer.

Furthermore, the policy vacuum surrounding off-duty social media-related misconduct disadvantages employers and employees by fostering uncertainty, inconsistency, and potential injustices in how these cases are addressed in the workplace. This vacuum highlights the pressing need for comprehensive policies to handle these complex and sensitive issues.

4.6.2 Adequacy of the Legal Framework in Determining Dismissal as a Fair Sanction

Judicial precedent indicates that dismissal in off-duty social media misconduct cases is the preferred sanction. Even so, it is argued that in these situations, it is imperative to contemplate the implementation of progressive discipline, as stipulated in the Code.[726]

The essence of this argument lies in the recognition that not all instances of off-duty social media misconduct warrant the most severe penalty, which is dismissal. When the employee's actions do not directly relate to the employer's business interests and were undertaken during personal time, a more graduated approach may be more just and equitable. This approach accommodates the potential for rehabilitation and allows employees to rectify their behaviour before facing the most severe consequences. By considering progressive discipline, the judiciary will build a body of law that guides future precedents on how these forms of dismissals should be decided.

Furthermore, as paragraph 1.2 has elucidated, the notion of dismissal as a fair sanction for instances of social media misconduct targeted at a third party may appear excessively severe in a country like South Africa. This consideration takes into account the prevailing social factors, particularly the high levels of unemployment, which

726 Item 3(2) of the Code.

impact the importance of balancing disciplinary actions with broader socioeconomic realities.

Against this background, the proposed Code's objective is to establish clear, proportional, and balanced off-duty conduct policies that respect employees' rights and the need for open communication. By doing so, this objective aims to foster a fair and equitable employment relationship. As part of this endeavour, the Code imposes an obligation on employers to take the following factors into account when formulating their off-duty conduct policies:

- clear and comprehensive policies;
- respect for employees' rights;
- proportional response;
- consistency and due process;
- impact on the workplace;
- alternative measures;
- review and revisions;
- legal consultation; and
- communication and consultation with employees.

These factors are explained in the concluding Chapter 8 below.

4.7 Conclusion

The present chapter focused on dismissals arising from social media misconduct, particularly because of derogatory and racist remarks directed at the employer and third parties. The objective was to assess the applicability of the existing legislative framework to off-duty social media misconduct. The following conclusions emerge:

First, the current legislative framework poses challenges, particularly in establishing guilt. The framework often necessitates a subjective assessment of this connection, leading to potential inconsistencies in adjudication. So there is a critical need for more precise legislative guidelines clearly defining and standardising the criteria for establishing this crucial link.

Secondly, the appropriateness of dismissal as a penalty for off-duty social media misconduct, especially when guilt is uncertain, raises concerns. Questions arise over finding dismissal as an appropriate sanction in matters that do not negatively affect the employer. Considering proportionality in labour law and constitutional principles, a balanced approach is imperative. Dismissal should be reserved for cases where misconduct makes the employment relationship intolerable or significantly harms the employer's interests. When guilt is unclear, or the link to employer interests is uncertain, alternative, less severe measures should be considered to address the issue without the immediate termination of employment.

Thirdly, dismissals for off-duty social media misconduct underscore the interplay between employees' constitutionally protected rights and the legitimate interests of employers, as mandated by the limitation clause of the Constitution. The chapter revealed that dismissing employees for this misconduct can infringe upon the rights mentioned. In some instances, there was an unjustifiably excessive restriction of these rights, with imposed limitations disproportionately severe in relation to the alleged misconduct.

In conclusion, the chapter highlights the interplay between employees' rights and employers' interests. To navigate this complex terrain effectively, a rights-based and balanced approach is crucial, rooted in clear policies, a well-defined legislative framework, and a commitment to safeguarding the interests of both employees and employers while upholding the principles enshrined in the South African Constitution.

CHAPTER 5

DISMISSALS FOR OFF-DUTY CONSUMPTION OF CANNABIS

5.1 Introduction

The previous chapter determined that the current legal framework regulating off-duty social media misconduct lacks clarity, resulting in subjective and sometimes unfair decisions. Observations revealed that instances of off-duty social media misconduct unrelated to the workplace challenged the automatic classification of this behaviour as gross misconduct. This challenge was exacerbated by the absence of comprehensive social media policies.

The purpose of this chapter is to investigate whether the current legal framework adequately applies to dismissals for off-duty cannabis use and whether these dismissals violate employees' rights. The chapter begins with a review of cannabis

and its effects on the human body. Thereafter, the reasons behind the CC's decision to legalise private cannabis use will be investigated, providing context to its workplace implications.

The chapter will also investigate the consequences of zero-tolerance policies, which presently govern cannabis usage in the workplace. These policies will be scrutinised to see how they affect employees' rights. The difficulty in recognising impairment due to cannabis use will be emphasised since it differs from detecting alcohol intoxication. This disparity raises the question of the appropriateness of implementing uniform zero-tolerance policies for both alcohol and cannabis use.

Case law addressing dismissals for off-duty cannabis usage will be extensively analysed to determine how the courts and the CCMA evaluate the fairness of these dismissals and which variables they use when making their judgments.

The subject of discussion in this chapter, like the previous chapter, engages with an employee's right to privacy and dignity (personal autonomy). These constitutional rights were comprehensively discussed in paragraph 4.4 above. So a discussion of these rights in this chapter will be limited to their role in dismissal for off-duty cannabis use.

5.2 Understanding the Nature of Cannabis

Cannabis is a tobacco-like greenish or brownish material consisting of the dried fruiting tops and leaves of plants of the cannabis family.[727] Cannabis contains hundreds of chemical substances and over a hundred known cannabinoids.[728] Cannabinoids are a class of chemical compounds that act on receptors in cells in the brain and body.[729] The most renowned cannabinoid is tetrahydrocannabinol (THC), known for inducing a

727 Canadian Centre for Occupational Health and Safety "Workplace Strategies: Risks of Impairment from Cannabis" 3rd Edition White Paper 4 https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf accessed 20 January 2022 (Canadian Centre for Occupational Health and Safety "Workplace Strategies").

728 Canadian Centre for Occupational Health and Safety "Workplace Strategies" 4.

729 Canadian Centre for Occupational Health and Safety "Workplace Strategies" 4.

meditative or euphoric state in users.[730] Cannabis is the only plant in the world that can be used medically for its fibre and be taken as a drug.[731]

Internationally, it falls mainly in the category of prohibited drugs.[732] Cannabis is often inhaled as smoke or dried herbal product and ingested in pill form or food or absorbed through the skin through creams or skin patches.[733] When inhaled, chemical smoke enters the bloodstream through the lungs.

Cannabis users differ in their susceptibility to its effects; still, the effects are the same regardless of the manner of use. These side effects include dizziness, sleepiness, light-headedness, lethargy, headache, memory loss, panic episodes, hallucinations, and decreased motor skills.[734] Dry mouth, throat discomfort, and coughing are further recorded side effects.[735]

The effects of inhalation may be noticed after a few minutes of the dose and will peak within 30 minutes. Initial effects last between two and four hours but may continue for longer periods (for example, 24 hours). Cannabis also offers medicinal advantages, such as decreasing intraocular pressure and treating glaucoma. It also decreases nausea and vomiting in cancer patients receiving chemotherapy.[736] Private use of cannabis by an adult person has been legalised in South Africa.

5.3 The Rationale Behind the Constitutional Court's Decision to Legalise Private Use of Cannabis in South Africa

In its landmark judgment in *Minister of Justice and Constitutional Development and Others v Prince and Others (Prince)*,[737] the CC recognised that the criminalisation of cannabis for personal and private use disproportionately affected individuals' rights to privacy, human dignity, and personal autonomy. The CC determined that limiting the

730 Mthembu "The Daily Leaf: Fire of Rastafari and Teachings of Righteousness" 4, https://uir.unisa.ac.za/bitstream/handle/10500/23461/Daily%20Leaf.pdf?sequence=2, accessed 20 January 2022 (Mthembu "The Daily Leaf").
731 Ramnath, Thesis University of KwaZulu-Natal (2015) 6.
732 Smith, Thesis University of Cape Town (1995) 4.
733 Canadian Centre for Occupational Health and Safety "Workplace Strategies" 4.
734 Canadian Centre for Occupational Health and Safety "Workplace Strategies" 4.
735 Canadian Centre for Occupational Health and Safety "Workplace Strategies" 4.
736 Mthembu "The Daily Leaf" 4.
737 2018 (6) SA 393 (CC) para 16.

right to privacy in the context of cannabis use lacked a reasonable and justifiable basis in a democratic society founded on principles of human dignity, equality, and freedom.[738]

In addition, the court found it acceptable to extend the scope of cannabis use from private residences to any non-public location, as long as such a location is not classified as a public space.[739] The court emphasised that adults should have the liberty to make decisions about their bodies and lifestyles in the privacy of their homes as long as their actions do not harm others.[740] The CC further held that the prohibition of private, adult cannabis use was viewed as an unwarranted intrusion into these personal autonomy.[741]

The CC clarified that using cannabis in public, in the presence of minors, or in the presence of non-consenting adults is prohibited.[742] It was also determined that the use or possession of cannabis in private by anybody other than an adult is prohibited.[743] The quantity of cannabis detected in the individual's possession will be a significant element in assessing whether the person possesses cannabis for purposes other than personal enjoyment.[744]

The CC's silence on the issue of cannabis use in workplaces is notable and aligns with its focus on individual privacy and personal autonomy rather than addressing employment-related matters. The decision centred primarily on the constitutional right to privacy and the legality of cannabis use in private spaces, not in workplace spaces. As a result, the ruling does not provide specific guidance on how cannabis use should be managed within the context of employment.

5.4 Effects of Cannabis Legalisation on the Workplace

738 *Prince* para 16 and para 86.
739 *Prince* para 19.
740 *Prince* para 108.
741 *Prince* para 71.
742 *Prince* para 110.
743 *Prince* para 109.
744 *Prince* para 110.

The challenge that employers have faced since the legalisation of cannabis relates to workplace safety.[745] This raises concerns about impairment while on the job, as the effects of cannabis can hinder an employee's ability to perform their duties safely and effectively.

Furthermore, the decision in *Prince* presents complications in regulating cannabis use because an employee who used cannabis privately could be dismissed for the detection of cannabis in their urine at work. The employee may test positive days or weeks after use because THC metabolises quickly and can remain in the user's body for a prolonged period after use.[746] Furthermore, specific tests such as urinalysis only detect the metabolites, meaning that these tests cannot indicate impairment but only the presence of these metabolites.[747]

Dismissals based on positive testing can lead to a possible violation of the employee's right to privacy where the cannabis was not consumed at work but while the employee was off duty. An additional complex matter concerns the absence of a universally accepted standard for determining safe levels of cannabis consumption. The impact of cannabis on individuals can also vary significantly because of several factors, including the concentration of THC, the frequency of use, and the presence of other variables, such as concurrent alcohol or drug use.[748] It is submitted, therefore, that this lack of consensus on safe consumption limits is a source of concern because it makes it challenging to establish clear guidelines or regulations related to cannabis use. Different individuals may react differently to the same quantity of cannabis, and no universally applicable threshold can guarantee safety. Consequently, determining when cannabis consumption took place becomes problematic.

The legalisation of recreational cannabis use brings into focus the employer's obligation to ensure a safe workplace. In South Africa, it is a statutory and common

745 Human Resources Professionals Association (HRPA) "Clearing the Haze: The Impacts of Marijuana in the Workplace" (2018) 8, available at https://wwwhrpa.ca/Documents/public/HRPA, accessed on 21 July 2022 (HRPA "Clearing the Haze").
746 Liquori (2016) *Nat'l Att'ys Gen. Training & Res. Inst. J.* 4.
747 Liquori (2016) *Nat'l Att'ys Gen. Training & Res. Inst. J.* 4.
748 HRPA "Clearing the Haze" 8.

law duty for employers to provide safe work conditions to employees.[749] The discussion below investigates the relationship between cannabis use and the employer's obligation to maintain a safe and healthy working environment.

5.5 Cannabis Use and the Duty to Maintain a Healthy and Safe Working Environment in the Workplace

It is undeniable that cannabis use in the workplace that is not controlled will lead to or worsen a variety of problems. The health and safety of everyone in the workplace, including those who use cannabis, is the most crucial of these considerations.[750]

Because of its potential to alter behaviour, working under the influence of cannabis can lead to workplace accidents and decreased productivity.[751] Common law states that employers have a positive duty to establish safe working conditions for their employees.[752] Furthermore, in South Africa, the responsibility for maintaining a safe and healthy work environment is governed by various legal provisions. The Constitution guarantees everyone the right to an environment that does not jeopardise their health or well-being.[753] The Occupational Health and Safety Act (OHSA) and the Mine Health and Safety Act 29 of 1996 (MHSA) outline various duties that employers must fulfil to ensure workplace safety.[754]

The OHSA outlines employers' general duty to provide and maintain a working environment that is safe and without risks to the health of employees. Employers are required to take measures to eliminate or mitigate workplace hazards.[755] The employer must also take the necessary steps to ensure compliance with the OHSA, such as prohibiting an employee from performing any work unless the necessary precautionary safety measures are in place, supervising work through the safety manager, and informing employees of their rights under the OHSA.[756]

749 Occupational Health and Safety Act 85 of 1993 and the LRA.
750 Bowal (2018) *LN* 55.
751 HRPA "Clearing the Haze" 8.
752 Van Niekerk *et al* (2019) 93.
753 Section 24 of the Constitution.
754 Section 8 of the OHSA and section 2(1) of the MHSA.
755 Section 8 of the OHSA.
756 Section 8(2)(d)–(j) of the OHSA.

Although the OHSA does not explicitly address cannabis, it does require employers to take all necessary precautions to maintain a safe workplace.[757] This requirement includes prohibiting employees from performing any work under the influence of substances that could impair their ability to work safely, which can be relevant to cannabis use.[758] Employers should also appoint a safety manager to oversee and enforce safety measures, ensuring that employees are not impaired by drugs or alcohol while on the job.[759]

The MHSA also regulates health and safety in the workplace by prescribing employer duties towards employees. These duties include conducting risk assessments, implementing safety measures, providing necessary training, and preventing accidents.[760]

Although the MHSA does not mention cannabis use explicitly, it is submitted that it focuses on ensuring that employees are not impaired by any substances, including drugs or alcohol, that could jeopardise their safety or the safety of others in the workplace.[761] Drugs could also include cannabis. Employers are responsible for maintaining a safe working environment and should have policies and measures to address impairment-related issues, regardless of the substance involved.[762]

The duty to maintain safety in the workplace does not rest solely on the employer's shoulders. Employees also share responsibility for upholding health and safety standards in the workplace. The OHSA requires employees to take reasonable precautions for their safety and the safety of anyone whom their actions may harm.[763] This requirement includes refraining from any behaviour or substance use that could impair their ability to perform their duties safely. In essence, OHSA indirectly highlights the critical importance of sobriety in the workplace, as impairment from drugs or

757 Section 8 of the OHSA.
758 Section 8 of the OHSA.
759 Section 8(2)(d)–(j) of the OHSA.
760 Sections 5–6 of the MHSA.
761 Sections 5–6 of the MHSA.
762 Section 8 of the MHSA.
763 Section 14(a) of the OHSA.

alcohol can pose serious risks not only to the individual but also to the safety of the entire work environment.[764]

Under the MHSA, employees' duties include compliance with the MHSA and related regulations, active participation in health and safety training programs provided by the employer, prompt reporting of any unsafe conditions or hazards to the employer, responsible and proper use of personal protective equipment supplied by the employer, and the right to refuse unsafe work if they have reasonable grounds to believe that it poses an immediate and severe risk to their health or safety.[765] Employees are also expected to cooperate with their employer in implementing and maintaining health and safety measures, refrain from unauthorised entry into restricted areas of the mine, and, crucially, not to be under the influence of or in possession of substances such as alcohol or drugs that could impair their health or safety or that of their colleagues while on the job.[766]

Even though the MHSA does not explicitly address cannabis use, its emphasis on avoiding actions that may compromise safety underscores the importance of not being under the influence of impairing substances, including cannabis, in mining operations.[767]

In addition to national legislation, the ILO has issued over 40 standards on occupational health and safety and over 40 codes of practice on workplace safety.[768] The ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) calls on all governments to guarantee that national and multinational enterprises offer acceptable safety and health standards for workers.[769] The ILO Constitution sets the principle that workers should be protected from sickness, diseases and injury arising from employment.[770] The ILO launched an action plan for the promotion of safety and health at work, concluding that the focus

764 Section 14 of the OHSA.
765 Section 22 of the MHSA.
766 Section 23 of the MHSA.
767 Section 23 of the MHSA.
768 ILO, https://www.ilo.org, accessed 24 June 2022.
769 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 6 ed (2022), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf, accessed 12 December 2023.
770 ILO, https://www.ilo.org, accessed 24 June 2022.

should be on promoting the concept of sound management of safety and health at work as the most effective means of achieving strong and sustained preventive safety and health cultures at both the national and enterprise levels. [771]

C187 signifies the recognition of occupational safety and health as a fundamental and core right for all member-state workers. It highlights the obligation of member states to establish, maintain, and continually enhance a comprehensive national framework dedicated to safeguarding the well-being of workers in their workplaces.[772] This framework encompasses legal and regulatory measures, collective agreements, and other pertinent instruments that collectively form the foundation of worker protection.[773]

This core right ensures that workers are entitled to a work environment where their safety and health are prioritised and mechanisms are in place to improve these conditions continually. The right emphasises the intrinsic value of workers' well-being. It underscores the responsibility of member states to uphold this fundamental right as an essential component of decent work and human dignity.

Although the CC's decriminalisation of cannabis represents a significant legal shift, it is essential to note that employers retain the right to take action, including dismissal, against employees for cannabis use to uphold safety and productivity in the workplace. This position highlights the critical balance between an individual's right to personal choices and an employer's duty to provide a safe and efficient working environment. The legalisation or decriminalisation of cannabis should not be interpreted as an unrestricted endorsement of its use in all contexts. Employers have a legitimate interest in ensuring that their employees are not impaired by substances, including cannabis, while performing job-related tasks, particularly in safety-sensitive industries.[774] This vested interest implies that employers retain the authority to uphold

771 ILO "Improving health in the workplace: ILO's framework for action", https://www.ilo.org/safework/info/publications/WCMS_329350/lang--en/index.htm, accessed 24 June 2022.

772 Article 4(1) of the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) (see ILO "Convention C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)", https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187, accessed 10 December 2023).

773 Article 4(1) of the Promotional Framework for Occupational Safety and Health Convention.

774 Section 14 of the OHSA.

workplace policies that forbid cannabis use during working hours or limit private cannabis consumption if it jeopardises an employee's capacity to perform their duties safely and efficiently. This approach aligns with the broader principles of occupational health and safety and maintains a practical balance between individual rights and collective responsibilities in the workplace.

The OHSA does not explicitly mandate company policies. However, employers must take specific measures to ensure a safe working environment. The OHSA emphasises the importance of risk assessment, the identification of hazards, and the implementation of measures to mitigate those hazards.[775] In practice, many employers develop company policies, procedures, and codes of conduct to establish clear workplace safety guidelines.[776] Employers commonly implement zero-tolerance policies that strictly prohibit any form of intoxication.[777] These policies often include safety rules, procedures for reporting hazards or incidents, and expectations regarding employee behaviour to uphold workplace safety standards.[778] Although not mandated by the OHSA, these policies help employers fulfil their obligations under the OHSA and promote a culture of safety within the workplace.[779]

Zero-tolerance policies are especially prevalent in safety-sensitive work contexts, where the tendency for personal damage is naturally increased and being free of impairment might be a legitimate professional demand.[780] According to Evans,[781] a zero-tolerance policy towards alcohol and drugs means that employees may not be permitted to work if they are found to have any trace of alcohol or drugs in their system when tested.[782] A zero-tolerance policy should be necessary for the health and safety

775 Section 14 of the OHSA.
776 *Superstone Mining (Pty) Ltd and National Bargaining Council for the Road Freight Industry* (2004) 25 *ILJ* 1567 (BCA); *Assmang Ltd (Assmang Chrome Dwarsriver Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 *ILJ* 2070 (LC) para 14.
777 Soltys and Dylan (2020) *Can. J. Hum. Rights* 65.
778 Soltys and Dylan (2020) *Can. J. Hum. Rights* 65.
779 Soltys and Dylan (2020) *Can. J. Hum. Rights* 65.
780 Soltys and Dylan (2020) *Can. J. Hum. Rights* 65.
781 Evans "The Truth about a Zero Tolerance Policy", https://www.alcosafe.co.za/In-the-News/View-Article-Detail/ArticleId/56/The-truth-about-a-Zero-Tolerance-Policy, accessed 17 December 2023.
782 See *Air Products South Africa (Pty) Ltd v Matee and others* [2021] JOL 53666 (LC) para 4, where the LC held that because workplace accidents could endanger the environment, employees, contractors, and the surrounding community, the applicant implemented strong safety protocols, policies, and procedures, including a zero-tolerance policy for alcohol and drug usage on its premises. In *National Union of Metalworkers of SA on behalf of Nhlabathi &*

of all employees working for the organisation.[783] However, if such a policy is employed, its details should be communicated to all staff clearly, correctly, and frequently.[784] Employees should understand their limitations, rights, responsibilities and the process that will follow should they violate the policy in any way.[785]

In the cases discussed below, zero-tolerance policies were some issues that had to be adjudicated.

5.6 The Regulation of Off-duty Cannabis Use through Zero- Tolerance Policies

The focal point of the case *Mthembu and others v NCT Durban Wood Chips* (*Mthembu*)[786] was the termination of the employment of employees who were found to be under the influence of cannabis during their working hours at NCT Durban Wood Chips, a firm operating in the wood and chip sector.[787] The workplace was characterised as intrinsically hazardous because of the use of substantial logs and apparatus of significant weight.[788] The organisation implemented a comprehensive drug abuse policy that prioritised a strict zero-tolerance position towards substance usage.[789] Employees were effectively educated about this policy via regular toolbox lectures.[790] Following the administration of urine tests, the employees exhibited positive results for cannabis use, leading to their subsequent dismissal.[791]

The employees contested the fairness of their dismissal, claiming that they engaged in the use of cannabis during their personal hours.[792] The employer maintained that the inherent hazards present in the workplace warranted the implementation of a

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another v PFG Building Glass (Pty) Ltd & others (2023) 44 *ILJ* 231 (LC) para 85, the LC defined a zero-tolerance policy as a policy that does not allow any violations of a rule and signifies that a certain kind of behaviour or activity will not be tolerated at all. Where a zero-tolerance policy is adopted and regularly implemented, it makes no difference how many dependants an employee has, how many years of pristine service he or she has rendered, or any other mitigating circumstance. The sole considerations are whether the employee was aware of the zero-tolerance policy, whether it was consistently enforced, and whether it was reasonable in the workplace.

783 *Air Products South Africa (Pty) Ltd v Matee and others* para 20.
784 *Air Products South Africa (Pty) Ltd v Matee and others* para 21.
785 *Air Products South Africa (Pty) Ltd v Matee and others* para 21.
786 [2019] 4 BALR 369 (CCMA).
787 *Mthembu* para 5.
788 *Mthembu* para 2.
789 *Mthembu* para 7.
790 *Mthembu* para 8.
791 *Mthembu* para 5.
792 *Mthembu* para 68.

stringent policy prohibiting the use of such substances.[793] The CCMA determined that the dismissals were fair, considering the company's prioritisation of safety and the employee's familiarity with the drug abuse policy.[794]

In the LC case *Enever v Barloworld Equipment, A Division of Barloworld SA (Pty) Ltd (Enever)*, an employer had a zero-tolerance policy for alcohol and drug abuse.[795] An employee who claimed to have previously relied on prescription drugs for pain and insomnia reportedly shifted to using cannabis for personal reasons over a few months.[796] She tested positive for cannabis and was later dismissed. She contended that the employer should have permitted her cannabis use since it occurred during her personal time.[797] Furthermore, she argued that the employer's zero-tolerance policy on drug abuse amounted to discrimination. Consequently, she asserted that her dismissal was automatically unfair[798] because it violated her constitutional right to privacy.[799] She also emphasised that her work in an office posed no safety risk to herself or others.[800]

The court considered the employee's dismissal fair because she had contravened a company policy that applied consistently to all employees.[801] The employer clarified that a zero-tolerance policy was uniformly enforced among all employees, and the employee had breached this policy.[802] The LC emphasised the uniformity and consistent application of the company's zero-tolerance policy, leading to the affirmation of the dismissal. Even though the employee did not operate heavy machinery, the court upheld the finding that she had violated the company's policy.[803]

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793 *Mthembu* para 72.
794 *Mthembu* paras 87–88.
795 (2022) 43 *ILJ* 2025 (LC) para 5.
796 *Enever* para 5.
797 *Enever* para 5.
798 According to item 2(3) of the Code, a dismissal is automatically considered unfair if the reason for the dismissal amounts to a violation of the fundamental rights of employees and trade unions, or if the reason for the dismissal is one of those mentioned in section 187. According to section 187(1)(f) of the LRA, a dismissal is automatically unfair if the employer discriminated against an employee directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.
799 *Enever* para 5.
800 *Enever* para 6.
801 *Enever* para 47.
802 *Enever* para 44.
803 *Enever* para 26.

Ntsoane AJ remarked as follows:

> "While I note that the applicant herself did not engage in such dangerous services, there is nonetheless no question that the respondent has a workplace that is fraught with danger. The applicant tested positive for cannabis and continued to test positive simply on her perpetuated act of consumption of the substance which she made it rather clear that she will not refrain from.… On the evidence before this court, it appears that the respondent has been treating alcohol and substance employees equally. In line with the policy, an employee who tests positive is immediately declared unfit to work and is refused entry to the premises of the respondent."[804]

The problem of balancing zero-tolerance policies and employees' rights was also observed in *National Union of Metalworkers of SA on behalf of Nhlabathi & another v PFG Building Glass (Pty) Ltd & others* (*PFG*). In this case, two employees tested positive for cannabis while on duty. They were subjected to a disciplinary hearing because of the employer's zero-tolerance policy on alcohol and drug abuse.[805] Both employees pleaded guilty to the allegation of testing positive for cannabis in the workplace and were consequently dismissed.[806] After that, the employees filed an unfair dismissal complaint with the CCMA, stating that their dismissal was substantively unfair because, among other things, the CC had decriminalised cannabis usage.[807]

The employer's argument in this regard revolved around the fact that its zero-tolerance policy was critical, given the hazardous environment in which it operated.[808] The employer also highlighted that the CC had only decriminalised private cannabis use, and that the workplace was still subject to the health and safety rules outlined in the OHSA.[809]

The arbitrating commissioner determined that the employee's dismissal was substantively fair.[810] Unsatisfied with the verdict, the employees petitioned the LC to review the arbitration award. The LC evaluated each complaint filed by the employees

804 *Enever* paras 23–24.
805 (2023) 44 *ILJ* 231 (LC) para 3.
806 *PFG* para 1.
807 *PFG* para 5.
808 *PFG* para 8.
809 *PFG* para 8.
810 *PFG* para 45.

and found no validity to any of the reasons, in line with the standard procedure for reviewing a CCMA decision.[811] Notably, the LC determined that the CC's decision did not safeguard employees from disciplinary action if they violated corporate rules or disciplinary codes.[812] The court held:

> "The respondent is entitled to set its own standards of conduct. Considering the hazardous workplace where employees work with glass, chemicals, furnaces and operate cranes and forklifts and the provisions of the Occupational Health and Safety Act, which are applicable and enforced as a matter of importance, the respondent has zero tolerance in respect of contraventions of its alcohol and drug policy."[813]

As a result, the LC dismissed the review.[814] In this case, the court was not concerned with whether cannabis was smoked in private or in the workplace. The primary considerations were whether the employee was aware of the zero-tolerance policy, whether it was consistently enforced, and whether it was reasonable in the workplace.[815] The court did not consider any mitigating factors. Prinsloo J commented:

> "In my view, it matters not that the applicants used dagga in private, that they posed no danger on the day they tested positive for dagga, that their period of employment was not insignificant or that they had a clean disciplinary record. It was undisputed that the respondent applied the alcohol and drug policy with zero tolerance for contravention thereof, due to its hazardous workplace and its duty to provide a safe working environment.… Zero tolerance means that a particular type of behaviour or activity will not be tolerated at all and a zero-tolerance policy is one that does not allow any violations of a rule. How many dependants an individual has or how many years of unblemished service he or she has rendered, or any other mitigating factor for that matter plays no role where a zero-tolerance policy is followed and consistently applied. The only factors that are to be considered are whether the employee was aware of the zero-tolerance policy, whether it was consistently applied and whether it is justified in the workplace."[816]

The court found no merit in the fact that on the day the applicants tested positive for cannabis, they were not stationed at any machines but were attending training.[817] This fact meant that the employees did not pose any danger to themselves or other employees, and the misconduct caused no harm to the respondent.[818] Furthermore,

811 *PFG* para 70.
812 *PFG* para 73.
813 *PFG* para 82.
814 *PFG* para 91.
815 *PFG* para 85.
816 *PFG* para 84–85.
817 *PFG* para 76.
818 *PFG* para 76.

the employment relationship had not broken down, and the applicants had a clean disciplinary record and had worked for the employer for some time.

In arriving at its decision, the court cited the LAC's decision of *SGB Cape Octorex (Pty) Ltd v Metal & Engineering Industries Bargaining Council & others* (*SGB*).[819] In *SGB*, the employee tested positive for THC and was dismissed as a result.[820] He was tested after a tip-off at work.[821] He referred an unfair dismissal dispute to the bargaining council, where it was determined that his dismissal was substantively unfair.[822] This was because, among other things, he pleaded guilty after the tests were conducted, he had been employed for more than four years, the employer suffered no prejudice, and he had a clean disciplinary record.[823]

The matter was taken on review to the LC, where the appellant claimed that the commissioner disregarded the employer's zero-tolerance policy for drug usage at work. The employer asserted that the commissioner's judgment did not fall within the range of reasonableness.[824] The LC ruled that the employer's claim lacked merit[825] It also found no indication that the employee had jeopardised the safety and integrity of other employees. As a result, the LC upheld the commissioner's ruling.[826]

However, on appeal, the LAC held that the review should have succeeded because the employer had a zero-tolerance policy on the use of narcotics in the workplace and it had imposed comparable punishments on former employees.[827] The LAC determined that the employer was prejudiced and noted that when an employer establishes a code of conduct for its employees, it is anticipated from its employees that violating such a code undermines the employer's authority. A policy violation was, therefore, considered prejudicial to the administration of discipline. Moreover, given that the employees performed tasks on the 8th and 9th floors, the employer had

819 (2023) 44 *ILJ* 179 (LAC).
820 *SGB* para 3.
821 *SGB* para 8.
822 *SGB* para 5.
823 *SGB* para 5.
824 *SGB* para 6.
825 *SGB* para 7.
826 *SGB* para 7.
827 *SGB* para 21.

heightened concerns about their safety.[828] The fairness of these dismissals is discussed below.

5.7 Assessing the fairness in establishing guilt and in determining whether dismissal is a fair sanction

In cases of dismissals for off-duty cannabis use, determining guilt often revolves around the violation of zero-tolerance policies established by employers. As discussed earlier, zero-tolerance policies typically set clear expectations regarding the use of controlled substances, including cannabis, and the consequences for violations. These policies emphasise that employees are prohibited from using these substances, especially in circumstances that may affect their job performance, workplace safety, or the employer's reputation. Zero-tolerance refers to the uncompromising stance against a specific behaviour or activity, where any violation of the associated rule is not tolerated whatsoever. A zero-tolerance policy rigidly enforces this principle without regard for factors such as the number of dependents an individual has or their length of unblemished service.[829] In a workplace adhering to a zero-tolerance policy, these mitigating circumstances hold no ground.[830] The pivotal considerations revolve around whether the employee was informed of the zero-tolerance policy, whether it was consistently enforced, and whether the actions warranting disciplinary action were justified within the workplace context.[831] Violating these policies by testing positive for cannabis use or engaging in related off-duty conduct resulted in guilty verdicts in the cases discussed above.

In analysis, the strong connection between the *SGB* case, which dealt primarily with on-the-job misconduct, and its subsequent application to the *PFG* case, where employees had consumed cannabis while off-duty and subsequently tested positive during work hours, raise important questions about the appropriateness of zero-tolerance policies and the fairness of dismissals for off-duty cannabis use. These cases display the significant weight given to zero-tolerance policies and the employer's prerogative to establish and enforce disciplinary standards within the workplace.

828 *SGB* para 12.
829 *PFG* para 85.
830 *PFG* para 85.
831 *PFG* para 85.

In the *PFG* case, the court recognised the employer's right to define its code of conduct, particularly in the context of the inherently dangerous nature of the workplace, where employees were exposed to glass, chemicals, furnaces and operated heavy machinery such as cranes and forklifts.[832] This emphasis on the employer's right to set and enforce workplace rules is critical to these cases, highlighting the importance of maintaining a safe work environment. The emphasis on the employer's right to enforce work rules raises questions about how these policies align with the changing legal landscape regarding cannabis use, especially when cannabis has been legalised for private personal use. Although employers have a legitimate interest in workplace safety, there is an emerging need to balance these concerns with employees' rights to privacy and autonomy, particularly when it comes to off-duty use of cannabis that does not pose an immediate risk to job performance or safety.

The application of zero-tolerance policies to off-duty cannabis use without clear legal standards can create uncertainty and potentially lead to situations where employees feel unfairly targeted for private choices made outside work hours. Striking a balance between safety, employer prerogative, and individual rights remains a complex challenge within the evolving landscape of cannabis legalisation.

The decision in *Mthembu* raises several important legal and ethical considerations, including off-duty privacy, employers' prerogatives, and the constitutional framework in South Africa.

The Constitution expressly recognises the right to privacy.[833] However, this right is not absolute, as the limitation clause allows for the limitation of rights in certain circumstances, provided that the limitation is justifiable in an open and democratic society based on human dignity, equality, and freedom.[834] In *Mthembu*, the limitation

832 *PFG* para 82.
833 Section 14 of the Constitution.
834 Section 36 of the Constitution.

of the employee's privacy rights was justified by the employer's legitimate concern for workplace safety and the potential dangers of intoxication.[835]

The case also highlights the complex issue of how far an employer's authority may encroach into an employee's off-duty life, particularly concerning the use of substances like cannabis. Although individuals have a reasonable expectation of privacy in their personal lives, this expectation may be limited when their off-duty conduct directly impacts their job performance and workplace safety.[836] The CCMA decision suggests that, in specific high-risk industries, employers have a valid interest in regulating off-duty behaviour that could compromise safety during working hours. While it is acknowledged that the employer had justifiable grounds for disciplining the employees, the contention is that alternative sanctions, rather than outright dismissal, should have been explored, taking into account relevant mitigating factors. The subsequent factors that should have been considered in *Mthembu's* case include the fact that the employee consumed cannabis during his non-working hours outside the employer's premises three days earlier. The three-day gap between his cannabis use and the incident suggested no immediate risk or impairment in the workplace. Furthermore, his lack of awareness regarding the company's explicit drug testing policy also raises concerns about whether he was sufficiently informed. These factors collectively contribute to the complexity of the case and highlight the significance of considering the context and timing of off-duty conduct when determining the fairness of dismissals for cannabis use.

Enever presents a distinct scenario from *Mthembu* as the employee in *Enever* worked in an office environment, devoid of inherent risks, thereby posing no danger.

Against this background a pivotal question is whether the prohibition of off-duty cannabis use should be limited solely to employees working with dangerous machinery, or whether this restriction should extend to all employees, irrespective of their job roles. In essence, should employers universally implement blanket zero-tolerance policies for off-duty alcohol and cannabis consumption?

835 *Mthembu* paras 87–88.
836 *Mthembu* paras 87–88.

In addressing this query, the author contends that, first and foremost, applying blanket zero-tolerance policies to all employees, regardless of their engagement in alcohol or cannabis use, is inherently unfair. Furthermore, these policies should not be uniformly applied to all employees, regardless of their involvement in potentially dangerous activities. The CCMA Guidelines permit employers to deviate from the strict consistency of applying workplace rules if justifiable grounds exist.[837] However, it is essential to recognise that employers have limited flexibility when a zero-tolerance policy is in effect. Nonetheless, even within such policies, mitigating factors play a crucial role in determining the appropriateness of dismissal. These factors are critical to evaluating whether dismissal is an equitable and proportionate response to this conduct. In light of these considerations, a balanced approach is warranted. Employers should carefully review their zero-tolerance policies to ensure that they align with legal requirements and consider incorporating provisions that allow for the consideration of mitigating factors in cases of off-duty misconduct. Consequently, there should be a consideration of mitigating factors in assessing the fairness of dismissals stemming from off-duty cannabis use, as opposed to relying solely on blanket zero-tolerance policies.[838].

When deliberating upon the dismissal of an employee for their off-duty cannabis use, it becomes paramount to acknowledge the potential infringement upon the individual's right to privacy. It is essential to bear in mind that the CC has firmly established an individual's entitlement to their personal space and the right to consume cannabis in a private setting. However, the extent of the infringement on privacy rights is not solely determined by legal principles but also by the policies established by the employer. The company's stance on off-duty cannabis usage, as articulated in its policies and procedures, significantly influences the degree to which employee privacy may be compromised. A stringent zero-tolerance policy, for instance, may result in heightened scrutiny and disciplinary action for any cannabis-related conduct, regardless of its impact on job performance or workplace safety. Conversely, a more lenient approach that acknowledges personal autonomy and privacy rights may afford employees

837 Guideline 101 of the CCMA Guidelines.
838 Newaj (2023) *ILJ* 698.

greater latitude in their off-duty activities. Thus, while dismissing employees for off-duty cannabis use may potentially impinge on their privacy rights, the magnitude of this intrusion is linked to the company's policy framework and its interpretation and implementation thereof.

Moreover, it is crucial to recognise that cannabis residues can persist in the body for an extended period, even after the psychoactive effects have subsided. The mere presence of cannabis in one's system does not necessarily indicate impairment. So adopting a well-regulated approach to address the dismissal of employees for off-duty cannabis use entails employers' acknowledging their employees' right to engage in private cannabis consumption while simultaneously upholding workplace safety standards. This approach effectively balances employees' off-duty rights and the imperative of responsible workplace practices.

Furthermore, the limitation clause is relevant to dismissals for off-duty cannabis use. Against this background, it is essential to note that the limitation clause should be applied in accordance with the principles of proportionality and reasonableness, ensuring that any limitations imposed on an employee's rights are necessary, reasonable, and justifiable in the given context. This multifaceted assessment should consider various mitigating factors, including the reasons behind the employee's cannabis use, the timing of their consumption in relation to work hours, the nature of their job responsibilities, the broader context of the employer's business operations, and a plethora of other pertinent circumstances.

By conducting such a thorough examination, a sense of proportionality can be achieved, aligning the need to safeguard the employee's right to privacy with the employer's legitimate prerogative to manage the workplace effectively and uphold safety standards. This approach ensures that any determinations regarding dismissal are rooted in a comprehensive understanding of the situation, ultimately leading to fair and equitable outcomes that consider the rights and interests of both the employees and employers.

5.8 Adequacy of the legal Framework in Regulating Dismissals for Off-duty Cannabis use

5.8.1 Adequacy of the Legal Framework in Establishing Guilt

As discussed in the three preceding chapters, in the South African legal framework, determining the fairness of misconduct dismissals rests on two legs: establishing guilt and determining whether dismissal is a fair sanction.

First and foremost, to establish guilt related to cannabis use, the criterion used is whether an employee's conduct constitutes a breach of workplace rules or standards.[839] The subsidiary investigations include determining whether the rule is valid and reasonable, whether the employee was aware or should have been aware of the rule, and whether the employer has consistently enforced the rule.[840]

Ensuring fairness in determining guilt becomes increasingly complex when considering the distinctive aspects of cannabis consumption and its impact on the human body. Unlike alcohol, for which there are relatively straightforward methods such as breathalyser tests, assessing impairment from cannabis use poses unique challenges. Cannabis compounds can linger in a person's system for an extended period, even after the acute intoxicating effects have subsided. This prolonged detection window adds a significant layer of complexity to accurately evaluating impairment in the workplace solely through drug tests. The absence of a direct correlation between detectable cannabis levels and immediate impairment further complicates the establishment of fair and effective regulatory measures.

In addition, the challenge of establishing guilt is further compounded by the absence of specific workplace legislation in South Africa that comprehensively addresses cannabis use. This legislative gap creates a situation where employers and employees alike may face ambiguity and inconsistencies when dealing with cannabis-related issues in the employment context. Without clear, tailored legislation to guide workplace policies and procedures related to cannabis use, employers are left to navigate a

839 Item 7 of the Code.
840 Item 7 of the Code.

complex legal landscape that relies on a patchwork of existing laws, including labour laws, constitutional principles, and legal precedents.

Ultimately, the case-by-case approach requires thoroughly examining all factors to determine guilt accurately and fairly. However, this approach also underscores the necessity for comprehensive and uniform legislation. This legislation would offer more precise guidance to both employers and employees, reducing the likelihood of varied outcomes and legal disputes in cases involving off-duty cannabis use. Until this legislation is in place, the legal landscape will continue to be complex, and all parties must rely on case-specific considerations.

5.8.2 Adequacy of the Legal Framework in Determining Dismissal as a Fair Sanction

Once guilt is established, the next step is determining whether dismissal is a fair sanction. The question of it being a fair sanction in a country where cannabis has been legalised is a complex and multifaceted issue that requires careful consideration of various factors.

It is argued that the mere fact that an employee consumes cannabis in their free time, within the bounds of the law, does not automatically warrant dismissal. Like many countries, South Africa upholds the principle of individual autonomy and the right to personal choices within the confines of the law. Legal activities, such as the private use of cannabis, fall within the sphere of personal autonomy. This legal recognition supports an individual's autonomy and freedom of choice, enhancing their dignity by acknowledging their right to make decisions about their private lives without interference. Achieving equilibrium between the imperative to preserve individual privacy rights and the organisational obligation to uphold workplace safety and enforce a zero-tolerance policy is paramount. Adherence to a zero-tolerance policy underscores commitment to uniform standards of conduct, irrespective of off-duty activities. Finding this balance involves considering laws, ethics, and the values of the company. By prioritising safety and respecting rights of employees, organisations demonstrate a commitment to ethical governance and social responsibility.

Dismissing an employee solely for engaging in lawful, off-duty activities could be seen as infringing on their right to autonomy. The fairness of a dismissal depends on whether an employee's cannabis use genuinely poses safety risks to themselves, co-workers, or the public, as well as the nature of their job responsibilities. It is submitted that employers should provide evidence of these risks and explore alternative sanctions before resorting to dismissal. This approach respects the principle of fairness and avoids imposing unnecessary restrictions on employees whose roles do not inherently contribute to the perceived dangers within the workplace.

Moreover, in South Africa, the constitutional right to be free from unfair discrimination, as enshrined in the equality clause, extends to safeguarding individuals against discrimination based on personal choices, including the lawful use of cannabis.[841] The dismissal of an employee for engaging in legal off-duty activities, such as cannabis use, could be interpreted as violating their dignity, constituting an encroachment on their autonomy and personal freedom. The constitutional principles of equality, freedom, and the security of the person underscore the significance of respecting individual choices and guarding against arbitrary actions that could compromise an individual's inherent dignity. Consequently, if a dismissal for legal cannabis use is not rooted in valid concerns about job performance, applied consistently, or considers the obligation for reasonable accommodation, it may be perceived as a breach of the employee's dignity.

In assessing the fairness of a dismissal, the examination of mitigating factors plays a crucial role. The Code and the review test also highlight the importance of considering mitigating factors. Courts commonly consider various mitigating factors to determine whether the dismissal is just and proportionate. These factors encompass the employee's history of performance, their willingness to engage in rehabilitation programmes, and the availability of alternative sanctions such as counselling or treatment. The fairness of dismissal for cannabis use should be determined on the basis of its potential to compromise not only the company's safety but also the safety of the employee and other stakeholders.

841 Section 9 of the Constitution is known as the equality clause.

5.9 Conclusion

In answering the question of whether the current legal framework adequately regulates dismissals for the off-duty use of cannabis, the following conclusions are drawn:
First, South African law recognises employees' rights, including the right to privacy, freedom of choice, and personal autonomy. The CC has affirmed the right to consume cannabis in private, which extends to off-duty use. However, this right must be balanced with an employer's legitimate interest in maintaining workplace safety.

Secondly, determining whether an employee is guilty of off-duty cannabis use is a complex task. Unlike alcohol, cannabis can remain detectable in the body for an extended period, even after the effects have worn off. This factor makes establishing impairment challenging. Clear testing protocols and guidelines are necessary to ensure fairness and accuracy in determining guilt.

Thirdly, dismissal should be considered a fair sanction only when there is a clear and demonstrable connection between an employee's off-duty cannabis use and their job performance or safety risks. Mitigating factors, such as the nature of the job, cooperation with rehabilitation efforts, and alternative sanctions, should also be considered. Blanket zero-tolerance policies may not always result in fair dismissals, as they may not consider individual circumstances.

Fourthly, in applying the limitation clause, South African courts should meticulously examine each case to ensure that the limitation on an employee's rights to privacy is justifiable and proportionate.[842] This examination considers whether dismissal is the only reasonable option or whether alternative measures can adequately address the concerns.

Finally, South Africa's legal framework for regulating dismissal for off-duty cannabis use needs further development and clarity. The process of balancing employee rights, establishing guilt, and determining dismissal as a fair sanction requires an approach considering individual circumstances and workplace safety. The application of zero-

842 Section 36 of the Constitution.

tolerance policies must align with legal principles. Legislative guidance and regulations in this evolving area of law would contribute to greater adequacy and fairness in addressing these complex issues.

CHAPTER 6

COMPARISON WITH THE UNITED STATES OF AMERICA REGARDING THE REGULATION OF DISMISSAL FOR OFF-DUTY MISCONDUCT

6.1 Introduction

The previous two chapters highlighted that an employee's fundamental rights to privacy, dignity and freedom of expression can be violated during dismissals for off-

duty misconduct. It was also concluded that there is a need to balance employers' and employees' rights when dismissing employees for off-duty misconduct.

This is a comparative chapter on how South Africa's approach to regulating off-duty misconduct through legislative frameworks measures up against that of the United States of America (USA). Focusing on three states in the USA — California, New York, and Colorado — and the broader federal rules in the USA, the chapter aims to gain valuable insights and lessons that South Africa can derive. The primary goal is to assess whether South Africa can enhance its approach to balancing the rights of employees and employers in cases of dismissals for off-duty misconduct.

The chapter begins by focusing on a detailed exploration of the federal laws in the USA that govern labour relations and dismissals. After examining federal laws, the chapter scrutinises the legislative frameworks of three states in the USA, providing a comprehensive understanding of how they regulate off-duty misconduct.

6.2 The United States System of Governance

The USA is considered the most powerful and resourceful country in the Western world and has significantly influenced developments in the global economy over the last two centuries.[843] Bendix states that the USA is viewed as the icon of individualism, capitalism, free market economy, and democracy.[844] Because of this combination, it is submitted that as the most powerful country in the Western world, the USA influences other countries.

The federal government system in the USA divides authority between the national (federal) government and individual states. The central or federal government holds certain powers and responsibilities, while each state has its own government with its set of powers. The US Constitution 1787 (the US Constitution) establishes this distribution of authority. The federal government deals with matters of national concern, and the states manage more localised issues. This system balances power between the central authority and the states, ensuring a cooperative yet independent

843 Bendix (2010) 755.
844 Bendix (2010) 756.

governance structure.[845] There are 50 states, each with executive, legislative, and judicial powers.[846]

The federal and state governments are all subject to the US Constitution, which still governs the country.[847] The nation is proud of the freedoms it provides to its citizens. Owing to the Bill of Rights and later Amendments to the US Constitution, people possess several fundamental rights.[848]

The US Constitution does not expressly provide for the right to fair labour practices and the right to dignity. It does provide for the right to privacy.[849] The foundation for rights has always been privacy, not dignity. There is little emphasis on the nature of human personality in US law. Instead, the law emphasises the right to be left alone, which is the right to privacy.[850] For Americans, dignity entails the freedom to choose.[851] This comes under the umbrella of privacy rights, including the zone of personal autonomy from which it emanates. So personal autonomy is an essential component of one's rights.

Levine argues that the concept of privacy is consistent with the US tort (in South African law, the delict) of intrusion on seclusion and Fourth Amendment jurisprudence, which established the test of reasonableness concerning the government's activities against its subjects.[852] This has been logically extended to the workplace of public employees, and it now appears to apply equally to the private sector workplace.[853] In South Africa, by contrast, personal autonomy is seen as a feature of human dignity.[854]

The First and the Fourth Amendments to the US Constitution are the most significant provisions securing constitutional rights for the American people. The First

845 "Legal Dictionary", https://legaldictionary.net/, accessed July 2022.
846 Goldman and Corrada (2018) 8.
847 Article II of the US Constitution. See also Van Arkel doctoral Thesis, Rotterdam Erasmus Universiteit (2007) 15.
848 US Constitution, https://constitutionus.com/books/, accessed 20 October 2022.
849 Eberle (1997) *Utah L.Rev.* 1032.
850 Eberle (1997) *Utah L.Rev.* 1033.
851 Eberle (1997) *Utah L.Rev.* 1034
852 Levine (2009) *ALSB J. Employ. Labor Law* 64.
853 Levine (2009) *ALSB J. Employ. Labor Law* 64.
854 Eberle (1997) *Utah L.Rev.* 1034.

Amendment protects freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom to petition the government.[855] It states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[856]

The Fourth Amendment to the US Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. In practical terms, this provision means that individuals have the right to be free from unwarranted intrusion by the government into their private affairs and possessions. The Fourth Amendment states:[857]

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"

As a common law and federal nation, the USA does not have a single set of codified labour laws applicable to all employers and employees.[858] The laws governing employment relationships are derived from a variety of sources. Current employment law is distinguished by a complex set of constitutional, legislative, administrative, and common law rights and duties.[859]

6.2.1 Federal Legislation Regulating Fair Labour Practices and Dismissals

The National Labour Relations Act of 1935 (the NLRA) is one of the critical pieces of legislation regulating employment relationships. Its objectives include the need to encourage the rationalisation of commerce and industry, address minimum wages and maximum hours of work, and the establishment of the National Labor Relations Board

855 US Constitution, https://constitution.congress.gov/constitution/amendment-1/, accessed 12 December 2023.
856 US Constitution, https://constitution.congress.gov/constitution/amendment-1/, accessed 12 December 2023.
857 US Constitution, https://constitution.congress.gov/constitution/amendment-4/, accessed 12 December 2023.
858 Some of the Acts include the Equal Employment Opportunity Act of 1972 (EEOA), the Americans with Disabilities Act of 1990 (ADA), the Family and Medical Leave Act of 1993 (FMLA), and the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act).
859 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 83.

(NLRB).[860] The NLRB is a crucial federal agency in the USA overseeing labour relations and unions in the private sector. It enforces labour laws, manages union elections, addresses unfair labour practices, resolves disputes, sets labour policy, and promotes collective bargaining. Its mission is to protect employees' rights to organise and collectively bargain, fostering fair labour practices and harmonious labour relations in the country.[861]

The NLRA stands out as a cornerstone safeguard, offering robust protection to employees. It bestows on them the fundamental right to engage in "concerted activities for collective bargaining or other mutual aid or protection."[862] Notably, this protection applies both in unionised and non-unionised workplaces, underscoring this provision's broad reach and significance.

Any action that interferes with the rights protected by the NLRA is classified as an unfair labour practice.[863] It establishes a robust shield for employees, granting them the freedom to communicate and collaborate on work-related concerns.[864] Importantly, this includes discussions about salaries and working conditions, even when these conversations occur outside the workplace or during an employee's off-duty hours, including on social media platforms. This legal safeguard empowers employees to voice their concerns and advocate for their rights without fear of retaliation. It sets a powerful precedent for protecting employees' rights in off-duty conduct cases.[865]

Employers should be aware that the NLRA may interpret employees' social media postings (Instagram, direct messages (DMs), group texts, tweets, Snapchat groups, Facebook posts, and sub-Reddit threads) and other forms of communication as a concerted activity if these postings seek to improve compensation or working conditions.[866] For example, if an employer dismisses an employee because their social media posts indicate that they filed a discrimination lawsuit against the employer or

860 Section 1 of the NLRA. The NLRB is an autonomous agency of the US federal government that was established by section 3 of the NLRA and is charged with the responsibility of implementing labour law regarding collective bargaining and unfair labour practices.
861 Section 1 of the NLRA.
862 Section 7 of the NLRA.
863 Section 8 of the NLRA.
864 Sections 7 and 8 of the NLRA.
865 Owen *et al* "The Challenges and Risks When Private Employers Regulate Employees' Off-Duty Conduct in California", https://hfsitalia.com/off-duty-social-media-use-and-termination/, accessed 17 December 2023 (Owen *et al* "Challenges and Risks").
866 Owen *et al* "Challenges and Risks".

took job-protected leave, this dismissal could violate section 8 of the NLRA.[867] The same applies if an employer takes adverse action against an employee for posting grievances concerning their pay or working conditions.[868]

Another vital piece of legislation regulating dismissal is the Civil Rights Act of 1964. This statute prohibits discrimination against any person in terms of employment conditions and employment privileges concerning race, colour, national origin, sex and religion.[869] If an employee can prove that he or she was dismissed on any of these discriminatory grounds, the dismissal will be unfair, and the employee will be entitled to claim damages.[870] Eichelberger argues that legal safeguards in the USA focus primarily on avoiding discrimination rather than safeguarding individuals' rights to data privacy.[871]

Two forms of dismissals are observed in the USA: dismissal under at-will employment and dismissal for just cause. These forms are discussed below.

At-will employment refers to the employment arrangement in which the employer retains the authority to terminate an employee's tenure at the employer's discretion without needing a specific cause.[872] In essence, this means that an employer can end the employment relationship with an employee at any time, and this decision can be based on various reasons or even no reason at all. It is important to note that the concept of employment at will does not come into play when existing collective bargaining agreements exist.[873] In these situations, employees are typically represented by a labour union, and the termination process is subject to certain conditions and due process requirements that must be met before an employee can be legally dismissed from their employment. These due process safeguards are put in place to protect unionised employees' rights and job security.[874]

867 Owen *et al* "Challenges and Risks".
868 Owen *et al* "Challenges and Risks".
869 Chapter 7 of the Civil Rights Act of 1964.
870 Barber (1993) *Syracuse J.Int'l L.& Com.* 3.
871 Eichelberger (2021) *Ind. Int'l & Comp. L. Rev.* 180.
872 Legal Dictionary "At Will Employment", https://legaldictionary.net/at-will-employment/, accessed 12 December 2023.
873 "Employment at will", https://ebrary.net/5943/law/employment-at-will_doctrine originate_united states accessed on December 2022.
874 Legal Dictionary "At Will Employment", https://legaldictionary.net/at-will-employment/, accessed 12 December 2023.

The prevailing legal framework in most states remains the employment-at-will doctrine.[875] This doctrine finds its historical roots in the work of Horace Gay Wood (1831–1893), a legal writer based in New York. His influential book on this doctrine became a touchstone reference for numerous state high courts in the USA. As a result, his formulation of this doctrine effectively shaped the statutes adopted by states.[876] The doctrine received further validation when the United States Supreme Court endorsed it during the Lochner era, a period marked by judicial efforts to resist government intervention in labour markets.[877] Consequently, the at-will employment doctrine gradually evolved into the default rule in most US states' common law governing employment contracts.[878]

Employment at will has exceptions, one of which pertains to discrimination cases. Employers cannot terminate an employee's employment for discriminatory reasons, such as race, gender, religion, or disability. This exception upholds anti-discrimination laws, protecting employees from unfair dismissal based on their personal characteristics.[879]

Implied contractual terms play a significant role among the exceptions to the at-will employment doctrine. Implied contractual terms arise when certain obligations or conditions are understood to be part of the employment relationship, even if they are not explicitly stated in the written employment contract. These implied terms are based on the parties' conduct, industry norms, or other circumstances surrounding the employment.[880] These implied terms can encompass various aspects, including but not limited to assurances of job security or specific conditions for termination, even when no explicit, documented agreement exists. For example, an employee may

875 Smit and Van Eck (2010) *CILSA* 54.
876 "Employment at will" available at https://ebrary.net/5943/law/employment-at-will_doctrine_originate_united_states accessed on December 2022.
877 The Lochner era emanates from the case *Lochner v New York* 198 U.S. 45 (1905). During this time, the US Supreme Court established a standard practice of "striking down economic rules implemented by the state based on the Court's conceptions of the most acceptable means for the state to achieve its preferred goals." The Court achieved this by applying its understanding of the substantive due process to invalidate statutes considered to infringe liberty or private contract.
878 *Adair v United States* 208 U.S. 161 (1908).
879 Harcourt *et al* (2013) *LLJ* 17.
880 Harcourt *et al* (2013) *LLJ* 17.

reasonably infer job security based on consistent company policies or practices that suggest long-term employment.[881]

In addition, while allowing for broad termination flexibility, the at-will employment doctrine does not shield employers from engaging in actions that contravene established public policy. When an employer's decision to terminate an employee's employment contradicts fundamental public policy principles, it may be considered unlawful and not protected by the at-will doctrine.[882] Statutory laws and judicial decisions typically define these public policy principles. For example, if an employer were to terminate an employee's employment for refusing to engage in an illegal activity, such as committing fraud or discrimination, the termination could be challenged because it violates public policy.[883]

Some states recognise an implied covenant of good faith and fair dealing in employment relationships. Under this doctrine, employers are legally bound to act in good faith and treat employees fairly in the employment relationship. This means that employers cannot terminate employees' employment in bad faith, with malicious intent, or for arbitrary reasons. The implied covenant of good faith and fair dealing is rooted in the belief that employment relationships should be built on trust, fairness, and honesty.[884] It implies that employers must have justifiable and non-discriminatory reasons for terminating employees' employment and cannot use termination as a means to harm or unfairly disadvantage employees. For example, if an employer were to terminate employment solely to deprive the employee of earned benefits, retaliate against them for exercising their legal rights, or interfere with their vested job security, this step might be considered a violation of this covenant.[885]

Furthermore, numerous federal and state laws act as vital exceptions to the at-will employment doctrine, specifying particular circumstances under which employee termination is prohibited. For example, the Civil Rights Act forbids discrimination based on protected characteristics such as race, religion, and sex, aiming to ensure equal

881 Harcourt *et al* (2013) *LLJ* 17.
882 Harcourt *et al* (2013) *LLJ* 17.
883 Harcourt *et al* (2013) *LLJ* 7.
884 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.
885 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.

treatment in employment. The Family and Medical Leave Act of 1993 (FMLA) protects employees seeking leave for family or medical reasons by providing job security during these absences. Collectively, these laws establish clear guidelines, promote fairness, and safeguard employees from arbitrary or discriminatory terminations, reinforcing the importance of equitable and respectful workplaces.[886]

Courts play a crucial role in interpreting and applying these exceptions to employment at will. Courts assess the specific circumstances of each case to determine whether an exception applies and whether the termination was lawful. Although the at-will doctrine emphasises workplace flexibility and contract freedom for employers, these exceptions ensure that employees are not unfairly or unlawfully dismissed.[887]

In linking at-will employment with dismissal for off-duty misconduct, the author contends that although the at-will employment doctrine typically grants employers considerable discretion in termination decisions, exceptions become particularly relevant when assessing off-duty misconduct. These exceptions, rooted in public policy, implied contracts, the covenant of good faith and fair dealing, and statutory protections, curtail an employer's latitude in dismissing an employee for their off-duty behaviour. It is further submitted that the significance of these exceptions highlights the necessity of comprehensive legal scrutiny in every off-duty misconduct case. This scrutiny is vital to ensure that the termination adheres to the law and respects the rights and protections available to employees.

As the traditional at-will doctrine has faced limitations in common law and court exceptions, many employers seek to codify employees' behavioural expectations through workplace codes of conduct.[888] These codes of conduct serve as a way for employers to set clear expectations for employee behaviour and performance while providing a framework for addressing disciplinary issues or terminations under

886 Harcourt *et al* (2013) *LLJ* 17.
887 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.
888 Labitoria "At-Will Employment: Everything You Need to Know", https://www.hcamag.com/us/specialization/employment-law/at-will-employment-everything-you-need-to-know/318985, accessed 17 December 2023. See also the discussion of California, New York and Colorado below.

evolving employment laws and regulations.[889] This shift reflects a growing recognition that the absolute freedom to terminate employees at will has become less viable in today's legal landscape, prompting employers to adopt more structured and compliant approaches to employment relationships.[890] As a result, the at-will employment doctrine is less harsh in its current form than it once was because of the development of common-law and statutory exceptions discussed above.[891]

Freed and Polsby make an important observation that the at-will employment doctrine significantly impacted the evolution of employee dismissal legislation.[892] State legislatures have also passed legislation restricting the number of legally permitted reasons for dismissing employees.[893] For example, the Model Employment Termination Act of 1991 (META), adopted by the state of Delaware and the District of Columbia, prevents employers from dismissing employees without reason if they have been with the company for more than a year.[894] The META allows an employer to opt out of the just cause regime by an explicit written agreement, as long as the company provides employees with a minimum graded schedule of severance pay.[895]

According to current practices in the USA, most US employees are protected by some form of "just cause" or objectively reasonable termination standard that exempts them from the strict definition of "at-will" employment.[896] Just cause is discussed below.

"Just cause" is a legal and employment-related term that refers to a valid and legally acceptable reason for taking disciplinary action, such as terminating an employment

889 Labitoria "At-Will Employment: Everything You Need to Know", https://www.hcamag.com/us/specialization/employment-law/at-will-employment-everything-you-need-to-know/318985, accessed 17 December 2023. See also the discussion of California, New York and Colorado below.

890 Labitoria "At-Will Employment: Everything You Need to Know", https://www.hcamag.com/us/specialization/employment-law/at-will-employment-everything-you-need-to-know/318985, accessed 17 December 2023. See also the discussion of California, New York and Colorado below.

891 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.

892 Freed and Polsby (1989) *Emory L.J.* 555.

893 Freed and Polsby (1989) *Emory L.J.* 555. See also St Antoine (1992) *LLJ* 495, who agreed that that state legislatures were expected to examine the Model Employment Termination Act of 1991 (META) and seek to prevent unfair dismissal of American employees. At the same time, the META seeks to protect American businesses from catastrophic blows, thereby balancing the interests of the employer and the employee.

894 Section (4) of META; Freed and Polsby (1989) *Emory L.J.* 555.

895 Freed and Polsby (1989) *Emory L.J.* 555.

896 Verkerke (2009) 448.

contract or imposing other significant penalties on an employee.[897] It is often used in employment contracts and labour laws to outline the circumstances under which an employer may take adverse actions against an employee. Just cause typically involves employee misconduct or performance issues that are serious or substantial enough to warrant these actions.[898] The definition of just cause can vary, depending on employment contracts and company policies. Still, it generally implies that the employer has a legitimate and lawful reason for the disciplinary action taken.[899]

It is essential to clarify that when considering a dismissal for just cause, the employer must establish compelling reasons for this dismissal.[900] The employer must also show that any mitigating factors the employee presents do not justify a more lenient outcome.[901] In other words, the decision to dismiss for just cause is based on a comprehensive evaluation of the employee's conduct, considering the seriousness of the actions and whether any extenuating circumstances should temper the severity of the consequences. This approach ensures that the decision is fair, proportionate, and based on considering all relevant factors thoroughly.[902] A typical just cause provision reads, "No employee will be disciplined or dismissed except for a just cause." Some agreements use "good cause," "proper cause," "reasonable cause," or simply "cause."[903]

Under the new "just cause" standard, many jurisdictions require employers to adhere to their own promises and commitments regarding employment termination. When an employer explicitly states, whether in employment contracts, company policies, or other written agreements, that employees will not be dismissed without a valid and lawful reason (just cause), the employer is legally bound to honour this commitment.[904]

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897 Taylor "Just Cause Meaning Law" concerning "What is Just Cause?" https://malcolmmackillop.com/just-cause-meaning-law/#:~:text=The%20definition%20of%20just%20cause%20is%20a%20reason,be%20something%20that%20is%20within%20the%20employee%E2%80%99s%20control, accessed 26 September 2022 (Taylor "What is Just Cause?").

898 Taylor "What is Just Cause?".

899 Taylor "What is Just Cause?".

900 Schwartz "Using 'Just Cause' to Defend Against Unfair Discipline", https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline, accessed 12 December 2023 (Schwartz "Just Cause").

901 Schwartz "Just Cause".

902 Schwartz "Just Cause".

903 Schwartz "Just Cause".

904 Cassim (1984) *ILJ* 284.

This standard holds employers accountable for their representations and helps protect employees from unjust or arbitrary dismissals when these commitments have been made.[905]

Some states advocate for the change from at-will employment to just cause. A good example is New York. New York City Mayor Bill de Blasio signed legislation on January 5, 2021, officially ending at-will employment for fast food workers in New York City. The legislation, which took effect on July 4, 2021, made New York City the first city in the country to implement employee safeguards for a specific sector. The new regulation prevents fast food operators from dismissing or significantly decreasing workers' hours without "just cause" outside a probation period. The legislation defines "just cause" as "the fast food employee's inability to fulfil job tasks adequately or misconduct that is manifestly and significantly damaging to the fast food employer's legitimate business interests."[906]

6.3 Legislative Regulation of Off-duty Conduct

No federal law in the USA specifically governs off-duty misconduct dismissals. However, the National Labour Relations Act (NLRA) takes a position that could offer significant protection to a broad range of employees.[907] It aims to bolster employees' rights to express themselves freely outside their workplaces, particularly when their expressions involve collective activities on social media platforms.[908] Social media provides a platform for employees to voice their opinions on crucial topics such as their working conditions or political matters, which is a fundamental aspect of the nation's democratic values. This NLRA position can potentially curtail the employer's disciplinary actions when employees engage in these activities, further safeguarding their freedom of expression.[909]

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905 Cassim (1984) *ILJ* 284.

906 See now § 20-1264 Outreach and education, Subchapter 7: Wrongful Discharge of Fast Food Employees, § 20-1272 Prohibition on wrongful discharge of the New York City Administrative Code. Its § 20-1272a states: "A fast food employer shall not discharge a fast food employee who has completed such employer's probation period except for just cause or for a bona fide economic reason." The provisions are available at "Subchapter 7: Wrongful Discharge of Fast Food Employees", https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-226125, accessed 12 December 2023.

907 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.

908 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.

909 McGinley and McGinley-Stempel (2012) *Hofstra Labor Empl. Law J.* 84.

Although at-will employment remains the prevailing model in the USA, employers do have the authority to establish rules governing employee behaviour, encompassing both on-duty and off-duty conduct.[910] As discussed in the previous paragraph, there is a discernible trend in the USA where employee privacy and anti-discrimination laws are on the rise, and these developments have started to curtail some of the powers employers traditionally had over employees' off-duty conduct. [911]

Arbitrator Carroll L Daugherty (1914–1998) devised seven questions in 1966 to evaluate the fairness of dismissals for misconduct that were subsequently applied to off-duty misconduct cases in the USA. The questions have been widely recognised and are often used to determine whether an employee's dismissal for off-duty misconduct was justified.[912] This test seeks to establish guilt, whether dismissal was a fair sanction, and whether procedural requirements were met before dismissal. Arbitrators in the USA considering disciplinary matters widely employ Daugherty's questions:

> "1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?
> 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
> 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
> 4. Was the company's investigation conducted fairly and objectively?
> 5. At the investigation did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?
> 6. Has the company applied its rules, orders, and penalties without discrimination to all employees?
> 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?"[913]

910 Sonne (2008) *Ga.L.Rev.* 174.
911 Sonne (2008) *Ga.L.Rev.* 150.
912 See *Enterprise Wire Co.* (46 LA 359, 1966), https://www.hawaii.edu/uhwo/clear/home/EnterpriseWire.html, accessed 12 December 2023.
913 See *Enterprise Wire Co.* (46 LA 359, 1966), https://www.hawaii.edu/uhwo/clear/home/EnterpriseWire.html, accessed 12 December 2023.

These questions cover critical aspects such as adequate employee caution, the connection between employer requirements and performance, due diligence in ascertaining guilt, fair and impartial inquiry processes, the presence of substantial evidence, and non-discriminatory enforcement of workplace rules. These questions are valuable for ensuring the equitable resolution of employment-related disciplinary matters.

According to Cassim, arbitrators have created a substantial and generally stable corpus of substantive and procedural law on dismissals. Cassim adds that,

> "In the United States of America, for instance, arbitrators 'have evolved accepted standards for what constitutes just cause for discipline, developed fair and efficient procedures for determining the guilt or innocence of accused employees, exercised responsibility for reviewing the appropriateness of penalties, and provided effective remedies of reinstatement and back pay'."[914]

As there is no legislative framework for off-duty misconduct, some states have enacted laws that give effect to the protection of employees' off-duty conduct and, in a way, regulate dismissals for off-duty misconduct. For instance, the states of California, New York, and Colorado explain which kind of conduct must be protected. They also explain how the interests of the employer and the employee should be balanced. And they provide a mechanism for resolving violations of this protection. These states have been pioneers in shaping legal frameworks and setting precedents regarding off-duty misconduct. Their proactive approach in addressing contemporary issues such as social media and cannabis has made them leaders in the field. By enacting comprehensive legislation and establishing significant legal precedents, these states have provided valuable guidance and insight for policymakers, employers, and the legislature. Their experiences serve as a benchmark for understanding the complexities involved in regulating off-duty conduct in the modern workplace.

6.3.1 Regulation of Off-duty Misconduct in California, New York, and Colorado

California, New York, and Colorado are all governed by at-will employment, which provides employers with broad discretion in termination decisions. However, as

914 Cassim (1984) *ILJ* 283–284.

explained earlier there are various legislative and regulatory measures at the federal and state levels which provide exceptions to the at-will doctrine. These exceptions establish limits and protections against dismissals, especially when off-duty misconduct is involved.

The statutes discussed below protect off-duty conduct. What follows is a detailed survey of how California, New York, and Colorado regulate and protect off-duty conduct, highlighting the variations in laws and protections across these three states.

6.3.1.1 California

In California, employees' off-duty conduct is regulated by the California Labor Code of 2019 (the California Labor Code). To protect off-duty conduct, employees cannot be demoted, suspended, or dismissed for engaging in lawful activities during off-duty hours while away from the workplace.[915] This California Labor Code provides that a California Labor Commissioner may file claims on behalf of employees for wages lost as a result of demotion, suspension, or dismissal from employment for lawful conduct occurring during nonworking hours and away from the employer's premises.[916] In addition to lost wages, the California Labor Code further provides for reinstatement of employees whose rights were violated.[917]

The California Labor Code does not explicitly define "lawful conduct" in the context of off-duty activities. It can be argued that "lawful conduct" in the California Labor Code refers to conduct that is within the bounds of the law and does not violate any legal statutes or regulations.

The California Labor Code was revised in 2001 to enable new actions and remedies for applicants as well as potential employees.[918] Section 98.6 bans discrimination against an applicant or employee who exercises any right granted by section 96(k). The California Labor Code states:

> "No person may discharge an employee or discriminate against an applicant for employment because the employee or applicant engaged in any of the

915 Section 96(k) of the California Labor Code.
916 Section 96(k) of the California Labor Code.
917 Section 98.6(b) of the California Labor Code.
918 Section 98.6(a) of the California Labor Code.

> conducts outlined in this chapter, including the conduct described in subdivision (k) of Section 96, which is, lawful conduct occurring away from the employer's premises during nonworking hours."[919]

The California Labor Code adds:

> "Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of their employment because the employee engaged in any conduct delineated in this chapter … shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer."[920]

The section above has been dubbed the most extensive off-duty labour law in the USA.[921] The author contends that this section stands out because of its robust protection of employees from various adverse employer actions, all of which are prohibited when they stem from lawful off-duty conduct. In essence, this section serves as a powerful safeguard, ensuring that employees' rights outside work are upheld and shielded from unfair consequences within the employment relationship.

The California Labor Code explicitly forbids employers from creating, adopting, or enforcing rules that would inhibit employees from engaging in political activities or seeking public office.[922] Employers are also prohibited from controlling or influencing employees' political affiliations or activities. The California Labor Code further prohibits employers from threatening to dismiss any employee based on their participation in political actions or activities.[923]

Furthermore, the California Labor Code is important in regulating off-duty conduct through its "non-disclosure" section.[924] The Labor Code states that employers, whether government agencies, private individuals, or corporations, are prohibited from requesting job applicants to provide information in writing or verbally regarding an arrest or detainment that did not lead to a conviction. Similarly, such employers are barred from seeking information about participation in pre-trial or post-trial diversion programs and details concerning convictions that have been judicially dismissed or

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919 Section 98.6(a) of the California Labor Code.
920 Section 98.6(b)(1) of the California Labor Code.
921 Sonne (2008) *Ga.L.Rev.* 174.
922 Sections 1101 and 1102 of the California Labor Code.
923 Section 1102 of the California Labor Code.
924 Section 432.7 of the California Labor Code.

legally ordered to be sealed; this includes, but is not limited to, information about arrests or detentions that did not result in convictions.[925]

In addition to the Labor Code, the California Penal Code of 1872 (California Penal Code) enforces respect for off-duty rights by providing dispute resolution mechanisms for unfair dismissal associated with employers who violate the California Labor Code.[926] As a result, a civil case against an employer under the California Penal Code allows an applicant to recover actual damages and costs.[927] Reasonable attorney fees can also be claimed if an employer violates the California Labor Code.

In a Californian case, *Garcia-Brower v Premier Auto Imports of CA, LLC* (*Premier*),[928] the employer, Premier Auto Imports, hired an employee but a few weeks later received a warning from the Division of Motor Vehicles (DMV) incorrectly stating that the employee had an active criminal conviction, when in fact the charges against her were dismissed when she finished three years of probation and repaid the money she embezzled.[929] Premier Auto Imports did not investigate whether the DMV was correct even though its background check indicated no conviction, and the plaintiff told Premier Auto Imports that her conviction had been vacated.[930] Premier Auto Imports instead dismissed the plaintiff for lying in her job application.[931] The Court of Appeal held that Premier violated the California Labor Code by retaliating against the plaintiff for exercising her right to withhold disclosure of her dismissed conviction on her employment application.[932]

6.3.1.2 New York

In New York, off-duty conduct is governed by section 201-D of the New York Labor Law, which, among other things, prohibits discrimination, demotion, retaliation and dismissal for engaging in certain activities. The New York Labor Law applies to all

925 Section 432.7 of the California Labor Code.
926 Section 432.7 of the California Labor Code.
927 Section 11140 of the California Penal Code.
928 269 Cal.Rptr.3d 856 (Cal.App. 1 Dist., 2020).
929 *Garcia-Brower* 860.
930 *Garcia-Brower* 861.
931 *Garcia-Brower* 861.
932 *Garcia-Brower* 871. See sections 432.7 and 98.6 of the California Labor Code.

employers with employees in New York.[933] This section was designed to protect employees from discrimination and dismissal based on lawful activities outside working hours.

According to the New York Labor Law, a line is drawn between work hours and off-duty hours:

> "Work hours are defined as all time, including paid and unpaid breaks and meal periods, that the employee is permitted or expected to be engaged in work."[934]

The New York Labor Law outlaws the dismissal of an employee if the employee's off-duty conduct is lawful and is based on their political activities outside working hours, away from the employer's premises and if such conduct is performed without the use of the employer's equipment or property.[935] However, the New York Labor Law does not protect employees who engage in off-duty conduct that creates a significant conflict of interest with their employer's trade secrets, proprietary information, or other business interests.[936]

The New York Labor Law can be interpreted as codifying the nexus test, which essentially justifies dismissal when there is a clear connection or nexus between an employee's off-duty behaviour and the employer's business interests.[937] The crucial distinction lies in the emphasis that employees should not be dismissed solely for engaging in lawful off-duty activities. In essence, this section recognises the importance of balancing the protection of an employer's proprietary interests with safeguarding employees from unfair dismissals based on lawful off-duty conduct. The New York Labor Law intends to prevent employers from using vague or ambiguous connections or links between an employee's personal life and the employer's economic interests to justify dismissal. It ensures that there must be a genuine and substantial relationship between the off-duty behaviour and the employer's business interests for a dismissal to be justified.

933 Section 201-D of the New York Labor Law.
934 Section 201-D(1) of the New York Labor Law.
935 Section 201-D(2)(a) of the New York Labor Law.
936 Section 201-D(3)(a) of the New York Labor Law.
937 Section 201-D(3)(a) of the New York Labor Law.

6.3.1.3 Colorado

Colorado, like the two states discussed above, prohibits employers from terminating employees' employment for lawful off-duty conduct. The Colorado Revised Statutes (CRS) define lawful off-duty conduct as any activity that is legal under state law while not at the workplace and during non-working hours which could include political participation and engagement, using lawful products, including tobacco and alcohol and any other lawful activity that is not specifically prohibited by state law.[938]

The CRS states:

> "(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:
>
> (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
>
> (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest."[939]

These provisions of the CRS provide a significant legal framework designed to navigate the complexities of off-duty conduct in the employment context. The provisions embody the essence of balance and fairness by meticulously considering employers' and employees' rights and interests.

On the one hand, the section acknowledges the importance of safeguarding employees' rights to engage in lawful off-duty conduct without facing unwarranted consequences from their employers. It acknowledges that individuals have personal lives beyond the workplace, which should be protected as long as they do not infringe upon the employer's legitimate interests.

Conversely, the section recognises that employers have a vested interest in maintaining a productive and harmonious work environment. In some situations, an employee's off-duty actions can directly and negatively impact the employer's

938 Section 24-34-402.5 of the CRS.
939 Section 24-34-402.5 of the CRS.

business operations, reputation, or safety. In these cases, the section provides a mechanism for employers to address these concerns and, if necessary, take appropriate disciplinary actions, including dismissal.[940]

This statutory framework thus strives to strike an equilibrium by distinguishing between lawful off-duty conduct that does not threaten the employer's interests and off-duty behaviour that crosses the line into areas that could harm the employer's legitimate concerns.[941] By doing so, the framework seeks to ensure that employees are not unfairly penalised for their lawful off-duty activities while allowing employers the necessary tools to protect their business when employee off-duty conduct genuinely jeopardises their operations.

Marsh v Delta Air Lines, Inc. (*Marsh*)[942] was decided by a federal court in 1997. The court held that the statute was enacted to safeguard employees' "off-the-job privacy." The court added that, more specifically, the law was intended to protect employees who participate in actions that are personally distasteful to their employer but are legal and unrelated to an employee's job requirements.[943] In practice, this statute should protect the job security of homosexuals who would otherwise be dismissed by an employer who discriminates against gay people or even smokers who work for an employer who is strongly anti-tobacco.[944] The court in *Marsh* dismissed claims made by a former Delta Air Lines employee who was dismissed after writing a letter to the editor of *The Denver Post* criticising Delta's choice to hire hourly contract workers to replace laid-off employees. The court applied the CRS which protects employees from termination based on engaging in lawful activities off the employer's premises during nonworking hours, unless specific exceptions apply. The court then held that this legal protection, though, is not absolute; the fact that the Colorado legislature provided exceptions to the general rule demonstrates the legislature's recognition that the policy of preserving an employee's off-the-job privacy must be weighed against an

940 Section 24-34-402.5 of the CRS.
941 Section 24-34-402.5 of the CRS.
942 952 F.Supp. 1458 (D.Colo.,1997).
943 *Marsh* 1458.
944 *Marsh* 1458.

employer's commercial needs.[945] It held that the employee's actions breached the implied duty of loyalty, justifying termination.[946]

The CRS[947] was also applied by the Colorado Supreme Court in an unfair dismissal case, *Watson v Public Service Co. of Colorado* (*Watson*).[948] The employee asserted that his employer ("Xcel Energy") dismissed him in retribution for filing a telephone complaint with the Occupational Safety and Health Administration (OSHA) regarding unsafe working conditions. He filed the complaint with OSHA while off-duty and away from the employer's premises.[949] The Colorado Court of Appeals ruled that the off-duty conduct legislation applied even to work-related conduct.[950] According to the court, the CRS makes it illegal for an employer to dismiss an employee for engaging in any lawful activity off the employer's premises during nonworking hours. Xcel Energy denied retaliation, claiming that the plaintiff was dismissed for failing to meet a requirement of getting a commercial driver's licence, not for calling OSHA.[951]

According to the court's ruling, it is incumbent upon the claimant to establish that the termination of their employment resulted solely from lawful off-duty conduct. Merely demonstrating that such conduct was one component in a situation involving multiple factors would not suffice as a valid claim.[952]

This finding sets a relatively high threshold for claimants to prove that the off-duty conduct was the sole or primary reason for their termination. It underscores the importance of clear and convincing evidence when pursuing legal claims related to off-duty conduct dismissals, as the court requires a direct and unambiguous connection between the conduct and the termination to support the claim.

6.3.2 Regulation of Dismissals for Off-duty Social Media Postings in California, New York, and Colorado

945 *Marsh* 1460.
946 *Marsh* 1460.
947 Section 24-34-402.5 of the CRS.
948 P.3d 860 (Colo. App. 2008).
949 *Watson* 863.
950 *Watson* 863.
951 *Watson* 863.
952 *Watson* 863.

The three states have had the opportunity to adjudicate on dismissals related to social media misconduct. It is worth mentioning that in addition to their own legislative frameworks regulating off-duty conduct, the three states also consider the NLRA as a point of reference in determining the fairness of dismissals for off-duty social media misconduct.

The following discussion examines how decision-makers have approached and decided these dismissal cases.

In a recently filed Californian complaint, *Leah Snyder v Alight Solutions, LLC*,[953] a remote employee living in California sued her Illinois-based employer, alleging several violations of California law following her termination. The employee participated in the US Capitol protests.[954] She uploaded photographs of herself in the Capitol on social media after she returned home.[955] Her selfies prompted a flood of negative comments on the employer's Facebook page. The employer dismissed the employee, but she alleged that her rights to freedom of expression and assembly were infringed.[956]

This employee alleged that her termination resulted from her political affiliations, which she argued violated the protections outlined in the California Labor Code. As discussed above, this Code explicitly prohibits employers from exerting control over or

953 8:21-CV-00187.

954 Docket available at https://www.docketbird.com/court-documents/Leah-Snyder-v-Alight-Solutions-LLC-et-al/NOTICE-OF-MOTION-AND-MOTION-to-Dismiss-Case-Pursuant-to-Fed-R-Civ-P-12-b-6-filed by-defendant-Alight-Solutions-LLC-Motion-set-for-hearing-on-4-26-2021-at-01-30-PM-before-Judge Cormac-J-Carney/cacd-8:2021-cv-00187-00010, accessed 31 August 2022.

955 "U.S. Capitol riot", https://www.history.com/this-day-in-history/january-6-capitol-riot, accessed 13 December 2023. Former President Donald Trump's supporters stormed Congress on January 6, 2021, in an attempt to prevent Joe Biden's election win from being certified. Rioters attacked Capitol police and trashed the facility, damaging property and forcing members of Congress and their staff to seek refuge in offices and bunkers. Amid the turmoil, a protester was shot by police, and over 100 members of law enforcement were wounded. Some members of Congress were led to an underground bunker, while others locked themselves in offices.

956 Docket available at https://www.docketbird.com/court-documents/Leah-Snyder-v-Alight-Solutions-LLC-et-al/NOTICE-OF-MOTION-AND-MOTION-to-Dismiss-Case-Pursuant-to-Fed-R-Civ-P-12-b-6-filed-by-defendant-Alight-Solutions-LLC-Motion-set-for-hearing-on-4-26-2021-at-01-30-PM-before-Judge-Cormac-J-Carney/cacd-8:2021-cv-00187-00010., accessed 31 August 2022.

influencing their employees' political activities or affiliations. It also bars employers from using the threat of dismissal or loss of benefits as a means of coercion.[957]

Although a final decision had not been reached in this specific case when this thesis was written, the case serves as a notable example to highlight the importance and real-world impact of legislative frameworks that regulate off-duty misconduct. The case exposes how these statutory provisions play a crucial role in protecting employees' rights, particularly their freedom to engage in lawful off-duty activities, including political affiliations, without fear of adverse employment consequences. It also emphasises the significance of these legal frameworks in holding employers accountable for potential violations.

In the case of *Martin House, Inc. v Tricia Blanton (Martin House Inc)*,[958] the employer was a non-profit residential institution for homeless individuals. It dismissed an employee who engaged in a Facebook chat with two friends during her night shift. In this chat, she ridiculed patients with psychological issues who were under the institution's care.[959] The General Counsel (GC) of the National Labour Relations Board (NLRB) examined the situation and concluded that the employee's speech was neither concerted nor protected. This determination was based on several factors: the employee did not use her Facebook account to communicate with other employees; no other employees were connected as friends on her Facebook page; she never discussed her Facebook posts with fellow employees; and the content of her posts was unrelated to the terms or conditions of her employment.[960] Consequently, the dismissal was deemed fair as the employee's speech was not protected under these circumstances. Concerted activity is generally protected when it pertains to issues

957 Docket available at https://www.docketbird.com/court-documents/Leah-Snyder-v-Alight-Solutions-LLC-et-al/NOTICE-OF-MOTION-AND-MOTION-to-Dismiss-Case-Pursuant-to-Fed-R-Civ-P-12-b-6-filed-by-defendant-Alight-Solutions-LLC-Motion-set-for-hearing-on-4-26-2021-at-01-30-PM-before-Judge-Cormac-J-Carney/cacd-8:2021-cv-00187-00010, accessed 31 August 2022.

958 34-CA-012950.

959 *Martin House Inc* para 3.

960 *Martin House Inc* para 3. see also *Lee Enterprises, Inc. d/b/a Arizona Daily Star v Brian Pedersen* 28-ca-23267 (N.L.R.B. Nov. 22, 2011), where the NLRB stated that employee remarks on social media were not concerted action in certain situations. one instance included a criminal reporter who tweeted about murder victims. his employer, the *Arizona Daily Star*, deemed his tweets offensive and insulting to the publication and dismissed him. The GC determined that the reporter's conduct was neither protected nor concerted since it had nothing to do with his employment terms.

such as wages, working hours, or other conditions of employment. In this case, the employee's actions were deemed to fall outside the scope of protected concerted activity, as they did not address or seek to improve workplace conditions.

This case underscores the importance of distinguishing between protected and unprotected speech in the workplace, particularly in the context of social media. Although employees have the right to express their opinions and engage in protected activities, such as discussing employment conditions with colleagues, these protections do not extend to all forms of speech. Speech unrelated to employment, involving harassment, or violating company policies may not be protected.

In another California case, the employee in *Karl Knauz Motors, Inc., d/b/a Knauz BMW v Robert Becker* (*Karl Knauz Motors*)[961] was a salesperson at a BMW dealership. He was dismissed for remarks and images on his Facebook profile. The employee stated that the employer hosted a sales event at which it offered insufficient food and refreshments.[962] The GC referred to the NLRA and found that the employee's Facebook comments and pictures criticising the employer for serving inadequate food and drink were protected because the employee and fellow employees had complained to the employer and they were concerned that a poorly run event would affect their sales commissions.[963]

The GC stated that when the employee posted remarks and images about the sales event on his Facebook page, he engaged in a concerted activity. Numerous employees were dissatisfied with the scheduled meal options before the event, and after the meeting, the employees communicated their dissatisfaction among themselves.[964] Because the employees were paid exclusively on commission, they were anxious about how the employer's choice of refreshments could affect sales and their commissions.[965] The GC transferred the matter so that the NLRB could hear it. The NLRB supported the judgment, concluding that the employee's Facebook speech about the sales event was protected.[966]

961 NLRB ALJ, ca-46452 (9/28/11).
962 *Karl Knauz Motors* para 2.
963 *Karl Knauz Motors* para 6.
964 *Karl Knauz Motors* para 6.
965 *Karl Knauz Motors* para 6.
966 *Karl Knauz Motors* para 8.

The argument put forth here is rooted in the interpretation provided by the GC regarding the scope of protection offered by the NLRA concerning this employee's off-duty activity. According to this interpretation, the NLRA protects employees when they engage in concerted activities aimed at collective bargaining or mutual aid and protection. Consequently, an employer's decision to terminate an employee's employment because of their postings on platforms such as Facebook or Twitter (X) constitutes an unfair dismissal if that speech is deemed protected as a concerted activity and the employer is aware of the concerted nature of the speech.

In a recent New York case, *Cooper v Franklin Templeton (Cooper)*,[967] Ms Amy Cooper, a white woman, contacted 911 following a verbal altercation with Mr Christian Cooper, a black man, in New York City's Central Park.[968] Ms Cooper alleged that Mr Cooper threatened her. Mr Cooper videotaped the altercation and shared it on Facebook. The video went viral on social media, with many people accusing Ms Cooper of being racist.[969] It did not take long for social media sleuths to figure out that she worked for Franklin Templeton as Vice President and Head of Investment Solutions.[970]

Accusations of abetting bigotry and threats to move business elsewhere were soon levelled against Franklin Templeton on social media.[971] Franklin Templeton dismissed Ms Cooper, stating that the company did not condone racism.[972] She sued her employer for sexual discrimination and defamation. Her claims were dismissed by the court when it held that her employer was justified in dismissing her.

The dismissal was founded on the following aspects:

First, the presence of a nexus between Ms Cooper's off-duty conduct and Franklin Templeton's interests is evident on several fronts. Her actions had the potential to

967 1:21-CV-04692.
968 *Cooper* para 1.
969 *Cooper* para 1.
970 *Cooper* para 2.
971 *Cooper* para 2.
972 *Cooper* para 2.

damage the company's reputation seriously. The video, widely shared on social media, attracted public attention and generated a negative public perception of both Ms Cooper and her employer.

Secondly, there was a tangible threat to the company's business interests. Clients of Franklin Templeton expressed their displeasure and threatened to move their business elsewhere because of the association with Ms Cooper, whose actions had become widely associated with the company. This development posed a real economic risk to the organisation.

In addition, Ms Cooper's actions could have exposed Franklin Templeton to legal risks, including defamation claims resulting from her false accusations. This legal jeopardy could have had far-reaching consequences for the company. Owing to her off-duty conduct, the company faced an existential threat to its reputation, client relationships, and potential legal liabilities. Dismissing her was a measure taken to mitigate these risks and protect the company's brand and financial stability.

The case also brings to the fore the notion of "cancel culture," a phenomenon in which social media users collectively hold individuals and entities accountable for their behaviour, frequently resulting in public condemnation and boycotts.[973] In navigating this conflict, employers must exercise prudence, considering both the legal impacts and the court of public opinion.

In 2021, the US Court of Appeals for the Third Circuit upheld a decision by the US District Court for the Western District of Pennsylvania in the case of *Ellis v Bank of New York Mellon Corp* (*Ellis*).[974] The ruling determined that an employee's social

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973 Dholakia (2020) "What Is Cancel Culture?", https://www.psychologytoday.com/us/blog/the-science-behind-behavior/202007/what-is-cancel-culture, accessed 10 December 2023.
Moya defines "cancel culture" as referring to "the popular practice of withdrawing support for (canceling) public figures and companies after they have done or said something considered objectionable or offensive" (see "What Is Cancel Culture according to South African Context?", https://techdailypost.co.za/2020/09/08/what-is-cancel-culture-according-to-south-african-context/, accessed 17 December 2023).

974 (2 :18-cv-01549).
See https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1215&context=thirdcircuit_2021, accessed on 13 December 2023.

media posts could serve as grounds for her dismissal by the employer. In *Ellis,* the plaintiff, a white bank employee, sued her employer after being dismissed for breaching the bank's Code of Conduct and Social Media Policy because of a post she wrote on her personal Facebook account over the weekend.[975] She posted a tweet advocating violence against demonstrators protesting the police killing of a black man in Pittsburgh.[976] Because the employee's Facebook account was set to "public," the post was viewable by anybody on Facebook, even those who were not friends with the employee.[977] The bank received several complaints because of the post including some that questioned whether the bank shared its employee's beliefs and condoned violence.[978]

Following an internal inquiry that included an interview with the plaintiff, the bank informed her that she had been dismissed immediately.[979] According to the bank, she violated the employer's Social Media Policy because her post was offensive, demonstrated poor judgement, showed a lack of respect for others, harmed the bank's reputation, and encouraged violent behaviour.[980] The employee sued the bank for racial discrimination under Title VII of the Civil Rights Act, claiming she was dismissed because of her race. The district court rejected the plaintiff's claim and awarded summary judgment in favour of the bank, ruling that the plaintiff had failed to establish a prima facie case of discrimination and that she could not dispute the bank's valid, non-discriminatory grounds for terminating her employment. The Third Circuit upheld the decision of dismissal.[981]

Several crucial elements come to the fore when assessing terminations related to off-duty social media misconduct in the USA:

First, dismissal is often considered a justifiable response in cases of off-duty misconduct involving social media posts that target the employer or a third party and have the tangible potential to damage the employer's reputation. This is particularly

975 *Ellis* para 12.
976 *Ellis* para 12.
977 *Ellis* para 13.
978 *Ellis* para 13.
979 *Ellis* para 17.
980 *Ellis* paras 17–18.
981 *Ellis* paras 17–18.

true when there is a significant public outcry and a threat of losing customers. In these dismissals, factors such as reputation, public opinion, and the fear of public backlash weigh heavily. Employers are increasingly concerned about the impact of social media "cancellation." Consequently, they may choose to distance themselves from an employee's behaviour by terminating their employment, especially if a problematic post goes viral.

Secondly, employees enjoy protection from dismissal for critical social media posts when those postings are deemed concerted activities covered by the NLRA.[982] This means that if negative posts, even though damaging to the employer's reputation, qualify as protected concerted actions, they may not lead to dismissal. For instance, in the *Karl Knauz Motors* case, the GC determined that the employee's criticism of the company fell under protected concerted action.

6.3.3 Regulation of Dismissals for Off-duty Cannabis Use in California, New York, and Colorado

The regulation of cannabis use in Californian workplaces is governed by a combination of state laws, including the Adult Use of Marijuana Act of 2016 (AUMA) and the California Business and Professions Code (BPC), as well as federal regulations. Under the provisions of AUMA, adults (persons over the age of 21) in California have the legal right to possess and use specified quantities of cannabis for personal, recreational use. This development marked a significant shift in the state's approach to cannabis, transitioning it from a substance strictly controlled and regulated for medical purposes to a more permissive framework that recognises the freedom of adults to engage in responsible, private consumption of .[983]

In addition, the exceptions to workplace protections related to cannabis use are outlined in the California Business and Professions Code.[984] This Code provides definitions and various provisions related to cannabis regulations in the state, including exceptions regarding workplace protections. The California Business and Professions

982 Section 7 of the NLRA.
983 Proposition 64. See "Proposition 64: The Adult Use of Marijuana Act", https://www.courts.ca.gov/prop64.htm, accessed 13 December 2023.
984 Section 26001 of the California Business and Professions Code.

Code states that although cannabis is legal, there are exceptions.[985] The legalisation does not affect the rights and obligations of public and private employers to maintain a drug and alcohol-free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of cannabis in the workplace, or affect the ability of employers to have policies prohibiting the use of cannabis by employees and prospective employees or prevent employers from complying with state or federal law.[986]

Secondly, the legalisation does not prevent the termination of employment or the imposition of discipline or affect any privilege or restriction in a workplace or on the property of an employer, as required by or provided for in the Health and Safety Code,[987] the Public Contract Code,[988] and the Revenue and Taxation Code,[989] or any other law.[990] This section makes it clear that although cannabis use may be legal for adults in California, it does not impact employers' rights to maintain drug and alcohol-free workplaces or to establish policies related to cannabis use by employees. Employers can still take action related to cannabis use in the workplace, and this law does not prevent them from doing so.

Furthermore, lawmakers in California have introduced a new piece of legislation aimed at establishing workplace protections for individuals who engage in cannabis consumption. Assembly Bill (AB) 2188 has implications for workplace regulations regarding cannabis use. AB 2188 seeks to provide certain workplace protections to individuals who use cannabis products for recreational purposes outside work hours. It was enacted to strike a balance between an individual's right to use cannabis within the bounds of the law and the employer's need to maintain a safe and productive work environment.[991]

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985 Section 26001(b) of the California Business and Professions Code.
986 Section 26001(b) of the California Business and Professions Code.
987 Sections 11362.45 or 11362.5 of the Health and Safety Code.
988 Sections 10281 and 10285 of the Public Contract Code.
989 Section 20176.2 of the Revenue and Taxation Code.
990 Section 26001(b) of the California Business and Professions Code.
991 Section 2 of AB 2188. See "Bill Text - AB-2188 Discrimination in Employment: Use of Cannabis", https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2188, accessed 13 December 2023.

One of the key provisions of AB 2188 is that it offers protection to California workers from discrimination by their employers because of their off-duty cannabis use. This means that employers cannot take adverse employment action, such as termination or other forms of discrimination, based solely on an employee's legal use of cannabis products during their personal time.[992]

AB 2188 applies to most employers in California, meaning that these protections cover most employees in the state. However, there are some exceptions. Workers subject to federal drug testing laws may not have the same level of protection under AB 2188.[993] AB 2188 will become effective on January 1, 2024.[994] Although AB 2188 protects employees against discrimination for legal, off-duty cannabis use, it is essential to note that employers in safety-sensitive industries may still have stringent policies regarding drug use, including cannabis. In these industries, safety concerns may override the protections provided by this law.[995] In other words, individuals in these specific industries may be subject to different regulations or standards regarding cannabis use, and the protections mentioned earlier may not apply to them. The clarity of the Bill is ambiguous regarding the scope of the restriction, leaving uncertainty about whether it applies universally to all employees employed in these industries or specifically to those who work with dangerous equipment.

Overall, AB 2188 reflects California's efforts to balance the rights of employees to engage in legal activities outside work, including cannabis use, with the rights and responsibilities of employers to maintain safe and productive workplaces.

New York's Labor Law states that it is unlawful to dismiss an employee for using cannabis before or after the employee's work hours and away from the employer's premises.[996] Although employers are prohibited from dismissing employees for off-duty cannabis use, the New York Labor Law provides exceptions. It states:

992 Section 2 of AB 2188.
993 Section 2 of AB 2188.
994 Bernstein and Haines, "California Expands Employees' Right to Off-Duty Cannabis Use", https://www.natlawreview.com/article/california-expands-employees-right-to-duty-cannabis-use, accessed 10 December 2023.
995 Section 2 of AB 2188.
996 Section 201-D(2)(b) of the New York Labor Law.

> "Notwithstanding the provisions of subdivision three or four of this section, an employer shall not be in violation of this section where the employer takes action related to the use of cannabis based on the following:
>
> (i) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;
>
> (ii) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or
>
> (iii) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding."[997]

The New York Labor Law outlines provisions that aim to balance protecting employees' off-duty rights and safeguarding employers' interests while ensuring clarity and certainty in employment regulations.[998] This provision provides certainty to employees regarding their off-duty activities, offering protection against unwarranted interference by employers in their personal lives.

Although the law protects employees' off-duty rights, it also recognises the legitimate interests of employers. It allows employers to take employment actions or prohibit certain conduct by employees under specific circumstances. These exceptions provide a degree of flexibility for employers to address situations where cannabis use may impede job performance or compromise workplace safety.

The New York Labor Law provides clear and specific criteria under which employers can take action regarding off-duty cannabis use. The inclusion of detailed conditions such as "specific articulable symptoms of cannabis impairment" adds clarity to the law, making it easier for both employers and employees to understand when employment actions are justified.

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997 Section 201-D4(a) of the New York Labor Law.
See https://www.nysenate.gov/legislation/laws/LAB/201-D, accessed 10 December 2023.

998 Section 201-D4(a) of the New York Labor Law.

By specifying the situations in which employers can act, the law offers employers a level of certainty in navigating the complexities of recreational cannabis use in their workplaces. They can rely on these guidelines to make informed decisions while respecting their employees' rights.

The New York Labor Law underscores the importance of maintaining a safe and healthy workplace, aligning with state and federal workplace safety laws. This prioritisation of safety serves the interests of both employers and employees, ensuring that workplaces remain conducive to productive and secure employment.

Colorado has introduced House Bill 1152, which addresses the use of medicinal cannabis by employees. Under this Bill, employers are prohibited from taking adverse actions against employees, including job candidates, based solely on their participation in medicinal cannabis use. This protection extends to instances where an employee uses medicinal cannabis on the employer's premises during working hours or uses retail or medicinal cannabis outside the employer's premises during nonworking hours.[999]

However, it is essential to note that the Bill also outlines circumstances under which an employer may restrict the use of medical or recreational cannabis. These restrictions can be applied when:

(a) The restriction is related to a bona fide occupational requirement or is reasonably and rationally connected to the job duties and responsibilities of a specific employee or a group of employees.
(b) The restriction is necessary to prevent a conflict of interest with the employee's responsibilities to the employer or to prevent the appearance of such a conflict of interest.[1000]

999 Section 8-2-131 of House Bill 1152. See "HB22-1152 Prohibit Employer Adverse Action Marijuana Use", https://www.leg.colorado.gov/bills/hb22-115, accessed 13 December 2023.
1000 Section 8-2-131 of House Bill 1152.

House Bill 1152 in Colorado represents a pivotal step in navigating the complex intersection of employees' rights to use cannabis and the legitimate concerns of employers regarding workplace safety, productivity, and potential conflicts of interest. At its core, this legislation embodies the principle of finding a harmonious equilibrium between these often-competing interests.

On the one hand, the Bill recognises and upholds the fundamental right of employees to access and use cannabis. This affirmation is particularly crucial for individuals who rely on cannabis to manage debilitating medical conditions and improve their overall quality of life. By safeguarding this right, the legislation acknowledges the evolving landscape of medical treatments and the growing acceptance of cannabis as a viable therapeutic option. On the other hand, the Bill acknowledges that specific job roles and responsibilities may necessitate limitations on the use of cannabis. This recognition stems from the importance of maintaining a safe and productive work environment for all employees. For example, positions that involve operating heavy machinery, ensuring public safety, or handling sensitive information may require stricter regulations to prevent impairments that could compromise workplace safety or security.

When the three states' legislative frameworks regarding the regulation of cannabis were analysed, the following aspects were noted:

The regulation of cannabis use in New York, California, and Colorado represents an evolving landscape of legislation aimed at balancing the rights of individuals to use cannabis for various purposes with the interests and concerns of employers and the broader public. Although these states share common goals in addressing cannabis regulation, they exhibit similarities and differences in their approaches.

First, all three states recognise the importance of protecting the individual's rights to use cannabis outside work hours and away from the workplace premises. This demonstrates a shared commitment to respecting individual freedoms and privacy.

Secondly, although the safeguarding of off-duty cannabis use is a shared feature in all three states, variations may exist in the extent of these protections;

The state of California acknowledges that safety-sensitive industries can uphold stringent drug policies. This recognition allows employers to maintain policies aligning with safety standards, ensuring that employees in roles where impairment could pose risks adhere to strict drug use guidelines.

New York's cannabis regulation takes a distinctive approach by placing a significant emphasis on observable impairment during work hours. The state's legislation requires that an employee, under the influence of cannabis, who exhibits specific and articulable symptoms that impact job performance or compromise workplace safety poses a threat to the workplace. This focus on tangible and observable signs provides a clear standard for employers to assess impairment objectively. By linking cannabis regulations directly to the impact on job responsibilities and workplace safety, New York prioritises the creation of a safe and hazard-free work environment, aligning with broader state and federal occupational safety and health laws.

Colorado's regulatory framework for cannabis use introduces the concept of a "bona fide occupational requirement" or a connection to job duties and responsibilities as a basis for restricting cannabis use. This approach acknowledges the diverse nature of employment responsibilities and allows restrictions that are reasonably and rationally connected to specific roles or groups of employees.

6.4 Comparison of the states of California, New York, and Colorado with South Africa

There are similarities and differences between the USA and South Africa in the regulation of off-duty misconduct. The similarities are that in these three states of the USA and in South Africa, the judiciary applies the nexus test together with relevant legislation.

There are similarities in the adjudication of social media misconduct cases. South Africa's *Cantamessa* case and the US *Cooper* case underscore the delicate balance between employee rights and employer interests, particularly in the context of off-duty conduct. *Cantamessa* case revealed the complexity in establishing a nexus between

private actions and reputational harm to the employer, as her dismissal was based on derogatory language promoting racial hatred albeit without concrete proof of damage to Edcon's reputation. In contrast, the *Cooper* case in the US highlighted the swift consequences of public backlash, with Franklin Templeton prioritising its public image and justifying her dismissal based on tangible evidence of reputational damage, as customers threatened to boycott the company.

By contrast to South Africa, the three US states have enacted laws regulating off-duty misconduct and protecting employees against dismissal for this conduct. In South Africa, the Code's generic provisions apply to both on-duty and off-duty employees. Whereas the US legislation provides clarity and specific guidelines, South Africa relies on case law and broader principles of fairness and justice. South African labour law places a greater emphasis on procedural fairness and substantive fairness. At the same time, US laws also prioritise balancing individuals' rights with employers' legitimate interests, such as safety by specifying which kind of off-duty conduct is out of the employer's reach.

The difference between South Africa and the three US states is that the state of New York regulates off-duty cannabis use and the states of California and Colorado have promulgated Bills for regulating cannabis use in the workplace. South Africa has not yet promulgated a Bill on regulating cannabis use, and cases are decided on the strength of zero-tolerance policies. The legalisation of private use of cannabis is a new concept in South Africa, and legislation on this aspect is needed.

In their legislative provisions regarding regulation of cannabis use, all three US states recognise exceptions for safety-sensitive positions, allowing employers to impose restrictions on off-duty conduct when it poses safety risks. Some provisions permit employers to take action when specific job-related requirements are unmet, ensuring that employees still fulfil their employment obligations. While California's regulation of off-duty cannabis use remains somewhat ambiguous, Colorado and New York provide clearer and more defined frameworks for overseeing such activities outside working hours. Colorado's cannabis regulation centres on tangible and observable signs of impairment, establishing a clear and objective standard for employers to assess employee fitness for duty. These approach links cannabis policies directly to job

responsibilities and workplace safety, enabling employers to make informed evaluations based on observable behaviours. Similarly, New York's regulations focus on specific, articulable symptoms caused by on-duty cannabis use, providing employers with a concrete standard to gauge impairment objectively.

The off-duty statutes above can be used as a learning platform for developing South African off-duty dismissal laws.

6.5 Lessons for South Africa

South Africa can learn several valuable lessons from California, New York, and Colorado on regulating off-duty misconduct and protecting employees' rights.

6.5.1 Lessons on Regulation of Off-duty Misconduct in General

New York and California have codified laws and regulations that specifically address off-duty misconduct and the rights of employees. South Africa can benefit from creating clear and specific legislation that outlines the boundaries of acceptable off-duty conduct and the consequences of violations.

6.5.2 Lessons on Regulation of Off-duty Social Media Misconduct

While US states have implemented specific legislative frameworks to navigate the delicate balance between employer and employee rights, South Africa relies on generic provisions in the Code that apply uniformly to both on-duty and off-duty employees, lacking specialised directives addressing off-duty conduct.

To foster fairness and equality, South Africa could draw inspiration from the nuanced legislative frameworks of California, New York, and Colorado, adapting regulations to changing societal norms and ensuring consistent treatment for all employees. The overarching goal for South Africa should be to establish a legal framework that navigates the complexities of off-duty misconduct with fairness, flexibility, and a keen understanding of evolving social attitudes.

Legislative framework lessons for South Africa can be summarised below:

- Defining off-duty conduct;

- Drawing the line between off-duty and on-the-job conduct;
- Codifying the nexus test;
- Stating which kind of off-duty activity is protected (in this case, only lawful activity);
- Giving examples of off-duty conduct that destroys the employment relationship;
- Explaining the consequences of violating employees' off-duty rights.

6.5.3 Lessons on Regulation of Off-duty Cannabis Use

The approach of these three US states to regulating off-duty cannabis use provides valuable lessons for South Africa. Emphasising the importance of safeguarding employees' rights, these states adopt a balanced framework that respects individual freedoms while considering employers' interests. The ability to adapt laws in response to changing societal norms showcases flexibility, ensuring consistent and fair rules for all employees. Specific provisions addressing off-duty cannabis use offer clarity, suggesting that South Africa, currently relying on generic provisions, could benefit from more tailored legislation.

Legislative framework lessons for South Africa in regulation of Off-duty cannabis use can be summarised below:

- Acknowledge the authority of safety-sensitive industries to enforce stringent drug policies, drawing inspiration from California's approach.
- Emphasise observable impairment during work hours, requiring specific and articulable symptoms that impact job performance, akin to New York's standard.
- Set a clear and objective criterion for employers to assess impairment, aligning with the goal of fostering a hazard-free work environment in accordance with occupational safety and health laws.
- Incorporate the concept of a "bona fide occupational requirement" from Colorado, recognising the diverse nature of employment roles and allowing rational restrictions on cannabis use that are reasonably and rationally connected to specific job duties and responsibilities.

- Develop a balanced and effective regulatory framework for off-duty cannabis use in South Africa by combining these lessons.

6.6 Conclusion

Several conclusions may be drawn from this comparative analysis of off-duty misconduct legislation and adjudication in South Africa and the USA:

First, the three US states have demonstrated a proactive approach to regulating off-duty dismissals by enacting legislation that balances safeguarding employers' and employees' rights and interests.

Secondly, these statutes provide clear guidelines by furnishing specific examples of the types of off-duty conduct that merit protection and delineating the conditions under which such protections are warranted. Through these regulations, the states aim to establish a harmonious equilibrium where employees are shielded from arbitrary dismissals related to their lawful off-duty activities, and employers are provided with the necessary flexibility to manage their workforce effectively.

By analysing these regulatory frameworks, South Africa can derive insights into best practices that promote fairness and legal compliance in the realm of off-duty conduct dismissals, fostering a conducive environment for employers and employees.

CHAPTER 7

COMPARISON WITH THE UNITED KINGDOM REGARDING THE REGULATION OF DISMISSAL FOR OFF-DUTY MISCONDUCT

7.1 Introduction

The preceding chapter discussed the regulation of dismissal for off-duty misconduct in the United States of America. For the legislative regulation of such conduct, that chapter surveyed the relevant law in three US states: California, New York, and Colorado. After the comparison with South African law, lessons were drawn for South Africa.

This chapter compares the corresponding law in the United Kingdom. After an introduction describing the UK system of governance and its body of labour law, the discussion moves to the legislation regulating dismissal for misconduct, and the regulation of off-duty misconduct dismissal in the Employment Tribunals. The relevant law is compared with that of South Africa, and lessons are drawn for South Africa.

The comparison with the UK provides a relevant and insightful benchmark for South Africa's approach to regulating off-duty misconduct dismissal. Both countries share similarities in their legal systems and labour frameworks, making the UK's legislative framework a suitable comparator. By analysing the UK's laws and their application in Employment Tribunals, valuable lessons can be drawn for South Africa regarding best practices, potential pitfalls, and areas for improvement in regulating off-duty misconduct dismissal. This comparative discussion paves the way for Chapter 8, which brings this thesis to a conclusion.

7.2 The United Kingdom System of Governance

The United Kingdom of Great Britain and Northern Ireland (the UK) comprises four nations. These are England, Wales, Scotland, and Northern Ireland.[1001] The three legal systems that apply in this jurisdiction are those of England and Wales; Scotland; and Northern Ireland. The framework of the UK legal system is defined by three primary sources of law: common law, statute law, and European Union (EU) legislation (regardless of Brexit).[1002] EU legislation that applied directly or indirectly to the UK before 11:59 p.m. on 31 December 2020 was preserved in UK law as a form of domestic legislation known as "retained EU legislation."[1003]

The UK Constitution, sometimes known as the British Constitution, consists of the written and unwritten agreements that form the UK as a political entity. Unlike in most

1001 Carter "A Guide to the UK Legal System", https://www.nyulawglobal.org/globalex/United_Kingdom.html#BACKGROUND, accessed 13 December 2023.

1002 The United Kingdom left the European Union on 31 January 2020. The transition period ended on 31 December 2020.

1003 "EU Legislation and UK Law", https://www.legislation.gov.uk/eu-legislation-and-uk-law, accessed 11 December 2023.

other nations, no effort has been made to codify these agreements into a single text, and so it is referred to as an uncodified Constitution.[1004] As no provisions are officially entrenched, the Constitution may be easily amended.[1005] The UK Supreme Court recognises constitutional concepts such as parliamentary sovereignty, the rule of law, democracy, and adherence to international law. The UK Supreme Court also acknowledges that some Acts of Parliament have special constitutional status and thus form part of the Constitution.[1006]

7.2.1 An Overview of Labour Law in the United Kingdom

The UK remains a signatory to the European Convention on Human Rights 1950 (ECHR), which plays a significant role in UK labour law even though the UK has left the EU.[1007] The future relationship between EU and the UK includes the UK's continued commitment to the ECHR framework.

As stated above, employees in the UK are protected by a set of employment rights enshrined mainly in different statutes[1008] and the common law.[1009] The Employment Relations Act 1999 (c 26) (ERA) is the chief legislation regulating employment relations in the UK. The ERA states that an employee has the right not to be unfairly dismissed.[1010]

Employment law covers two categories, employee and worker, each with its own set of rights.[1011] First, an employee possesses all the fundamental rights, such as job stability, retirement, child care, and the right to fair treatment, and is defined as a person who has engaged in or works or has worked under a contract of employment.[1012] A "contract of employment" refers to a contract of service or apprenticeship, whether explicit or implied, and whether oral or written.[1013] A worker is

1004 Johnson (2008) *K.L.J.* 640.
1005 Johnson (2008) *K.L.J.* 640.
1006 *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324 para 207.
1007 European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/Convention_ENG, accessed 11 December 2023.
1008 See, for example, the Health and Safety at Work Act 1974 (c 37), the National Minimum Wage Act 1998 (c 39), and the Equality Act 2010 (c 15).
1009 Collins (2022) 5.
1010 Section 94 of the ERA.
1011 Carby-Hall (2023) 100.
1012 Section 230(1) of the ERA.
1013 Section 230(2) of the ERA.

"an individual who has entered into or works under a contract of employment or any other contract, whether express or implied and whether oral or in writing, under which the individual undertakes to do or perform personally any work or services for another party to the contract."[1014]

Apart from the protection provided by the ERA, the right to privacy and freedom of speech are protected by several statutes. Thus the Human Rights Act 1998 (c 42) states that domestic legislation should be interpreted to be consistent with the ECHR.[1015] If a compatible interpretation would cause an Act's language to be stretched too far, the ECHR compels courts to make a declaration of incompatibility, allowing Parliament to alter the legislation to be compatible with the ECHR.[1016]

The right to privacy is guaranteed by Article 8 of the ECHR. Article 14 also plays a crucial role in safeguarding human rights, particularly in the context of work. It bans discrimination on all grounds, offering protection against unfair treatment based on different variables, including but not limited to race, gender, religion, nationality, sexual orientation, and other pertinent traits. In the field of employment, Article 14 protects workers against all manifestations of discriminatory practices, including recruitment processes, employment terms, promotions, and treatment within the workplace. Protection against discrimination plays a crucial role in maintaining workplace equality and diversity, as it underscores the need to ensure that all employees are given equal chances and rights, regardless of their individual characteristics.

Furthermore, the protection of the right to freedom of association, as enshrined in Article 11 of the ECHR, plays a crucial role in safeguarding workers' rights, with a particular focus on their collective interests and labour-related issues. Article 11 establishes and guarantees the entitlement to freedom of assembly and association, including the right to establish and participate in labour unions. Within the field of work, this entitlement assumes a crucial function in safeguarding the capacity of employees to engage in collective bargaining, express their grievances, and seek representation in matters pertaining to labour disputes. The concept of solidarity and bargaining serves as a foundation, enabling workers to unite, establish labour unions, and

1014 Section 230 (3) of the ERA.
1015 Section 3 of the Human Rights Act.
1016 Article 35 of the ECHR.

participate in collective endeavours to safeguard their interests, attain equitable working conditions, and advocate for their rights. This concept acknowledges the need to establish a harmonious and equitable dynamic between employers and workers, emphasising the imperative for employees to possess a structured and unified means of expression.

The right to an effective remedy, as outlined in Article 13 of the ECHR, provides a crucial safeguard for anyone, who endeavours to seek legal recourse for infringements of their human rights, regardless of whether these breaches occur within or outside the confines of the workplace. This article guarantees persons the entitlement to a proficient recourse before domestic authorities when their rights under the ECHR have been infringed. Article 13 is significant for employment, particularly for workers who encounter human rights abuses in the workplace, such as discrimination or unfair labour practices. Article 13 offers workers a legal means to contest these infractions and pursue suitable redress. This provision underscores the notion that persons need to possess not only entitlements but also avenues for implementing and safeguarding these entitlements, thus guaranteeing responsibility and fairness in workplace-related violations of human rights.

Employees' rights are further protected by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).[1017] This EU Regulation is a law that sets guidelines for collecting and processing personal information from individuals.[1018]

The United Nations Human Rights Committee (HRC), an autonomous panel of proficient individuals tasked with overseeing the enforcement of the International Covenant on Civil and Political Rights 1966 (ICCPR) by its partners, recognises diverse forms of electronic and Internet-based platforms as viable channels for

1017 Article 8 of the ECHR states that everyone has the right to have their privacy and family life respected.

1018 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679, accessed 13 December 2023. The purpose of this Regulation is to support the establishment of an area characterised by freedom, security, and justice, as well as an economic union. It aims to promote economic and social advancement, enhance the cohesion and convergence of economies within the internal market, and improve the overall well-being of individuals.

exercising freedom of expression. Article 19 of the ICCPR safeguards the fundamental entitlement to freedom of expression. This encompasses the unrestricted ability to actively pursue, acquire, and disseminate information and ideas of any kind without regard to geographical boundaries and using any communication medium.[1019]

Another relevant statute is the Regulation of Investigatory Powers Act 2000 (c 23). This Act prohibits an employer from intercepting private communications, including reading emails, scrutinising inboxes, or monitoring phone calls or websites, unless there is legislative authorisation. In addition, irrespective of company policies, the employer must uphold a fundamental level of privacy.[1020]

The European Court of Human Rights (ECtHR), established by the ECHR, plays a critical role in protecting human rights in the workplace. As articulated in the ECHR, the ECtHR functions as a judicial body tasked with enforcing and protecting human rights.[1021] It adjudicates cases brought by individuals, groups, or states alleging human rights violations, issues legally binding judgments, and plays a critical role in interpreting and setting standards for the ECHR. The ECtHR monitors the implementation of its judgments and enforces compliance with its decisions, helping maintain a common European human rights framework. The ECtHR also provides advisory opinions and engages in outreach efforts to promote human rights education and awareness across its member states.

The ECtHR heard the landmark case *Barbulescu v Romania* (App. No. 61496/08)[1022] *(Barbulescu)* in 2016.[1023] The case centred on the issue of privacy in the workplace and the extent to which an employer can monitor an employee's electronic communications. The case involved a Romanian engineer using a company-owned Yahoo Messenger account for professional and personal communication. After his employer discovered that he had been using the messenger for personal conversations, including with his fiancée and brother, Mr Bărbulescu was dismissed

1019 Article 19 of the ICCPR.
1020 Section 1(3) of the Regulation of Investigatory Powers Act.
1021 Article 32 of the European Convention on Human Rights.
1022 See *Barbulescu v Romania (App. No. 61496/08)* [2017] IRLR 1032, [2017] ECHR 61496/08.
1023 *Barbulescu* para 78.

for violating the company's policy that prohibited personal use of company resources.[1024]

Mr Bărbulescu challenged his dismissal in the Romanian courts, arguing that his privacy rights had been violated because his employer had accessed his personal messages without his consent. Those courts upheld the dismissal, emphasising the company's policy and the need to protect the employer's interests.[1025]

Mr Bărbulescu then took his case to the ECtHR, alleging a violation of his right to privacy under the ECHR.[1026] The ECtHR ruled that Mr Bărbulescu's privacy rights had not been violated.[1027] This decision was based on several factors. The employer had a legitimate interest in monitoring its employees' communications to ensure they were using company resources for work-related purposes.[1028] The employer had explicitly notified employees of its policy prohibiting personal use of company resources, including electronic communication tools. The employer's monitoring was limited in scope and focused on checking whether the messenger was being used for work-related tasks. The employees' personal messages, while private, were accessed by the employer because they were sent using company-owned equipment during work hours.[1029]

Although the ECtHR ruled in favour of the employer in this specific case, it also acknowledged that employees have a reasonable expectation of privacy, even in the workplace.[1030] The ECtHR emphasised that employers should clearly communicate their policies on electronic communications and monitoring to employees.[1031]

The ECtHR also ruled in *Halford v United Kingdom (Halford)*[1032] that intercepting an employee's phone conversations invaded their private life, especially as they were not informed of the degree of monitoring and were given a legitimate expectation of privacy.[1033] The ECtHR stated that the ECHR specifies that any interference by a

1024 *Barbulescu* para 78.
1025 *Barbulescu* para 78.
1026 Article 8 of the ECHR.
1027 *Barbulescu* para 80.
1028 *Barbulescu* para 80.
1029 *Barbulescu* para 80.
1030 *Barbulescu* para 80.
1031 *Barbulescu* para 80.
1032 [1997] IRLR 471.
1033 *Halford* para 49.

public body with an individual's right to respect for private life must conform with the law.[1034] The ECtHR clarified that because of the absence of public inspection and the potential for abuse of power in the context of secret measures of monitoring or interception of communications by public authorities, domestic law must protect the person against arbitrary interference with ECHR rights.[1035] Thus, domestic legislation must be sufficiently clear to provide individuals with an acceptable indication of the circumstances and conditions under which public authorities are authorised to use such secret measures.[1036]

Subsequently, in *Copland v United Kingdom (Copland)*,[1037] the ECtHR determined that it was a violation of the ECHR for a manager to monitor an employee's phone conversations and Internet usage and then talk about the person having an affair.[1038] The Human Rights Act also made it unlawful for any public entity, including courts, to act in a way that was incompatible with an ECHR right unless obliged to do so by primary legislation, ensuring the development of common law in conformity with ECHR rights.[1039]

This overview highlights the importance of protecting employees' privacy rights in electronic and Internet-based workplace communications, guided by international principles and legislation. Notable cases, including *Bărbulescu v Romania*, illustrate the need for carefully balancing employees' privacy and employers' legitimate interests with clear communication of policies and proportionate monitoring. Further ECtHR cases such as *Halford v United Kingdom and Copland v United Kingdom* stress the protection of personal communications and the role of domestic legislation in safeguarding individuals against arbitrary interference. This evolving legal framework aims to uphold employees' privacy while acknowledging the responsibilities of employers in respecting their employees' rights. The discussion that follows concentrates on the legal framework regulating dismissals for misconduct.

1034 Article 8(2) of the ECHR.
1035 *Halford* para 49.
1036 *Halford* para 49.
1037 See *Copland v United Kingdom* (62617/00) [2007] ECHR 253, (2007) 45 EHRR 37.
1038 *Copland* para 41.
1039 *Copland* para 19.

7.3 Legislation Regulating Dismissal for Misconduct in the United Kingdom

There are five recognised reasons for a fair dismissal:

- conduct;
- capacity;
- redundancy;
- statutory illegality or breach of a statutory restriction; and
- any other substantial reason.[1040]

Procedurally, an employer can only lawfully dismiss an employee if a fair procedure has been followed.[1041]

An employer's authority to dismiss employees for misconduct is limited by unfair dismissal legislation. The ERA provides employees with the "right not to be unfairly dismissed" by their employers and delineates the process for determining whether a dismissal is fair or unfair.[1042] The ERA gives employees the right to file a case of unfair dismissal at an Employment Tribunal (ET).[1043] These tribunals are public organisations in the UK with statutory competence to hear different forms of disputes between employers and employees. Among the most typical cases heard by the ETs are cases of unfair dismissal, redundancy payments, and employment discrimination.[1044] When hearing unfair dismissal cases, the ET applies the provisions of the ERA discussed below.[1045]

The ET follows a procedure akin to the CCMA procedure in South Africa when assessing the fairness of a dismissal. Subsequently, the ET decision can be reviewed at the Employment Appeal Tribunal (EAT). In the UK review process, the fairness of a dismissal is determined by the reasonable employer test,[1046] as articulated by Lord

1040 Section 98(1)–(2) of the ERA.
1041 Section 98A of the ERA.
1042 Section 94 of the ERA.
1043 Section 111 of the ERA.
1044 Section 111 of the ERA.
1045 Section 98 of the ERA.
1046 See *St Anne's Board Mill Co Ltd v Brien* [1973] ICR 444, where it was held that for a dismissal to be fair, an employer's conduct should not be outside the band of reasonable responses of

Denning MR in *British Leyland (UK) Limited v Swift.*[1047] Here the Court of Appeal held that the key question was whether it was reasonable for the employer to dismiss the employee. If it were not, then the dismissal would be regarded as unfair. Lord Denning MR held:

> "It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."[1048]

This test underscores the fundamental role of "reasonableness" in determining the fairness of employee dismissals. It recognises that different employers may hold divergent perspectives on dismissing or retaining an employee based on the specific context. It also shows the inherent subjectivity in employment decisions, as what one employer deems a valid reason for dismissal, another might see as justification for retaining the employee. The critical criterion for fairness is whether the employer's decision is reasonable within the context, acknowledging the diversity of valid viewpoints in employment matters and underscoring the need for case-specific evaluations to ensure fairness in dismissals.

The ERA states that an employer must show that there is a reason for the dismissal before dismissing an employee.[1049] When determining the fairness of dismissal for misconduct cases, the ET must first establish that the grounds for dismissal constituted misconduct, after that it proceeds to establish whether the dismissal was

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any reasonable employer. The conduct is reasonable if a decent employer would have handled it similarly, but unreasonable if no reasonable employer would have handled it the same. Mummery LJ in *X v Y* [2004] ICR 1634 (CA) held (para 59(4)): "Considerations of fairness, the reasonable response of a reasonable employer, equity and substantial merits ought, when taken together, to be sufficiently flexible, without even minimal interpretative modification under section 3, to enable the employment tribunal to give effect to applicable Convention rights."

1047 [1981] IRLR 91.

1048 *British Leyland (UK) Ltd v Swift* para 11. Also see *Haddon v Van den Bergh Foods Ltd* [1999] ICR 1150, where this view was heavily criticised for failing to allow for a proper weighing of employers' and employees' interests. This is based on the idea that if an employer imposes a sanction on and employee that is within the "band of reasonable" sanctions that can be applied, a court will not interfere with or overturn the decision.

1049 Section 98(1) of the ERA.

fair.[1050] An employer with a large number of employees and with more administrative resources is expected to conduct a more thorough investigation of the misconduct and to follow a thorough procedure appropriate to its capabilities.[1051]

An ET may order reinstatement or re-employment of an employee if the employee indicates a desire for such a remedy and the circumstances permit.[1052] Usually, the ET makes a compensation award consisting of a basic award. When determining which award to make, the ET should consider:

- the fairness of the investigation the employer conducted into the misconduct;
- the reasons the employer had for believing the employee had engaged in the alleged misconduct;
- the procedure the employer followed in dismissing the employee; and
- the employer's decision to use dismissal, the most severe sanction available to it, as a response to the misconduct.[1053]

In these areas, the employer's decision is compared to a range or band of legitimate actions that employers might adopt. The range is intended to safeguard administrative discretion, with dismissals being considered unfair only if completely irrational.[1054]

Guidelines for determining the fairness of dismissals for misconduct are provided for by the Advisory, Conciliation and Arbitration Service Code of Practice on disciplinary and grievance procedures 2015 (the Acas Code).[1055] The Acas Code provides fundamental practical guidance to employers, employees, and their representatives

1050 Sections 98(1) and (2).
1051 See Brodtkorb (2010) *IJLMA* 527, where it is asserted that when an employee is dismissed for misconduct, three connected but conceptually distinct considerations must be considered in assessing the reasonableness of the employer's decision to dismiss. The first is the fairness of the employer's dismissal process, including the employer's inquiry into the employee's misconduct and whether the employee was given a chance to provide a defence and appeal the decision. The second factor is how much evidence was available at the time of the dismissal that the employee had participated in the alleged misconduct. The final question is whether the employer behaved fairly in selecting dismissal as the appropriate discipline for the misconduct rather than a lesser penalty.
1052 Section 113 of the ERA.
1053 *British Home Stores v Burchell* [1978] IRLR 379.
1054 *Iceland Frozen Foods v Jones* [1982] IRLR 439.
1055 Acas Code, https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures, accessed 1 December 2022 (Acas Code).

and guidelines for dealing with workplace disciplinary and grievance problems.[1056] In its foreword, the Acas Code states that failure to follow it does not automatically subject a person or organisation to legal proceedings. However, ETs will consider the Acas Code when evaluating relevant situations.[1057]

The Acas Code states that where formal action is required, what action is reasonable or justified will be determined by the facts of the particular case.[1058] The Acas Code sets out the requirements of substantive and procedural fairness by stating that the matter must be investigated to establish the facts of the case and to determine the need for a disciplinary hearing.[1059] After the existence of the employee's conduct has been established, procedural requirements should be met. This step includes informing the employee about the disciplinary hearing.[1060] After being informed, the employee should also be allowed to be represented at the disciplinary meeting.[1061]

Consequently, when ruling, ETs will consider an employer's size and resources and the fact that it may not always be feasible for all employers to implement all the actions outlined in the Acas Code.[1062]

7.4 Regulation of Off-duty Misconduct Dismissal in Employment Tribunals

The ERA does not expressly provide for dismissal for off-duty misconduct. However, according to the Acas Code, employers should have disciplinary policies that regulate conduct.[1063] The Acas Code also regulates dismissal for off-duty criminal activities.

The Acas Code states:

> "If an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given

1056 Acas Code.
1057 Acas Code.
1058 Item 3 of the Acas Code.
1059 Item 5 of the Acas Code.
1060 Item 9 of the Acas Code.
1061 Item 13 of the Acas Code.
1062 Item 3 of the Acas Code.
1063 Item 2 of the Acas Code. See also "Acas Guide to Discipline and Grievances at Work", https://www.acas.org.uk/acas-guide-to-discipline-and-grievances-at-work, accessed 13 December 2023. Item 2 of the Acas Code states that to ensure fairness and transparency, employers should develop and use rules and procedures to handle disciplinary and grievance situations. These rules and procedures should be set down in writing and must be clear and specific. Employees and their representatives should be involved in the development of these rules and procedures.

> to what effect the charge or conviction has on the employee's suitability to do the job and their relationship with their employer, work colleagues and customers."[1064]

Item 31 of the Acas Code can be construed as indicating that an employer should refrain from dismissing an employee based on reasons related to a criminal conviction if this conviction is unrelated to the employee's job responsibilities and the employment relationship.[1065] Dismissal would only be deemed justifiable if the conviction had implications for other employees, hindered their ability to carry out their duties, or eroded the trust inherent in the employment relationship.[1066] Although item 31 of the Acas Code primarily addresses off-duty misconduct dismissal in criminal cases, its principles can be applied to various forms of off-duty misconduct.

The Acas Code states that when regulating the workplace, an employer should also have in place examples of acts that the employer regards as gross misconduct in their policies or staff handbook.[1067]

7.4.1 Regulation and Adjudication of Off-duty Misconduct

In adjudicating off-duty misconduct, UK courts and ETs emphasise the presence of policies that govern the behaviour of employees, as highlighted in the cases below.

In *X v Y*,[1068] the respondent discovered that the appellant, a development officer, was once arrested in connection with an incident that occurred while he was off-duty and away from work.[1069] However, this matter was not disclosed.[1070] After investigations and a disciplinary hearing, the appellant was summarily dismissed for gross misconduct.[1071] The respondent's disciplinary code provided that it was gross misconduct to commit a criminal offence, making the employee unsuitable for employment.[1072] The appellant alleged that the dismissal was inconsistent with respect for privacy under the ECHR and in breach of the prohibition of discrimination in the

1064 Item 31 of the Acas Code.
1065 Item 31 of the Acas Code.
1066 Item 31 of the Acas Code.
1067 Item 24 of the Acas Code.
1068 [2004] ICR 1634.
1069 *X v Y* para 12.
1070 *X v Y* para 12.
1071 *X v Y* para 12.
1072 *X v Y* para 15. Article 8 of the ECHR.

ECHR on grounds of sexual orientation.[1073] The ET determined that the disciplinary hearing had been conducted under proper procedures.[1074] The ET also concluded that categorising the appellant's behaviour as gross misconduct and subsequently imposing the penalty of dismissal fell within the spectrum of acceptable and justified responses.[1075]

The ET further found that the employee's conduct revealed an improper lack of self-control and a severe lack of judgement, both of which directly impacted his job in a position that dealt mainly with vulnerable children. The behaviour undermined the relationship of trust and confidence between the employer and the employee. After the matter was appealed, the EAT held that the reason for his dismissal was not private off-duty misconduct but public off-duty misconduct.[1076]

The Court of Appeal determined that Article 8 of the ECHR was not applicable in this situation since the offence occurred in a public space (a transport café), and, therefore, the details should have been disclosed to his employer. In the absence of Article 8, the relevance of Article 14 of the ECHR diminished. Lord Justice Mummery recommended that employment tribunals should handle issues arising under the Human Rights Act in a more systematic manner than demonstrated in this case.[1077]

Derived from the specific circumstances of this case, it becomes evident that in the UK, a crucial distinction is drawn between private and public conduct when it comes to adjudicating off-duty misconduct dismissal cases. The determinative factor often hinges on the location of the conduct in question, specifically whether it occurs in a public or private setting. When an employee's off-duty behaviour occurs in the public domain, it is more likely to lead to a decision in favour of upholding the dismissal.

In *Pay v United Kingdom (Application no 32792/05)*,[1078] Mr Pay worked as a probation officer for the Lancashire Probation Service from 1983. Following a tip from the police in 2000, the employer discovered that Mr Pay spent his free time performing shows at hedonist and fetish clubs, as well as being a director of a company that sold bondage

1073 *X v Y* para 15.
1074 *X v Y* para 15. Article 14 of the ECHR.
1075 *X v Y* para 18.
1076 *X v Y* para 28.
1077 *X v Y* para 28.
1078 [2009] IRLR 139.

and sadomasochism-related products on the Internet. Images of him with semi-naked women and men were also available online.[1079]

Mr Pay was dismissed because he refused to stop his extracurricular activities.[1080] He challenged the legality of his dismissal because it infringed his right to privacy.[1081] The ET and the EAT both dismissed his claim.[1082] The EAT held that Mr Pay's right to privacy was not infringed because his actions took place in public.[1083] Although there was a restriction on his freedom of expression, the restriction was proportional because his activities could harm the Probation Service's reputation.[1084]

The EAT's ruling in Mr Pay's case portrays the significance of the public versus private dimension in evaluating off-duty misconduct and its impact on an employer's reputation. It is, therefore, argued that employees maintain the right to engage in personal activities outside work, particularly in private settings. However, when these activities occur in public, the potential for harm to the employer's reputation becomes a pivotal factor in the decision-making process. In Mr Pay's situation, the EAT concluded that his actions, despite restricting his freedom of expression, did not infringe on his right to privacy because they occurred in a public context and could potentially adversely affect the Probation Service's image.

The matter was then referred to the ECtHR where the ECtHR overturned the decision and determined that the disclosure in question lacked proportionality in relation to the legitimate aim pursued. The court specifically criticised the blanket and indiscriminate nature of the disclosure system, noting the absence of adequate safeguards. This approach, according to the ECtHR, failed to strike a fair balance between the individual's right to respect for private life (Article 8) and the public interest.

The ECtHR's ruling provides a robust defence of an employee's right to enjoy their private life without undue interference from an employer. It stresses that an employer's disapproval of an employee's off-duty activities, even on moralistic grounds, does not automatically justify a fair dismissal. The decision further establishes that the public or

1079 *Pay v United Kingdom* para 54.
1080 *Pay v United Kingdom* para 55.
1081 *Pay v United Kingdom* para 56.
1082 *Pay v United Kingdom* para 57.
1083 *Pay v United Kingdom* para 57.
1084 *Pay v United Kingdom* para 57.

accessible nature of the employee's conduct does not necessarily negate the right to privacy.

This finding implies that for the UK courts to align their rulings with the ECtHR, they must initially reinterpret the concept of the right to privacy. Furthermore, they must incorporate a proportionality test into the unfair dismissal laws when the termination of employment infringes upon a right protected by the ECHR.

7.4.2 Regulation and Adjudication of Dismissals for Off-duty Social Media Postings and the Impact of Social Media Policies

In the absence of specific legislation governing dismissals for off-duty social media conduct, a situation somewhat akin to South Africa, numerous cases of this nature have found their way into the courts.

In *Smith v Trafford Housing Trust (Trafford Housing Trust)*,[1085] the claimant, a devout Christian, worked as a housing manager for the defendant's trust.[1086] He posted a message on his Facebook page in response to an article he saw on the British Broadcasting Corporation (BBC) website. In the post, he expressed opposition to gay marriages in churches.[1087] Following that, he had a conversation with two co-workers who had access to the Facebook page, in which he expressed his objections.[1088]

As a result, he was suspended on full pay and, after investigations, found guilty of gross misconduct.[1089] Owing to his extensive service, he was not dismissed but instead demoted.[1090] He challenged his demotion. His employer argued that its actions were justified as the postings were activities that could bring the trust into disrepute. The employer also argued that while the claimant was promoting his religious views, he failed to treat fellow employees with dignity and respect, and this violated the company's Code of Conduct and Equal Opportunities Policy.[1091]

1085 [2013] IRLR 86.
1086 *Trafford Housing Trust* para 10.
1087 *Trafford Housing Trust* para 10.
1088 *Trafford Housing Trust* para 11.
1089 *Trafford Housing Trust* para 50.
1090 *Trafford Housing Trust* para 51.
1091 *Trafford Housing Trust* para 51.

According to Briggs J in the Chancery Division, by accepting a demotion, the claimant was unfairly dismissed under relevant legislation.[1092] The court then proceeded to consider the fairness of the dismissal. It was held that the claimant's Facebook wall had not acquired a sufficiently work-related context to attract the prohibition against promoting political or religious belief; hence, the dismissal was found to be unfair.[1093] The court further held that for an employee to be dismissed for off-duty misconduct, the most important thing to assess was whether or not the off-duty conduct impacted the employment relationship.[1094] It also had to be considered whether there was a deliberate infringement of corporate policy, a negative impact on the trust relationship between the employer and employee, damage to the employer's reputation, or a violation of the employee's responsibilities.[1095]

In this case, the court did not specifically discuss the breakdown of the employment relationship as a central issue. Instead, the focus was primarily on the employee's comment made on his personal Facebook page regarding same-sex marriage. The employer took disciplinary action in response to this comment. The critical legal question in this context was whether the employee's statement constituted misconduct and whether the employer's decision to impose disciplinary measures was justified.

This case emphasises the significance of upholding an employee's freedom of expression and personal opinions. Even when those opinions are at odds with the employer's views or preferences, respecting diverse viewpoints was upheld.

This case reaffirms the fundamental right to freedom of expression, protected under the ECHR and a core principle in democratic societies.[1096] It emphasises that individuals, including employees, have the right to express their opinions and beliefs, even when those opinions are controversial or unpopular. The case makes it clear that personal opinions expressed outside work-related contexts, such as on social media or personal websites, should generally be protected unless they incite hatred or

1092 *Trafford Housing Trust* para 51.
1093 *Trafford Housing Trust* para 51.
1094 *Trafford Housing Trust* para 71.
1095 *Trafford Housing Trust* para 74.
1096 Article 10 of the ECHR.

violence. In this case, the comment made by the employee was on his personal Facebook page and did not relate directly to his job responsibilities.

In *Game Retail Ltd v Laws (Game)*,[1097] an employee was dismissed for tweeting non-work-related but offensive comments from a personal Twitter account.[1098] The ET found the dismissal unfair and not within the band of reasonable responses.[1099] The tweets were sent from Mr Laws's phone outside office hours and for personal reasons.[1100] It had not been determined whether someone in the public had access to Mr Laws's Twitter stream and had linked him to the corporation.[1101] The fact that the Game Retail disciplinary policy did not clearly state that using social media in this manner could be considered gross misconduct was also significant.[1102] On appeal, the EAT held that the dismissal was fair because the tweets were posted on a public platform. It emphasised that Game Retail stores depended on Twitter and other social media as tools for marketing and communications, thus establishing a solid nexus and possible reputational damage.[1103]

In the case of *Mrs E Plant v API Microelectronics Ltd* (*Plant*),[1104] the employee, Mrs Plant, had a long and unblemished work record of 17 years but was dismissed for making negative remarks about her company on her personal Facebook page.[1105] The company had a social media policy warning against behaviour that could harm its reputation.[1106] Mrs Plant was dismissed despite claiming she did not realise her Facebook page was linked to her employer's systems.[1107]

She filed a claim for unfair dismissal, which the ET ultimately rejected.[1108] The ET found that her comments did breach the company's social media policy, and the employer had valid reasons to believe she had engaged in misconduct.[1109] Although

1097 UKEAT/0188/14/DA (3 November 2014).
1098 *Game* para 4.
1099 *Game* para 12.
1100 *Game* para 12.
1101 *Game* para 13.
1102 *Game* para 31.
1103 *Game* para 31.
1104 See *Mrs E Plant v API Microelectronics Ltd* [2017] UKET 3401454/2016 (28 April 2017); http://www.bailii.org/uk/cases/UKET/2017/3401454_2016.html, accessed 17 December 2023.
1105 *Plant* para 5.
1106 *Plant* para 4.
1107 *Plant* para 6.
1108 *Plant* para 15.
1109 *Plant* para 15.

it acknowledged that dismissing an employee with a clean record might seem harsh, the ET deemed the dismissal fair.[1110] It emphasised the reasonable employer test and concluded that the decision to dismiss Mrs Plant was within the range of acceptable responses.[1111]

The case involved a conflict between an employee's right to express personal opinions on social media and an employer's concern for safeguarding its reputation. Despite the employee's lengthy and clean employment history, her dismissal resulted from Facebook posts related to the employer, raising concerns about reputational damage. The ET assessed the reasonableness of the dismissal, emphasising the delicate balance between employees' rights and employers' interests in the digital age. The case underscores the significance of clear policies, fair decision-making, and contextual assessment in navigating such situations.

In *The British Waterways Board (t/a Scottish Canals) v Smith* (*British Waterways Board)*,[1112] an employee was dismissed for posting offensive and derogatory comments about his managers and colleagues on his personal Facebook page.[1113] The employee, Mr Smith, had taken to his personal Facebook account to vent his frustrations and make disparaging remarks about his managers and colleagues at British Waterways Board.[1114] Unsurprisingly, when these posts were discovered, it led to significant concern within the workplace. [1115]

British Waterways Board acted swiftly on discovering Mr Smith's Facebook posts. They argued that his actions amounted to gross misconduct and initiated the dismissal process. The company cited its well-established social media policy as a basis for justifying the dismissal.[1116] This policy had clear guidelines regarding employees' appropriate use of social media and emphasised the potential consequences of misconduct.[1117] The case ultimately reached the EAT, which upheld the dismissal. The

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1110 *Plant* para 15.
1111 *Plant* para 16.
1112 [2015] UKEAT 0004_15_0308 (03 August 2015); http://www.bailii.org/uk/cases/UKEAT/2015/0004_15_0308.html, accessed 17 December 2023.
1113 *British Waterways Board* para 2.
1114 *British Waterways Board* para 5.
1115 *British Waterways Board* para 5.
1116 *British Waterways Board* para 14.
1117 *British Waterways Board* para 14.

EAT emphasised that Mr Smith's comments amounted to gross misconduct and that the company's clear social media policy was crucial in justifying the dismissal.[1118]

This case was also decided on the strength of the presence of a company policy regulating social media use. The existence of such a policy played a pivotal role in justifying the employer's decision to dismiss the employee for his offensive social media posts. It underlined that clear company policies provide a framework for acceptable conduct and consequences for policy violations.

In the case of *Higgs v Farmor's School* (*Higgs*),[1119] Mrs Higgs, an employee at Farmor's School, faced dismissal for her controversial Facebook posts regarding relationship education in primary schools. She argued before the ET that her dismissal amounted to discrimination based on her protected beliefs or harassment related to them.[1120] She outlined her beliefs, including opposition to certain aspects of relationship education and her religious convictions. The school contested the protection of some of these beliefs under the Equality Act 2010 (c 15). The ET rejected some of the school's arguments but also ruled that Mrs Higgs had no reasonable expectation of privacy concerning her Facebook posts.[1121]

The ET ultimately determined that her dismissal was not primarily due to her protected beliefs but because the school was concerned that her posts could be construed as holding homophobic and transphobic views. Mrs Higgs appealed, and the EAT provisionally ruled in her favour. The EAT also allowed the Archbishops' Council of the Church of England to provide general submissions as an intervener but remained neutral on the specific merits of the case.[1122]

The grounds of appeal included considerations of proportionality, the lawful prescription of interference, and the school's ability to restrict Mrs Higgs's freedom of speech. The EAT found that the ET had not adequately balanced the interference with

1118 *British Waterways Board* para 54.
1119 [2023] EAT 89 (16 June 2023), [2023] ICR 1072, [2023] IRLR 708; http://www.bailii.org/uk/cases/UKEAT/2023/89.html, accessed 17 December 2023.
1120 *Higgs* para 5.
1121 *Higgs* para 17.
1122 *Higgs* para 3.

her rights against the school's legitimate interests and had not properly engaged with questions related to her dismissal.[1123]

The EAT stressed the importance of proportionality in assessing whether Mrs Higgs's dismissal was due to her protected beliefs or objectionable manifestations of those beliefs. It also noted the need for more general guidance in cases involving the manifestation of religious or philosophical beliefs.[1124]

Consequently, the appeal was granted, and the case was returned to the ET for additional examination. The primary consideration would be whether the school's actions were connected to the expression of Mrs Higgs's protected beliefs or valid objections to how those beliefs were communicated. This assessment would involve determining whether the school's measures were legally mandated and essential for safeguarding the rights and freedoms of others.[1125]

The decision in this case serves as a crucial reminder of the need for a balanced and proportionate approach when assessing the potential infringement on an employee's freedom of expression and belief in the modern workplace. It highlights the importance of considering the specific circumstances of each case and whether the employee's actions genuinely warrant disciplinary action. Moreover, the case underscores the significance of well-defined organisational social media policies. In the *Higgs* case, the EAT meticulously examined whether the school's actions were primarily motivated by a genuine concern for protecting its reputation and the rights of others or whether they were more focused on objecting to how she expressed her beliefs. This scrutiny emphasises the need for employers to demonstrate a valid and justifiable basis for any disciplinary action taken against employees for their off-duty conduct on social media platforms.

In *M Austin v A1M Retro Classics Ltd (Austin),*[1126] the ET concluded that an employee was unfairly dismissed for a Facebook post. Mr Austin worked as a paint sprayer for the respondent. In 2020, the parties argued over the claimant's poor craftsmanship,

1123 *Higgs* para 59.
1124 *Higgs* paras 68–73.
1125 *Higgs* para 93.
1126 [2020] UKET 2500934/2020 (13 December 2020); http://www.bailii.org/uk/cases/UKET/2020/2500934_2020.html, accessed 17 December 2023.

which caused the respondent to become irritated and yell at the claimant.[1127] When the claimant got home that day, he went to Facebook to vent about the disagreement; one of his postings read, "I don't think I'm a bad person but I don't think I have ever felt so low in my life after my boss's comments today."[1128] The post drew several comments from individuals seeking to comfort the claimant, some of which were improper and contained personal verbal assaults on the respondent, including homophobic remarks.[1129]

After a few days, the claimant was summoned to a disciplinary hearing without genuine prior notice and without the respondent's disciplinary procedure being followed. The claimant was dismissed the following day via phone and afterwards filed an unfair dismissal suit with the ET.

The ET upheld his claim because the respondent failed to investigate the occurrence properly, and no advance notice of the disciplinary proceeding was provided to the claimant.[1130] The employer emphasised that its social media policy explicitly stated that employees were only allowed to post on their personal social media accounts and were prohibited from making comments that could negatively impact the organisation and its leaders. The ET stated that the employer, before conducting a disciplinary hearing, should have researched whether the claimant's place of work was recognisable on his Facebook profile.[1131] The ET added that a "reasonable" employer would not only have done this but would also have verified the privacy settings of the post and the size of the group that engaged with it — owing to the social media policy emphasising the necessity for "appropriate privacy settings" on employee postings.[1132]

Although this case revolves predominantly around fulfilling procedural prerequisites before an employee's dismissal, it also underscores a pivotal substantive aspect. It highlights that to assess the potential harm to reputation resulting from a social media misconduct post, a nexus between the post's content and the employer must be

1127 *Austin* para 12.
1128 *Austin* para 21.
1129 *Austin* para 21.
1130 *Austin* para 37.
1131 *Austin* para 37.
1132 *Austin* para 39.

established. This is why the ET emphasised that the employer should have investigated whether the employee's Facebook profile could be linked to the employer.

Recently, the BBC suspended journalist Mr Gary Lineker after he posted a tweet against the treatment of refugees by the UK government. A few days later, the BBC and Mr Lineker reached an agreement. The BBC lifted his suspension, agreeing to get him back on air[1133] and the organisation started reviewing its social media policies.[1134] This case illustrates that employers need to draft their social media policies in a manner that is clear about which type of off-duty conduct is considered misconduct. This must also be done in a manner that balances the interests of the employer and the employee.

The cases examined above offer valuable insights into how courts and tribunals handle issues related to an employee's social media activity and the influence of a company's social media policy on the fairness of a dismissal. The decision of the ET in *Game Retail Ltd v Laws*, highlights the significance of having a clearly defined social media policy and ensuring that employees are well-informed about its terms.

These cases also display the importance of considering various mitigating factors when evaluating the appropriateness of disciplinary actions. One key factor is the content of the employee's social media posts. Courts analyse the nature of the posts, assessing whether they genuinely pose a threat to the employer's reputation or the rights of others.

Mitigating factors have been considered in assessing a dismissal's fairness, as illustrated in the following cases. Despite Ms Plant's 17-year tenure and clean record in *Plant*, she was dismissed for offensive remarks on her personal Facebook page linked to the employer's computer system. The ET deemed the dismissal within an acceptable range, considering reasonable grounds for misconduct, an opportunity for explanation, and her failure to provide one.

1133 Landler "BBC Ends Suspension of Top Sports Host After Staff Mutiny" *New York Times* (13 March 2023), https://www.nytimes.com/2023/03/13/world/europe/gary-lineker-bbc-return-motd.html, accessed 20 June 2022.

1134 Letsas and Mantouvalou "Censoring Gary Lineker", https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/, accessed 11 December 2023.

In the *British Waterways Board* case, the tribunal deemed the dismissal unfair, emphasising the insufficient consideration given to the employee's apology, remorse, and long service record. This highlights the importance of factoring in an employee's remorse and previous record as significant mitigating factors when evaluating the fairness of dismissals linked to social media misconduct.

In the *Higgs* case, significant mitigating factors included the employee's lengthy service and unblemished disciplinary record with the school. Furthermore, the EAT granted the Archbishop's Council of the Church of England permission to make general submissions as an intervener, suggesting consideration of broader factors in the case. Although the EAT did not present an exhaustive list of mitigating factors, the case implies that elements such as an employee's history with the employer may influence the assessment of the fairness of a dismissal related to social media activity

7.4.3 Regulation of Dismissals for Off-duty Cannabis Use

Cannabis holds a class B drug classification in the UK.[1135] Doctors who are on the General Medical Council specialist registry gained the authority to prescribe cannabis-based products for medical use from 1 November 2018. This prescription ability is contingent on clinical appropriateness and patients' best interests.[1136] According to the Home Office,[1137] it is still unlawful to possess, cultivate, distribute, or sell cannabis in the UK.[1138] This means that employers are justified in dismissing employees for being under the influence of cannabis in the workplace, especially if cannabis was consumed for recreational purposes.

In the case of *Mr C Pamment v Renewi UK Services Ltd* (*Pamment*),[1139] an employee was dismissed for off-duty medicinal cannabis use after failing a drug test. The

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1135 "Drug Penalties", https://www.g2023/03/13/world/europe n-dealing, accessed 2 January 2023. Class B drugs include amphetamines, barbiturates, cannabis, codeine, ketamine, methylphenidate (Ritalin), synthetic cannabinoids, and synthetic cathinone (for example, mephedrone and methoxetamine). The penalty for possession is up to 7 years, and the penalty for supply and distribution is life in prison, an unlimited fine or both.

1136 "Drug Penalties", https://www.gov.uk/penalties-drug-possession-dealing, accessed 2 January 2023.

1137 "Home Office", https://www.gov.uk/government/organisations/home-office, accessed 11 December 2023. The Home Office is a ministerial department of the British government, responsible for immigration, security, and law and order,

1138 "Drug Penalties", https://www.gov.uk/penalties-drug-possession-dealing, accessed 2 January 2023.

1139 [2021] UKET 3201672/2020 (29 April 2021); http://www.bailii.org/uk/cases/UKET/2021/3201672_2020.html, accessed 17 December 2023.

employee, Mr Pamment, had a legitimate medical need for cannabis to manage severe back pain and had been prescribed it by his GP.[1140] Despite his medical necessity, he did not disclose his cannabis use to his employer before the drug test, leading to his dismissal for gross misconduct.[1141] However, the ET ruled in favour of Mr Pamment, emphasising that the employer had failed to consider his valid reasons for using cannabis and his unblemished work record.[1142] The ET found that Mr Pamment's cannabis use was not recreational but medicinal, aimed at relieving his genuine ailment, and had no noticeable impact on his job performance.[1143]

The *Pamment* case highlights the need for well-defined policies that address the use of prescription cannabis and a balanced approach in such cases. Before dismissing an employee who tests positive for cannabis, employers should weigh factors such as the individual's clean employment history and job performance as mitigating considerations. The ET's focus on these mitigating circumstances reflects a fair and comprehensive approach to handling dismissals related to cannabis usage. Mitigating factors provide valuable context and insights into an employee's situation, enabling more balanced and reasonable decision-making. In addition, the ET recognises that a single instance of testing positive for cannabis may not accurately reflect an employee's overall behaviour and contributions to the organisation.

7.5 Comparison with South Africa

The comparative analysis of labour law frameworks in the UK and South Africa reveals a common reliance on the nexus test to adjudicate off-duty misconduct cases, underlining a shared commitment to fairness while balancing the interests of employers and employees. However, nuanced differences exist in their approaches and regulations. The UK employs the "reasonable employer test," while South Africa utilises the "reasonable decision-maker test," showcasing distinct perspectives on

See also *Focus DIY Ltd v Nicholson* [2021] UKET 3201672/2020 (29 April 2021), http://www.bailii.org/uk/cases/UKET/2021/3201672_2020.html, accessed 17 December 2023, where the EAT overturned an industrial tribunal's decision that a deputy manager's dismissal for using cannabis while at a party with co-workers was unfair, and commented that a legitimate dismissal decision must, of course, be backed by a thorough investigation. Given the number of factors that exist when comparing one instance to another, the nature and extent of the proper investigation should be determined by the facts of the specific case.

1140 *Pamment* para 28.
1141 *Pamment* para 84.
1142 *Pamment* para 85.
1143 *Pamment* para 88.

evaluating dismissals that may influence case outcomes. Notably, the Acas Code in the UK provides additional guidance on handling criminal convictions and developing off-duty misconduct policies, a feature which is absent in the South African legal landscape.

In the UK, off-duty misconduct cases hinge significantly on company policies, with a meticulous distinction between “public” and “private” behaviour shaping proceedings. Actions in public settings negatively impacting an employer’s reputation often serve as justifications for dismissal. Conversely, South African courts have upheld off-duty dismissal cases even in the absence of specific company policies, showcasing a different approach that considers individual circumstances. Notably, South Africa’s evaluation of off-duty cannabis use centres on whether a zero-tolerance policy was breached, without due consideration for mitigating factors, contrasting with the UK's more comprehensive assessment that includes inquiry into reasons for cannabis use and the relevance of mitigating circumstances.

7.6 Lessons for South Africa

It is observed that UK and South African dismissal laws are similar as regards the legislative frameworks. However, as explained above there are differences in their approaches.

7.6.1 Lessons on Regulating Off-duty Misconduct in General

The UK’s approach to off-duty misconduct and dismissals underscores the critical significance of well-defined and comprehensive off-duty policies within the workplace. This emphasis on proactive management and prevention highlights the pivotal role that such policies play in guiding both employers and employees, establishing expectations, and mitigating potential misunderstandings. The key takeaway from this approach is the recognition that a proactive stance towards off-duty conduct, facilitated by robust policies, can significantly contribute to fostering a transparent and harmonious work environment. This proactive approach has the potential to reduce the necessity for dismissals related to off-duty misconduct by fostering a shared understanding of acceptable behaviour.

7.6.2 Lessons on Regulating Off-duty Social Media Misconduct

Similar to the regulation of general off-duty misconduct cases, the oversight of social media misconduct underscores the necessity of well-defined social media policies. Dismissals related to off-duty social media misconduct are commonly upheld when a social media policy is intentionally breached.[1144] The ET highlights the importance of an off-duty policy addressing social media conduct, emphasising that it should explicitly outline the circumstances under which social media postings can result in dismissals.

A well-crafted social media policy plays a pivotal role in guiding both employers and employees on the acceptable and unacceptable utilisation of social media platforms within the workplace. It serves to clearly define expectations, outlining the types of content considered inappropriate, discriminatory, or detrimental to the employer's reputation, and specifying potential consequences, including the possibility of dismissal, for violating these guidelines. Particularly crucial in addressing off-duty social media misconduct, where the lines between personal and professional life may become blurred, such a policy provides a framework for responsible social media use. By proactively informing employees about the potential repercussions of inappropriate online behaviour, the policy acts as a preventive measure, contributing to a more informed and responsible digital engagement within and outside the professional realm.

Additionally, ETs necessitate employers to conduct thorough investigations and ascertain the public nature of an employee's social media posts before taking any disciplinary action, such as dismissal, related to off-duty social media misconduct.

7.6.3 Lessons on Regulating Off-duty Use of Cannabis

When applying the employer's zero-tolerance policy for dismissing employees' cannabis use, the ETs stress the importance of considering mitigating factors related to cannabis use. Additionally, a mere breach of the policy is not automatically grounds for dismissal; instead, there should be an investigation into why the employee breached the zero-tolerance policy. This lesson can be integrated into South African jurisprudence to align with the CC's intent in legalising the private use of cannabis by

1144 *Trafford Housing Trust* para 74.

individuals. This development involves recognising that the private use of cannabis, in itself, may not be an automatic justification for dismissal. Instead, the focus should be on assessing whether the employee's actions have a direct and detrimental impact on their job performance or workplace safety.

7.7 Conclusion

The UK emphasises the need for companies to have clear social media rules outlining inappropriate behaviour. Furthermore, the UK emphasises the need to consider mitigating reasons before dismissing an employee. Considering these findings, South Africa may gain valuable lessons from the UK.

The UK provides valuable insights into two crucial lessons that South African courts and the CCMA can apply when assessing cases involving off-duty misconduct. First, the presence and relevance of an established company policy must be a pivotal consideration. Evaluating whether the employer has a clearly defined policy in place concerning off-duty conduct is essential. These policies provide guidelines that inform employees about the expectations regarding their behaviour outside work and help employers maintain consistency in their responses to off-duty misconduct cases.

Secondly, South African courts and the CCMA should carefully examine a range of mitigating factors related to the particular employee's off-duty cannabis use. These elements can encompass the nature and severity of the misconduct, the potential impact on the employer's reputation, the employee's overall performance and conduct at work, and whether compelling personal circumstances influenced the off-duty behaviour. This comprehensive approach ensures that the decision-making process is nuanced, considering each case's complexity, ultimately leading to fairer and more balanced outcomes in off-duty misconduct disputes.

In summary, South Africa should enhance its labour law framework concerning off-duty misconduct by learning from the experiences and regulations of other legal systems. By doing so, South Africa can provide more precise standards for employers and employees, facilitating a more balanced and fair approach to resolving off-duty misconduct cases. This approach promotes the protection of rights for both these parties, striking a balance between individual freedoms and employers' concern.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

South African labour legislation regulating dismissal for off-duty misconduct remains a pressing issue. The situation has been exacerbated by the prevalence of off-duty use of social media and off-duty use of cannabis by employees. Despite decisions from the IC, the CCMA and the LC on this topic, certain questions remain unanswered.

In the context of these challenges of dismissal for off-duty misconduct, the thesis sought to answer the questions outlined below.

8.2 Conclusions in Respect of Question One

- How does the current legislative framework govern dismissals for off-duty misconduct?

This research investigated the history and changes in misconduct dismissals in South Africa to examine how labour laws regulate off-duty misconduct dismissals. Although the concept of dismissal for off-duty misconduct was introduced into South African law during the IC era, the study revealed that the regulation of off-duty misconduct dismissals remains connected to broader regulations governing on-the-job misconduct.

The Constitution, through its recognition of the right to fair labour practices, plays a pivotal role in guiding the legal framework governing dismissals for off-duty misconduct. It sets the stage for ensuring that both employers and employees' rights are protected, and that fairness and justice prevail in employment actions.

In addition, the ILO indirectly influences the governance of off-duty misconduct dismissals by shaping international labour standards and promoting principles of fairness, non-discrimination, and decent work. Although the ILO's impact is more indirect and advisory, its standards and guidance inform the development and implementation of labour laws and practices at the national level.

The primary regulatory framework governing off-duty misconduct is the LRA's Code, which provides comprehensive guidance for handling misconduct cases. Notably, the Code takes a broad approach to regulating misconduct without distinguishing between on-the-job and off-duty misconduct, even though these two forms of misconduct have distinct characteristics and implications.

In addition to the Code, the regulation of off-duty misconduct dismissals involves two pivotal criteria: the "nexus test" and the "breakdown of employment relationship test." The nexus test assesses the extent of the connection between an employee's off-duty misconduct and their employment, focusing on whether the behaviour directly impacts the employers' interests or the workplace environment. Conversely, the breakdown of employment relationship test concentrates on whether the off-duty misconduct has irrevocably destroyed the employment relationship, rendering ongoing employment unfeasible. These tests provide essential criteria for evaluating the appropriateness of employees' dismissals for off-duty misconduct.

The LCs use the reasonable decision-maker test in determining the fairness of off-duty misconduct dismissals. As discussed in the thesis, this test involves assessing the reasonableness of the decision made by the commissioner regarding the dismissal. This test considers various factors, such as whether the alleged misconduct had a direct impact on the employment relationship, and whether the disciplinary action taken was proportionate to the seriousness of the misconduct.

In conclusion, the response to the research question reveals that the legal framework governs off-duty misconduct through the Constitution, the LRA and the Code of Good Practice, judicial tests, including the review test and the ILO instruments.

8.3 Conclusions in Respect of Question Two

- Is the current legislative framework adequate to ensure the fairness of dismissals for off duty misconduct?

Upon close inspection of the legal framework, it was revealed that the current legal framework, especially the Code, largely covers dismissal for general misconduct. The Code establishes obligations for both substantive and procedural justice. However, it was discovered that the Code lacks explicit measures for dealing with incidents of off-duty misconduct for the reasons stated in the paragraphs below.

8.3.1 Application of the Current Legal Framework to Conventional Forms of Misconduct

First, it was determined that the regulation of conventional off-duty misconduct involves considering the Code, review standards, and judicial tests when establishing the fairness of a dismissal. After an analysis of the application of the current legal framework to conventional off-duty cases, it was concluded that, although the legal framework provides a very helpful framework for establishing the fairness of dismissals for misconduct, the application of items that determine the substantive fairness of a dismissal raises concerns such as the violation of an employee's rights to privacy, dignity, and freedom of expression.

Secondly, courts and the CCMA have tried to define off-duty misconduct. According to South African jurisprudence, off-duty misconduct includes an employee's conduct that has negative effects on the company or behaviour that breaks down the employment relationship to the point that it is irretrievable. This was addressed in the thesis under the judicial tests: namely, the nexus and the employment relationship tests. Although judicial tests help give guidance on determining the fairness of dismissals for off-duty misconduct, it was noted that the application of the nexus and breakdown of the employment relationship tests leads to inconsistencies. Although applying the same tests, judges and arbitrators arrive at different decisions.

Courts are divided on how a nexus is established in conventional off-duty misconduct cases and how a line should be drawn between on-the-job misconduct and off-duty misconduct. It was observed that the line between the private life and the work life of employees is blurred. In the case of *Simmers*, for example, the challenges arising from the application of the nexus test were evident. Despite the weak connection between the employer and the employee's off-duty behaviour during a work-related event, the employee was dismissed for sexual harassment.

The determination of a breakdown in the employment relationship also poses problems in the sense that it is not clear whether employers should prove an actual breakdown or a potential breakdown of the employment relationship. What is also not clear is whether an employer must prove that the employee's conduct broke down the relationship irretrievably or whether the gravity of the conduct speaks for itself, obviating the necessity for evidence. The answer to this question lies in the explanation and codification of off-duty misconduct legislation.

The thesis also underscored the issue of neglecting progressive discipline. Since the judiciary is a component of the legal framework that regulates off-duty misconduct dismissals, the judiciary's failure to consider progressive discipline diminishes the effectiveness of the governance of such dismissals in South Africa. This is because progressive discipline is essential in correcting misconduct.

In summary, while the current legal framework provides a foundation for addressing off-duty misconduct, the complexities and inconsistencies in its application to

conventional off-duty misconduct indicate a need for clearer guidelines and more precise legislation to ensure fairness and consistency in handling off-duty misconduct cases.

8.3.2 Application of the Current Legal Framework to Contemporary Forms of Misconduct

The analysis of the current legal framework for regulating off-duty social media misconduct demonstrates several inherent challenges and limitations.

The framework, primarily designed for conventional general misconduct, struggles to account for the interplay between employees' personal and professional lives on social media platforms. The inherent challenge arises from the fact that employees often connect with colleagues, supervisors, and clients on these platforms, making it challenging to delineate between personal and professional conduct. This interconnectedness has the potential to blur the boundaries and complicate the application of the regulatory framework.

Particularly in cases where social media posts are directed at third parties, the existing legal framework presents significant challenges. This framework lacks the clarity and specificity necessary to provide clear guidance to adjudicators, employers, and employees regarding what constitutes conduct connected to the workplace to an extent that it becomes intolerable, leading to a breakdown in the employment relationship and justifying dismissal.

Furthermore, the framework does not adequately consider the importance of off-duty misconduct policies when assessing the fairness of these types of dismissals. This omission can create confusion and inconsistency in how such cases are handled, as the relevance of policies addressing off-duty conduct is often overlooked.

Moreover, the concept of progressive discipline**,** which entails a gradual escalation of sanctions in response to misconduct, is not consistently embraced within this framework. The failure to consider progressive discipline can lead to disproportionate

or unfair dismissals, especially when lesser measures might suffice to correct the misconduct and maintain the employment relationship.

The effectiveness of the current legal framework for regulating off-duty conduct, including the use of cannabis, is also challenged by a range of complex factors.

The framework grapples with the inherent tension between individual rights and employer interests. Off-duty cannabis use raises questions about privacy and personal freedom versus workplace safety, productivity, and reputation. The framework does not provide a precise roadmap for reconciling these conflicting rights and interests, contributing to the overall inadequacy in addressing the issue. Extenuating and mitigating factors that contribute to the violation of the policy are usually not considered.

In addition, the challenge of determining impairment resulting from cannabis use further complicates the regulatory framework. Although standardised tests and limits exist for alcohol, cannabis impairment assessment is more complicated. The absence of specific guidelines for employers to assess impairment can lead to uncertainty in deciding whether an employee is actually guilty when charged with impairment, and whether disciplinary actions, such as dismissal, are justified.

The current legal framework's adequacy in regulating off-duty cannabis use is hindered by legislative gaps, conflicting rights and interests, and challenges in assessing impairment. To enhance the effectiveness of the framework, it may be essential to develop more specific legislation or guidelines that consider the evolving landscape of cannabis legalisation and its implications for the workplace. These measures could provide clearer guidance, promote fairness, and balance individual rights with employer concerns.

As a recommendation, a mechanism that will not punish medicinal and private cannabis use is needed, especially if the presence of cannabis in the person's system does not impede their performance. Although further research is required, brain-based assessment may offer an objective, practical, and much-needed answer. In view of these circumstances, new knowledge is emerging, and researchers at Massachusetts

General Hospital discovered that a non-invasive brain imaging technology may identify people whose performance has been hindered by THC, the psychoactive element in cannabis.[1145]

The objective of the research was to see whether cannabis impairment might be diagnosed from brain activity on an individual basis.[1146] This is a key problem since a breathalyser technique will not identify cannabis impairment, making it very difficult to measure THC impairment objectively.[1147] According to the primary investigator into the research, Dr Evins, the founder of the Center for Addiction Medicine, the identification of acute impairment from THC intoxication using portable brain imaging might be an important tool.[1148] She added that the accuracy of this strategy was proven by the fact that impairment was detected by machine learning models seventy-six per cent of the time using information from functional near-infrared spectroscopy (fNIRS). fNIRS is a non-invasive neuroimaging technology that records changes in the quantity of oxygenated or deoxygenated blood to quantify brain responses.[1149]

In conclusion, the existing legislative framework falls short in effectively regulating conventional off-duty misconduct because of its lack of specificity, failure to adapt to evolving workplace dynamics, and limited consideration of mitigating circumstances and progressive discipline. This inadequacy underscores the pressing need for legislative reform to establish clearer, more adaptable legal standards that can address the complexities of off-duty misconduct cases and ensure fairness and consistency in their handling, aligning with the demands of modern workplaces.

1145 "Study Identifies Potential Test for Cannabis Impairment" *Harvard Gazette* (11 January 2022), https://news.harvard.edu/gazette/story/2022/01/research-describes-brain-based-method-for-identifying-cannabis-impairment/, accessed 13 December 2023 (*Harvard Gazette* "Cannabis Impairment Study").

1146 *Harvard Gazette* "Cannabis Impairment Study".

1147 *Harvard Gazette* "Cannabis Impairment Study".

1148 *Harvard Gazette* "Cannabis Impairment Study".

1149 The Clinical Brain Lab "Functional Near-Infrared Spectroscopy", https://www.clinicalbrain.org/resources/techniques/fnirs/, accessed 13 December 2023.

8.4 Conclusions in Respect of Question three

- Are there lessons for South Africa from the regulation of off-duty misconduct in the USA and UK?

From the US states discussed, South Africa can derive valuable insights into the approach of codifying laws that regulate off-duty conduct. Examining the legal frameworks and precedents established in these states can provide a foundation for South Africa to develop comprehensive legislation that addresses the complexities of conduct outside working hours. Moreover, the South African legal system can benefit from studying examples of off-duty conduct that are protected, understanding the delicate balance between an employee's private life and an employer's legitimate concerns.

Furthermore, specific provisions addressing off-duty cannabis use offer clarity, suggesting that South Africa could benefit from more tailored legislation, effectively navigating the delicate balance between individual freedoms and workplace considerations in the context of legalised cannabis. The legislative framework in New York provides clearer guidance on off-duty cannabis use. It specifies that an employer can terminate an employee if they are under the influence of cannabis, exhibiting observable symptoms that impair their job performance. A valuable lesson can also be learnt from the state of Colorado as well in that its legislative framework emphasises restrictions of cannabis use related to a "bona fide occupational requirement" or a connection to job duties. South Africa can benefit from clearly articulating and specifying how off-duty conduct, especially cannabis use, must be related to job responsibilities and business interests. This provides a defined framework for employers to assess the appropriateness of an employee's off-duty actions in relation to their role. This nuanced approach, coupled with clarity in defining impairment-related criteria, serves as a beneficial model for South Africa in crafting regulations that address the complexities of off-duty cannabis use in the workplace.

South Africa can draw valuable insights from the UK's approach to off-duty misconduct and dismissals, particularly in considering mitigating factors before employee dismissals for off-duty misconduct. The UK's emphasis on comprehensive off-duty

policies underscores the importance of proactive management, promoting transparency, and reducing the need for dismissals related to off-duty misconduct. Additionally, the UK's reliance on well-defined policies serves as a crucial guide for navigating the blurred lines between personal and professional life, preventing inappropriate behaviour and dismissals. Integrating these lessons can contribute to a fair, transparent, and balanced regulatory framework for off-duty conduct in South Africa.

8.5 Conclusions in Respect of Question Four

- What legislative amendments are required to ensure fairness to both the employer and employee in dismissals for off-duty misconduct, considering the conflicting rights that require protection?

First and foremost, legislative revisions should concentrate on creating a balance between opposing rights that deserve protection to provide justice to both the employer and the employee. As alluded to above, a Code is proposed to ensure fair dismissals in off-duty misconduct cases.

The Proposed Code will seek to balance employer and employee rights by providing guidelines on the following aspects:

- Defining concepts pertaining to off-duty misconduct.
- Defining the nexus.
- Explaining the concept of the breakdown of trust and intolerable off-duty conduct.
- Providing examples of intolerable off-duty conduct.
- Mandating employers and adjudicating authorities to consider mitigating factors. These include an employee's clean record and past job performance, and any indication of repentance or rehabilitation, among other factors, should be considered.

The Proposed Code in South Africa should compel employers to establish clear off-duty conduct policies, explicitly defining undesirable behaviours and outlining

consequences for violations. Emphasising proactive management and prevention, these policies can contribute to a transparent and harmonious work environment, potentially reducing the need for dismissals related to off-duty misconduct. Comprehensive off-duty misconduct policies, especially in social media, can prevent conflicts between employee privacy and employer security interests. Adopting these policies benefits both employees and employers by providing clear guidelines and preventing potential disputes.

This Code should also enhance employee privacy protections, particularly in social media, prohibiting invasive surveillance and unjust penalties for private actions unrelated to job performance. The Code should address conflicting rights, balancing freedom of expression with an employer's right to protect reputation and financial interests.

The proposed Code will be of importance for adjudicators, as it will offer them clear criteria for assessing the fairness of such dismissals. It will emphasise the importance of considering mitigating factors in both CCMA arbitrations and LC reviews. This balanced approach ensures proportionate and fair responses to off-duty misconduct, maintaining the integrity of the adjudication process.

The bottom line is that legislation, the courts and the CCMA should strike a balance between competing employer and employee rights.[1150] The conclusion of such a balancing act is, and always will be, very important. The dismissal for off-duty misconduct should be approached with careful consideration of South Africa's prevailing socio-economic conditions, characterised by a high unemployment rate. It is evident that dismissing employees for off-duty misconduct carries inherent risks, which are likely to persist until the South African legislature takes proactive steps to provide clearer legal guidance on this issue. Therefore, the establishment of a comprehensive Code specifically regulating dismissals for off-duty misconduct is strongly recommended to mitigate uncertainties and ensure a fair and equitable approach in addressing such cases within the country's unique socio-economic context.

1150 Papandrea (2010) *BYU L.Rev.* 2119.

Against this background, the Code below is proposed.

8.6 Recommendations: The Proposed Code of Good Practice: Dismissal for Off-duty Misconduct

1 Introduction

1.1 This Code guides decision-makers in evaluating the fairness of dismissals related to off-duty misconduct. The aim is to ensure that such dismissals align with the principles of fairness enshrined in the LRA, considering the interests of both employers and employees.

1.2 Disciplinary policies, procedures and collective agreements should align with this Code. However, it is acknowledged that each case is unique, and deviations from these guidelines may be justified under appropriate circumstances.

1.3 These guidelines acknowledge the prevalent use of social media and the recent legalisation of private cannabis use by adults.

1.4 The Code address crucial components of dismissals for off-duty misconduct, covering aspects such as defining off-duty misconduct, providing examples of off-duty misconduct, exploring protected off-duty conduct, and examining the fairness of off-duty misconduct dismissals. It also emphasises factors to be considered by tribunals and the Labour Court in evaluating the fairness of off-duty misconduct dismissals, serving as a comprehensive guide for both employers and employees in navigating this complex area.

2 Defining off-duty misconduct

Off-duty misconduct involves unfavourable behaviour outside an employee's scheduled work hours and away from the employer's premises for which disciplinary action can be instituted.

The key factors in the definition and its distinction from on-duty misconduct are as follows:

2.1 Context, Timing and location

a) Off-duty misconduct occurs outside scheduled work hours, while on-the-job misconduct happens during designated working times**.** In the context of overtime work, if after-hours meetings or events are essential to an individual's job responsibilities or are mandated by the employer, any misconduct during these instances could be regarded as on-the-job conduct, even though they occur outside the standard working hours. Furthermore, misconduct occurring during after-hours meetings or events could be considered on-the-job if these activities are directly related to the individual's employment or if attendance is mandatory. However, clear policies and guidelines are essential to define the boundaries between work-related and personal activities.

b) For senior managers required to work beyond the standard 8 to 5 timeframe, it is crucial to recognise that any misconduct during these extended hours may still be categorised as on-the-job conduct. This classification arises from the nature of their managerial responsibilities, which necessitate their continued engagement in work-related activities outside regular hours. Whether their conduct is considered on-duty or off-duty depends on whether they are furthering the interests of the company during these extended working hours. This distinction is vital for clarifying the professional boundaries between their responsibilities and personal activities.

2.2 Equipment

Equipment may not always be a factor. It would usually be relevant in misconduct related to social media postings. On-the-job misconduct involves inappropriate actions or policy violations related to company-owned devices and social media accounts during scheduled working hours. This may encompass unauthorised access to confidential information, misuse of equipment, or violating company social media

guidelines. Off-duty misconduct, in contrast, pertains to similar violations but occurs outside scheduled work hours, often on personal devices.

2.3 Relevance to Employment

Factors linking off-duty conduct to one's employment encompass actions that damage the employer's reputation and have a negative impact on the employment relationship. Examples of such conduct include but are not limited to; off-duty assault of a co-worker; off-duty dishonesty that erodes the trust relationship; engaging in a criminal offence, even if it occurs outside of work hours; off-duty sexual harassment of a work colleague; engaging in social media posts targeting the employer; off-duty social media posts that lead to grave consequences such as customers boycotting or 'cancelling' the employer's business; and off-duty use of cannabis that impairs an employee's performance at work.

3 Protected Off-Duty Conduct

3.1 Notwithstanding that off-duty conduct can constitute misconduct as set out in paragraph 2 above, the following off duty conduct will not be regarded as misconduct.

(a) Political activities that are not prohibited by any law are protected. These typically involve a range of lawful and democratic expressions of political engagement. This may include participating in election campaigns, attending political rallies or events, joining peaceful protests, expressing political opinions on social media, and engaging in discussions or debates about political matters. As long as these activities comply with relevant laws and regulations, individuals are generally free to exercise their democratic rights and contribute to the political process without legal restrictions.

Utilisation of legally permissible consumables, such as alcohol and cannabis, that do not result in impairment during work hours nor affect work performance is protected. Employees who test positive for cannabis, particularly when they exhibit no signs of impairment and do not operate hazardous equipment, should not be considered as having committed

misconduct. Employers may measure impairment through observable signs of impaired behaviour such as slowed reaction times, altered speech patterns, bloodshot eyes, poor concentration, and impaired motor skills. Additionally, performance testing, standardised field sobriety tests and blood samples, can be used for determining impairment. Blanket zero-tolerance policies may not account for individual circumstances and could lead to unfair consequences.

(b) Participating in unconventional hobbies, such as creating controversial art or engaging in activities disapproved by the employer, may face scrutiny in certain environments due to diverse cultural or workplace norms is protected. This behaviour should typically not be classified as misconduct, provided that it does not contravene legal or contractual obligations and does not adversely affect the employment relationship

(c) Postings on social media platforms that neither violate any laws nor is prejudicial to the employer is protected. This involves individuals expressing themselves online in a manner that is within legal boundaries and does not adversely impact the employer's interests. Such activities encompass a wide range of personal opinions, thoughts, and content shared on social media platforms, reflecting an individual's freedom to engage in online expression without facing legal consequences. From an employment perspective, it underscores the importance of respecting employees' rights to express themselves within lawful and non-detrimental boundaries on social media.

4. Fairness of Dismissal for Off-Duty Misconduct

4.1 Policy Development

As a starting point, employers must have policies in place that govern off-duty misconduct. These policies, outlining prohibited activities and associated consequences, foster transparency and contribute to a positive workplace culture. Regular communication and training on these policies enhance employee awareness, promoting a harmonious work environment. These policies should clearly outline

expectations for employee behaviour outside of working hours, covering aspects such as a code of conduct, social media use, conflicts of interest, protection of the employer's reputation, legal compliance, use of company resources, reporting mechanisms, potential disciplinary actions, and the commitment to consistent application. The policies should be comprehensive, regularly reviewed, and include educational programs to ensure employee understanding.

4.2 Employer Responses to Off-Duty Misconduct

In response to off-duty misconduct by employees, employers may implement a range of disciplinary measures to address the violation of company policies and standards of conduct. Common disciplinary actions include verbal or written warnings, suspension, and, in severe cases, dismissal. Employers may also provide additional training or counselling to help employees understand the impact of their off-duty behaviour on the workplace and encourage compliance with established guidelines. The nature and severity of the misconduct often dictate the appropriate disciplinary response, with employers striving to strike a balance between corrective action and fair treatment of employees.

4.3 Employer's Decision to Dismiss for Off-Duty Misconduct

a) Procedural requirements

When deciding to dismiss an employee for off-duty misconduct, employers should follow a structured and fair process. This process includes the following:

i) Establishing clear policies regarding off-duty conduct. These policies guide employees on acceptable behaviour, ensuring a consistent and transparent standard against which their actions can be measured.

ii) Conducting a thorough investigation, which involves gathering all relevant facts. This process ensures that the decision to dismiss is based on accurate and complete information, preventing misunderstandings or unfair judgments.

iii) Following due process, by adhering to contractual and legal obligations. This includes providing the employee with an opportunity to respond to allegations, upholding procedural fairness, and ensuring that the dismissal aligns with contractual terms and legal requirements.

iv) Seeking legal advice during the drafting of policies is essential to ensure compliance with labour laws. Legal guidance not only helps mitigate the risk of legal challenges but also ensures that the organisation operates within the boundaries of the law.

v) Documenting decisions and providing a clear rationale for the chosen course of action. A well-documented decision-making process, including reasons for dismissal, strengthens the employer's position and serves as a reference in case of legal inquiries.

vi) Communicating the decision to dismiss clearly and respectfully. Providing the employee with a clear understanding of the reasons behind the decision fosters transparency, maintains dignity, and minimises potential misunderstandings.

b) Substantive fairness

i) Assessing whether the employee actually committed off-duty misconduct by conducting a thorough and objective examination of the alleged actions and considering relevant evidence and established company policies and company values.

ii) Assessing the severity and impact of the misconduct on the workplace. Understanding the extent to which the behaviour has disrupted the work environment or harmed the organisation’s interests provides valuable context for the decision to dismiss.

iii) Considering the relevance of the behaviour to the employee's job responsibilities. Misconduct that directly interferes with or undermines the core functions of the role may warrant a more severe response, including dismissal.

iv) Maintaining consistency in disciplinary actions across all employees is paramount. Ensuring that similar instances of misconduct are treated with uniformity reinforces fairness and prevents perceptions of favouritism or bias.

v) Exploring alternatives to dismissal demonstrates a commitment to fair and proportionate responses to misconduct. While zero-tolerance policies may be in place, employers should consider alternative sanctions and mitigating factors before resorting to dismissal.

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4.4 Factors to be Considered by the CCMA and other Tribunals in Evaluating Fairness of Off-Duty Misconduct Dismissal.

a) In evaluating the fairness of an employer's decision to dismiss an employee for off-duty misconduct, the arbitrator plays a crucial role in examining whether the employee's actions breached a relevant workplace rule or standard. This assessment involves scrutinising the connection between the off-duty conduct and established professional expectations. Additionally, in cases where there is no specific policy addressing the misconduct, the arbitrator should consider whether the employer communicated clear expectations and if the dismissal aligns with general workplace norms.

b) It is essential to assess the validity and reasonableness of the rule or standard that was contravened. This involves a critical examination of whether the rule or standard is clear, well-defined, and directly related to the workplace's legitimate interests. The arbitrator should consider whether the employer communicated the expectations effectively and if the rule in question serves a legitimate business purpose. Validity and reasonableness are key factors in determining the appropriateness of the employer's response, ensuring that the

disciplinary action aligns with justifiable workplace requirements and is not arbitrary or disproportionate.

c) It is crucial to determine whether the employee was aware of, or could reasonably be expected to have been aware of, the relevant workplace rule or standard. This assessment involves scrutinising the communication and dissemination of policies to ensure clarity and accessibility. The arbitrator should consider the effectiveness of the employer's efforts in conveying expectations regarding off-duty conduct, emphasising the importance of employees being informed and accountable for adhering to workplace standards, even in their off-duty activities.

d) The arbitrator should examine whether the employer consistently applied the rule or standard in similar cases.

e) The arbitrator must evaluate whether mitigating factors were taken into consideration. This involves a thorough examination of circumstances that may lessen the severity of the employee's actions or provide context to their behaviour. Mitigating factors could include personal challenges, a lack of prior misconduct, or external influences contributing to the off-duty behaviour. The arbitrator should assess whether the employer considered these factors in their decision-making process and whether they appropriately weighed the mitigating elements against the severity of the misconduct. This evaluation ensures a comprehensive and fair understanding of the employee's situation, preventing unjust or disproportionate disciplinary actions.

f) In evaluating the appropriateness of dismissal for off-duty misconduct, the focus is on examining the proportionality between the employee's actions and the disciplinary response. The arbitrator must assess whether the severity of the misconduct justifies dismissal, considering alternative sanctions that may align more proportionately with the violation. This evaluation aims to ensure the employer's response is fair, reasonable, and commensurate with the gravity of the offense, preventing disproportionate consequences. Additionally, encouraging a progressive discipline approach is recommended, incorporating

stages like verbal warnings, written warnings, suspension, final written warnings, and dismissal. This structured approach aligns disciplinary actions with the severity of misconduct, offering clear expectations and opportunities for improvement, while reserving termination for more serious misconduct.

4.5 Factors to be considered by the Labour Court in Review Applications

All reviews must comply with the *Sidumo* review test. The labour court's responsibility is to determine if the arbitrator's decision is one that a reasonable decision-maker, with the evidence available, could not have reasonably reached.

When determining whether the arbitrator reached a reasonable decision in determining the fairness of a dismissal, the labour court must, depending on the reasons tendered for the review;

a) assess whether there is a strong nexus between the employee's conduct and the employer's business interests, thereby establishing the employee's guilt in off-duty misconduct. This involves analysing the direct impact of the employee's conduct on the employment relationship, workplace, or the employer's business. The evaluation ensures that the CCMA decision aligns with principles of fairness and legal validity, substantiating any disciplinary actions taken.

b) ensure that the arbitration took various factors into consideration in establishing the nexus. Factors such as the impact on the workplace, violation of policies, professional reputation, position and responsibilities, public perception, contractual agreements, direct employer connection, and the nature of the misconduct contribute to establishing this connection. Each case requires a detailed analysis to show a clear and reasonable link between the off-duty conduct and the employer's legitimate concerns.

c) consider that establishing a nexus in off-duty misconduct cases without a company policy requires demonstrating a clear connection between the employee's off-duty behaviour and the employer's legitimate interests or the employment relationship. This can be achieved by emphasising the direct

impact on the employment relationship, inconsistency with job responsibilities, adverse effects on professional reputation and workplace dynamics, potential harm to public perception and company image, alignment with organisational values, expectations of professional conduct, impact on employee morale, and considering the employee's position of leadership or influence. The absence of a specific policy necessitates a comprehensive narrative that highlights the tangible and negative consequences of the off-duty misconduct on the organisation.

d) consider whether dismissal was a fair sanction. When evaluating dismissal as a fair sanction, it is crucial to consider the breakdown of the employment relationship. This involves examining the overall dynamics, including the severity of the misconduct and its impact on the employment relationship. The court must evaluate whether the employer took reasonable steps to address the breakdown of the employment relationship, reinforcing the importance of fairness, proportionality, and preserving a functional employment relationship when deciding on termination.

e) bear in mind that proving the breakdown of trust in off-duty misconduct involves evaluating the consistency with organisational values, assessing the impact on workplace relationships and employee responsibilities, considering reputational damage, examining communication transparency, gauging the effect on employee morale and company culture, and reviewing past conduct and leadership influence. Employee feedback and perceptions also contribute to understanding the level of the breakdown. The severity and nature of the misconduct, along with its broader impact on the workplace, are crucial factors in this holistic assessment.

f) consider whether the CCMA decision took into account any mitigating or contextual factors surrounding the off-duty misconduct. This includes an assessment of whether the circumstances surrounding the employee's actions were thoroughly examined, ensuring a fair and comprehensive understanding of the situation.

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