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ARE NEGATIVE OR DEROGATIVE POSTINGS ON SOCIAL MEDIA A VALID GROUND FOR DISMISSAL?

by

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SUMMARY

Social media has influenced the world in many different ways and the sphere of employment law is no different. We see a dramatic increase in cases regarding the dismissal of employees for posts on social media and this results in the important question: Is a negative or derogative post on social media a valid reason for a dismissal?

Even though we do not have specific legislation dealing with social media in the workplace, the Labour Relations Act 66 of 1995 provides us with clarity as to the reasons why an employee may be dismissed. The Act further states the substantive and procedural aspects of each type of dismissal one must comply with before a dismissal can be deemed fair.

It is important for an employer to have a code of conduct, otherwise known as a disciplinary code. That clearly stipulates the rules within the employment relationship. Such a code or policy will also provide the suggested consequences for the breach of said rules. If such a breach resulting in misconduct is classified as serious, dismissal may be an appropriate sanction.

This dissertation seeks to determine whether a negative or derogative post on social media can be regarded as a form of misconduct and a valid ground for a dismissal in terms of the South African labour law sphere. Section 188 of the Labour Relations Act provides us with the three grounds for a fair dismissal, these being an employee's conduct or capacity, or the operational requirements of the employer. To reach such a conclusion, various legislation will be examined and the South African position will be compared to the legal position in the United Kingdom.

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CHAPTER 1: INTRODUCTION

1.1. CONTEXTUAL BACKGROUND

"Social media has not changed any aspect of employment law in a fundamental way. What it has done, however, is highlight some legal aspects of the employment contract in a unique way."[1]

Employees have always had the common law duty of good faith towards their employer. This duty includes loyalty and carrying the employer's best interest at heart.[2] It means that an employee is in a trust relationship with the employer and should not partake in any actions that can harm said trust relationship.[3]

"People tend to have the misconception that if they post something privately, it cannot be seen. But anything you post online can make its way into the public domain and people need to be mindful of this."[4]

Employees are or should be reasonably aware that they cannot say whatever they want without any accountability for said statement on their part. One's conduct in the employment sphere should always be above reproach, otherwise one could face disciplinary action. Employees apply this knowledge in their day-to-day conduct but somehow this knowledge and awareness disappears when employees use social media. People in general believe that what they write on the internet or social media doesn't matter and/or cannot be traced back to them so they will never be held accountable for what they write.

Employees are not exempted from this misconception. The fact that an offence occurred through the usage of social media will not affect the fact that an offence

1 Potgieter *Social Media and Employment Law* (2014) 63.

2 Mischke 'Acting in Good Faith : Courts Focus on Employee's fiduciary Duty to the Employer' (2004) CLL 14(1); *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2010) 2 BLLR 128 (SCA).

3 Van Niekerk, A & Smit, N *Law@Work* (2015) LexisNexis 3rd ed p 89; *Rand Water v Stoop* (2013) 34 *ILJ* 576 (LAC).

4 Burrows 'Social media changes the disciplinary landscape' *Mail & Guardian* 10 November 2013 http://mg.co.za/article/2013-11-01-00-social-media-changes-the-disciplinary-landscape visited on 28 April 2016.

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was committed and relevant disciplinary action can still be taken against the guilty employee.[5]

Even in cases where an employee does not mention his/her employer directly but the identity of the employer can reasonable be deduced, the employee can be charged with a disciplinary hearing and dismissed, depending on the facts of each specific case.

In the case of *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith*[6] (2014) the commissioner found that the dismissal of the applicant was substantively and procedurally fair. The applicant was dismissed after posting racial comments on social media. The applicant did not mention her employer in the post, but the commissioner held that sufficient proof existed that the employer could suffer potential harm. The commissioner held the following:

> The constitutional right to freedom of expression is not absolute; it is limited by section 36 of the Constitution. It is important that when a person exercises the said right she does not encroach on other person's rights. The respondent is operating a business with the purpose to make profit. It is the very same profit that pays the salaries of the employees including that of the applicant when she was still employed by the respondent. Therefore, making unjustifiable and irresponsible remarks on social media had in my view the potential for harm to the business of the respondent as [counsel] correctly argued.

As a result of this potential harm caused by the racial comments on social media, the commissioner held that the posts were sufficient proof of misconduct and the dismissal was held to be substantively and procedurally fair.

In the cases of *Sedick and another v Krisray (Pty) Ltd*.[7] and *Fredericks v Jo Barkett Fashion*[8] this position was confirmed. In both cases the employees placed derogatory Facebook posts and were subsequently dismissed. The employees challenged the fairness of their dismissals and argued that the employer breached their right to privacy by accessing their social media

[5] Burrows 'Social media changes the disciplinary landscape' *Mail & Guardian* 10 November 2013 http://mg.co.za/article/2013-11-01-00-social-media-changes-the-disciplinary-landscape visited on 28 April 2016.

[6] *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* (2013) 7 BALR 689 (MIBC).

[7] *Sedick and Another v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA).

[8] *Fredericks v Jo Barkett Fashion* (2011) JOL 27923 (CCMA).

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accounts. In both cases the Commission of Conciliation, Mediation and Arbitration[9] held that the dismissals of the employees were fair. The CCMA followed the position that the employee's right to privacy cannot be infringed upon if they themselves posted on a site where anybody could see the relevant posts. The acts of posting on social media were therefore not protected and misconduct was proven on the employees' side. The CCMA held that said misconduct was a valid ground for the subsequent dismissals of the employees.

Social media is a new concept and as a result legislation in South Africa has not yet been developed to regulate it. In the South African labour sphere there has to date been no legislation regulating specifically whether negative or derogative posts on social media are valid grounds for dismissal. Development of the law in the form of legislation is a lengthy, research intensive process. Judgemade law is a quicker, less intensive process. For the time being the responsibility therefore falls on the courts to develop our law in terms of social media and labour law. Employers need to then go further and incorporate this judgemade law into their own set of rules through their codes of conduct and disciplinary policies pertaining to social media and the workplace. This will enable employers to enforce responsible usage of social media and ensure they take fair disciplinary action against any employee who breaches said rules. It will enable employers to comply with the onus placed on them in terms of section 192(2) of the Labour Relations Act (LRA) which determines that after dismissal has been established, the onus lies with the employer to prove that said dismissal is fair.

Uncertainty as to what the company's position is in terms of social media and labour law, employees as well as the employers are exposed to potentially negative consequences, which can be either a costly legal battle on the employer's side or dismissal on the employee's side.

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[9] Hereinafter referred to as the CCMA.

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1.2. RESEARCH QUESTION

In order for an employee to be fairly dismissed, Schedule 8 of the Labour Relations Act[10] needs to be complied with.

In order to prove or disprove this statement, the following questions will be asked and answered:

1.2.1. What are an employee's duties towards an employer as a result of the employment relationship?

1.2.2. What are an employee's rights in terms of social media and the usage thereof?

1.2.3. What is the effect of section 23(1) of the Constitution[11] on both the employee's and the employer's position in regard to social media and the usage thereof?

1.2.4. Can an employer infringe on an employee's right to privacy? How is the right to privacy balanced against the employer's right to fair labour practices?

1.2.5. In terms of the LRA, what legal remedies do an employer have if an employee breaches his or her duties?

1.2.6. Can an employer use negative or derogative posts on social media as an example of serious misconduct and thus as a valid ground for a substantively fair dismissal if said communication impacts derogatively and/or negatively on an employer?

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[10] Labour Relations Act 66 of 1995 hereinafter referred to as the LRA.

[11] The Constitution of the Republic of South Africa of 1996 hereinafter referred to as The Constitution.

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1.2.7. What are the requirements for a substantively and procedurally fair dismissal in a case of negative/derogative posts on social media?

1.3. IMPORTANCE OF THE STUDY

In this current day and age, people spend large amounts of their time on social media. It can be used as a platform for heated debates and wild statements.

Both employers and employees have a fundamental right to fair labour practices[12] as well as a fundamental right to dignity.[13] Both employers and employees need to be able to protect themselves from potential harmful consequences of an individual abusing social media and it impacting negatively on them.

The two opposing parties have a conflict of interests and one needs to balance this carefully. On the one hand employees need to be able to protect themselves against unlawful infringement on their constitutional rights to dignity, privacy and freedom of expression. Employees also need to be protected against the potential harmful effect on their reputation if derogative statements start to become accepted as fact instead of an individual's opinion.

Employers on the other hand have a constitutional right to fair labour practices which includes the right to proprietary interests.

In this study the author has chosen to compare the South African labour legal position to that of the legal position in the United Kingdom (UK) as a result of the several similarities that occur between the two legal systems. These similarities include, but are not limited to, procedure as well as substantive reasoning for complying with the requirements of a fair dismissal.

[12] Section 23 of the Constitution.
[13] Section 10 of the Consitution.

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These similarities will be discussed comprehensively in Chapter 4.[14]

1.4. RESEARCH METHODOLOGY

A critical analysis of applicable statutes, case law, books and articles was undertaken. The basis of this investigation includes a critical analysis and a comparative study based on different legal sources.

[14] Chapter 4 p 48.

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CHAPTER 2: THE SOUTH AFRICAN LEGISLATIVE POSITION REGULATING SOCIAL MEDIA RELATED RIGHTS

2.1. INTRODUCTION

Social media is a relatively new concept that has grown exponentially in the last couple of years and the impact of social media can be felt in many different fields. The law and in particular labour law is no exception. Even though there is no specific law regulating the use of social media in the workplace in South Africa, the LRA is still applicable. Section 188 and Schedule 8 of the LRA would still be applicable to determine whether a dismissal for negative or derogative posts on social media would constitute a valid reason for a dismissal. In this chapter the author discusses different sources of labour law in South Africa and its applicability on the use of social media in the workplace.

The possible impact of negative or derogative posts on social media on the employer and employees are discussed. An in-depth discussion of the employee's duties towards an employer and the remedies available to the employer if the employee breaches said duties are also included.

2.2. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

In terms of social media in the workplace we have the employee's right to privacy, human dignity, freedom of speech and fair labour practices up against the employer's right to human dignity and fair labour practices.[15]

South Africa's Constitution is seen by many as one of the best and most progressive constitutions in the world.[16] It is this Bill of Rights that enshrines the rights that each and every citizen or person within the boundaries of South Africa is entitled to.

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15 Rights found in Chapter 2 of the Constitution otherwise known as the Bill of Rights.

16 http://www.southafrica.info/about/democracy/constitution.htm#.V_OeC6KzBsk visited on 4 October 2016.

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Labour legislation gives effect to our constitutional rights. Section 1 of the LRA reads as follows:

> **1. Purpose of this Act**
>
> The purpose of this Act[1] is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are -
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution. [17]

The right to join a trade union and partake in union programmes is given effect to in section 4 and chapter 3 of the LRA. Chapter 4 of the LRA is the realisation of an employee's constitutional right in terms of section 23(2)(c) of the Constitution.

2.2.1. THE RIGHT TO PRIVACY

> **14.** Privacy- 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.[18]

The right to privacy was part of the common law long before it became entrenched in the Constitution.[19] In terms of the common law, the breach of someone's right to privacy would constitute an offence. This will occur when there is an unlawful intrusion on someone's privacy or an unlawful disclosure of private facts about a person.[20]

[17] The legislation refers to section 27 of the Constitution of the Republic of South Africa of 1993 which correlates with section 23 of the Constitution.

[18] Section 14 of The Constitution.

[19] Burchell, J. 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' *Electronic Journal of Comparative Law* (2009) Vol 13.1.

[20] Burchell, J. 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' *Electronic Journal of Comparative Law* (2009) Vol 13.1.

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Some forms of breach of this common law right was mentioned by Ackermann in his judgment in the *Bernstein v Bester NO*[21] case. This case is to date still the most comprehensive interpretation of the right to privacy.[22] The right to privacy and how one can limit said right is important for this dissertation as the right to privacy is one of the fundamental rights of the employee which needs to be balanced against the rights of the employer. The way and manner one can thus limit the right to privacy is important. Briefly the facts of this case were as follows:

The applicants challenged certain sections in the Companies Act,[23] specifically the constitutionality of these two sections. Prior to this case, the courts found that these specific sections were unconstitutional only to the extent that they forced parties to give self-incriminating evidence.[24] In the case of *Bernstein and Bester* the applicant contested the section on a broader spectrum and wanted the whole section to be declared invalid.

In a unanimous decision the Constitutional Court denied each of these claims and found that the section was indeed constitutional.

The court held that "it seems to be a sensible approach to say that the scope of a person's privacy extends *a fortioti* only to those aspects in regard to which a legitimate expectation of privacy can be harboured."[25]

This reasonable expectation to privacy has two aspects to it, namely a subjective expectation of privacy and objective reasonableness.[26]

It is especially the first part of that legitimate expectation of privacy, namely the subjective expectation that plays a big part in social media issues within the workplace. The basic argument is that one cannot have a subjective expectation

[21] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 68.
[22] Currie & De Waal *The Bill of Rights* 5th ed 317.
[23] The Companies Act 66 of 1973.
[24] *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984.
[25] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 75.
[26] *Bernstein v Bester NO* 1996 (2) SA 751 (CC) par 75.

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to privacy if one has explicitly or implicitly consented to waiver one's right to privacy.[27]

This is exactly the argument employers use when using an employee's post on social media in a charge of misconduct. The employer argues that an employee waived their right to privacy the moment they chose to post it on social media, which is a public forum and could potentially be seen by anyone. This argument is strengthened if an employee's privacy settings are not strictly applied and he or she thus had the option to restrict who saw the posts but chose not to do so.

The argument is also supported by the second part of the legitimate expectation of privacy, namely objective reasonableness. Employers argue that it would not be objectively reasonable to be able to claim breach of privacy after one posted something on social media, which by definition is not private but indeed a public forum.

In the *Bernstein* case, Ackermann went further and provided a practical application of the legitimate expectation test. This was the "continuum of privacy interest".[28]

> The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.[29]

Ackermann therefore clearly stated that the court feels that in one's inner sanctum one almost has an absolute right to privacy. However, experience has

---

[27] Currie & De Waal *The Bill Of Rights* 5th ed 318.

[28] The phrase was coined by Sachs J in *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) par 27.

[29] *Bernstein v Bester NO 1996 (2) SA 751 (CC)* par 67.

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shown that the further a person moves outside that inner sanctum into the world of work and social interaction, the lesser or "weaker" one's right to privacy becomes as an opposing right to the right to privacy of other parties.

The *Bernstein* "Continuum" proved to be very useful as a source of reference to the Constitutional Court concerning matters related to the right to privacy.

It is clear from case law on the right of privacy that under the correct circumstances and after taking the necessary steps an employer can infringe on an employee's right to privacy.[30] The infringement of one's right to privacy is regulated in terms of section 36 of the Constitution and is discussed in Chapter 2.[31]

2.2.2. THE RIGHT TO DIGNITY

> **10.** Human dignity - Everyone has inherent dignity and the right to have their dignity respected and protected.[32]

Human dignity forms one of the cornerstones in the Constitution[33] and this was confirmed by Chief Justice Chaskalson when he said:

> The affirmation of (inherent) human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War.[34]

Even though we have a fundamental right to human dignity, it is a difficult right to define in the practical sense. The courts have stated that despite difficulty in defining the concept of dignity, it is clear that dignity requires us to acknowledge the value and worth of all individuals as members of society.[35]

---

30 *Moonsamy v The Mailhouse* 1999 20 ILJ 464 (CCMA).
31 Chapter 2 p 28.
32 Section 10 of The Constitution.
33 Section 1 of The Constitution.
34 Chaskalson, A 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196.
35 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 29.

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The right to dignity will not be the primary right to take into account but it will play a role in terms of the employment relationship. Both the employer and the employee are entitled to human dignity.

On the side of the employer this right will manifest in the right to a good name and the expectation of respect between an employer and an employee. By posting derogative or negative statements on social media, the good name of the employer can be negatively impacted and by the mere nature of social media the employer might never be able to state his case or to rectify the situation by providing perspective on the matter.[36]

The employee is subsequently entitled to be handled with dignity and respect during the whole investigation into the matter of the posts on social media.

It is thus clear that both the employer and the employee are entitled to dignity. If one keeps in mind that human dignity is one of the values the Constitution was founded on, it emphasises the importance of this right.[37]

2.2.3. THE RIGHT TO FREEDOM OF EXPRESSION

> **16.** Freedom of expression-
> (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.
> (2) The right in subsection (1) does not extend to -
> (a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[38]

Section 16 of the Constitution regulates the freedom of expression. What is interesting in this section, is that it already contains a limitation in terms of section 16(2). This subsection states that this right does not extend to propaganda for

[36] Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80; This is also confirmed in the recent cases discussed in Chapter 3, 44.
[37] Section 1 of the Constitution.
[38] Section 16 of The Constitution.

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war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion.

Section 16(1) of the Constitution provides freedom of expression and not just freedom of speech. The Constitutional Court has stated that the South African approach to this right expressly protects the freedom of expression in a manner which does not warrant a narrow reading.[39]

In terms of South African law expression would therefore include acts of speech, writing, painting, dancing and publication of photographs. It would even include symbolic acts like the burning of a flag, physical gestures or wearing certain items.[40]

A post on social media, the retweet on twitter and posting of photos would thus all fall within the scope of exercising the right to freedom of expression, allowing an employee the freedom to do so, unless that right is limited by section 16(2) or section 36 of the Constitution. Section 36 of the Constitution is discussed later in this chapter.[41]

2.2.4. THE RIGHT TO FAIR LABOUR PRACTICES

Labour relations - (l) Everyone has the right to fair labour practices.
(2) Every worker has the right -
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.
(3) Every employer has the right -
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation have the right -
(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.

[39] *De Reuck v Director of Public Prosecution (Witwatersrand Local Division)* 2004 (1) SA 406 (CC) par 48.
[40] G Marcus & D Spitz "Expression" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996; 3 rev 1999) 20.6(a).
[41] Chapter 2 28.

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> (5) Every trade union, employers' organisation and employer have the right to engage in
> collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).
> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).[42]

Most important for this study in the context of social media posts and its negative or derogatory effect on the employment relationship, is the constitutional right to fair labour practices, which means that both the employer and the employee are equally entitled to this right.

The wording of section 23 of the Constitution has resulted in debate on the specific usage of the word 'everyone'. One approach to this specific wording was to argue that the usage of the word 'everyone' could cause this right to be extended beyond the employment relationship.

Cheadle argues that the word 'everyone' is qualified by the usage of the phrase 'labour practices' and that this should be where the focus lies and not merely on the usage of the word 'everyone'.

> Although the right to fair labour practices in subsection (1) appears to be afforded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to 'labour practices'. The focus of the enquiry into ambit should not be on the use of 'everyone' but on the reference to 'labour practices'. Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole.[43]

It is therefore clear that section 23 of the Constitution is applicable to employees and employers as well as trade unions and employers' organisations which represent the respective parties.

---

[42] Section 23 of The Constitution.
[43] Cheadle 'Labour Relations' in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2006).

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This was confirmed in the case of *NEHAWU v University of Cape Town & Others*.[44] In this case Ngcobo J stated the following:

> Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations as the case may be, the Constitution says so explicitly. If the rights in s 23(1) were to be guaranteed to workers only, the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes all employers are juristic persons. That is not so. In addition, section 23(1) must apply to either all employers or none. It should make no difference whether they are natural or juristic persons.[45]

As a result of the right to fair labour practices that is applicable to both employers and employees, a conflict of interest can occur between the said parties. The employer's interest lies in the growth, expansion and profitability of his or her business. From this flows an employer's interest in the good reputation of the company.[46] The employee's interest lies in job security, being treated fairly in the workplace and earning an income.

These interests need to be in constant balance. A negative or derogative post on social media and the subsequent consequences of said post can cause potential harm to both the employee and the employer and cause said interest to be in an imbalance.

The fact that both employees and employers enjoy the right to fair labour practices raises several other questions, including but not limited to the question as to when this right is enforceable. Is one only entitled to the right during working hours or does the right extend beyond working hours?

This issue of off-duty misconduct was recently addressed in the case of *City of Cape Town v South African Local Government Bargaining Council (SALGBC) and others*.[47]

[44] *Nehawu v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC).
[45] *Nehawu v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC).
[46] Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
[47] *City of Cape Town v South African Local Government Bargining Council (SALGBC) and Others* (2011) 5 BLLR 504 (LC).

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In this case the employee obtained a fake driver's license in Namibia and upon returning to South Africa she presented said license to be converted into a South African license.

The employer found out about the fraud after an investigation by an independent body and subsequently dismissed the employee after a disciplinary enquiry. The employer only become aware of the fraud nine years after the employee committed it, but acted within a reasonable time after becoming aware of said fraud. The employee felt that the dismissal was unfair and referred the case to the CCMA.

After the arbitration the commissioner felt that there was a sufficient link between the employee's misconduct and the employer's business interests in that she held a senior management position that required the employer to place a high degree of trust in her. The commissioner however did not agree that dismissal was the appropriate sanction and felt that it was too harsh. The commissioner ruled that the employee was to be re-employed.

The employer did not agree with this judgment and referred the case to the Labour Court for review. The Labour Court based its judgment on the following five aspects:

1. The misconduct the employee was accused with is a criminal offence.
2. The usage of a fraudulent license amounted to gross dishonesty and even corruption.
3. The misconduct had a severe negative impact on the trust relationship between the employee and the employer.
4. The employee continued her dishonest behaviour and acted dishonestly during the arbitration.
5. The employee held a senior management position at the employer.

The Labour Court found in favour of the employer and set aside the arbitration award.

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From this case it is clear that disciplinary steps may be taken against an employee for conduct that took place outside working hours as long as there is a link between the misconduct and the employer. The steps taken by an employer must always be subject to the provisions in Schedule 8 of the LRA to be deemed fair. Subsequently such a link would exist if the conduct of the employee has a negative effect on the employer's business interests, or on the trust relationship between the employee and the employer.[48]

The issue of off-duty misconduct has not been tested in relation to posts on social media, so in the absence thereof one can use case law as discussed and derive therefrom that an employer can take steps against an employee for negative or derogative posts on social media even if the posts were placed outside working hours.

The control of an employee's conduct during working hours as well as off-duty misconduct comes from the employer's common law right of supervision and control.

In *the SA Broadcasting Corporation v Mckenzie*[49] the court held the following:

> The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done.[50]

This right of an employer to supervise and control can mean that an employer then limits an employee's right to privacy, which was discussed earlier in chapter 2.[51] This is an example of how employees' and employers' interest can be in conflict with each other and would thus require to be limited to ensure that a balance is obtained.

48 Van Niekerk, A & Smit, N *Law@Work* (2015) LexisNexis 3rd ed 279.
49 *SA Broadcasting Coporation v Mckenzie* (1999) 20 *ILJ* 585 (LAC).
50 *SA Broadcasting Coporation v Mckenzie* (1999) 20 *ILJ* 585 (LAC) par 23.
51 Chapter 2 p 13.

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Negative or derogative posts on social media can even go as far as to be deemed as defamation or harassment and can cause severe damage to the employer's reputation.

In the UK case of *Otomewo v Carphone Warehouse (Ltd)*[52] the court found that the employer was vicariously liable for negative posts an employee had made on social media. The posts were in relation to another colleague's sexual orientation. This same legal concept of vicarious liability exists in South African law.[53]

In the case of *Media 24 Ltd and Another v Grobler*[54] the court held that the employer was vicariously liable after the employee was subject to sexual harassment by another employee. The court held that the employer had failed to take reasonable steps to ensure that the employee would not be subjected to said harassment.

If an employer is found to be vicariously liable for the conduct of an employee, it could have a severe negative impact on the employer's reputation and good name as well as have a financial implication for the employer.[55]

In the case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others*[56] the court awarded the employee damages as a result of the sexual harassment suffered. The court held that the employer was vicariously liable because they failed to ensure a safe working environment for their employees.

Part of this safe environment an employer needs to provide, is to ensure as far as possible that the other employees will not also be branded as, for example, being racist, sexist etc as a result of another employees' posts on social media.

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52 Otomewo v Carphone Warehouse Ltd (2012) EqLR 724.

53 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

54 *Media 24 Ltd and Another v Grobler* (2005) All SA 297 (SCA).

55 Smit, DM and Viviers, DJ 'Vicarious Liability of the Employer in Sexual Harassment Cases: A Comparative Study' *Journal of Business* (2016) Vol 01. No.01.

56 *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* (2007) 28 *ILJ* 897 (LC).

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If an employer obtains a reputation for racist, negative or derogative comments or views, that reputation can also be inferred to all the other employees.[57]

In a country like South Africa aspects like discrimination, racism, sexism etc is a very sensitive issue. In light of the history of South Africa in regard to its previous racist disposition and the apartheid regime, employers and employees should be sensitive to any issues that might be reminiscent of said historical problems.

This means that negative or derogative posts on social media have the potential not only to influence the image of the employee by branding him/her as discriminatory or racist and damaging the employers' brand and image, it can also have a severely negative impact on the position of the other employees.

When the employer therefore enforces his right to fair labour practice, he also needs to keep in mind the right to fair labour practices of other employees and protect them as well.

Legislation gives effect to our constitutional rights. As already mentioned, employees' right to fair labour practice is realised in terms of several examples of labour legislation. For the purpose of this dissertation the focus is mainly on the LRA.

One of the purposes of the LRA as stated in section 1 is to give effect to the constitutional rights found in section 23 of the Constitution. The relevant sections of the LRA are fully discussed in Chapter 2.[58]

2.2.5. SECTION 36 OF THE CONSTITUTION

> **36.** Limitation of rights -
> (1) The rights in the Bill of Rights may be limited only in terms of 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, taking into account all relevant factors, including -

[57] Please refer to Chapter 3 44 for recent examples.
[58] Chapter 2 28.

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

(2) Except as provided in subsection (1) or in any other provision of the Constitution,

(a) no law may limit any right entrenched in the Bill of Rights.[59]

In theory every person should be able to enjoy the full application of all their rights. An employee's right to freedom of expression is limited as a result of an employer's right to fair labour practices in a situation where negative or derogative posts on social media are not allowed.

In practice this is simply not possible because people have conflicting interests where the exercising of one person's rights infringes the right(s) of another. Section 36 of the Constitution regulates the limitation of competing rights under specific circumstances in general, as well as in the employment environment.

In short, it is unconstitutional to limit any rights as contained in the Bill of Rights unless the limitation complies with the requirements as set out in section 36 of the Constitution. If the limitation complies, it would be deemed constitutionally valid and there would be no recourse available to the individual whose right has been limited.

The general criteria regulating the limitation of a right in the Bill of Rights entail a two-stage approach.[60] Firstly, it must be established whether it is a law of general application and secondly, one would ask if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom with regard to the outcome of the limitation.

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59 Section 36 of The Constitution.

60 S v Zuma & Others 1995 (2) SA 642 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC).

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a) Law of general application

The first requirement before a right in the Bill of Rights can be limited is that the right must be limited by law of general application. An example of this law of general application is the case of *August v Electoral Commission.*[61]

In this case the Constitutional Court had to decide whether the IEC's[62] failure to take steps to ensure that prisoners were able to vote in the 1999 general election was in line with the requirements of section 36.

The court found that there was no law that prohibited prisoners from taking part in the general elections and thus there was no law of general application that limited the prisoners' right.

It would seem through case law that all forms of legislation would qualify as law in terms of this section. This would include common law and customary law. However, a policy or practice does not qualify as law and would not be seen as sufficient reason to limit an individual's right. This was confirmed by the Constitutional Court in the case of *Hoffmann v South African Airways.*[63] The court found that the mere policy of South African Airways to not employ individuals who tested HIV-positive did not constitute a law of general application and could thus not be seen as sufficient reason to limit these individuals' rights.

From the scenario of negative or derogative posts on social media, one can derive that a rule or standard prohibiting said posts would constitute a law of general application. In the absence of South African case law confirming said position, one can look at the UK case law. In the case of *Crisp v Apple Retail*[64] the court held that the limitation on an employee's right to privacy was a valid limitation.

61 *August v Electoral Commission* 1999 (3) SA 1 (CC).
62 Independant Electoral Commission.
63 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) par 4.
64 *Crisp v Apple Retail (UK) Ltd* ET/1500258/11.

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b) Reasonableness and justification in an open and democratic society based on human dignity, equality and freedom

To comply with this element of the test for limitation in terms of section 36 of the Constitution, the limitation needs to be deemed fair and reasonable. During this evaluation one needs to keep in mind rights such as human dignity and equality and corresponding values, including freedoms, as stated in section 1 of the Constitution.

In the case of *S v Makwanyane*[65] the Constitutional Court applied the following approach to the general limitation clause:

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1)(IC). The fact that different rights have different implications for democracy, and in the case of our constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-to-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1)(IC), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the court is not to second-guess the wisdom of policy choices made by legislators'.

In the case of *S v Bhulwana*[66] the Constitutional Court confirmed the position of the Makwanyane case and summarised the position as follows:

> In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and the effect of the infringement caused by the legislation on the other. The

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65 *S v Makwanyane* 1995 (3) SA 391 (CC).
66 *S v Bhulwana* 1996 (1) SA 388 (CC).

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> more substantial the inroad into the fundamental rights, the more persuasive the grounds for the justification must be.

Even though the case of S v Makwanyane[67] was decided under the interim Constitution[68], the elements as set out in the judgement correlate with section 36 of the Constitution. The elements that need to be taken into account in terms of said case and section in the Constitution are:

a) The nature of the right;
b) The importance of the purpose of the limitation;
c) the nature and extent of the limitation;
d) The relation between the limitation and its purpose; and
e) Less restrictive means to achieve the purpose.

It is important to know the circumstances and procedure one needs to follow when limiting a constitutional right. As stated above, the employer and employee have different rights in terms of the Constitution which result in a conflict of interest between the parties. In order to ensure these rights and interests are in balance, they need to be limited, thus the importance of knowing when such limitation is constitutional.

2.3. OTHER LEGISLATION

There are numerous acts that play an important part in social media, the monitoring thereof, as well as the impact on the employer-employee relationship. The most comprehensive labour legislation is the LRA. Other acts relevant in the regulation of posts on social media are the Electronics Communications and Transactions Act,[69] the Regulation of Interception of Communications Act,[70] the Protection from Harassment Act,[71] the law of delict and the Protection of Personal Information Act.[72]

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67 *S v Makwanyane* 1995 (3) SA 391 (CC).
68 The Constitution of the Republic of South Africa, 200 of 1993.
69 The Electronics Communications and Transactions Act 25 of 2002.
70 The Regulation of Interception of Communications Act 70 of 2002.
71 Protection form Harassment Act 17 of 2011.
72 The Protection of Personal Information Act 4 of 2013.

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2.3.1. LABOUR RELATIONS ACT 66 of 1995

Section 185 of the LRA states that an employee has the right to not be unfairly dismissed. Section 188 and Schedule 8 of the LRA provide an employer with the legal remedies and procedure available to the employer if an employee breaches his or her duties towards the employer. In a case of misconduct for posting negative or derogative posts on social media, section 188 and Schedule 8 of the LRA will regulate if and how an employer may dismiss the guilty employee.

The LRA prescribes both the substantive and procedural aspects that need to be adhered to, to ensure that any disciplinary steps taken against an employee are fair in accordance with section 188 of the LRA.

In terms of section 188 of the LRA there are three grounds that can be provided for a dismissal to be fair. These three grounds are however further developed in Schedule 8 of the LRA, which clearly states that each reason for dismissal needs to be both substantively and procedurally fair before the dismissal is deemed fair. The three reasons or grounds permitted by section 188 are misconduct, incapacity or operational requirements. These reasons are in line with the international position as shown in the International Labour Organisation's Convention on the Termination of Employment 152 of 1982. This Convention is more fully discussed in Chapter 4.[73]

If an employer wishes to dismiss an employee for negative or derogative posts on social media, it would fall under the category of dismissal for misconduct and the substantive and procedural fairness for such a dismissal will be discussed below.

[73] Chapter 4 49.

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2.3.2. SUBSTANTIVE FAIRNESS OF A DISMISSAL FOR NEGATIVE OR DEROGATIVE POSTS ON SOCIAL MEDIA

Section 192 of the LRA determines that the onus lies on the employee to prove that a dismissal did take place. After said onus has been met, the onus moves to the employer to prove that the dismissal was fair in terms of section 188 and Schedule 8 of the LRA. If an employer therefore dismissed an employee for negative or derogative posts on social media, the onus to prove that the said dismissal was both substantively and procedurally fair is on the employer.

To determine the fairness of a dismissal in regard to substantive issues involves a two-part enquiry. Firstly, one needs to determine whether the facts and evidence led by the parties prove a dismissal in terms of section 186. Secondly, fairness entails that the contravention by the employee should be of such a serious nature that a dismissal as a measure of last resort is considered as the appropriate sanction. The courts have applied the approach of corrective or progressive discipline.[74]

This in effect means that the main purpose of discipline should not be to punish an employee but rather to rectify his or her behaviour. This places a bigger burden on employers and ensures that an employee cannot simple be dismissed for a small, easily rectified transgression. This concept needs to be incorporated into the employers code of conduct or disciplinary policy to ensure consistency in dealing with transgressions.

The courts have stated that the determination of whether a dismissal is an appropriate sanction for misconduct is a subjective question which should be determined on a case to case basis.[75]

Generally an employer is only entitled to judge the conduct of an employee within employment hours and anything that happens outside thereof, is of no concern

[74] Item 3(2) of Schedule 8 of the LRA.
[75] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (CC).

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to the employer. If, however, an employee's conduct outside employment hours has a negative impact on the employer's interests, the employer is entitled to take disciplinary action against the employee, as mentioned previously.[76]

Item 7 of Schedule 8[77] provides us with specific requirements that need to be taken into account before a dismissal for misconduct can be deemed substantively fair.

These requirements are as follows:

1. Whether the accused employee contravened a rule or standard in the workplace;
2. If there was a rule, was the rule reasonable;
3. Was the employee aware or should reasonably have been aware of the rule;
4. Does the employer apply the rule with consistency within the workplace; and
5. Was dismissal the appropriate sanction or were there other options available.

The common law principles regulating the employment contract entail among other aspects the duties of the employee towards the employer. There are numerous common law duties applicable to the employee to render services in good faith, which include the aforementioned common law duties.[78]

The duty of good faith has been developed to include an employee's duty to act in such a way as to promote an employer's interests. It has been established through case law that even though this duty is not specifically mentioned in the employment contract, it will always be an implied term thereof.[79]

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[76] Chapter 2 18.

[77] Item 7 of Schedule 8 of the LRA.

[78] Mischke 'Acting in Good Faith : Courts Focus on Employee's fiduciary Duty to the Employer' (2004) CLL 14(1); *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2010) 2 BLLR 128 (SCA).

[79] Murray v Minister of Defence (2008) 29 ILJ 1369 (SCA); South African Maritime Safety Authority v McKenzie (2010) 31 ILJ 529 (SCA).

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The first requirement for a substantively fair dismissal for misconduct, according to Schedule 8 of the LRA, is whether there was a rule or standard that the employee contravened. It is on the basis of the common law duty that an employee must obey the employer and render services in good faith. The employer therefore argues that there is a rule or a standard against negative or derogative posts on social media.

The reason for said rule would be that such posts could potentially have a severe negative impact on the employer's business interests and on the other employees. From this one can conclude that it is therefore not a requirement for a rule to be written into a policy or disciplinary code for it to be valid or for an employee to be guilty of contravening said rule.[80]

After an employer has established the existence of a rule or standard, an employer needs to provide proof that the employee contravened said rule or standard. Proof of said contravention can take several forms, for example but not limited to verbal testimony, documents or recordings.

The proof the employer provides must be obtained through lawful and ethical ways. In the case of *Smith v Partners in Sexual Health (non-profit)*[81] the CCMA found that the employer did not have any permission to access the employee's private e-mail account for a second time. Thus any evidence the employer gathered as a result of said unauthorised access was inadmissible and could not be used in the case. This case is discussed further in Chapter 3.[82]

The second requirement provided for in Item 7 of Schedule 8[83] is that the rule must be reasonable. Reasonableness of a rule will differ from employer to employer. What is deemed to be a reasonable rule for one employer may not be

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80 Grogan, J 'Workplace Law' (2014) Juta Eleventh Edition p 233; *Motswenyane v Rockfall Promotions* (1997) 2 BLLR 217 (CCMA).

81 *Smith v Partners in Sexual Health (Non Profit)* (2011) 32 *ILJ* 1470 (CCMA).

82 Chapter 3 42.

83 Schedule 8 of the LRA: Code of Good Practice: Dismissals.

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deemed reasonable for another. It will depend on the circumstances of each situation.

It is generally accepted that an employer who can justify the reason behind the rule in terms of the nature, spirit and requirements of the employer's business, can prove that such a rule is reasonable. Furthermore, such a rule should not be in contravention of any law or collective agreement governing the employment relationship.[84]

A rule or standard stating that negative or derogative posts on social media are not allowed, would be reasonable. An employer would be able to prove that there is justification for the rule or standard as such posts can have a negative impact on the employer's brand, reputation etc.

This requirement should not be confused with whether the sanction was reasonable or not. It merely looks at whether the rule or standard that exists is reasonable. The appropriateness of the sanction is part of a separate requirement in terms of Schedule 8. If the rule or standard however does prescribe a sanction, the subsequent sanction should be applied unless there are circumstances prohibiting this.[85]

The third requirement is whether the employee was aware or should reasonably have been aware of the rule or standard. In the case where the rule is obvious, the employer need not prove the existence of said rule, but can rely on the fact that an employee should reasonably have been aware of such a case. Examples of such cases are theft, fraud, assault etc.

In a case where the rule or standard is not as obvious, the employer will need to provide evidence of the existence of such a rule, as well as the fact that the employee knew about it or should have known about it.[86]

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[84] Grogan, J 'Workplace Law' (2014) Juta Eleventh Edition p236; Van Niekerk, A & Smit, N *Law@Work* (2015) LexisNexis 3rd ed 279.

[85] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (CC).

[86] Grogan, J 'Workplace Law' (2014) Juta 11th ed p236; Van Niekerk, A & Smit, N *Law@Work* (2015) LexisNexis 3rd ed 283.

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Employees use the defence that they were unaware of the rule prohibiting them from posting negative or derogative comments on social media. In the case law developing in regard to so-called 'Naming and Shaming' on social media it is clear that individuals do not realise that such conduct is prohibited and they can be held accountable for it. The courts therefore do not entertain the excuse that employees or people did not know that such posts were prohibited. This is confirmed in the case of *H v W*.[87]

In the case of *H v W* [88] the court found that the respondent should be held responsible for the posts on social media and that the mere excuse of ignorance as to the potential harm was not a sufficient excuse. The court made an order that all the relevant posts needed to be removed and the respondent also had to pay the applicant's legal costs. This case is further discussed in Chapter 3.[89]

Even though this was not a case in terms of labour law, the principles can be applied to the labour law sphere. There was no written law, rule or standard that specifically stated the respondent could not post the posts on social media. The applicant argued that even though there is no written law, rule or standard, one cannot post negative or derogative posts about another on social media as it causes undue harm. The court agreed with the applicant and found that a reasonable person should have known that such conduct is unacceptable and can therefore be held accountable for contravening this unwritten rule or standard.

The fourth requirement to establish whether a dismissal for misconduct is fair, is whether the employer applies the rule or standard consistently.

This requirement entails that the employer needs to consistently address all incidences of contravention of a rule in the same manner. If the employer fails to meet the requirement of consistency concerning the decision to sanction an

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87 *H v W* (GSJ) (Unreported case no 10142/12,301-2013).
88 *H v W* (GSJ) (Unreported case no 10142/12,301-2013).
89 Chapter 3 43.

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employee for contravening the rule, the action taken by the employer will not meet the requirement of substantive fairness.[90]

A further argument is that if an employer does not apply a rule consistently, the employee can argue that the employer does not believe in the validity of the rule which comes into place in terms of the first two requirements for a substantively fair dismissal for misconduct, as discussed above.[91]

The last requirement in terms of Schedule 8 of the LRA is whether the decision to dismiss an employee was the appropriate sanction. The sanction is determined by considering numerous factors, including the severity and seriousness of the misconduct, the impact it has on the employment relationship and the disciplinary history of the employee.

According to Schedule 8 of the LRA a corrective or progressive approach is endorsed by the courts.[92]

In the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*[93] the Constitutional Court found that when assessing whether the appropriate sanction for misconduct was applied, the court or commission should ask the question as to whether the sanction was fair and not whether a reasonable employer would have come to the same conclusion. The Court stated the following:

> There is nothing in the constitutional and statutory scheme that suggest that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator. Article 8 of the International Labour Organisation Convention on Termination of Employment 158 of 1982 (ILO Convention) requires the same.

90 *National Union of Metalworkers (Incorrectly cited as 'Mineworkers') of SA v Haggie Rand Ltd* (1991) 12 *ILJ* 1022 (LAC); *NUMSA & others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A).
91 *Matshoba v Fry's Metals* (1983) 4 *ILJ* 107 (IC).
92 Item 3(2) of Schedule 8 of the LRA.
93 *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (CC).

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The Constitutional Court goes further and lists the following aspects that one needs to consider before determining whether dismissal is the appropriate sanction:

1. The importance of the rule the employee contravened;
2. The reason the employer used for dismissal as an appropriate sanction;
3. The basis on which the employee argues against dismissal as an appropriate sanction;
4. The effect or harm caused by the employee's conduct;
5. Whether additional training and assistance may result in the employee not contravening the rule again;
6. The effect of the dismissal or proposed dismissal on the employee;
7. The employment record of the employee.

The court specifically noted that this was not an exhaustive list and that any other factor which is relevant can and must be considered in determining whether dismissal is an appropriate sanction.[94]

It is no longer merely enough to state the trust relationship has broken down. The employer must lead evidence to prove the trust relationship between the parties has broken down irretrievably.

In the case of *SATAWU obo Matlatso v Commission for Conciliation Mediation and Arbitration and Others*[95] the employee was dismissed after being absent from work without permission.

The CCMA found in favour of the employer and stated that the employee only tried to use the strike as an excuse for her unauthorised absence from work.

The employee did not agree with the judgment by the CCMA and took the matter to the Labour Court on review. The Labour Court found that the CCMA applied

[94] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (CC) par 78.
[95] *SATAWU obo Matlatso v Commission for Conciliation Mediation and Arbitration and Others* (2013) 12 BLLR 1271 (LC).

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an approach to the matter that was too narrow. The CCMA's approach only focused on whether the employee was guilty or not and did not consider whether dismissal was an appropriate sanction. The Labour Court agreed with the guilty finding but differed in whether dismissal was an appropriate sanction.

The Labour Court found that the employer needed to provide evidence that the trust relationship has broken down irretrievably and that this onus had not been met in this case.

In the case of *Edcon Ltd v Pillemer NO and Another*[96] the court stated the following:

> In my view, Pillemer's finding that Edcon led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly filed to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her.

It is clear from the case law that if an employer proves that the trust relationship between the employee and the employer has broken down irretrievably, dismissal can be an appropriate sanction for misconduct.

If an employer therefore proves an employee is guilty of negative or derogative posts on social media, dismissal would be appropriate if the employer proved that the trust relationship has broken down irretrievably as a result of serious consequences of said misconduct.

2.3.3. PROCEDURAL FAIRNESS OF A DISMISSAL FOR NEGATIVE OR DEROGATIVE POSTS TO SOCIAL MEDIA

The requirement of procedural fairness in terms of section 188(2) and Schedule 8 of the LRA regulates the physical procedure an employer followed before dismissing an employee. It has no bearing or influence on the reason or

96 *Edcon Ltd v Pillemer NO and Another* (2009) 30 *ILJ* 2642 (SCA).

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substantive fairness of a dismissal and can thus not answer or influence the question as to whether negative or derogative posts are a valid reason for dismissal.

The most important aspect to ensure the procedural fairness of a dismissal iscompliance with the *Audi Alteram Partem* rule, which states that both parties need to be awarded the opportunity to state their case before a decision is made. This is confirmed in the case of Mahlangu v CIM Deltak.[97]

Van Jaarsveld and Van Eck[98] developed 10 golden rules by which to determine whether a dismissal is procedurally fair. The 10 golden rules are:

(i) The employee must be fully informed about the charges brought against him prior to the hearing;
(ii) he must be informed about the charges timeously and also when and where the hearing will take place;
(iii) the hearing must be held within a reasonable time;
(iv) the hearing must be conducted in the employee's presence;
(v) the employee is entitled to be represented at the hearing by a co-employee, or a trade union official or a lawyer;
(vi) the employee must be afforded a fair opportunity to state his case to a disciplinary committee after the employer has presented his case. In other words, he is entitled:
  (aa) to full discovery of and access to all evidence (including documents) to be used against him;
  (bb) to cross-examine the persons testifying against him;
  (cc) to give evidence and put forward his defence;
  (dd) to call witnesses to substantiate his defence;
  (ee) to make representations to the committee;
(vii) the chairman and his disciplinary committee must be unbiased and must consider all relevant circumstances and facts to the charges objectively with a just and open mind;
(viii) after a finding of guilty but before the imposition of a penalty, the employee must be afforded the opportunity to adduce evidence in mitigation of sentence;
(ix) the decision and the reasons for the decision must be made known to the employee; and
(x) the employee must be reminded that he is entitled to appeal the decision and may also render the dispute to the CCMA or a bargaining council for resolution.

[97] Mahlangu v CIM Deltak (1986) 7 ILJ 346 (IC).
[98] Van Jaarsveld, S.R. and Van Eck, B.P.S 'Principles of Labour Law' *Butterworth Publishers (Pty) Ltd* 3rd ed 159.

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The courts have applied these golden rules.[99] In terms of legislation there is no prescribed procedure in terms of our Labour Law as to how a dismissal should be approached. We only have this judgemade law and Item 4 of Schedule 8[100] to govern procedural fairness and provide general guidelines as to how to approach such incidences.

In terms of this schedule the first step that needs to be taken is an investigation into the alleged misconduct. The code is not specific on what form such an investigation should take. Under the previous LRA[101] the court developed a "check-list" of what needs to be present for a dismissal to be procedurally fair. The courts have determined that a more relaxed approached should be taken towards the procedure of disciplinary hearings. The hearings should not be governed by legalities, requirements and rules but should rather focus on a more informal, effective and accessible way to investigate transgressions in the workplace.[102]

2.4. CASE LAW

Case law is another source of labour law in South Africa. Relevant case law will be discussed in Chapter 3.[103]

2.5. CLOSING REMARKS

It is therefore clear that there are numerous pieces of legislation and rights that influence the employment relationship as well as posts on social media. The LRA provides us with the most information as to what is required to ensure that a dismissal is both substantively and procedurally fair. If one applies this to the scenario of negative or derogative posts on social media it is clear that it is possible that such misconduct can result in a dismissal. Such a dismissal would

99 *Pillay v Commissioner for Conciliation Mediation and Arbitration and Others* (2014) ZALCD 55 (LC).
100 Item 4 of Schedule 8 of the LRA.
101 Labour Relations Act 28 of 1956.
102 *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 *ILJ* 1644 (LC).
103 Chapter 3 p 39.

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also be deemed fair if the employer complied with all the requirements in regards to substantive and procedural fairness as set out in section 188 and Schedule 8 of the LRA.

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CHAPTER 3: THE SOUTH AFRICAN POSITION ON SOCIAL MEDIA AND DISMISSAL LAW

3.1. INTRODUCTION

In recent times the courts have provided employees with specific clear guidelines as to what behaviour will be deemed acceptable and what not. It will be shown how the courts approach the matter of privacy. In our legal system it is generally accepted that each individual has the right to a sphere of intimacy and autonomy that should be protected from invasion by any other person or entity.[104]

3.2. *SEDICK AND ANOTHER v KRISRAY (PTY) LTD*[105] AND *FREDERICKS v JO BARKETT FASHION*[106]

In these two cases both employees were dismissed after they posted inappropriate and derogative posts on social media. The employees referred the cases to the CCMA as unfair dismissal cases.[107]

The basis of their arguments was that their posts on social media were private and that the employer had thus infringed their constitutional right by accessing and subsequently using these posts in the disciplinary enquiry.[108]

The CCMA found these arguments to be unfounded. According to the CCMA, employees' right to privacy had not been infringed as the employees waived said right when they placed their comments on a site that was in essence in the public domain. The employees did not protect their privacy by adjusting their privacy settings on the social media platform. The posts were visible to everyone accessing Facebook.[109]

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104 *Khumalo v Holomisa* 2002 (5) SA 401 (CC).
105 *Sedick and Another v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA).
106 *Fredericks v Jo Barkett Fashion* (2011) JOL 27923 (CCMA).
107 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
108 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
109 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

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The CCMA held that the Regulation of Interception of Communications and Provision of Communication-related Information Act[110] grants the employer the right of access to Facebook posts and to use them as evidence in a disciplinary hearing. Thus the argument of the employees was moot and the dismissals were deemed to be fair.[111]

In the case of *Tshichlas v Touch Line Media (Pty) Ltd*[112] the court held that for publication to take place the statement needs to be made to at least one person other than the defamed individual. Neethling went further and explained that publication can take on numerous forms, ranging from speech, print, pictures, to cartoons or even photographs.[113]

The Films and Publications Act[114] defines publication as follows:

> **"publication"** means—
> *a)* any newspaper, book, periodical, pamphlet, poster or other printed matter;
> b) any writing or typescript which has in any manner been duplicated;
> (*c*) any drawing, picture, illustration or painting;
> (*d*) any print, photograph, engraving or lithograph;
> (*e*) any record, magnetic tape, soundtrack, or any other object in or on which sound has been recorded for reproduction;
> (*f*) computer software which is not a film;
> (*g*) the cover or packaging of a film;
> (*h*) any figure, carving, statue or model; and
> (*i*) any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet.

It is clear that posts not protected or regarded as private by the employee who created the post on social media, can be held liable for the publication of the post to a potentially unlimited number of individuals. The CCMA was thus correct in

110 Regulation of Interception of Communications and Provision of Communicaion-related Act 70 of 2002.
111 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
112 *Tsiclas v Touch Line Media (Pty) Ltd* 2004 (2) SA 112 (W) 120.
113 Van Zyl "Online defamation: Who is to blame? " 2006 *THRHR* 139*; Tsiclas v Touch Line Media* (Pty) Ltd 2004 (2) SA 112 (W) 121.
114 The Films and Publications Act 65 of 1996 as amended.

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its interpretation that posts on Facebook would not be covered by an individual's right to privacy and can be used as evidence in a hearing.

In terms of the five requirements for a substantively fair dismissal the CCMA did not go into detail as to how each requirement was met. The employees never argued aspects like the consistency application of the rule before the commission, so the CCMA had no choice but to accept that these requirements had been met.

The case provides us with clear guidance that negative or derogative posts on social media are indeed a valid reason for the dismissal of an employee. The case goes further to prove that the mere argument of privacy will not always protect an employee form bearing the consequences of his or her actions. If one balances the employer's interest against the good name and reputation of his business as well as his right to fair labour practices, the balance will weigh towards the interest of the employer. One cannot post comments that have a potential negative impact on the employer, without accepting the consequences for said posts.

3.3. *MEDIA WORKERS ASSOCIATION OF SA OBO MVEMVE v KATHORUS COMMUNITY RADIO*[115]

The employee in this case worked at a radio station. He made a statement about the criminality of the station manager and also criticised the board of the organisation. The company felt that this was a serious breach of the trust relationship and had placed the company in disrepute and consequently dismissed the employee.[116]

The employee referred the case to the CCMA, where he could not provide any evidence to support any of his claims or statements. Furthermore, the company argued that if the employee was unhappy and had a problem, he could have

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[115] *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 *ILJ* 2217 (CCMA).

[116] Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

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attempted to resolve the matter internally before posting negative or derogate posts in the public domain. Such an internal approach was never attempted by the applicant.[117]

Unfounded statements that cause potential damages can result in a civil case of defamation or even a criminal case of criminal injuria.

In light of this, the CCMA found that the applicant had been fairly dismissed[118] and still had other avenues available to him. The CCMA further held that the employee's actions had been unfounded and reckless as he had no proof for the said allegations.

This case should serve as a warning to employees. It is very easy to voice one's frustrations and anger on social media but this should never be the forum to use and definitely not the forum of first instance.

It also confirms the fact that placing negative or derogative posts on social media is a valid ground for dismissal.

3.4. *SMITH v PARTNERS IN SEXUAL HEALTH (NON-PROFIT)*[119]

In this matter the legal question was whether the employer infringed on the applicant's right to privacy by accessing her private e-mail account. The applicant was on leave when the respondent's chief executive officer accessed the applicant's private e-mail account and found correspondence between herself and people outside the company. The correspondence included information regarding internal matters at the company. Even though the initial access to the e-mail account was accidental, the company then repeatedly accessed the account intentionally.[120]

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117 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
118 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.
119 *Smith v Partners in Sexual Health (Non-Profit)* (2011) 32 *ILJ* 1470 (CCMA).
120 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

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The applicant faced numerous charges, was found guilty and dismissed. These charges included bringing the company's name into disrepute, which meant the employee had tarnished the employer's reputation. The right to said good reputation flows from an employer's right to dignity, as discussed in Chapter 2. The applicant then referred an unfair dismissal case to the CCMA.[121]

The CCMA held that the intentional access to the applicant's private e-mail account contravened the Regulation of Interception of Communications and Provision of Communication-related Information Act[122] and any evidence obtained in this manner was thus inadmissible and could not be used.

As a result of this the respondentwas unable to prove their case and the CCMA found that the applicant's dismissal was both procedurally and substantively unfair.[123]

This case proves that a company must refrain from obtaining evidence in contravention of the law. Not only could they jeopardise their own case by not meeting the requirements of Act 70 of 2002 but they could at the same time infringe on an employer's right to privacy and fail to discharge the onus of a fair dismissal. In this case the information was not placed on a public forum and the company unlawfully continued accessing the employee's e-mails. The employer failed to prove that the employee contravened a rule or standard in the workplace and the CCMA held that the dismissal was substantively unfair.

It is therefore very important to note that an employer must firstly prove the existence of the rule, then that the employee was aware of the rule, and thereafter the employee's contravention of the rule in its Code of Conduct.

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121 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

122 Regulation of Interception of Communications and Provision of Communicaion-related Act 70 of 2002.

123 Manyathi "Dismissals for social media misconduct" *De Rebus* December 2012:6 80.

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3.5. *H V W*[124]

In this case the applicant applied to the court for an interdict preventing the respondent from posting negative and derogative statements about the applicant on any social media platform. The applicant asked for an interdict that specifically ordered the respondent to remove any relevant posts that already existed as well as prohibited any future posts with similar content. The applicant was successful in her application and the respondent had to remove all the relevant posts from any social media platform and also had to pay the applicant's costs.[125]

The court further held that the common law needs to be developed to deal with the infringements of the right to privacy on social media platforms. This duty is also placed on the courts and the judiciary in terms of section 39 of the Constitution.

Even though this case does not involve labour law, it indicates the possible effect of posts on social media and makes people aware of their writing and the consequences involved. The case contains very important legal positions because people need to realise that their words have an impact and carry consequences. The consequences of publication can be applied to publications on the internet, as confirmed by the following statement by Professor Sanette Nel:

> The print media always had rules and regulations pertaining to what they publish, but … There is no regulation on ordinary people and they do not realise that once they publish something on the internet, they publish it for purposes of publication and there should also be certain rules and regulations that apply to them.[126]

It is therefore very important for people and specifically employees to think before posting anything on social media because once it is posted it has been published and one can be held liable for the consequences thereof.

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[124] *H v W* (GSJ) (Unreported case no 10142/12, 301 – 2013)(Willis J).

[125] O'Reilly " South African law coming to grips with cyber crime" *De Rebus* May 2013:14 75.

[126] Professor Sanette Nel at the Lex Informatica 2013: Cyber Law, ICT Law and Information Ethics Conference held in Pretoria on 4 and 5 April 2013; O'Reilly " South African law coming to grips with cyber crime" *De Rebus* May 2013:14 75.

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3.6. OTHER RECENT CASES

There has been a recent increase in social media posts that are deemed to be inappropriate or derogative.

The first of these was Penny Sparrow who posted the following on Facebook:

> These monkeys that are allowed to be released on New Years' eve and New Years day on to public beaches towns etc. obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was amongst the revellers and all I saw was black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and get their way dear oh dear. From know I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter.[127]

These posts led to a national outcry and had severe implications for Ms Sparrow as well as her employer. At the time Ms Sparrow was employed as an estate agent with Jawitz Property. By a simple matter of association, Jawitz Property was also implicated and mentioned in several media headlines.[128] Even though she placed an apology a couple of days later, the Equality Court found her guilty of hate speech. She was ordered to pay R50 000 to a charity fund and criminal charges were laid against her.[129]

The outcome of this case proves that any post, even if one tries to qualify it or apologises later, can still have disastrous results for both the employee and the employer. The employee may face criminal charges and the damage to the

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[127] Jeff Wicks Twitter erupts after KZN estate agents calls black people 'monkeys' *Mail & Guardian* http://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys visited on 21 October 2016.

[128] Jeff Wicks Twitter erupts after KZN estate agents calls black people 'monkeys' *Mail & Guardian* http://mg.co.za/article/2016-01-04-twitter-erupts-after-kzn-estate-agent-calls-black-people-monkeys visited on 21 October 2016; Jenni Evans Penny Sparrow Back in court on criminal charges for raccists comments City Press http://city-press.news24.com/News/penny-sparrow-back-in-court-on-criminal-charges-for-racist-comments-20160912 visited on 21 October 2016.

[129] Jenni Evans Penny Sparrow Back in court on criminal charges for raccists comments City Press http://city-press.news24.com/News/penny-sparrow-back-in-court-on-criminal-charges-for-racist-comments-20160912 visited on 21 October 2016.

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employer's brand may take an extended period to recover. Taken the public nature of this incidence, the stigma will follow Ms Sparrow for a long time to come.

The posts by Ms Sparrow had a definite racial connotation. In light of South Africa's history of racism and apartheid the consequences of such a post can be even more severe. As a country we are moving forward towards a non-racial and non-sexual country, as stated in section 1 of the Constitution. Such a post can undo years of hard work as it tarnishes the reputation of the individual, the employer and even the country.

The next high profile case was that of Gareth Cliff. After the outrage resulting from the Penny Sparrow post, Mr. Cliff tweeted the following:

> "People really don't understand free speech at all." https://twitter.com/romancabanac/status/683958528248274944 …

A public outcry ensued to have Mr. Cliff removed as a judge from the reality show, Idols. M-net bowed to public pressure and dismissed Mr. Cliff as one of the Idols judges.

Mr. Cliff opted to take the civil route and not the labour law route. Even though he was an M-Net employee at the time of the incident and he could have approached the Labour Court, he opted to approach the High Court. Mr. Cliff issued an urgent application in the High Court to have his employment contract restored. M-Net argued that the employment relationship had not yet started because the employment contract was still unsigned. Mr. Cliff's reply to this argument was that the signing of the contract was a mere formality and that both parties had been operating as if the employment relationship was already in place.

The court found in favour of Mr. Cliff and M-Net was ordered to reinstate his contract to the same position it was prior to the incident.

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This case proves that just because some people will perceive a post on social media as racist or derogative does not necessarily mean the post was indeed racist or derogative. An employer should also conduct a full investigation and then make a decision and not bow to public pressure. Public pressure is notoriously emotional in nature and there is no place for emotion in the law as it is not based on the principles of the law.

Another incident involved the FHM model Jessica Leandra who was dismissed from FHM and stripped of her title as a result of her racist posts on Twitter.[130]

Chris Hart resigned from Standard Bank Wealth and Investment, after his tweet went viral, stating the following:

"More than 25 years after apartheid ended, the victims are increasing along with a sense of entitlement and hatred towards minorities."[131]

3.7. CLOSING REMARKS

"Social media is still an underdeveloped area of our law. How our courts will deal with the issues arising out of social media usage is still, to a large extent, a process of development on a case by case basis. Normal rules of fairness and equity will apply to all instances of social media misconduct."[132] These values of fairness and especially equity are some of the founding values on which our entire Constitution is based as can be seen in section 1 of the Constitution.

It is clear from the LRA and case law that, even though the law governing social media in the workplace is in its developing stages, there is still a long road ahead.

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[130] Times Live 'Racist tweet model stripped of FHM title' *Times Live* http://www.timeslive.co.za/local/2012/05/04/racist-tweet-model-stripped-of-title-by-fhm visited on 21 October 2016.

[131] Adiel Ismail 'Chris Hart breaks his silence on controversial tweet' *Fin24* http://www.fin24.com/Economy/chris-hart-breaks-his-silence-on-controversial-tweet-20160315 visited on 21 October 2016.

[132] Ms Lenja Dahms-Jansen at the Lex Informatica 2013: Cyber Law, ICT Law and Information Ethics Conference held in Pretoria on 4 and 5 April 2013; O'Reilly " South African law coming to grips with cyber crime" *De Rebus* May 2013:14 75.

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It is the responsibility of each employer to ensure that the Code of Conduct and/or disciplinary policy is clear and concise as to how the employer should approach social media in the workplace. This is obtained through social media strategies, policies and training of employees. All employees must be informed of their rights and responsibilities to minimise the risk to the interests of both parties: employees and the employer.

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CHAPTER 4: INTERNATIONAL POSITION

4.1. INTRODUCTION

Even though South Africa's legal system is completely independent from any other, we do find guidance from international law and foreign law as stipulated in section 39 of the Constitution, which reads as follows:

> **39.** Interpretation of Bill of Rights - (1) When interpreting the Bill of Rights, a court, tribunal or forum -
> *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> *(b)* must consider international law; and
> *(c)* may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

In the case of *Wyeth SA (Pty) Ltd v Manqele and Others*[133] the Labour Appeal Court had to decide on a jurisdictional matter. The relevant question before the court was whether an employee becomes an employee when the employment contract is signed or only when the employee physically starts employment.

In the courts investigation into the matter, it considered previous legislation, foreign legislation as well as foreign case law. The court stated the following:

> It is necessary, for the purpose of this judgment and in line with the constitutional imperatives, to have regard to comparable statutory enactments and case law in other countries as the jurisprudence in such countries may be an important resource in developing the South African Labour Law with regard to issues under consideration.

It is therefore clear that the courts must consider International Law when interpreting the Bill of Rights and everything it contains, including as to whether negative or derogative posts on social media are a valid ground for dismissal.

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133 *Wyeth SA (Pty) Ltd v Manqele and Others* (JA 50/03) (2005) ZALAC 1.

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Taking this into account, the author has chosen to assess and compare South African Labour Law with the labour law system of the UK.

4.2. INTERNATIONAL LABOUR ORGANISATION CONVENTION 158

The International Labour Organisation[134] is an important source of international labour law. The ILO publishes various standards all relevant to the labour environment.

The relevant convention for this study is Convention 158: Termination of Employment Convention.[135]

South Africa has not ratified Convention 158 but the Constitutional Court found that regardless of this, it can still be considered in interpreting and developing our legislation. In the case of *S v Makwanyane*[136] the Constitutional Court stated the following:

> International agreements and customary international law provide a framework within which ... (the Bill of Rights) can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee of Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the interpretation of particular provisions.

Convention 158 provides the labour law community with a breakdown of what the ILO deems to be the three core principles to be adhered to before a dismissal can be deemed fair.

The three core principles as set out in Convention 158 are as follow:

[134] Hereinafter referred to as the ILO.
[135] Convention 158: Termination of Employment Convention, 1982 (No 158) hereinafter referred to as Convention 158.
[136] *S v Makwanyane* 1995 (3) SA 391 (CC).

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1. There needs to be a valid reason for the dismissal of an employee; and
2. The employee must be provided with the opportunity to defend themselves against all the charges against them; and
3. The employee must have the ability to appeal against the decision by the employer to dismiss the said employee.[137]

FIRST CORE PRINCIPLE: VALID REASON

The first principle is that there must be a valid reason before an employee can be dismissed. This is further developed by stating that the reason can be in terms of three categories, namely misconduct and incapacity, both due to faults on the employees' side, or operational reasons that are not the fault of the employee.[138] It can thus be assumed that any reason outside these parameters would be considered unfair.

SECOND CORE PRINCIPLE: RIGHT TO DEFEND

In terms of the second core principle, the Convention is very vague. It does not state that there needs to be a hearing. It merely states that the employee needs to be able to defend him/herself against the accusations.

The defence can occur in an informal debate or a formal hearing depending on the specific merits of each case.

THIRD CORE PRINCIPLE: RIGHT TO APPEAL

The third core principle is the right to be able to appeal to an independent forum or body. The convention does not mention whether there first needs to be an

[137] Smit. Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 Chapter 3 (South African dismissal law: An International framework) Unpublished thesis University of Pretoria.
[138] Article 4 of Convention 158.

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internal appeal or not. It only mentions an appeal to an independent body or forum.

As stated above, even though Convention 158 was not ratified by the South African government, the principles and ideas contained in Convention 158 can be seen in South African legislation.

The core principles in Convention 158 provide a basis of what is internationally deemed to be the requirements for a fair dismissal.

This is the reason the author has chosen to use these three core principles when evaluating the labour law system of the UK. These three core principles have also been used as a basis for the comparison between the legal systems of the UK and South Africa.

4.3. UNITED KINGDOM

UK labour law is very similar to South African labour law. The influence of the International Labour Organisation's standards is reflected in both countries' legal systems. The UK's employment relationships are governed by the Employment Rights Act[139] and the Employment Act.[140]

In terms of section 94(1) of the Employment Rights Act an employee has the right not to be unfairly dismissed. Section 98(1)(b) of the same act regulates the reasons or grounds for a fair dismissal.

The fair reasons for dismissal as set out in the Employment Rights Act are:

1. Capabilities or qualifications;
2. Conduct;
3. Redundancy;

139 Employment Rights Act of 1996 hereinafter referred to as the Employment Rights Act.
140 Employment Act of 2002 hereinafter referred to as the Employment Act.

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4. Contravention of an Act; and
5. Any other substantial reason.

The Employment Act regulates the procedure in Schedule 2 thereof. Section 98 of the Employment Rights Act was amended by the introduction of regulations that contain a statutory procedure for disciplinary action.[141]

In the UK, as in South Africa, a fair dismissal must therefore adhere to the requirements of a fair reason and a fair procedure.[142] It would consequently be possible to dismiss an employee for negative or derogative posts on social media in both countries, subject to the fulfilment of all other requirements.

4.3.1. UNITED KINGDOM EMPLOYMENT LAW AND SOCIAL MEDIA

Most of the law and the arguments around social media and employment law deal with the right to privacy, especially on the side on the employee. In the UK there is no direct protection of the right to privacy. The labour tribunal uses the European Convention on Human Rights[143] to interpret this right.

The UK applies Articles 8 to 10 of said Convention, which read as follows:

> ARTICLE 8
> Right to respect for private and family life
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
> ARTICLE 9
> Freedom of thought, conscience and religion
> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

141 Regulation 2004 of the Employment Act.
142 Smit. Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 Chapter 3 (South African dismissal law: An International framework) Unpublished thesis University of Pretoria.
143 As amended by Protocols nos. 11 and 14.

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> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
> ARTICLE 10
> Freedom of expression
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

There are numerous cases in the UK that deal with privacy and freedom of speech. In the case of *Teggart v Teletech*[144] the court found that when someone places comments on Facebook pages that are open to public access, the author of the comments cannot in terms of Article 8 of the European Convention on Human Rights rely on the right to privacy. In said case the court went further and made the following comment about Article 10 of the European Convention on Human Rights:

> The right to freedom of expression, as set out in Article 10, brings with it the responsibility to exercise that right in a way that is necessary for the protection of the reputation and rights of others. The right of freedom of expression does not entitle the claimant to make comments which damage the reputation or infringe the rights of A. The claimant does not assert that A was promiscuous but states that his comments were a joke or done for fun. A's reputation has been harmed on the basis of a joke or fun. Furthermore she has the right not to suffer harassment.

In the UK Court of Appeal case *X v Y*[145] the court considered the interplay between the European Convention on Human Rights with specific reference to Articles 8-10 and the Employment Rights Act of 1996. The Appeal Court

144 *Teggart v TeleTech UK Ltd* (2012) NIIT/00704/11.
145 *X v Y* (2004) EWCA Civ 662, IRLR 625.

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developed a framework with guidelines on how to apply both employment law and human rights law to the same situation.

The framework that was developed reads as follows:

1. If one evaluates the specific aspect of the dismissal, does some of the circumstance fall within the sphere of the Convention? If not, then the Convention does not come into play and human rights law is not applicable.

2. If some of the circumstances fall within the sphere of the Convention, does the specific right create a positive obligation on the state to ensure the fulfilment of said right? If there is no such positive obligation, the Convention is highly unlikely to influence a dismissal claim from an employee against a private employer.

3. If there is a positive obligation, is the infringement on the right justifiable? If there is a justifiable reason for the infringement, proceed to point 5.

4. If there is no justifiable reason for the infringement, was there a permissible reason in terms of the Employment Rights Act of 1996 which does not include the unjustifiable infringement on a right as contained in the European Convention on Human Rights? If there is no such permissible reason for the dismissal, the dismissal will be deemed to be unfair.

5. If there was a justifiable reason for the infringement on the right contained in the European Convention on Human Rights, one needs to determine whether the dismissal was fair in terms of section 98 of the Employment Rights Act of 1996 and section 3 of the Human Rights Act of 1998. Lastly, one needs to determine whether this dismissal is compatible with the right contained in the European Convention on Human Rights.

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This provides the courts with a clear guideline as to how to approach dismissal case where there is a conflict of interest between an employee's right to privacy and an employer's right to fair labour practices. It may also assist the courts in determining how to approach a dismissal for negative or derogative posts to social media.

4.3.2. COMPARISON BETWEEN UNITED KINGDOM LABOUR LAW AND SOUTH AFRICA'S LABOUR LAW

If one compares the legal system of South Africa to that of the UK, one would find that they are very similar, although with minor differences.

As was explained earlier, the three core principles of Convention 158 will be used as a basis to compare the two legal systems as these are internationally deemed to be the requirements for a fair dismissal.

4.3.2.1. THERE NEEDS TO BE A VALID REASON FOR THE DISMISSAL OF AN EMPLOYEE

As discussed above, Convention 158 provides three reasons for an employer to dismiss an employee. The reasons are conduct, capacity and operational requirements.[146]

In South Africa we find these very same reasons in section 188 of the LRA, whichreads as follows:

> (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove -
> (a) that the reason for dismissal is a fair reason -
> (i) related to the employee's conduct or capacity; or
> (ii) based on the employer's operational requirements;
> and
> (b) that the dismissal was effected in accordance with a fair procedure.

146 Article 4 of Convention 158.

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In terms of labour law in the UK, employees are awarded the same protection as stipulated in Convention 158. The difference between the two legal systems is realised in the application of the requirements.

The scope of the protection afforded to an employee is subject to the category in which the employee falls. Certain categories of employees in the UK are excluded from the protection provided by the Employment Rights Act.[147] These categories are as follows:

1. Employees over the normal retirement age of 65;
2. Members of the armed forces and the police; and
3. Employees with less than one year of continued service.[148]

In November 2011 the period for continued service was increased from one to two years.[149]

This differs from the South African position in that we do not have a compulsory service period before someone is entitled to protection. All employees are protected from the moment they start employment. Employees above the age of 65 are also still protected. South African labour law does however exclude certain employees, namely members of the National Defence Force and the State Security Agency, but unlike the labour law system in the United Kingdom, the police force is not excluded from the protection of the LRA.[150]

It is therefore clear that in both the South African legal system as well as the UK legal system there needs to be a valid reason before an employer can dismiss an employee.

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[147] The Employment Rights Act of 1996.

[148] Smit. Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 Chapter 3 (South African dismissal law: An International framework) Unpublished thesis University of Pretoria.

[149] F&L Fitzgerald *Dismissal Procedures UK* (2015).

[150] Section 2 of the LRA.

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It is also clear that in terms of both legal systems, if there is a rule or standard against negative or derogative posts on social media and the employee contravenes that rule or standard, it may be a valid reason for dismissal.

4.3.2.2. EMPLOYEES' RIGHT TO DEFEND AGAINST CHARGES

The current South African labour law does not determine a specific procedure that employers must follow during a disciplinary enquiry. However, under previous case law a strict and very formalistic approach was adopted to the procedure of a disciplinary enquiry. This practice has continued even though the courts have found that disciplinary hearings should not be as strict and formalistic as they were previously. They should rather take on a more relaxed approach.[151]

The Code of Good Practice: Dismissal Schedule 8 of the LRA provides standards for employers to determine which steps should be followed to ensure they follow a fair procedure where employees enjoy the right to be heard and defend themselves against charges by the employer.[152]

The UK follows a very strict obligatory system where employees are offered the opportunity to defend themselves.[153] Employees must be provided with a written notification of a meeting or, as we know it, a hearing, during which they will then be offered the opportunity to state their case.[154]

In the UK the notification for the hearing needs to be in writing. Even though it is practice in South Africa to provide such a written notification, there is a legal obligation on an employer to provide a written notification. Section 4(1) of Schedule 8 of the LRA merely states that the employer should notify the employee of the charges against him or her in a form and language that the employee understands.

[151] *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* (2006) 27 *ILJ* 1644 (LC).
[152] Schedule 8 of the LRA.
[153] Smit. Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 Chapter 3 (South African dismissal law: An International framework) Unpublished thesis University of Pretoria.
[154] F&L Fitzgerald *Dismissal Procedures UK* (2015).

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In South African labour law there is also no prerequisite of a formal hearing as is the requirement in the UK and the hearing or enquiry in South Africa can take a very informal approach. Unfortunately, a formal approach has become the standard practice. This is in contradiction to Schedule 8 of the Labour Relations Act that states there needs to be an investigation, and qualifies this requirement by explicitly stating that an inquiry does not need to be a formal inquiry.

Furthermore, Schedule 8 confirms that the employee needs to be notified in a form and language that they understand. Nowhere does it state that it needs to be a written notification. In regard to the timeframe for preparations, the Act merely states that it needs to be reasonable and there is no prescription as to how many hours or days one needs to provide.

It the employer has a disciplinary code or policy that goes further than the Act and does prescribe a certain amount of notice, such a policy needs to be adhered to. Failure to do so will be procedurally unfair. In the case of *South African Municipal Workers Union obo Nkuna v Enhlanzeni District Municipality and Another*[155] the court found that unless there are extraordinary circumstances that explain why an employee should not be treated like other employees, the employer is bound by the terms and conditions of their disciplinary code and policy.

Reasonableness is something that is determined on a case to case basis. For example, in a case where the employee was late for work, a long period to prepare is not required and the employer can merely request a reason. However, in a case where the employee is charged with fraud and audited reports etc are used, days and even weeks can be required for the employee to be able to reasonably prepare for the enquiry.[156]

This requirement deals with the procedure and will not influence whether negative or derogative posts on social media are a valid reason for a dismissal.

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[155] *South African Municipal Workers Union obo Nkuna v Enhlanzeni District Municipality and Another* (j272/14) (2014) ZALCJHB 28.

[156] Grogan, J 'Dismissal' (2010) Juta 228.

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4.3.2.3. EMPLOYEE'S RIGHT OF APPEAL AGAINST EMPLOYER'S DECISION TO DISMISS

In South African law there is an extensive independent appeal procedure available to employees in the form of the CCMA or the relevant Bargaining Councils. If an employee feels his or her dismissal was unfair in terms of the LRA, the case can be referred to the relevant CCMA or Bargaining Council. There it will be first conciliated and then arbitrated by an independent commissioner.

The fact that there are no fees involved to refer a case and that one does not need legal representation to approach the CCMA or Bargaining Council makes this option a very easy and approachable forum for the South African labour force. Both forums try to be a lot less formal and the officials assist parties during the whole process, which makes it more approachable and accessible to all parties.

If one looks at the third core principle, both South Africa and the UK do comply with it and employees have the option to refer a matter to an independent forum for an appeal.

There are, however, two big difference between the two countries in terms of the appeal process.

Firstly, in the UK a compulsory internal appeal procedure has to be followed before a case can be referred externally.[157] In South African labour law a similar compulsory internal appeal does not exist. If a company creates an internal appeal in their disciplinary code, it needs to be complied with, but it is not a statutory requirement in South African labour law.[158]

[157] Smit. Disciplinary enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 Chapter 3 (South African dismissal law: An International framework) Unpublished thesis University of Pretoria.
[158] Labourguide http://www.labourguide.co.za/discipline-dismissal/254-disciplinary-code-a-procedure visited on 6 May 2016.

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The second difference in terms of the appeal between the two countries is that South African labour law does not require costs to approach the forum for appeal.[159]

In the UK the party who refers the case for an external appeal needs to pay certain fees. If that party however does win the case, the fees can be repaid.[160] South Africa as a third world country and the UK as a first world country, operate from two different backgrounds within two vastly different economies. This could explain the difference in fees between the two countries.

Even though the countries' legal systems share similarities, their respective economic, political as well as social economic situations differ greatly. The UK is a developed country as opposed to South Africa, which is known as a developing country. This explains why there are small differences in the legal systems, especially in the application thereof. The principles are all the same; it is only the application that differs.

4.3.3. EXAMPLES OF CASES FROM THE UNITED KINGDOM

4.3.3.1. *CRISP V APPLE RETAIL*[161]

In this case the claimant worked at one of Apple's Retail Stores. V8On 27 November 2010 one of the claimant's colleagues informed the store management of numerous derogative posts the claimant had made on Facebook about their employer, Apple Retail.[162]

The claimant was charged and a disciplinary investigation was held. During this investigation the claimant claimed that his Facebook page was private and that

159 In South Africa it is either the CCMA or the relevant Bargaining Council.

160 F&L Fitzgerald *Dismissal Procedures UK* (2015).

161 *Crisp v Apple Retail (UK) Ltd* ET/1500258/11.

162 'Apple's dismissal of employee for adverse Facebook comments not unfair or breach of human rights' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-em8ployment-tribunals-november-2011/111057/#crisp visited on 25 October 2016.

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not all the posts were in reference to Apple. The claimant did however admit that he did refer to Apple in some of the derogative posts.[163]

The claimant further claimed that other employees had made similar posts without any action taken against them. The chairperson found that the claimant was guilty of bringing the company name into disrepute and dismissed the claimant in accordance with Apple's disciplinary code and policy. The claimant appealed but the appeal was upheld.[164]

The claimant felt that the dismissal was unfair and referred the case to the tribunal. The tribunal upheld the dismissal.[165]

In this case Apple benefited from the fact that they had the correct policies and procedures in place and that their employees received relevant training. It rendered the claimant's potential arguments that he was unaware of the consequences of his acts, or that he did not mean to mute of little value, invalid. The tribunal upheld his dismissal.[166]

It is therefore clear from this court case that negative or derogative posts on social media is a valid reason for a dismissal. From this case South African employees can learn to be mindful of the content of their posts on social media and employers can learn that a properly-worded policy can assist them in such cases. Such a policy is further discussed in Chapter 5.[167]

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163 'Apple's dismissal of employee for adverse Facebook comments not unfair or breach of human rights' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-november-2011/111057/#crisp visited on 25 October 2016.

164 'Apple's dismissal of employee for adverse Facebook comments not unfair or breach of human rights' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-november-2011/111057/#crisp visited on 25 October 2016.

165 'Apple's dismissal of employee for adverse Facebook comments not unfair or breach of human rights' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-november-2011/111057/#crisp visited on 25 October 2016.

166 'Apple's dismissal of employee for adverse Facebook comments not unfair or breach of human rights' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-november-2011/111057/#crisp visited on 25 October 2016.

167 Chapter 5 page 69.

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4.3.3.2. *GILL v SAS GROUND SERVICES UK LIMITED*[168]

The claimant was employed by the respondent in this matter. She also acted as a part-time model and actress for which she had a specific Facebook page. On 11 July 2009 the claimant was booked off sick until 19 September 2009. Later it became apparent that the claimant worked at the London Fashion Week during said sick leave. The employer became aware of this situation when a colleague printed the claimant's Facebook page and took it to management.[169]

The employer investigated the matter and felt that this was a severe breach of the trust relationship between the parties and that the employee was indeed working while on sick leave. Taking into account that this was not the first incidence of this kind, the employer dismissed the claimant.[170]

The claimant referred the case to the tribunal, who found in favour of the employer on the basis that the employer acted both substantively and procedurally fair. The dismissal was upheld.[171]

This proves that even though one does not reference the employer or make derogative remarks, the contents found on social media is regarded as permissible evidence against an employee in a disciplinary hearing. Such a post will be a valid reason for dismissal. This principle can thus also be applied in terms of the South African labour law system. As long as an employer can prove the link between the negative or derogative post and potential damages suffered

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[168] *Gill v SAS Ground Services UK Limited* ET/2705021/09.

[169] 'Facebook entry and YouTube Video led to amateur model's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-august-2010/104153/#gill visited on 25 October 2016.

[170] 'Facebook entry and YouTube Video led to amateur model's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-august-2010/104153/#gill visited on 25 October 2016.

[171] 'Facebook entry and YouTube Video led to amateur model's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-august-2010/104153/#gill visited on 25 October 2016.

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by the employer, the CCMA and courts will find it a sufficient reason for dismissal.[172]

4.3.3.3. *PREECE v JD WETHERSPOONS PLC*[173]

The claimant was employed by the respondent as a shift manager. The claimant was aware that the company had strict policies against posts on social media that could be to the detriment of the company.[174]

During an incident at the claimant's workplace two patrons became abusive and were eventually asked to leave the premises. After they left, numerous phone calls were made to the employer, swearing at the claimant and insulting her.[175]

Later the evening the claimant started a Facebook group where she continuously posted negative and derogative comments about the two patrons. These posts came under the attention of the patrons' daughter who then laid a complaint with the employer.[176]

The claimant was charged and a disciplinary investigation was held. She was found guilty and subsequently dismissed. The claimant appealed on the basis that all the mitigating circumstances was not taken into account, but the appeal failed.[177]

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[172] *City of Cape Town v South African Local Government Bargining Council (SALGBC) and Others* (2011) 5 BLLR 504 (LC).

[173] *Preece v JD Wetherspoons PLC* ET/2104806/10.
[174] 'Abusive Facebook comments led to pub shift manager's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-march-2011/107998/#preece visited on 25 October 2016.
[175] 'Abusive Facebook comments led to pub shift manager's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-march-2011/107998/#preece visited on 25 October 2016.
[176] 'Abusive Facebook comments led to pub shift manager's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-march-2011/107998/#preece as visited on 25 October 2016.
[177] 'Abusive Facebook comments led to pub shift manager's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-march-2011/107998/#preece as visited on 25 October 2016.

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The claimant referred the case to the labour tribunal. In spite of the tribunal's disagreement with some aspects of the outcome of the employer's investigation and the appeal hearing, the tribunal upheld the dismissal.[178]

This is a clear example of where derogative or negative posts do create a valid reason for a dismissal.

4.3.3.4. *TEGGART v TELETECH UK LTD*[179]

The claimant in this matter made two Facebook posts about the promiscuity of a fellow employee. These posts were viewed by fellow employees and people commented on both posts. The posts were brought to the attention of management by someone outside the company.

At the disciplinary investigation the claimant alleged that his posts on social media were protected by his right to privacy and that he never meant the relevant fellow employee any harm. The posts were allegedly meant as a joke or fun.

The claimant, who was dismissed after the disciplinary investigation, referred the matter to the tribunal as an unfair dismissal.

Even though the tribunal was not content with every aspect of the disciplinary investigation's outcome, they still upheld the dismissal.

The tribunal found that the claimant's right to privacy in terms of the European Convention of Human Rights had not been violated. This confirms that one can limit a fundamental right like the right to privacy in an exercise of balancing an employee's interests with that of the employer.

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[178] 'Abusive Facebook comments led to pub shift manager's dismissal' *Xpert HR Law Reports* 2011 http://www.xperthr.co.uk/law-reports/in-the-employment-tribunals-march-2011/107998/#preece visited on 25 October 2016.

[179] *Teggart v Teletech UK Ltd* NIIT/704/11.

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The outcome of this case is of importance. The tribunal laid down the principle that employees who post on a public forum like Facebook, cannot rely on the rights in terms articles 8 - 10 of the European Convention of Human Rights. This proves that an employee cannot simply claim privacy when accused of misconduct in regard to negative or derogative posts on social media. This correlates with the South African position and the right to privacy as discussed in Chapter 2.[180]

4.4. CLOSING REMARKS

The similarities between UK dismissal law and South African dismissal law are apparent. The UK has been confronted with social media usage having a direct impact on the employment relationship. Social media impact the rights of both the employee and the employer and these rights and subsequent interest's needs to be balanced. The same situation has now started to occur in the employment sphere in South Africa. If the balance between the interests of an employee and an employer is disturbed as a result of negative or derogative posts on social media by the employee, the employer will have remedies available to him to ensure the balance is corrected.

It is clear that both countries still have a long way to go in the process of formulating social media law and legal certainty. Taking into account the legal system of the UK and the South African system, one can argue that the latter will develop in the same direction as that of the UK.

This assumption is strengthened by section 39 of the Constitution that obliges courts to consider international law when interpreting the Bill of Rights. One can hope that the courts will consider the international position, learn from their mistakes, challenges and decisions and develop our own legal system so that it protects both the employer and employee in these circumstances.

[180] Chapter 2 13.

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CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

It is clear from the previous chapters that the legal system is in the process of development on the subject of social media and the usage and impact thereof on labour law.

In this chapter the author explains how negative and derogative posts to social media can be seen as a valid reason for dismissal. It will also be endeavoured to provide steps that may be useful to employers to develop and extend the platform of knowledge and protection to the parties in the employment relationship. It could hopefully assist in the process of establishing certainty about the standard of rules applicable to the use of social media. Not only could it contribute to protecting the interests of employers and employees but, most importantly, to maintaining the trust relationship between the parties.

5.2. SUBSTANTIVE FAIRNESS OF A DISMISSAL FOR NEGATIVE AND/OR DEROGATIVE POSTS ON SOCIAL MEDIA

It is clear from the numerous court cases in Chapter 3 as well as from the international case law in Chapter 4 that there is a duty or standard on the employee to act in good faith towards his or her employer. This duty can be breached by negative or derogative posts on social media and the employee will then be guilty of an offence.

By placing such posts on social media, the employee will be guilty of bringing the employer's name into disrepute.[181]

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[181] *National Commissioner of the SAPS v Myers* (2012) 33 *ILJ* 1417 (LAC). This judgment was set aside in *Myers v National Commissioner of the South African Police Services and Others* (2013) 34 *ILJ* 1729 (SCA).
The SCA still found the employee guilty of bringing the employer's name into disrepute but felt that the circumstances and the absence of an argument to prove the breakdown in the trust relationship, rendered dismissal an inappropriate sanction. The SCA ordered the employee's reinstatement and that the employee be issued with a final written warning.

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The next requirement is a rule that will inform employees of the zero-tolerance attitude towards placing negative or derogative posts on social media, which must be avoided at all costs during and after working hours. Rules could be printed in an employer's Code of Conduct on the Regulation of Social Media in the Workplace. These rules as learnt from case law should be clear and reasonable in relation to employees' right to privacy. It is clear that because an employer and even other employees may suffer damages as a result of such posts, the prohibition thereof would be deemed reasonable.

The same applies to the requirement that an employer needs to provide proof that an employee knew or should reasonably have known about the relevant rule or standard. It would be difficult for an employee to argue that he or she did not know he or she had a duty to act in the employer's best interest. Furthermore, an employer has an obligation to develop and discuss his or her social media policy with the prescribed rules and standards so that an employee cannot claim he or she was not aware of the existence of such rules.

The aspect about consistency does not influence whether such posts created a valid reason. It impacts the enforcement of such rules. If an employer has historically not enforced a rule, it does however not mean they can never enforce said rule.

If a rule that was historically not enforced is now required to regulate a problem in the workplace, the employer is entitled to start enforcing the rule. Such a decision and the reasons therefore should be clearly communicated to the employee to ensure that it is fair. If an employee thereafter breaches said rule, the enforcement of the rule would be deemed fair and if it results in a dismissal, the dismissal can also be a fair sanction, depending on the other requirements for a fair dismissal.[182]

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[182] *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2004) 25 *ILJ* 1707 (LC).

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The last requirement is directly relevant to the question as to whether negative or derogative posts are a valid reason for a dismissal. It has been proven through the legislation and case law that, depending on each case's circumstances, dismissal may be an appropriate sanction for negative and/or derogative posts on social media.

It is clear from the relevant case law and Schedule 8 of the LRA that certain aspects must be considered before dismissal would be an appropriate sanction. If the trust relationship between the employee and employer has broken down irretrievably, dismissal would be a valid sanction regardless of whether all the other aspects as mentioned are present.

5.3. RECOMMENDATIONS

In order to protect both the employee and the employer in regard to posts on social media and the usage of social media the relevant steps and documents required to address this issue were briefly investigated.

5.3.1. SOCIAL MEDIA STRATEGY

The definition of a strategy is:

> A careful plan or method for achieving a particular goal usually over a long period of time.[183]

Before a company can offer training to their employees on the topic of acceptable conduct regarding social media and the employer's brand, the company needs to consider its social media strategy.

The company has to decide whether they will have a presence on social media or not. If the company chooses not to have a social media presence, it simplifies the situation and employees can merely be informed to refrain from any social

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183 Merriam-Webster's Learner's Dictionary http://www.merriam-webster.com/dictionary/strategy visited on 24 October 2016.

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media usages that are connected with the employer as well as any usage of social media during working hours.

If the company however decides to have a social media presence, as so many currently do, the need for a clear strategy is imperative.

It is important for management to know where the company is going in future, what their goals are and how they plan to reach said goals. If these aspects are clearly mapped out in a strategy, it is easier to develop policies in line with this and train employees on exactly how the company approaches said aspects etc.

5.3.2. SOCIAL MEDIA POLICY

The definition of a policy is as follows:

1. *1 a* : prudence or wisdom in the management of affairs *b* : management or procedure based primarily on material interest
2. *2 a* : a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions *b* : a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body[184]

The policy entails clear general day-to-day guidelines about the process the company plans to follow to compile a strategy. The social media should be adapted to suit each company's own needs and requirements.

It is important to note that there is a fine line between too much information in a policy that becomes too detailed, and a policy that refrains from necessary detail and results in a vague, ambiguous and complex document that could hardly be followed.

The policy should contain a clear guideline on what the employer deems to be acceptable versus unacceptable social media use.

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[184] Merriam-Webster's Learner's Dictionary http://www.merriam-webster.com/dictionary/strategy visited on 24 October 2016.

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A clear distinction should be made between personal and professional social media use. The policy should state what is deemed to be acceptable personal use and what is defined as professional social media use. It is not possible to publish a complete list of all the offences as employees will always find new and creative ways to bypass the closed list.

A company that provides devices for communication purposes is entitled to rely on sections 5 and 6 of the Regulation of Interception of Communications and Provision of Communication-related Information Act.[185]

These sections read as follows:

> **4. Interception of communication by party to communication**
>
> (1) Any person, other than a law enforcement officer, may intercept any communication if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence.
>
> (2) Any law enforcement officer may intercept any communication if he or she is –
> (a) a party to the communication; and
> (b) satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16(5)(a), unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.
>
> **5. Interception of communication with consent of party to communication**
>
> (1) Any person, other than a law enforcement officer, may intercept any communication if one of the parties to the communication has given prior consent in writing to such interception, unless such communication is intercepted by such person for purposes of committing an offence.
>
> (2) Any law enforcement officer may intercept any communication if –
> (a) one of the parties to the communication has given prior consent in writing to such interception;
> (b) he or she is satisfied that there are reasonable grounds to believe that the party who has given consent as contemplated in paragraph (a) will –

[185] Regulation of Interception of Communications and Provision of Communicaion-related Act 70 of 2002.

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> (i) participate in a direct communication or that a direct communication will be directed to him or her; or
> (ii) send or receive an indirect communication; and
> (c) the interception of such direct or indirect communication is necessary on a ground referred to in section 16(5)(a), unless such communication is intercepted by such law enforcement officer for purposes of committing an offence.

The social media policy can include a clause that the company provides the devices for business purposes but that reasonable and responsible private usage is allowed. The employer should however reserve the right to monitor, read, filter block, intercept and use all communication, documents and content of the devices.[186]

The policy should contain guidelines on the risks of social media usage to personal and professional brands to explain why the company deems inappropriate comments and content in such a serious light. This information could assist the company to prove the existence of a rule which is one of the requirements for a dismissal for misconduct in terms of Item 7 of Schedule 8 of the LRA. Employees ought to respect their employer's fair policies that aim to protect the good name of the workplace and the reputation of fellow employees. Employees cannot claim ignorance if they disrespectfully ignore the effects and consequences of their actions when they commit an offence related to social media.[187]

The consequences for breaching the social media policy should be clearly defined and should also be supported by the disciplinary code and policy.[188]

5.3.3. TRAINING

The mere existence of a social media strategy and policy is insufficient to ensure that an employer and employees are protected when accessing social media and against the negative effect thereof on the employment relationship. The

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[186] Potgieter ' Social Media and Employment Law' *Juta* 2014 p 103.
[187] Potgieter ' Social Media and Employment Law' *Juta* 2014 p 102.
[188] Potgieter ' Social Media and Employment Law' *Juta* 2014 p 102.

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employees should be properly trained and knowledgeable about acceptable conduct.

For a dismissal for misconduct to be substantially deemed fair the following requirements need to be met:

1. There needs to be a rule that is contravened.
2. The rule needs to be lawful and reasonable.
3. The employee should have known or should reasonably have known about the existence of the rule.
4. The employer should apply the rule to all employees with consistency.
5. If it is found that the employee did contravene the rule, the sanction applied should be fair and reasonable.[189]

As can be seen in the *Apple Retail*[190] case in the UK, the company had a clear policy that formed part of the employee's training.

The training contained the following aspects:

1. How one should appear and present oneself on social media;
2. Actions outside business hours and on an employee's personal time can still have an effect on the employer; and
3. Potential disciplinary actions the company can take following inappropriate communication on social media and the consequences that can flow from said disciplinary actions.[191]

This case proves that if a company did everything to ensure that an employee had reasonable knowledge of what is expected of him or her and he or she still breaches the employee-employer trust with inappropriate and harmful social media posts, a dismissal may be the appropriate sanction, depending on the merits of each case.

189 Schedule 8 of the LRA.
190 *Crisp v Apple Retail* (UK) Ltd ET/1500258/11.
191 *Crisp v Apple Retail* (UK) Ltd ET/1500258/11.

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5.3.4. ENFORCEMENT MECHANISMS

It is important for a company to not only develop their social media policy, but also to develop their disciplinary policies. Such policies must include guidelines for acceptable social media usage as well as examples of offences and penalties related to the wrongful usage of smart phones or social media sites. More serious charges must refer to social media posts that have a negative or derogative impact on the company's brand.

Offences relating to social media are probably already covered by examples of offences in the company's disciplinary code.

> Say something publicly rude about your employer? Then you probably already have ' [brought] the company into disrepute' in a list in your Disciplinary Policy. Use social media inappropriately towards other employees? Probably included within your Bullying and Harassment Policy. A breach of confidentiality via a social media platform? I am assuming a clause in your standard contract of employment will have this covered. Employees have always done things that they shouldn't, and in HR we often have the task of sorting this out. Social media is just another place that this can happen. We need to be aware and prepared, without seeking to overly constrain our employees. As we know, there will always be one or two employees that get it wrong, or push the boundaries too far.[192]

This is indeed true but from experience it can be seen that the defence most offered in social media cases is employees' claim of ignorance. Not only do employees claim ignorance about the unacceptability of the posts, but also about the level of privacy that can be expect in social media usage. This risk increases if a company encourages employees to participate in social media to promote the company and its brand, but simultaneously fails to provide clear guidelines on the process or the contents of posts. As seen from the case law, such as the example of *Apple Retail*[193] in the UK, it is worth going to the trouble of compiling

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192 Reucroft 'Call that a social Media Policy?...lol' 2014 *The HRDirector* https://www.thehrdirector.com/features/social-media/call-that-a-social-media-policy-lol/ visited on 24 October 2016.

193 *Crisp v Apple Retail* (UK) Ltd ET/1500258/11.

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a proper policy and ensuring that all employees are properly trained on the contents thereof.[194]

Furthermore, it is important to ensure that an employer acts consistently in these cases. The employer needs to set up monitoring processes to ensure all communication is appropriate and in line with the company's strategy and policy.[195]

The company can go even further and provide a safe environment where other employees, clients, members of the public or any other person can report any inappropriate, negative or derogative communication. The employer then needs to act with the same consistency it has always approached these matters in the past.[196]

5.4. CLOSING REMARKS

It is clear that the pro-active steps employers must take are simple and easy to implement and could potentially save the employer substantial amounts of money by avoiding costly litigation and unwanted publicity. Each company's policy, procedure and documents will vary depending on its needs. It can be as simple as a single page or as complicated as a 100-page document. The importance of such measures, as seen from research reflected in this chapter, is that the position of the employer needs to be clear and communicated to all employees.

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194 Potgieter ' Social Media and Employment Law' *Juta* 2014 p 102.

195 *National Union of Metalworkers (Incorrectly cited as "Mineworkers") of SA v Haggie Rand* (1991) 12 *ILJ* 1022 (LAC); *NUMSA & others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A); *Cholata v Trek Engineering (Pty) Ltd* (1992) 13 *ILJ* 219 (IC).

196 *National Union of Metalworkers (Incorrectly cited as "Mineworkers") of SA v Haggie Rand* (1991) 12 *ILJ* 1022 (LAC); *NUMSA & others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A).

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