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**MPHIL RESEARCH PAPER**

**CANDIDATE:** **Unathi Stungwa**

**STUDENT NO:** **3148921**

**TITLE OF THE RESEARCH PAPER:** **The Effect of Social Media on the Employment Relationship: Can an employer use a social media post by an employee to initiate disciplinary proceedings against that employee with a view to dismissal?**

**DECLARATION**

I, Unathi Stungwa do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at University of the Western Cape on this the …. day of ………………..

**Signature: ----------------------------**

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**Abstract**

Over the past few years, there has been a noticeable increase of cases that the Commission for Conciliation, Mediation and Arbitration (CCMA) has dealt with relating to dismissal for social media posts by employees. Employees have shared some of their unpleasant experiences with their employers, some have expressed their grievances and in other situations have posted on social media platforms how unfairly they feel they are treated by their employers.

There is very little scholarly research in South Africa on the discussion on the use of social media and how it affects the employment relationship that exists between the employer and employee as well as how it may affect the relationship that exists between colleagues.

The main objective of this research is to establish whether there is a fair reason to dismiss an employee based on what they post on their personal social media platforms, and to understand when and how the right to privacy can be limited. The aim of this research is to find whether there are any shortcomings in the South African labour laws that social media has opened in our laws with regards to the employment relationship and the use of social media, if there are any shortcomings will recommend how the said shortcomings can be addressed.

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## CHAPTER ONE

### 1.1 BACKGROUND

Once an employment relationship has been established between an employer and employee there are certain duties that arise with the context of this relationship. According to Grogan 'primary duty of employees is to place their personal services at the disposal of the employer, while that of the employer is to remunerate the employee.'[1] Another duty that arises within the context of the employment relationship is the duty of good faith that an employee has to his or her employer.[2] This means, *inter alia* that an employee must not bring the company into disrepute. Furthermore, employees have a duty to respect and obey lawful instructions from their employers because lack of respect renders the employment relationship intolerable and undermines the employer's authority.[3] Grogan further highlights that disrespect towards the employer can be of such nature that it can lead to dismissal in that it renders the continuation of the employment relationship intolerable.[4] However, with the use of social media platforms this duty upon the employee has become rather complex and a bit confusing. If the actions of the employee outside the workplace impacts the company of the employer, the employer has the right to keep the employee accountable.[5] The conduct referred to is inclusive of what employees post on their social networks.

Over the past few years, there has been a noticeable increase of cases that the Commission for Conciliation, Mediation and Arbitration (CCMA) has dealt with relating to dismissal for social media posts by employees.[6] Employees have shared some of their unpleasant experiences with their employers, some have expressed their grievances and in other situations have posted on social media platforms how unfairly they feel they are treated by their employers.

In *Mahoro v Indube Staffing Solution*, Mahoro (employee), refused to attend a scheduled meeting since the meeting stemmed from what she had previously posted on her social media account on Facebook and a colleague assumed that the post in question was about her. Mahoro's colleagues complained about the social media post and lodged a grievance to against Mahoro to their employer.

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[1] Grogan J *Workplace Law* 12th ed (2017)26.
[2] SAPPI Novoboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC).
[3] Grogan J *Workplace Law* 11th ed (2014)56.
[4] Gorgan J, *Workplace Law* 11th ed (2014)56.
[5] Van Niekerk *A Unfair Dismissal* 2nd ed (2004)44.
[6] Manyathi N '*Dismissal for Social Media Misconduct'* 2012 Derebus 1.

The employer then called Mahoro regarding the grievance lodged against her. Mahoro again refused to attend the meeting. Mahoro stated that her comments were not about the colleagues who had lodged the grievance, she also stated that the comments were her private communication. Mahoro's supervisor summoned her to a disciplinary hearing for insubordination due to the fact that Mahoro refused to attend the hearing as well as for causing disharmony at work. At this disciplinary meeting Mahoro was found guilty and dismissed.

Mahoro referred the matter to the CCMA. In the CCMA Commissioner found that there was no evidence to prove that Mahoro's Facebook posts caused disharmony at work. The Commissioner also found that the Human Resources representative had given Mahoro the options to either attend the meeting or state reasons for not attending the meeting in writing. Mahoro submitted reasons in writing. Therefore, her refusal to attend the meeting was acceptable justified and did not amount to insubordination. Mahoro's dismissal was thus found to be unfair based on the facts presented to the CCMA and Mahoro had to be compensated.[7]

In other cases, social media posts have been met with a strict approach by the employers and have led to dismissals for some employees since these posts were found to be bringing the employer or company to disrepute for example employees making discriminatory statements on their social media platforms.

## 1.2 RESEARCH QUESTION

The primary research question of this paper relates to the use of social media posts by an employee and whether such a post can be a catalyst in initiating disciplinary action against the employee making such a post. An ancillary research question is whether such a dismissal can be considered a dismissal for misconduct.

## 1.3 Objectives of the research

The main objective of this research is to establish whether there is a fair reason to dismiss an employee based on what they post on their personal social media platforms, and to understand when and how the right to privacy can be limited. The aim of this research is to find whether there are any shortcomings in the South African labour laws that social media has opened in our laws with regards to the employment relationship and the use of social media, if there are any shortcomings will recommend how the said shortcomings can be addressed. To ensuring

[7] Mahoro v Indube Staffing Solutions [2012]4 BALR 395 (CCMA).

that jobs are not lost mainly on the difference of opinions between employer and employee. To further educate employees that their right to privacy is not in isolation to the rest of other laws and other rights enshrined in the constitution, 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill of Rights.'[8]Further the Constitution provides that 'When applying a provision of the Bill of Rights to a natural or a juristic person in terms of subsection 2 a court may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'[9]

### 1.4 Significance of the research

There is very little scholarly research in South Africa on the discussion on the use of social media and how it affects the employment relationship that exists between the employer and employee as well as how it may affect the relationship that exists between colleagues.

In agreement with Davey and Dahms-Jansen in their article Social Media and Strikes note that there is an increase in CCMA cases dealing with dismissal for social media misconduct.[10] This research will reflect on what our current legislative authority states with regards to dismissals due to social media communication.

Secondly it is imperative that this thesis illustrates how employee's right to privacy and right to freedom of expression are affected and to emphasize that the rights mentioned are not autonomous. They can be limited by section 36 of the limitation clause.

What employee's posts on social media may cause the breakdown of the employment relationship examples of recent cases that will be discussed in great depth in chapters to follow that caused an outrage on social media affecting the employment relationship are the Gareth Cliff[11] case, Penny Sparrow[12] case amongst many others. As well as the lack of clear legal academic research on how social media affects the employment relationship inspired and motived this piece of writing.

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[8] Constitution of the Republic of South Africa of 1994.
[9] Constitution of the Republic of South Africa of 1994.
[10] Davey R and Dahms-Jansen L 'Without Prejudice: Social Media and Strikes' (2012)26.
[11] Cliff v Electronic Media Network (Pty) Ltd [2016] ZAGPJHC2 JOL 35104 (HC).
[12] African National Congress v Penny Sparrow [2016] 16 ZAEQC 1.

It is also important to also fully determine how the right to privacy and the right to freedom of expression of an employer is under threat and to establish when its right limited and to strike a balance between the right to privacy and the limitation clause.

Finally, the study will include a comparative study with other states and how they have addressed issues of social media and the workplace and provide any recommendations on areas that need to improve in our labour laws.

**1.5 RESEARCH METHODOLOGY**

It is necessary to conduct a literature review study in order to explain what a dismissal for misconduct entails. In addition, the scope and content of the meaning of 'misconduct' in the context of dismissals will be discussed. This literature review will by necessity include the analysis of legislation, case law, relevant journal articles and textbooks. Due to the research being based partially on current affairs, the secondary sources of this research will include media reports, where relevant.

The Constitution of the Republic of South Africa[13] and particularly the right to privacy will be discussed and explained. The purpose of this discussion is to determine the extent of this right and what it means in the employment relationship. In addition, the limitations clause and its application to the right to privacy will be discussed. The balance between these two sections of the Constitution that need to be established for purposes of the employment relationship will be discussed.

Since the study deals with electronic posts on social media, the Regulation of Interception of Communications and Provision of Communication-related Information Act[14] becomes relevant This Act helps us to understand when a posts on any social media platform is private and instances in which the employer can access social media posts without necessarily infringing on their right to privacy.

[13] Constitution of Republic of South Africa Act of 1996.

[14] Regulation of Interception of Communications and Provision of Communication-related Information Act of 2002.

South African cases such as the *Fredericks v Jo Barkett Fashions*[15], *Sedick and Another v Krisray (Pty) Ltd*,[16] *Media Workers Association of SA on behalf of Mvemve v Kathorus Community Radio.*[17]

In the *Fredericks* case, Ms Nadia Fredericks (the employee) of Jo Barkett Fashions (the employer) was employed as an administrative assistant and subsequently dismissed for derogatory statements she had posted on her Facebook account. The derogatory statements were about the company and the manager.

It was brought to Ms Barkett (the manager) that Ms Fredericks was making derogatory statements on Facebook. Ms Barkett went on Facebook and found it was indeed true. The applicant did not show any respect to her as the manager and the company itself.[18] An investigation was conducted and another tip off was sent to Ms Louise Muir-Bolberg (Human Resources Manager) that Ms Fredericks was posting derogatory statements on her Facebook account.[19] A hearing was conducted and she was dismissed upon findings.

Ms Fredericks then referred the matter to the CCMA for arbitration.[20] Ms Fredericks contested that her right to privacy was violated. She also mentioned that the dismissal was too harsh.[21] The Commissioner had to decide whether the dismissal was both substantively and procedurally fair.[22] The Commissioner relied upon the Labour relations Act, Code of Good Practice. Furthermore, it noted that the company had no specific policy to regulate Facebook usage in the company.[23] The Commissioner addressed her claims of her right of privacy being infringed, for this the Commissioner relied on the Regulation of Interception of Communication Act provides that "any person may intercept any communication unless the person is intercepting that information or communication for committing an offence."[24] Facebook is a public platform that can be accessed by any person who has an account. The

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[15] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA).
[16] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA).
[17] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA).
[18] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 4.1.
[19] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 4.2.
[20] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 3.
[21] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 5.
[22] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 2.
[23] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 6.
[24] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 6.3.

Facebook user has an option to restrict access to their pages. Ms Fredericks chose not to restrict access to her account and any person had access to view anything she posted.[25]

The Commissioner also found that Ms Fredericks knew what she was doing and she did not dispute her actions. No evidence was placed to rebut the procedure followed. Therefore, the dismissal was both substantively and procedurally fair.

In the *Sedick and Another v Krisray (Pty) Ltd* case, Sedick and De Reuck (the employees) referred their matter to the CCMA for conciliation/arbitration after being dismissed for misconduct. Sedick was employed as a bookkeeper and De Reuck as operations manager.[26] The CCMA must determine whether the dismissal was both substantively and procedurally fair.

Ms Coeatzee who was both Sedick and De Reuck senior manager saw after having sent friend requests to both employees she discovered derogatory statements about the company from both their Facebook accounts. Both Sedick and De Reuck has no restrictions on their Facebook accounts and anyone who has access to Facebook was able to read through their status updates.[27]

Sedick and De Reuck state that the companies name was not brought into disrepute[28] Sedick further alleged that her account was restricted and that all the printed posts of her statements were obtained illegally.[29]

Similar to other cases discussed the Commissioner in this matter relied upon the Regulation of Interception of Communications and Provision of Communication-Related Information[30]

The Commissioner further stated that in the absence of the pages being restricted, De Reuck and Sedick's pages remained wholly in the public domain.[31] Lastly, the Commissioner stated both Sedick and De Reuck had enough time information to form a defence[32], thus the dismissal was both substantively and procedurally fair.

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[25] Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA) para 6.3.
[26] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA).para?
[27] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) para 28.
[28] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) para 39.
[29] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) 40.
[30] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) 47.
[31] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) 52.
[32] Sedick and another v Krisray (Pty) Ltd [2011] JOL 27445 (CCMA) 60.

Another example is the *Media Workers Association of SA on behalf of Mvemve v Kathorus Community Radio,*[33] Mr Mvemve (the employee) was employed as a content by Kathorus Community Radio Station. In the matter Mr Mvemve is represented by a union official. He was dismissed for posting a malicious statement on Facebook. In the statement he claimed that the station manager was a criminal and was being protected by the board.[34]

Mr Mvemve was not immediately dismissed, rather the board requested him to apologize to the board within 24 hours, to staff, and to post a retraction to his friends on Facebook.[35] The board however did not receive an apology within the stipulated time, thus lead to the dismissal of Mr Mvemve.

Mr Mvemve states that he wrote an apology to the board and also apologised to the staff. He also stated that he was unable to write the apology on Facebook as he has already deactivated his Facebook account and the manager was aware of that.[36]

In his findings the Commissioner stated that it was "highly improbable that the applicant could have submitted a letter to the station manager whom he accused of being a criminal."[37] Further that there was no documentary evidence that proved that the board was aware that Mr Mvemve had deactivated his Facebook account. Mr Mvemve was failed to apologise within the time stipulated even though he had ample time to do so. Therefore, the commissioner ruled in favour of the employer and stated that the dismissal was substantively fair.

A comparison study is needed to establish how other jurisdictions have dealt with similar cases arising from this issue. This study focuses on Australia and the United Kingdom. Both these jurisdictions have laws in place that protect employees from unfair dismissals, as well as similar approaches when dealing with social media and employment matters. These are further discussed in the chapters three.

**1.4 STRUCTURE OF RESEARCH PAPER**

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[33] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA).

[34] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA) para 4.

[35] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA) para 4.

[36] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA) para 4.

[37] Media Workers Association of South Africa obo Mvemve v Kathorus Community Radio [2010] 31 ILJ 2217 (CCMA) para 5.4

Chapter 1

Chapter one will include the introduction and background information to the study and outline the research question. It will also contain the objectives and the significance of the research paper, a chapter outline and methodology of the paper.

Chapter 2

Chapter two focuses on setting out the current legal position in South Africa. It will also consider academic writing available on social media in the workplace and the impact of social media on the employment relationship.

Chapter 3

A comparative study will be conducted in this chapter. It will look at how other jurisdictions have dealt with the effect of social media on the employment relationship. Will try to try to establish circumstances where dismissal for social media post will be fair.

Chapter 4

This is the concluding chapter which provide the answer to the research question and make and recommendations where applicable.

**CHAPTER 2:**

## 2.1 INTRODUCTION

This chapter will discuss the Constitutional right to privacy and will contextualise the right to privacy as it relates to the workplace and social media in particular. This chapter will also include a discussion of the right to fair labour practices and the related issue of unfair dismissals. Lastly, the chapter will include an analysis of the extent to which legislation allows an employer to intercept on employee's communication such as intercepting their work emails, telephone conversations.

## 2.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

The Constitution is the "source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of State, including Parliament, the executive, and the courts as well as the fundamental rights of every person which must be respected in exercising such powers."[38] Therefore a Constitutional analyses is important when dealing with Constitutional right.

### 2.2.1 Interpreting rights in the Bill of Rights

Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[39] This means that all legislation, including labour legislation must be consistent with Constitution.[40] In the event that labour legislation is found to be unconstitutional it may be declared invalid and will be inoperable as long as it remains unconstitutional.

Section 7 provides that:

> (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

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[38] S v Makwanyane and Another 1995(6) BCLR 665 (CC) para 15.
[39]Section 2 of the Constitution of the Republic of South Africa of 1996.
[40] Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 9.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

In terms of section 7(2), there is a positive duty placed on the state to respect, protect, promote and fulfil the rights in the Bill of Rights[41]. In the context of this thesis, this means that this obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights.[42]

According to De Waal and Currie, section 7(2) is peremptory and creates a positive obligation on the state through the use of the word 'must'.[43]

Furthermore, in the *Glenister* case the court held that there are a number of ways in which the state can fulfil its obligations to protect the rights in the Bill of Rights. The Constitution leaves the choice of the means to the state. How this obligation is fulfilled and the rate at which it must be fulfilled must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect.[44]

Although the Constitution makes provision of the abovementioned sections it still does not prescribe how in itself should be interpreted. Furthermore, section 39 contains an interpretation clause of the Bill of Rights. These are also sufficiently abstract and require interpretation.[45]

Section 7 further provides that all rights in the Bill of Rights may be limited in terms of section 36. Section 36 provides that:

However, rights are not absolute and can be limited. Section 36 provides that:

The freedoms in the Bill of Rights may be restricted to the degree that the restriction is fair and justifiable in an open and democratic society based on human dignity,

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[41] S7(2) of the Constitution of Republic of South Africa Act of 1996.

[42] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 105.

[43] Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 134.

[44] Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) para 107.

[45] Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 134-135.

equality and freedom taking into account all relevant factors, only in terms of the law of general application.[46]

The above stated factors are not an exhaustive list. They are key considerations, to be used in conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable.[47]

In the case of *Bernstein v Bester* case it was held that '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.'[48] Therefore the rights of an individual can be limited by the rights of another.

Likewise, in the case of *Case v Minister of Safety and Security*[49] the court also emphasised that the right to privacy is broad but can be limited.[50]

### 2.2.2 The right to fair labour practices

Section 23 of the Constitution provides that everyone has the right to fair labour practices.

Section 23 confers a number of independent, if related rights: to 'fair labour practices' to form and join trade union and participate in their activities and programmes; to form, join and participate in the programmes and activities of employers organisations; to organise; to engage in collective bargaining.[51]

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[46] Section 36 of the Constitution of the Republic of South Africa of 1996.
[47] S v Manamela and Another (Director-General of Justice Intervening) 2000 (3) SA 1 (CC) para 33.
[48] Bernstein v Bester and others NNO 1992(2) SA 751 (CC).
[49] Case and Another v Minister of Safety and Security and Others 1996 (3) SA 617 (CC).
[50] Case and Another v Minister of Safety and Security and Others 1996 (3) SA 617 (CC) para 106.
[51] Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 474.

In *NEHAWU v University of Cape Town* it was stated that in determining the meaning of section 23(1), guidance should be sought from the 'equity based jurisprudence generated by the unfair labour practices provisions of the 1956 LRA as well as the codification of unfair labour practice in the LRA'.[52]
It was further stated that it is the function of the legislature, at first instance, and then the Labour Appeal Court and the Labour Court to give content and meaning to section 23(1)[53]

Ngcobo J further held that the focus of section 23(1) is the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices.[54]
The protection of section 23 should not be restricted to only those who have contracts of employment.[55]
Therefore, section 23 protects everyone that becomes a victim of unfair labour practices. However, it is unclear in South African law whether if an individual who engages in their union social media page and shares their grievance about their employer would amount to unfair labour practice. As the comments would be made on their public page on any social media platform.

### 2.2.3 The right to freedom of expression

Another right which may be linked to the use of social media is the right to freedom of expression. Section 16(1) of the Constitution provides that everyone has a right to freedom of expression, which includes:

(a) freedom of the press and other media;

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[52] National Education Health & Allied Workers Union v University of Cape Town & Others 2003 24 ILJ 95 CC para 111.
[53] National Education Health & Allied Workers Union v University of Cape Town & Others 2003 24 ILJ 95 CC para 34.
[54] National Education Health & Allied Workers Union v University of Cape Town & Others 2003 24 ILJ 95 CC para 40.
[55] Pretorius and Another v Transport Pension Fund and Others 2018 ZA (CC) para 48.

(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

S16(1) protects the right of freedom of expression. Employers have a right to protect their reputation[56]

Section 16(2) provides an internal limitation on the right to freedom of expression. Freedom of expression 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.

The limitation of rights was also emphasised in *S v Makwanyane*[57], where it was held that '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.'[58]

The right to freedom of expression is also subject to section 36 of the Constitution This also limits the right to freedom of expression, meaning that the right to freedom of expression is not absolute.

Propaganda for war, incitement of imminent violence and certain forms of hate speech are not constitutionally protected expression.[59] Although the right to freedom of expression is available, employers also have a right to protect their reputation and good name.[60]

Lastly in the *Khumalo* case it was held that:

The law of defamation seeks to protect the legitimate interest individuals have in their reputation. To this end, therefore, it is one of the aspects of our law which supports the protection of the value of human dignity. When considering the constitutionality of the law of defamation, therefore, we need to ask whether an appropriate balance is struck between the

[56] Caxton Ltd and Others v Reeva Forman(Pty)Ltd and Another 1990 (3) SA 547 (A) 5601.
[57] S v Makwanyane and Another 1995(6) BCLR 665 (CC).
[58] S v Makwanyane and Another 1995 (6) BCLR 665 (CC) para 104.
[59] Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)32.
[60] Caxton Ltd and Others v Reeva Forman (Pty)Ltd and Another 1990(3) SA 945 (A)5601.

protection of freedom of expression on the one hand, and the value of human dignity on the other.[61]

In trying to strike a balance between these constitutional rights. In *Herdhold v Wills* it was stated that it is not good enough that the words published words are true. They must also be to the interest of justice.[62] Another important aspect to note that was held is that not only the person making the defamatory statement will be held liable but everyone else that decides to partake in it.[63]

In conclusion, people cannot post anything that they like and then use the right to freedom of expression as a defence. The right to freedom of expression is not absolute and thus can be limited.

**2.2.4 The right to privacy**

The Constitution provides that:

> 'Everyone has the right to privacy, which includes the right not to have;
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized;
> (d) the privacy of their communications infringed.'[64]

This provision ensures that individuals' right to privacy is recognised. For purposes of this thesis, subsection (d) is most relevant.

According to De Waal, the scope of a person's right to privacy extends only to those aspects of his or her life or conduct about which a legitimate expectation of privacy can be harboured.[65]

The test to determine whether there is a legitimate expectation of privacy, as set out in *Bernstein v Bester*, there are two questions that are addressed; namely whether the person has a subjective right to privacy and whether society has recognised such an expectation as objectively reasonable.[66]

[61] Khumalo v Holomisa 2002 (5) SA 401 (CC) para 25.
[62] Herhorldt v Wills (2012) 129 SALJ 375.
[63] Sedick and Another v Krisray (Pty) Ltd (2011) 8 BALR 879 (CCMA).
[64] Section 14 of the Constitution of Republic of South Africa Act of 1996.
[65] J De Waal, I Currie *The Bill of Rights Handbook* 6th ed (2013) 297.
[66] Bernstein v Bester 1996 ZACC 2 para 75.

In *Smith v Partners in Sexual Health*, Smith was employed as an administration assistant. Smith was employed by a non-profit organisation that empowered the youth to make informed decisions in relation to their sexual and reproductive health and right. Smith was then dismissed. Smith challenged both the procedural and substantive fairness of her dismissal.

At the time of the incident the respondent created an e-mail account with the Internet-based 'Gmail' service provided by Google. At that stage it did not have its own Internet domain and required an e-mail account that would allow it immediately to start communicating with donors, sponsors and users.[67]Smith also had a private Gmail email account.
One of Smith's duties was to check the Gmail account on a regular basis and forward to respondent's new e-mail accounts any e-mails sent to the Gmail account. The CEO in Smith's absence, decided to check respondent's Gmail account and forward any e-mails received. When she logged into the business Gmail account she found e-mail correspondence between Smith and a number of former employees as well as other persons outside the organization, which e-mails made reference to internal matters. De Lora printed a number of these e-mails and exited the account. When she later re-accessed mail and attempted without success to find the same e-mails again she realized that she was now looking at respondent's Gmail account and further, that what she had been looking at earlier was Smith's private Gmail account.[68]Both emails belonged to Gmail.
She then found several emails between Smith and former employees whereby confidential information of the company was shared by Smith.
The Commissioner relied on the definition provided for in the Regulation of Interception of Communications and Provision of Communication-related Information for assistance. Interception is defined as being 'the ... acquisition of the contents of any communication through the use of any means ... so as to make some or all of the contents of a communication available to a person other than the sender or recipient or intended recipient of that communication and includes the ... viewing, examination or inspection of the contents of any indirect communication'.[69]
The content of Smith's communications was acquired by electronic means by the CEO although she was not the sender, the recipient or intended recipient of those communications. She clearly was not party to the communications. She had not received any consent from

[67] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para 6.
[68] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para 13.
[69] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para47.

Smith to such interception.[70] Further it was stated that the suspension letter barring Smith from contacting any of the current employees did infringe on his right to have an employee to represent her. Therefore, it was concluded that the dismissal was both substantive and procedurally unfair.

To find otherwise would be effectively to give employers carte blanche to 'hack' into the private e-mail box of any employee on any occasion that they suspect the employee of having made remarks H deemed inappropriate. This cannot be condoned.[71]

Commissioner Bennet emphasised that one does not have a reasonable expectation of privacy with regard to internet-based social networking sites because the site structure allows the viewing (the interception) of conversations by persons not party to those communications. Thus emails cannot be compared to social media accounts[72]

However, from the CCMA cases *Sedick v Krisray* and *Fredericks v Jo Barkett Fashions*[73] it is evident that if one does not exercise options to restrict access to one's Facebook page by changing the settings to private and not choosing the automatic sign-in option, one in effect stays within the public domain. Thus, when one moves into the realm of business and social interaction, the scope of one's personal space shrinks, and this decreases but does not obliterate one's expectation of privacy.[74]

A number of factors have been developed when one tries to ascertain whether invasion of privacy has occurred. In *Mistry v Interim National Medical and Dental Council*, indicated that the following factors should be considered in determining the invasion of the right to information privacy:

a) whether the information was obtained in an intrusive manner;

b) whether it was about intimate aspects of the applicant's personal life (thus how great was the expectation of privacy with regard to the information);

c) whether it involved data provided by the applicant for one purpose but which was used for a different purpose; d) whether the information was disseminated to the press or the general

[70] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para48.
[71] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para 60.
[72] Smith v Partners in Sexual Health (Non-profit) 2011 32 ILJ 1470 (CCMA) para 51.
[73] Fredericks v Jo Barkett Fashions [2012]1 BALR 28 (CCMA).
[74] Protea Technology Ltd v Wainer 1997 9 BCLR 1225 (W) paras 496.

public or persons from whom the applicant could reasonably expect such private information would be withheld.[75]

When dealing with social media the above factors can as a guideline to determine whether an employee's right to privacy has been infringed upon. The above factors also provide clarity on cases whereby the employee has used the data provided to upload on their social media account.

The broadness of the right to privacy was also acknowledged in the *Serious Economic Offences and Others v Hyundai Moto Distributors (Pty) Ltd and Others.*[76]

**Legislation that gives effect to the right to privacy in the workplace**

Although there is no legislation directly deals with the regulating of social media and employment relationship. That distinctively sets boundaries on how far can an employer be able to use what an employee posts on their social network as an instrument leading to possible dismissal. However, there is legislation in place that give guide lines.

According to the Protection of Personal Information Act (POPI) provides that personal information must be processed:

(a) lawfully and
(b) in a reasonable manner that does not infringe the privacy of the data subject.[77]

Further the POPI Act provides that personal information must be collected directly from the data subject except as otherwise provided for in subsection (2).

(2) It is not necessary to comply with subsection (1) if;

(a) the information is contained in or derived from a public record or has deliberately been made public the date subject
(b) the data subject or a competent person where the data subject is a child has consented to the collection of the information from another source[78]. The POPI Act ensures that

[75] Mistry v Interim National Medical and Dental Council 1998 ZACC 10 para 51-52.
[76] Investigating Directorate: Serious Economic Offences and Others v Hyundai Moto Distributors (Pty)Ltd and Others 2000(10) BCLR 1079 (cc) para 16.
[77] Section 9 of the Protection of Personal Information Act 4 of 2013.
[78] Section 12 of the Protection of Personal Information Act 4 of 2013.

employers process employees lawfully and without invading the privacy of their employer's.

The Electronic Communication and Transaction Act herein referred to as ECTA is also one of our current legislations enacted that addresses the matter of personal information. First understanding that the following provision apply to 'personal information that has been obtained through electronic transactions.'[79]

Section 51 of the ECTA provides the following:

> (9) A party controlling personal information may use that personal information to compile profiles for statistical purposes and may freely trade with such profiles and statistical data, as long as the profiles or statistical data cannot be linked to any specific data subject by a third party.[80]

The above make provision for the employer to intercept communication of its employees where the employee has given consent prior the interception of communication, where it was a party to such communication and the communication made by the employee happens while carrying out the business of the employer.

The Regulation of Interception of Communication and Provision of Communication-Related Information Act under section 6 confirms the above by providing:

> 'Any person may. in the course of the carrying on of any business, intercept any
>
> (a) by means of which a transaction is entered into in the course of that business;
> (b) which otherwise relates to that business; or
> (c) which otherwise takes place in the course of the carrying on of that business, in the course of its transmission over a telecommunication system.'[81]

[79] Section 50(1) of the Electronic Communication and Transaction Act 25 of 2002.
[80] Section 51 of the Electronic Communication and Transaction Act 25 of 2002.
[81] Section 6(1) of the Regulation of Interception of Communication and Provision of Communication-Related Information Act 70 of 2002.

Furthermore, the above prove that the right to privacy is not absolute and can be limited. As well as noting that it is important to have a balance between the employer's pursuit to protect his or her business and the protection of employees' rights. This was also discussed in the *Moonsamy v The Mailhouse*[82] case, where it stipulated that ' the rights that a citizen is entitled to in his or her personal life cannot simply disappear in his or her professional life as a result of the business necessity. At the same time the employer's business necessity might legitimately impact on the employee's personal rights in a manner not possible outside the workplace. Therefore, there is a clear balancing of interests.'

Furthermore in *Gaertner and others v Minister of Finance and others*[83] it was held that as a person moves into communal relations and activities such as business and social interaction, the scope of their personal space shrinks. This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. It was further held that the right to privacy was not absolute like other right in the bill of rights. [84]

[82] Moonsamy v The Mailhouse (1999) 20 ILJ 464 (CCMA) at 471G.
[83] Gaertner & Others v Minister of Finance & Others 2014 (1) BCLR 38 (CC).
[84] Gaertner & Others v Minister of Finance & Others 2014 (1) BCLR 38 (CC) para 49.

**DIMISSAL**

## 2.3 THE LABOUR RELATIONS ACT

The LRA is the most fundamental legislation when dealing with the employer and employee relationship. It sets standards that both the employers and employees have to follow to ensure that there the employment relationship is intact as well as to ensure that there is fairness between the employer and employee.

One of the standards that the LRA has developed are set in the code of good practice. These are important when issues of dismissal arise, they ensure that the dismissal is both substantively fair and procedurally fair.

Schedule 8 of the LRA states the following:

> (1) This code of good practice deals with some of the key aspects of dismissal for reasons related to conduct and capacity. It is intentionally general. Each case is unique, and departures from the norms established by this Code may be justified in proper circumstances. For example, the number of employees employed in an establishment may warrant a different approach.
>
> (2) This Act emphasizes the primary of collective agreements. This Code is not intended as a substitute for Disciplinary Codes and procedures where these are the subject of collective agreements, or the outcome of joint decision-making by an employer and a work-place forum.
>
> (3) The key principle in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. While employees should be protected from arbitrary action, employers are entitled to satisfactory conduct and work performance from their employees.[85]

The above provision clarifies what the intention of the code of good practice is. This thesis will only focus on aspects of the code of good practice deals with dismissal for misconduct. It further provides the following:

[85] Schedule 8 Item 1 (1)-(3) of the Labour Relations Act of 1996.

Disciplinary procedures prior to dismissal

(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.

In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them.

(2) The courts have endorsed the concept of corrective or progressive discipline.

This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a

dismissal will not be fair if it does not meet the requirements of section 188. [86]

The case of *Sidumo v Rustenburg Platinum Mines*[87]also highlights the importance of applying the code of good practice in matters related to dismissal.

As provided for above this provision does not seek to be a substitute for Disciplinary Codes. Therefore, employers ought to develop their own handbooks or rules relating to internet and social media usage.

### 2.3.1 DEFINITION OF DISMISSAL

Grogan states that a dismissal has taken place when 'the contract is terminated at the instance of the employer and entails an act whereby the employer brought the contract to an end.'[88] Another author in trying to determine or rather define what dismissal is states that definition of dismissal is broad and comprises of various elements.[89]The Labour Relations Act (LRA) gives us a much detailed definition of what dismissal and when a dismissal is said to have taken place.

Section 186(1) of the LRA provides the following:

(a) An employer has terminated a contract of employment with or without notice;

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;

(c) an employer refused to allow an employee to resume work after she;

i. took maternity leave in terms of any law, collective agreement or her contract of employment; or

ii. was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;

[86] Schedule 8 item 3(1)-(4) of the Labour Relations Act of 1995.
[87] Sidumo and Another v Rustenburg Platinum Mines Ltd 2007 BLLR 1097 (CC) para 33.
[88] Grogan J *Workplace Law* 11th ed (2010)165.
[89] van Niekerk A *Unfair Dismissal* 2nd ed (2004)16.

(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

(f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.[90]

The above provision of the LRA gives a comprehensive definition of what a dismissal is and instances whereby it occurs. In terms of this legislation there is no need for a notice for dismissal to take place. There are several forms of dismissal or rather dismissal occurs in several forms namely being; dismissal under the LRA, automatically unfair dismissals and dismissals for misconduct: fair reason, dismissal for misconduct: fair procedure, dismissal for poor work performance, incompatibility and incapacity, dismissal for operational requirements and dismissals of unprotected strikers.

Terminating the employment contract between employer and employee does not only occur by way of dismissal. Termination of employment can occur outside the definition provided for in the LRA. This can happen if the following instances; termination of employment of a contract of employment by the effluxion of time or the happening of a specified event, reaching retirement age, insolvency, mutual agreement, death and supervening impossibility of performance.[91] However this thesis will not give a detailed discussion on these forms of termination of a contract of employment that do not form part of the definition of dismissal as provided for in the LRA.

What will be discussed in great depth will be the forms of termination of employment within the definition of dismissal as per the LRA.

[90] Labour Relations Act 66 of 1995.

[91] van Niekerk A *Unfair Dismissal* 2nd ed (2004)23.

### 2.3.2 TYPES OF DISMISSAL

The different types of manner an employee maybe dismissed will be discussed below.

#### 2.3.2.1 Dismissal under the LRA section 186

The Labour Relations Act under section 186 identifies what a dismissal is. This provision of the LRA as stated above highlights that 'the common denominator of the various forms of dismissal is that all of them are ultimately caused by the employer.'[92] The very first thing that this section addresses is that dismissal can take place with or without a notice.[93] The employer need not necessarily send a notice to the employee notifying them about termination of employment.

Where the employer does not renew a fixed term contract or perhaps does but on less favourable terms thus renders the employment contract to have been terminated.[94] Section 186 also makes provision for termination of employment contract based on pregnancy related matters. Where the employee does not comply with their contractual obligations and exceeds the leave period provided for in the Basic Employment Conditions Act which is four consecutive months maternity leave.[95] Otherwise if the employee complied with her contractual duties and is none the less dismissed for pregnancy related matters it amounts to automatically unfair dismissals[96], which will be discussed below.

Further this provision extends protection to employees where they have been refused re-employment while other employees in the same or a similar position have been offered re-employment.[97] Lastly it makes provision for constructive dismissal as well as dismissal after a business had been transferred from one owner to another.

#### 2.3.2.2 Automatic unfair dismissals

The Labour Relations Act makes provision for grounds whereby no justification is valid for dismissing an employee on[98]. These grounds are included under section 187 of the Act as follows;

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[92] Du Toit D Labour Relations Law: *A Comprehensive Guide* 6th ed (2016)426.
[93] Labour Relations Act 66 of 1995.
[94] Labour Relations Act 66 of 1995.
[95] Basic Employment Act of 1997.
[96] Labour Relations Act 66 of 1995.
[97] Du Toit D Labour Relations Law: *A Comprehensive Guide* 6th ed (2016)429.
[98] Du Toit D Labour Relations Law: *A Comprehensive Guide* 6th ed (2016)433.

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is: (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV; (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health; (c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and

their employer; (Section 187(1)(c) substituted by section 31 of Act 6 of 2014) (d) that the employee took action, or indicated an intention to take action, against the employer by - (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act. (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.[99]

The above section gives a lists of grounds where if an employee is dismissed the dismissal would amount to an automatically unfair dismissal. There is no justification for dismissing an employee based on these grounds, 'victims of automatically unfair dismissals will invariably be reinstated, unless they prefer compensation'[100].

This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187. The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.[101]

The following case *Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre* [102] illustrates an instance whereby an employer was unfairly discriminated and then dismissed. The dismissal amounted to an automatically unfair dismissal.

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[99] Labour Relations Act 66 of 1995.
[100] Grogan J *Workplace Law* 11th ed (2010)208.
[101] Labour Relations Act 66 of 1995.
[102] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7.

Mr Allpass was appointed on the 28 October 2008 by the respondent as Stable Yard Manager and horse riding instructor. The applicant's letter of appointment confirms his appointment commencing on 1 November 2008 "on a temporary basis for a period of three months, where after the position will (sic) reviewed". The terms of his employment included remuneration at R12000.00 per month as well as accommodation on the respondent's premises. The respondent announced his appointment in a notice dated 3 November 2008 to all stablers, pupils and riders, listing the applicant's 27 years' experience in horse riding, instructing, stable yard management and judging of dressage competitions. The notice referred to his impressive curriculum vitae and achievements, which included, inter alia, representing South Africa in dressage championships as well as being a qualified South African National Defence Force ("SANDF") riding instructor.

During his interview Gary Allpass stated that he was a homosexual and in a same-sex union. He further said that he was in a good health condition and had a bond over an immovable property when asked about debt he might have.

The applicant has been living with HIV for some 18 years. However according to his medical expert, and which evidence was unchallenged, his CD4 count at the material time was exceptionally low and his viral load was at such a low level as to be undetectable. He was said to be in excellent health and able to perform the duties required of him at all material times.[103]

Gary Allpass was then asked to fill in a Personal Particulars Form and Malan collected the form on the 28 November 2008. The following day a confrontation ensued between Malan and the applicant during which the applicant was dismissed and instructed to vacate the premises.[104]

The applicant's dismissal was confirmed in a final notice dated 19 November 2008 and which accompanied his salary payment. The note stated that he was being dismissed for fraudulent misrepresentation.[105]

The matter was then taken to court. After both parties lead their evidence the court concluded that the compensation for an automatically unfair dismissal must be 'just and equitable in all

[103] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 6.
[104] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 8.
[105] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 11.

the circumstances, but not more than the equivalent of 24 months' remuneration' (section 194(3)). The applicant for obvious reasons does not seek reinstatement.[106]

The respondent accused the applicant was of "tactical opportunism" in that he deliberately exploited his HIV status. It also challenged his credibility. This accusation appears to emanate from a stereotype about homosexuals and people with HIV.[107]

The following order was made; the applicant's dismissal is declared to be automatically unfair under section 187(1)(f). The respondent is ordered to pay the applicant compensation in the sum of twelve months' remuneration, reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status.[108]

The case above illustrates a matter whereby an employee is dismissed. His dismissal was automatically unfair as he was unfairly discriminated against due to his health status. The applicant preferred to be compensated rather than to be reinstated as the relationship had broken down irretrievably.

**2.3.2.3 Dismissal for poor work performance, incompatibility and incapacity**

This type of dismissal refers to the employee's work performance and whether or not he is capable of doing the work required of him. Although instances of automatically unfair dismissals may overlap with these issues[109], for purposes of this paper the focus is on aspects that do not overlap.

Schedule 8 of the Labour Relations Act provides for employees on probationary period as well as those who are permanently employed, this thesis will only focus on those who are permanently employed.

Therefore, The Code of Good Practice provides guideline for cases on dismissal for poor work performance as follows:

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[106] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 67.
[107] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 69.
[108] Allpass v Mooikloof Estates (Pty) Ltd Mooikloof Equestrain Centre (JS178/09) [2011] ZALCJHB 7 para 78.
[109] Grogan J *Workplace Law* 11th ed (2010)229.

Any person determining whether a dismissal for poor work performance is unfair should consider:

(a) whether or not the employee failed to meet a performance standard; and
(b) if the employee did not meet a required performance standard whether or not:
   i. the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
   ii. the employee was given a fair opportunity to meet the required performance standard; and
   iii. dismissal was an appropriate sanction for not meeting the required performance standard.[110]

The above provision should be employed where one believes that a dismissal for poor work performance was unfair. There are a number of reasons or causes that result in poor work performance.

The case of *Chevron South Africa (Proprietary) Limited v Chemical Energy Paper Printing Wood and Allied Workers Union on behalf of Bongani Voyiya* gives an understanding of the above provision where an employee is dismissed for poor performance. Mr Bongani Voyiya was employed by Chevron South Africa from 1995 until being dismissed in 2015.He was dismissed for poor work performance. Following his dismissal, he declared an unfair dismissal dispute to the Bargaining Council and one of the reliefs sought was that of reinstatement.[111]

The applicant approached the court to review and set aside the arbitration award issued by the arbitrator. The arbitrator found that the employee's dismissal was both procedurally and substantively unfair.[112] The applicant also wanted to have the award substituted with an order that the dismissal of the employee was substantively and procedurally fair, alternatively to direct that the unfair dismissal dispute be remitted to the Bargaining Council for arbitration de novo before any commissioner other than the arbitrator.

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[110] Labour Relations Act 66 of 1995.
[111] Chevron South Africa (Proprietary) Limited v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union obo Bongani Voyiya and Others [2017] ZALCCT 71 para 8.
[112] Chevron South Africa (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union obo Bongani Voyiya and Others (C734/2016) [2017] ZALCCT 71 para 2.

This Court then applied the guidelines in the code of good practice of the LRA was applied in determining the case for poor work performance. Any person determining whether a dismissal for poor work performance is unfair should consider the following:

(a) whether or not the employee failed to meet a performance standard; and
(b) if the employee did not meet a required performance standard whether or not—
    i. the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
    ii. the employee was given a fair opportunity to meet the required performance standard; and
    iii. dismissal was an appropriate sanction for not meeting the required performance standard.[113]

The dismissal was substantially fair. There was no dispute that the employee was unable to do his duties. Further the court held that the dismissal of Mr Bongani Voyiya was procedurally unfair, therefore, the applicant is ordered to pay him a compensation equivalent to 3 months of his salary.

The matter is remitted to the arbitrator to be decided de novo, before any commissioner, on the following terms: the only issue to be decided is whether or not the dismissal was an appropriate sanction, and if not, substitute it with an appropriate sanction, (b) both parties be allowed to lead evidence only in respect of this issue.[114]

Poor work performance is a justifiable ground to dismiss an employee. Where an employer has done all that he/she to assist the employee to carry out their duties and obligations. Further if there is absolutely no other option but to dismiss the employee, in such instance dismissal is fair.

**2.3.2.4 Dismissal for operational requirements**

According to the LRA operational requirements means 'requirements based on the economic, technological, structural or similar needs of an employer.'[115] Therefore for a dismissal to

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[113] Labour Relations Act 66 of 1995.
[114] Chevron South Africa (Pty) Ltd v Chemical, Energy, Paper, Printing, Wood and Allied Workers Union and Others [2017] ZALCCT 71 para 34.
[115] Labour Relations Act 66 of 1995.

amount to a dismissal for purpose of an operational requirement it must satisfy all the three requirements mentioned above; economic, technological and structural.

This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer's business.[116]

Grogan further emphasizes that retrenchment should be the last means that employers resort to. The employer must comply with certain procedural requirements.[117] Where these requirements set out for operational requirement are not met then the dismissal is not a dismissal for operational requirements. Section 189 and section 189A clearly provide how retrenchments must be conducted. However, for purposes of this thesis which seeks to determine whether an employer may dismiss an employee for what they update on their social network system, it will not discuss retrenchments.

**2.3.2.5 Dismissal for misconduct: fair reason**

The main focus of this piece of writing is whether there is fair reason to dismiss an employee based on what they post on their private social media platforms. As it is already established that there are no laws that govern the employment relationship and the use of social media by employees.

Therefore, there is a need to go in depth in understanding dismissal for misconduct. Serious misconduct issues include; dishonesty or damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and insubordination.[118] This is not an enclosed list of misconduct. The inquiry for misconduct has been split into two process that the employer has to follow before dismissing an employee for misconduct.[119] The first process being "was there good reason to dismiss"[120] (substantively fair) and the second 'did the employer follow a fair procedure before deciding to on the penalty of dismissal' [121](procedurally fair).

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[116] Labour Relations Act 66 of 1995.
[117] Grogan J *Workplace Law* 11th ed (2010)317.
[118]van Niekerk A *Unfair Dismissal* 2nd ed (2004)40.
[119] Grogan J Workplace Law 11th ed (2010) 231.
[120] Grogan J Workplace Law 11th ed (2010) 231.
[121] Grogan J Workplace Law 11th ed (2010) 231.

The first step of the inquiry for dismissal for misconduct substantive fairness. The labour Relations Act provides guidelines for dismissal for misconduct which are as follows:

Any person who is determining whether a dismissal for misconduct is unfair should consider:

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) If a rule or standard was contravened, whether or not;

i. the rule was a valid or reasonable rule or standard;
ii. the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
iii. the rule or standard has been consistently applied by the employer; and
iv. dismissal was an appropriate sanction for the contravention of the rule or standard.[122]

Further the LRA states that a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure.[123]

Fair reasons for dismissal

(1) A dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out below.

(2) This Act recognises three grounds on which a termination of employment might be legitimate. These are: the conduct of the employee, the capacity of the employee, and the operational requirements of the employer‘s business.

[122] Schedule 8 item7 of the Labour Relations Act 66 of 1996.
[123] Section 188 (b) of the Labour Relations Act 66 of 1995.

(3) This Act provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187. The reasons include participation in a lawful strike, intended or actual pregnancy and acts of discrimination.

(4) In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[124]

The first requirement in determining whether the dismissal for misconduct was substantially fair, the employer must prove on a balance of probabilities that the employee was actually guilty of misconduct.[125] Second, the rule must be valid and reasonable. The rule must contravene any law and most importantly it must not contravene the constitution. Any law that is not in line with the constitution is invalid.[126]Thirdly, "the employer must prove that the employee was aware or could be reasonably be expected to have been aware of the rule."[127] Another requirement in terms of the Act is that the employer must apply the rule consistently. This means that the rule must be applied equally to all employers. "It is unfair to dismiss an employee for an offence which the employer has habitually condoned or only to some of a number of employees guilty of the same offence."[128] The last requirement that the employer needs to make sure that is met, is that the dismissal is the appropriate form of punishment for breaking or contravening the rule. For dismissal for misconduct to be substantively fair all the above requirements need to be satisfied.

In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[129]

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[124] Schedule 8 item 2(1)-(4) of the Labour Relations Act 66 of 1995.
[125] Grogan J Workplace Law 11th ed (2010)233.
[126] Section 2 of the Constitution of the Republic of South Africa of 1992.
[127] Grogan J Workplace Law 11th ed (2010)236.
[128] Grogan J Workplace Law 11th ed (2010)236.
[129] Labour Relations Act 66 of 1995.

### 2.3.2.6 Dismissal for misconduct: fair procedure

As already mentioned above that there are two steps to the inquiry for dismissal for misconduct the first discussed above is substantive fairness and the second which is discussed below is fair procedure. This step is concerned with whether the employer followed the correct procedure rather than trying to prove that employee is indeed guilty of breaking a rule and whether the rule broken existed, as well as to determine if dismissal is a fair penalty.[130]

There are certain requirements that need to be satisfied in order for the procedure to be determined as a fair procedure. The LRA in item 4(1) provides the following: 'normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.'[131] Once the above is satisfied the procedure which the employer followed to dismiss the employee for misconduct is fair.

## 2.4 CONCLUSION

This academic writing looks at the effect of social media on the employment relationship. Although it is not easy to provide one definition of a dismissal. The above chapter has defined what a dismissal is and under what circumstances a dismissal is set have taken place. As demonstrated above that dismissal consists of various components as listed in the LRA above.

Further when analysing what the effect of social media has on the employment relation and trying to determine whether an employer can use what an employee posts on their social network systems to initiate disciplinary proceedings against that employee with a view to dismissal. The right to privacy and freedom of expression as they apply to employees need to be discussed. The above chapter also provides which legislation that gives the full effectiveness of both the right to privacy and freedom of expression in the workplace.

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[130] van Niekerk A *Unfair Dismissal* 2nd ed (2004)40.

[131] Labour Relation Act 66 of 1995.

## CHAPTER 3: COMPARITIVE STUDY

### 3.1 INTRODUCTION

On the quest of determining whether an employer can use a social media post of an employee to initiate disciplinary proceedings against that employer with the view to dismiss. Different approaches have been adopted around the world by different states. This chapter will look at the provisions made for the right to privacy within the different jurisdictions. Further analyse how the employer can ensure that his or her business is not brought into disrepute by employee's posts and comment on any social networking system without necessarily infringing on the employers right to privacy and freedom of expression. The chapter also looks at the different legislatures that the states use when dealing with the cases that involve social media cases. Lastly it also takes not of any suggestions made regarding the importance of social media policies or rules that are clearly set out that address the use of internet including the use of social networking systems.

### 3.2 AUSTRALIA

Like the rules of South Africa. The Privacy Act sets the privacy standard in Australia. Similar to the South African CCMA, an independent body known as the Fair Work Commission resolves disputes by making legal rulings between employer and employee. Thus a comparative study is conducted with this jurisdiction.

#### 3.2.1 Right to privacy

The *Privacy Act*[132] provides a few principles in relation to privacy in Australia. These principles are referred to as privacy principles found in schedule one of the Act. The privacy principles are as follows; open and transparent management of personal information, anonymity and pseudonymity, collection of solicited personal information, dealing with unsolicited personal information, notification of the collection of personal information, use or disclosure of personal information, direct marketing, direct marketing, cross-border disclosure of personal information, adoption, use or disclosure of government related identifiers, quality of personal information, security of personal information, access to personal information and lastly correction of personal information.[133]

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[132] Privacy Act of 1988.
[133] Schedule 1 of Privacy Act of 1988.

The *Fair Work Act* [134]provides for the administration of this Act by establishing the Fair Work Commission (FWC) previously known as the Fair Work Australia.[135] FWC is a commission that is very similar to the CCMA of South Africa. It deals with the matters that arise between employers and employees. The decisions that it makes are legally binding on the parties involved.[136] However there are certain laws in place to assist on right of privacy and monitoring of employee information. These will be discussed below.

Freedom of expression of the Australian Capital Territory Current Acts:

(1) Everyone has the right to hold opinions without interference.

(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.[137]

However similar to the limitation clause provided in the Constitution of South Africa. The right to freedom of expression is not absolute and can be limited.

Section 28 of the Human Right Act[138] provides:

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.[139]

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[134] Fair Work Act of 2009.
[135] Section 1(d) of the Fair Work Act 2009.
[136] Fair Work Commission available at *https://www.fwc.gov.au* (accessed 30 March 2019).
[137] Section 16 of Human Rights Act 2004.
[138] Human Rights Act 2004.
[139] Section 28 the of Human Rights Act 2004.

Like South Africa, Australia does not have a direct legislation or laws specifically set out to regulate social media use.

### 3.2.3 Cases

In the *Corporation v Lenah Game Meat Pty Ltd*[140] it was noted that the assumption made from the decision laid down in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[141] was authority for the premise that there was no common law right to privacy which could be enforced by action. This assumption was in fact incorrect or there was more read into it than what it was actual meant.[142]Thus making *Corporation v Lenah Game Meat Pty Ltd* the first case to deal with invasion of privacy by individuals as being punishable in Australia.

Now that the assumption that there was no right to privacy in common law was removed in the Lenah Game Meat Pty Ltd, it was easier to deal with cases whereby an individual's right to privacy was invaded. In another the case of *Grosse v Purvis*[143] the plaintiff was compensated for her privacy being invaded[144]. This decision confirms that courts do acknowledge the right to privacy and that invasion of this right is punishable by law.

Social media has a great influence on the employment relationship as demonstrated throughout this thesis. Fair Work Australia has various decisions regarding this matter. It is important to also note that not all social media posts that may appear as negative may amount to a dismissal.

In the case of *Sally-Anne Fitzgerald v Dianna Smith Escape Hair Design*[145] the Commissioner held that the comments made on the Facebook page where indeed silly however they did not adversely affect the employers business. Therefore, the dismissal was harsh, unjust and unreasonable. [146]

[140] Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd, (2002) 208 CLR 199.
[141] Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] HCA 45; (1937) 58 CLR 479.
[142] Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd, para 182.
[143]Grosse v Purvis 2003 QDC 151.
[144] Grosse v Purvis 2003 QDC 151 par 475.
[145] Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design 2010 FWA 7358.
[146] Sally-Anne Fitzgerald v Dianna Smith T/A Escape Hair Design 2010 FWA 7358 para 56.

In another case, the *Stutsel*[147] case, Mr Stutsel was employed by the Company as a truck driver. The applicant's employment contract was terminated for serious misconduct following the posting of comments about two of his managers on his Facebook profile page.

The comments posted on the Applicant's Facebook page regarding the managers were offensive, derogatory and discriminatory, and included suggestions of dishonest and underhanded conduct, and comments of sexual misconduct as per the Company's allegations.

One of the managers saw the applicants Facebook post. She noted that she along with another manager were named on the post. She later filed a complaint to the company. The Group Manager for Workplace Relations investigated the matter. She recommended that the Company consider terminating the applicant's employment.

The Commissioner indicated that he would confine himself to the three specific allegations made against the Applicant in the termination letter. The letter summarises the reasons for the dismissal as follows:

"1. on your Facebook profile page, which was open to the public, you made a number of statements about one of your managers, Mick Assaf, that amounted to racially derogatory remarks;

2. on your Facebook profile page, which was open to the public, you made a statement about one of your managers, Ms Nina Russell, which amounted to sexual discrimination and harassment; and

3. you made extremely derogatory comments about your managers, Mr Assaf and Ms Russell."[148] The Company did not have a policy on the use of social media by employees. In an era in which many companies have detailed social media policies, the parts of the induction training material and handbook upon which the Company relied were not adequate to ground the action taken against the Applicant.[149]

All in all, I find that Mr Stutsel was not guilty of serious misconduct relating to the matters set out in the termination of employment letter. I further find that there was not a valid reason for the termination of his employment, based on the reasoning set out above."[150] Although in this

[147] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444.
[148] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444 para 6.
[149] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444 para 8.
[150] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444 para 10.

case the Commissioner found that the dismissal was procedurally fair but the dismissal was harsh, unjust and unreasonable.[151]

Another important aspect that the Commissioner stresses on, is the importance of employers having a policy handbook that would address social media and or internet use by employees. It is not enough that the company did not have such a handbook or policy.[152]

In another case. The case of *Colby Somogyi v LED Technologies*[153] a case whereby the employer was found to be unfair on the decision to dismiss the employee regardless of distasteful comments made on his Facebook page. Mr Colby Somogyi was employed by LED Technologies. He had been employed as a merchandiser. He was then dismissed for serious misconduct as a result of a statement he had posted on his Facebook page. Mr Somogyi filed for unfair dismissal against his employer LED Technologies.

Mr Somogyi received a call lasting around a minute, instructing him to *"return all company property to the office*," and when he asked why he was told by Mr Ottobre "*it doesn't matter, you're fired,"* and the call was ended. Mr Ottobre admits that he didn't listen properly to My Somogyi while he was trying to explain his post.[154]

Colby Somogyi posted the following statement on his Facebook:

*"I don't have time for people's arrogance. And your not always right! your position is useless, you don't do anything all day how much of the bosses cock did you suck to get were you are?"*

Mr Somogyi submits in response that the post had nothing to do with LED Technologies, or anyone associated with the business. He submits instead that it involved his mother, and the fact that at the time he was concerned her employment was being threatened by another employee, who had been employed more recently and appeared to be trying to take over his mother's role.[155]

Due to limited evidence submitted by LED Technologies to prove that they indeed had a social media policy in place that was active at the time and that they had given it to Mr Somogyi could not be established.[156]

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[151] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444 para 11.
[152] Stutsel v Linfox Australia Pty Ltd 2011 FWA 8444 para 30.
[153] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966.
[154] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966 para 7.
[155] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966 para 24.
[156] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966 para 28.

Regarding his Facebook the Commissioner is aware that it was rather crude and immature. However further makes a note that the language used by Mr Somogyi is offensive and vulgar despite the fact that, regrettably, they are increasingly part of the common vernacular.[157]

LED Technologies also attested that the post was made during working hours. The Commissioner held that although it was made during working hours his working hours were flexible in his role as a travelling representative and it may well have been posted during a break he was entitled to take. There is no clear evidence to suggest whether this was the case or not. There is also no evidence that confirms Mr Somogyi was provided with the social media policy LED Technologies refers to.

In addition, leaving aside the offensive nature of the post, there is nothing in the submissions and evidence of LED Technologies that provides confirmation or even suggests the post was directed at the business or any of its employees.[158]

In all the circumstances Commissioner is not satisfied LED Technologies had a valid reason for Mr Somogyi's dismissal.

Therefore Mr Somogyi was unfairly dismissed and LED Technologies was ordered to compensate Mr Somogyi.[159]

It is apparent in the cases above that in Australia the approach to deal with cases relating to social media is based on a case by case issue. The Commission tries to ensure that the punishment given is not harsh and unreasonable to the offense. The Commission also ensures that the dismissal is fair and just.

### 3.2.4 Conclusion

Like South African law. In Australia the Privacy Act sets the standard for privacy. An independent body known as the Fair Work Commission similar to the South African CCMA settles dispute by making decision that are binding between employer and employee. This Commission stresses the importance of companies to have their own policies that guide employees on social media usage at work. Australia deals with each case differently similar to the approach taken in South African law.

[157] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966.
[158] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966 para39.
[159] Colby Somogyi v LED Technologies Pty Ltd 2017 FWC 1966 para 53.

## 3.3 UNITED KINGDOM

The United Kingdom has similar approach when dealing with disputes that arise between employees and employers. It also protects the right to privacy. Lastly it has legislation in place that regulate the interception of communication and processing of an individual data. Thus making it one of the most relevant jurisdiction to conduct a comparative study with.

### 3.2.1 Right to privacy

The Human Right Act[160] provides that everyone has the right to respect for his private and family life, his home and his correspondence. 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 well-being 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.[161] This acts as a basis and authority for right to privacy in United Kingdom.

Employment tribunals were established under the Industrial Tribunal Act which later became known as the Employment Tribunals Act. Section 1 of the Act states 'The Secretary of State may by regulations make provision for the establishment of tribunals to be known as employment tribunal.'[162] These tribunals have jurisdiction to hear disputes that arise between employers and employees.[163]

There are several legislations in place to assisting in the lawful interception of communication. The Telecommunications (Interception of Communications) Regulations 2000 is one. Section 1 of the Telecommunications Regulations provides that:

monitoring or keeping a record of communications

monitoring communications for the purpose of determining whether they are communications relevant to the system controller's business which fall within regulation 2(b)(i) above; or

[160] Human Rights Act of 1998.
[161] Article 8 to the Human Rights Act 1998.
[162] Employment tribunal Act 1996.
[163] Section 2 of the Employment Tribunal Act 1996.

monitoring communications made to a confidential voice-telephony counselling or support service which is free of charge (other than the cost, if any, of making a telephone call) and operated in such a way that users may remain anonymous if they so choose.[164]

However the interception can only occur if the section interception in question is effected solely for the purpose of monitoring or (where appropriate) keeping a record of communications relevant to the system controller's business.[165] This regulation permits monitoring emails, telephones and the use of the internet.

The *Data Protection Act* permits the processing of individual data and monitoring email communication. Section 7(a) of the Act provides that an individual must be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller.[166] Although these do not address the use of social media directly they do act as guidelines when dealing with social media cases and interception of communication.

**3.2.2 Dismissal**

The Employment Rights Act[167] under section 98 sets the fairness test that must be satisfied to ensure that the dismissal is fair. In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show

> (A) the reason (or, if more than one, the principal reason) for the dismissal.
>
> (B) it is either a reason falling within subsection 2 or more other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held.[168]

This test must be taken into account on issues of dismissal.

**3.2.3 Cases**

In the case of *Preece v J S Wetherspoons. Preece the claimant was employed by Wetherspoons as a manger. The claimant signed on and was provided a contract and an Employee Handbook.*

[164] Section 1(a)-(c) of the Telecommunication Regulations 2000.
[165] Section 2(a) of the Telecommunication Regulations Act 2000.
[166] Data Protection Act 1988.
[167] Employment Rights Act 1996.
[168]Section 98 Employment Right Act of 1996.

*The contract stipulated that she would be dismissed immediately if found to be guilty of gross misconduct.*[169]

*The Employee Handbook included the company's internet, intranet and email policy.*[170] *The policy that the company provided to the claimant included any posts that maybe be on social media that may bring the company into disrepute. For difficult situations an emergency number existed that the claimant could dial at any point. The claimant was aware of this emergency number.*[171]

*Preece received verbal abuse and physical threats from two customers. The claimant was trained to manage people. Preece then received an abusive telephone call from the customer's daughter, then thereafter received three more telephone calls with the same abusive language towards her.*[172] *Then the claimant log into her Facebook and posted "f… off, f… off… f off". Another employee (Rachel Hillman) who was not on duty responded on the post by commenting "work still full of nob heads then? Ha ha x" To which*

*Preece replied "I hate …in people!!!"*

*Rachel Hillman: "ha ha ha ha me too Iam so glad I've finished!!!X"*

*Preece: "Shut your face Hillman"*

*Rachel Hillman: "ha ha ha"*

*Another employee (Leanne Grundy) commented: Are they all barred now"… "Can't believe you barred all those dear old nice people."*

*Preece: "hahaha just had a phone call from the daughter calling me a snide bitch lol"*

*Rachel Hillman: ha ha ha, that's well funny She is right though…Shame on you for picking on the oldies ha ha ha!!!"*

*Preece: "can u f..c of each plz lol"*

*Rachel Hillman: "only messin about time some 1 told the maonin old hag lol"*

*Preece: "Fu..in hag!!! Hope her hip breaks"*

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[169] Preece v J S Wetherspoons para 11.
[170] Preece v J S Wetherspoons para 12.
[171] Preece v J S Wetherspoons para 15.
[172] Preece v J S Wetherspoons para 17.

*A third employee (Naomi Schorah) commented: "Why does fun stuff happen when the one night I am not working!... What happened?"*

*Preece: "Sandra and Brian barrd ha ha ha!"*[173]

*A complaint was then lodged and an investigation was conducted. The claimant was then found guilty of gross misconducted and dismissed with immediate effect. The tribunal dismissed the claimant's case and held that the dismissal was fair. It stated that the claimant was aware of the policy but continued to post negative comments on her Facebook. The Tribunal also stated that whether her Facebook settings were set on private or not was irrelevant in this case. The claimant was discussing customers that could clearly be identified in the posts.*

*In this case the Tribunal stressed the importance of employers to have a fully detailed and clearly outlined policy regarding the usage of internet and social media by the employees.*

*However in the case of Witham v Club24, where the company also has a policy warning employees of the risks of posting information about their work on the Internet. Mrs Witham who is also the claimant in the matter, was employed as a Team Leader for Skoda Customer Services.*

*After an allegedly difficult day at work. The claimant posted on her Facebook that "I think I work in a nursery and I do not mean working with plants."*[174] *Her Facebook settings were set to only her friends and not the rest of the public. She then later continued to a comment in response to a friend's comment. The claimants commented and said "Ya, work with a lot planks though!!! LOL." The Facebook posts were made outside of working hours. Mrs Witham's colleagues who are also her Facebook friends saw the post and reported it to her manager.*[175]

*Mr Leishman dealt with the disciplinary hearing. Mr Walsh conducted the investigation. The claimant admitted that her Facebook post was in fact inappropriate. The Employment Handbook was referred to and the claimant was dismissed.*

*The tribunal found that the Employment Handbook does make reference to social media use in the workplace. However, this reference was set to regulate the confidentiality purposes. To ensure that employees do not divulge any confidential information to third parties. In this case*

[173] Preece v J S Wetherspoons para 22.
[174] Whitham V Club24 Ltd Ventura para 5.
[175] Whitham V Club24 Ltd Ventura para 7.

*Mrs Witham did not divulge any confidential information to third parties.*[176]*The tribunal also held that the dismissal was unreasonable as the comments made were minor and her dismissal was unfair.*[177]

As already mentioned above the United Kingdom has established Employment Tribunals. These tribunals are similar to the CCMA of South Africa, the FWC of Australia. All these independent bodies deal with disputes that arise between employers and employees. All decision made by employment tribunals are legally binding.

### 3.2.4 Conclusion

Similar to the Constitution, the United Kingdom has a Human Right Act which affords the protection for the right to privacy. Furthermore, Employment Tribunals established by the Employment Tribunal Act which are similar to the South African CCMA to act as courts for employment disputes. The Telecommunications (Interception of Communications) Regulations that provide guidelines on how one can intercept communication of another without violation their right to privacy. United Kingdom also has the Data Protection Act which regulates the processing of an individual's personal data. In dealing with dispute that arise because of social media between an employer and employee. The Employment tribunals have suggested that companies have handbooks and policies in place that regulate the usage of social media platforms.

## 3.5 CONCLUSION

This chapter closely looked at the provisions of the right to privacy in each state. Then further critically analysed case law from the different jurisdiction.

In Australia the Privacy Act sets a standard or provision for privacy. The judgement given in the Victoria case led to the assumption that invasion of privacy was not punishable nor recognised in common law. This assumption was the rebutted in the Lenah case were the victim was compensated for having their privacy violated.

An independent body was established by the Fair Work Act referred to as Fair Work Commission. This commission deals with matters that arise between employer and employee. The decision made by the commission are legally binding on all parties involved. Another right that is usually threatened when limitations of social media usage are imposed on employees, is

[176] Whitham V Club24 Ltd Ventura para14-15.
[177] Whitham V Club24 Ltd Ventura para 41.

the right to freedom of expression. The Human Rights Act of the Australian Territory Current Act indicates to us that everyone has the right to freedom of expression. It further provides that this right is not absolute and can be lawfully limited. In the different cases the commission stresses the importance for employers to develop a clear and detailed handbook or policy that directly deals with social media usage that must be given to employees.

In United Kingdom, the Human Rights Act forms the basis for the right to privacy. Employment tribunals were then formed for disputes that handle cases between employers and their employees. According to the Telecommunications Regulations Act communication of an individual. Another legislation namely the Data Protection Act grants processing of an individuals' data and emails. These legislative provisions are used when a case of social media is dealt with.

The Employment Rights Act sets the fairness test discussed above that must be applied when dealing with cases of dismissal. Similar to judgements given by other independent bodies from other states. In *Preece v J S Wetherspoons,* the tribunal also stressed the importance of having a social media policy.

It is apparent that all states discussed above have independent bodies that primarily deal with issues that arise in an employment relationship. All decisions made by these independent bodies is legally binding on the parties involved. In Australia there is the FWC.

## CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Introduction

This piece of writing seeks to answer whether can an employer use a social media posts by an employee to initiate disciplinary proceedings against that employee with a view for dismissal?

In pursuit to answer the research question this research paper has examined the different approaches that the Commission for Conciliation, Mediation and Arbitration has employed in dealing with similar cases. It determined whether there is the potential to dismiss an employee based on their social media activity. This include an explanation of dismissal for misconduct. This research paper has also determined whether the employer is permitted to search the employee's social media and to what extent are they able to do so. This led to a discussion of the employee's Constitutional right to privacy which provides that certain aspects of the person's privacy must not be violated. It further discussed the right to privacy in the employment relationship.

When examining the right to privacy in the Constitution it is also necessary to investigate the limitation clause contained in the Constitution[178] and how it impacts an employee's right to privacy.

This research paper in turn analysed the Regulation of Interception of Communications and Provision of Community-related Information Act[179] regarding how an employer is able search through the employee's social media platforms without necessarily violating the employee's right to privacy. Along with this legislation, the Protection of Personal Information Act[180] needed to be consulted as a means to thoroughly understanding the protection of employee's privacy within the workplace and on what grounds an employer can intercept communication

[178] Section 30 of the Constitution of the Republic of South Africa 1996.
[179] Regulation of Interception of Communication and Provision of Communication-related Information Act 70 of 2002.
[180] Protection of Personal Information Act 4 of 2013.

without violating the employee's constitutional rights. Finally, the dissertation will examine the relevant provisions of the Electronic Communications and Transactions Act[181].

**4.2 Findings**

The Constitution is the highest law in the land. Any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The Constitution also makes provision for rights that are applicable to all individuals in the republic.

The Bill of Rights provide for a number of rights. However, for purposes of this writing, it focuses on freedom of speech and the right to privacy.

Through section 16 of the Constitution which makes provision for the freedom of speech. An individual is able to receive or impart information or ideas, and are able to have freedom of artistic creativity and freedom of press and other media. Freedom of expression does not extend to situations whereby one incite eminent violence, propaganda for war and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.[182] This then sets a limitation on this particular right. Furthermore, Section 36 of the Constitution which is also known as the limitation clause makes limits freedom of expression.

This was also asserted in the *Makwanyane*[183] case, where it was held that 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.

The limitation clause does not only limit freedom of expression but also other rights provided for in the Constitution. The limitation clause provides that 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.

Thus limiting the right to privacy. The *Bernstein v Bester* case judgment asserts the limitation of the right to privacy. It was held that privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social

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[181] Electronic Communication and Transactions Act 25 of 2002.
[182] Section 16 of the Constitution of the Republic of South Africa of 1996.
[183] S v Makwanyane and Another 1995(6) BCLR 665 (CC).

interaction, the scope of personal space shrinks accordingly. The rights of an individual are also limited by the same rights applying to another.

Likewise in the *Gaertner and others v Minister of Finance and others*[184] case as a person moves into communal relations and activities such as business and social interaction, the scope of their personal space shrinks. This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy

The right to privacy has been greatly contested in the workplace. A balancing of rights is therefore required as there are competing interests between the employer and the employee. The case of *Moonsamy v The Mailhouse*[185] affirms this where it held, the rights that a citizen is entitled to in his or her personal life cannot simply disappear in his or her professional life as a result of the business necessity. At the same time the employer's business necessity might legitimately impact on the employee's personal rights in a manner not possible outside the workplace. Therefore, there is a clear balancing of interests.

In seeking to balance the competing interest of the employer and employee. There are certain legislative provisions that allow the employer to monitor the employees' internet use and thus inclusive of social media use.

These legislative provisions as identified are Protection of Personal Information Act (POPI) which makes provision for the collection of personal data. The Electronic Communication and Transaction Act makes provision for 'personal information that has been obtained through electronic transactions.'[186] The Regulation of Interception of Communication and Provision of Communication-Related Information Act section 6 makes provision for when an employer may lawfully intercept communication of an employee.

The above legislations set the criteria on what grounds an employer can legally scrutinise the online activity of an employee. The above mentioned laws also assist to regulate the interception of communication. However as discussed in preceding chapters that these legislative provisions still leave a lot of loopholes as far as social networking system and the employment relationship is concerned.

[184] Gaertner & Others v Minister of Finance & Others 2014 (1) BCLR 38 (CC).
[185] Moonsamy v The Mailhouse (1999) 20 ILJ 464 (CCMA).
[186] Section 50(1) of the Electronic Communication and Transaction Act 25 of 2002.

The Constitution further provides for the right to fair labour practice. The dessertation discusses how fair labour practice ensure that there is mutual respect within the employment relationship. As well as to make sure that the correct processes are followed more especially where dismissals are concerned.

Furthermore, Grogan defines dismissal has taken place where 'the contract is terminated at the instance of the employer and entails an act whereby the employer brought the contract to an end.'[187] The Labour Relations Act in section 186(1) gives us a detailed definition of what dismissal means and when it has taken place. There are various forms of dismissal namely;

dismissal under the LRA section 186, Automatic unfair dismissals, dismissal for poor work performance, incompatibility and incapacity, dismissal for operational requirements and dismissal for misconduct.

The Labour Relations Act makes provision for grounds whereby no justification is valid for dismissing an employee on[188]. These grounds are included under section 187 of the Act as follows;

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is: (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV; (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health; (c) a refusal by employees to accept a demand in respect of any matter of mutual interest between them and

their employer; (Section 187(1)(c) substituted by section 31 of Act 6 of 2014) (d) that the employee took action, or indicated an intention to take action, against the employer by - (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act. (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy; (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any (g) a transfer, or a reason related to a transfer, contemplated in section 197

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[187] Grogan J *Workplace Law* 11th ed (2010)165.
[188] Du Toit D Labour Relations Law: *A Comprehensive Guide* 6th ed (2016)433.

or 197A; or (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.[189]

Dismissal for poor work performance, incompatibility and incapacity, this type of dismissal refers to the employee's work performance and whether or not he is capable of doing the work required of him.

Dismissal for operational requirements, according to the LRA operational requirements means 'requirements based on the economic, technological, structural or similar needs of an employer.'[190]

Dismissal for misconduct: fair reason and fair procedure, serious misconduct issues include; dishonesty or damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and insubordination.[191]

The inquiry for misconduct has been split into two process that the employer has to follow before dismissing an employee for misconduct.[192] The first process being "was there good reason to dismiss"[193] (substantively fair) and the second 'did the employer follow a fair procedure before deciding to on the penalty of dismissal' [194](procedurally fair). Procedurally fair, this step is concerned with whether the employer followed the correct procedure rather than trying to prove that employee is indeed guilty of breaking a rule and whether the rule broken existed, as well as to determine if dismissal is a fair penalty.[195]

Finally, this dissertation turned to other states and how they dealt with matters that related to the employees use of social network system and their relationship with the employer.

Australia has legislation which protects individuals' privacy. Australia the Privacy Act sets the standard for privacy. Further, an independent body known as the Fair Work Commission similar to the South African CCMA settles dispute by making decision that are binding between employer and employee. This Commission stresses the importance of companies to have their

[189] Labour Relations Act 66 of 1995.
[190] Labour Relations Act 66 of 1995.
[191]van Niekerk A *Unfair Dismissal* 2nd ed (2004)40.
[192] Grogan J Workplace Law 11th ed (2010) 231.
[193] Grogan J Workplace Law 11th ed (2010) 231.
[194] Grogan J Workplace Law 11th ed (2010) 231.
[195] van Niekerk A *Unfair Dismissal* 2nd ed (2004)40.

own policies that guide employees on social media usage at work. Australia deals with each case differently similar to the approach taken in South African law.

United Kingdom has a Human Right Act which affords the protection for the right to privacy. The United Kingdom has similar to South Africa and Australian approach developed an independent body that strictly deal with disputes that arise between the employer and employee. Thus the, Employment Tribunals established by the Employment Tribunal Act.The United Kingdom also has legislation that gives guidelines to intercept another's communication without unlawfully violating their right to privacy. The Telecommunications (Interception of Communications) Regulations provides these guidelines.

The most obvious similarity across all states is that there is no law developed that directly address the use of social media. Another similarity noted in this research paper is that employers are encouraged to develop social media policy's in the work place. However, the question of whether can an employer use a social media post by an employee to initiate disciplinary proceedings against that employee with a view to dismissal is still unclear as the different states have dealt with each case on its own merits.

**4.3 Conclusion and Recommendations**

In pursuit to answer the research question, the previous chapters of this dissertation have analysed different legislation that looks into the factors that must be satisfied when a dismissal is being dealt with, the rights that apply to employees such the right to privacy, their right to freedom of expression. It further also looked at employers right to protect the image of their business, this includes laws that grant the employer to access and monitor the employees' internet usage. Furthermore, the dissertation also discussed different case law and decisions made where the use of social media affected the employment relationship.

Therefore, an employer is able to use a social media post by an employee to initiate disciplinary proceedings against the employee with the view to dismiss the employee. In agreement with the judgments and opinions given by the courts that the employer may monitor the employees' internet usage to protect the interest of their business. I am also in agreement that employers must develop their own policy guides that address the use of social media.

However, I am of the opinion that labour laws should also extend to give basic guidelines for employers and employees on this matter. These laws would set what basic factors every policy that a company formulates must consist of. Also allow employees to be able to participate

online with their respective trade unions. Even if this means that they will be posting negative comments about their employers however it would be within them as being members and simply exercising their right to be part of trade unions and be part of meaningful engagements on challenges that they want their unions to address issues that they may be faced with.

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