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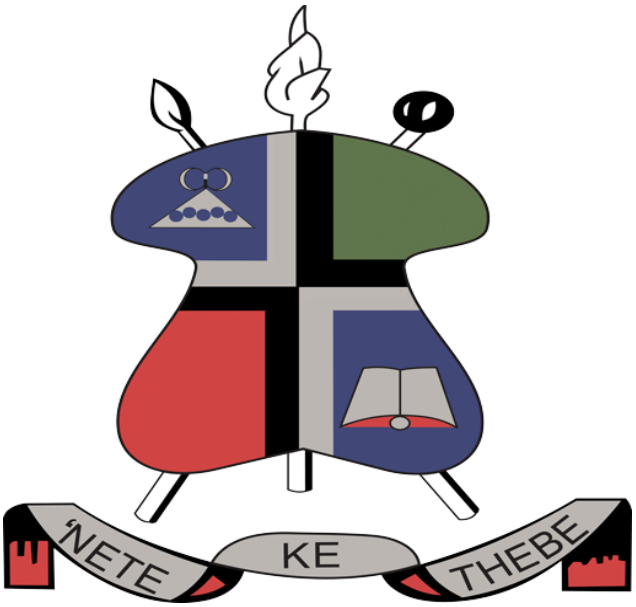

FACULTY OF LAW

LESOTHO LABOUR LAWS AND SOCIAL MEDIA MISCONDUCT: THE NEW ERA IN LESOTHO IN THE FACE OF GROWING SOCIAL MEDIA INFLUENCE ON EMPLOYMENT

A Research Dissertation submitted in the fulfilment of the requirements for the Master of Laws in Labour Law at the National University of Lesotho

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Declaration

I, Thapelo Letseka do solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

Name: Thapelo

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Date: 26/06/2022

Place: Roma, Maseru

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Abstract

Social media misconduct is a relatively new concept which is challenging the parameters of the law in employment relations. The challenge with social media misconduct is that it affects certain constitutional rights such as the right to privacy and freedom of expression. There must exist a reasonable, if not perfect balance between the rights of an employee to privacy and freedom of expression against the interests of the employer to a good name and reputation. While there may have been no recorded case of social media misconduct in Lesotho there has been a noticeable increase in the use of social media.

With such an increased usage of social media and its platforms, it is not unreasonable to anticipate that sooner or later Lesotho courts will be confronted with the dilemma of social media misconduct within the workplace. The purpose of this study therefore, is to examine whether the current Lesotho labour law legal framework, sufficiently confronts and addresses the issue of social media misconduct. The findings of this study reveal that the two labour legislations (Labour Code Order and Codes of Good Practice) do not expressly deal with social media misconduct. Neither do the laws indicate whether this form of misconduct should be dealt with in the same way as any other forms of misconduct expressed under these two laws. The study recommends that in the face of this legal lacuna, these two pieces of legislation should be amended to suitably tackle social media misconduct.

List of Acronyms

CCMA	Commission for Conciliation Arbitration and Mediation
USA	United States of America
NLRB	National Labor Relations Board
NLRA	National Labor Relations Act
ALJ	Administrative Law Judge
UK	United Kingdom
ET	Employment Tribunal
EAT	Employment Appeal Tribunal
BBC	British Broadcasting Cooperation
ILO	International Labour Organisation
LMPS	Lesotho Mounted Police Service
LCA	Lesotho Communications Authority
SIM	Subscriber Identity Module

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1 CHAPTER 1

1.0 Introduction

The use of social media[1] has transcended in history as among the modern day developments. It has influenced various aspects of our society including the field of employment. Commentators indicate that the cloverleaf between social media activity and employment is a soaring universal concern.[2] While the majority of existent literature has primarily focused on the Global North on the impacts and consequences of social media[3] at the workplace, this has ignored the notable spread of digital communication into the Global South[4] and its impacts and consequences at a workplace.

Currently the labour laws of Lesotho do not cater for misconducts on social media.[5] The primary inquiry of this research is therefore premised upon this status *quo*. The study is therefore based on the aspects of both labour law and constitutional law. Its purpose is to examine whether, in light of the current labour laws an employer can discharge an employee on account of social media misconduct. It is to further enquire into whether constitutional rights such as the right to freedom of speech and the right to privacy can offer protection where an employee is charged with social media misconduct.

In this chapter a general background of the study is given. It seeks to give definitions of key terms such "social media'' and "social media misconduct'' and what they entail. Additionally, the chapter also highlights on the integral parts of the study such as the statement of research problem, significance of research, scope and limitations of the study, literature review, hypothesis, methodology, a summary of chapters and lastly a conclusion.

[1] Social media is referred to as channels of electronic communication that facilitate the sharing of information Social Media, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20Media> accessed > 08/March 2022. A more comprehensive definition of social media has been provided in part 1.2.
[2]Rene Cornish & Kieran Tranter, "The Cultural, Economic and Technical Milieu of Social Media Misconduct Dismissals in Australia and South Africa" (2019) 36 Law Context: A Socio-Legal J 17.
[3]Ibid 17-18.
[4]Ibid 17- 18.
[5] The Kingdom of Lesotho Combined Second To Eighth Periodic Report Under The African Charter on Human and Peoples Rights and Initial Report Under The Protocol To The African Charter On The Rights of Women In Africa April 2018 para 83 pg 37.

1.1 Background

It is without dubiety that social media utilization has significantly increased all over the world.[6] It has eased communication from tedious expensive telephone calls to alacritous and quick communication with an instant click at the palm of our hands. When societies continue to be rejuvenated by use of social media, Lesotho is not left behind. The recent report according to Digital 2022: Lesotho indicates that there are 1.13 million internet users in Lesotho; the number increased from approximately 8.9% to 10.8% between 2021 and 2022 The same report articulates that as of January 2022 the number of social media users amounted to 532000, the number increased by approximately 23% between 2020 and 2021.[7] The number of social media users in Lesotho was equivalent to 24% of the total population in January 2022.[8]While it might not be the majority of the population it is not fathomable to assert that this numbers represent people who are social media literate.[9]

These technological advancements are advantageous as well as they may be hazardous. In the world of business, labour and employment they have provided a platform in labour relations including employment promotions, information exchange between employees, workers compensation, and collective bargaining.[10] However these technological advancements have also proved to be disastrous if left unregulated. In an attempt to enjoy their right to freedom of expression, employees may speak their mind on these platforms. However, in some instances such opinions may cause disrepute to the employer's name and business. In this manner, there comes a convergence of rights, between those of the employee's rights to freedom of expression, privacy, and freedom of association, [11]against the employer's economic interests or his good reputation.

It therefore becomes prudent to inquire into questions of fairness of a discharge as a consequence of social media misconduct. For instance, can an employer lawfully dismiss an

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[6] Christian Arno, "Worldwide Social Media Usage Trends in 2012'', (2012) Search Engine Watch (08/03/2022), http://searchenginewatch.com/article/2167518/Worldwide-Social-Media-Usage-Trends-in-2012.

[7]Simon Kemp "Digital 2022; Lesotho" (Datareportal 16 February 2022)<datarpotal.com/reports/digital - 2022>accessed 03 March 2022.

[8] Ibid.

[9] Social media literacy may mean the ability to access and use social media effectively : ShakuntalaBanji, "Social Media and Literacy,"*InternationalEncyclopaedia of Digital Communication & Society* 1-13.

[10] Francois QuintinCilliers, "The Role and Effect of Social Media in the Workplace" (2013) 40 N Ky L Rev 567.

[11]McGoldrick D "The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective"2013 *Human Rights Law Review* 125 125-151; Davey 2012 De Rebus 82-83; Cilliers FG "The Roleand Effect of Social Media in the Workplace" 2013 Northern Kentucky Law Review 567 568 -592; BuchbachJSocial Media Policies and Work: Reconciling Personal Autonomy Interests and Employer Risk (PHD thesis Queensland University of Technology 2017) 15- 255.

employee for social media misconduct? Are the labour laws sufficient to provide guidance in regard to social media misconduct? These are challenging question that come with the increased use of social media by a wide spectrum of people who are interrelated especially in the sphere of employment. There arises a convergence of rights between those of the employer and of those of an employee, in the wake of this chaos, the law must strike the balance and create harmony between these rights

However, while there is still no law that regulates social media misconduct in the sphere of employment in Lesotho, the use of social media continues to grow alarmingly. Recent reports indicate that the use of Facebook amounts to 80%, Twitter 7.9%, Instagram 1.4% and LinkedIn at 0.24% as of October 2021[12] with the latter being used mainly for formal business connections. The numbers are constantly accelerating,[13] not stagnant and thus more people are using these platforms. This makes it probable that sooner or later Lesotho will be confronted with the issue of social media misconduct. It therefore goes without saying that it becomes important to set a debate on this issue beforehand and to take steps to mitigate the risks.

1.2 Social Media and social media misconduct

Defining social media has been described to be elusive.[14] However social media maybe outlined as a conglomeration of internet mediums that facilitate electronic exchange of information.[15]Subscribers create content that necessitate a significant extent of self-disclosure and permit a various levels on social interaction.[16]

Therefore, the most critical and significant element in defining social media is that users share information in the form of texts, pictures, videos, documents or audio through the use of internet or web-based technologies.[17] This sharing often occurs online. It creates a platform on which users can consume and share content while also enabling communication.

[12]Statcounter gs.statcounter.com.
[13]Kemp n7.
[14] Tess P. "The role of social media in higher education classes (real and virtual) A literature review'' (2013) vol29 ,issue 5 Computers in Human Behaviour A60 ,A68.
[15]Kaplan A and Haenlein M "Users of the world, Unite! The challenges and opportunities of Social Media'' (2010)Vol 53 *Business Horizons*, 59,68.
[16] Carr C and Hayes R "Social media defining developing and diving'' (2015) vol 23 *Atlantic Journal of Communication* 26,65.
[17]Kietzmann JH and Others "Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media" 2011 *Business Horizons* 241 243-251.

As indicated above, Lesotho has seen an increased use of approximately four social platforms such as Facebook, Whatsapp, Twitter, Instagram and LinkedIn, while others such as YouTube and Pinterest may be used, they are not as popular as the four: a discussion on these platforms is as follows.

(a) Facebook

Mark Zuckerberg and his Harvard housemates originated FaceMash in 2003.[18] However Harvard University shut down the site for violating copyright laws, breach of campus security and violation of privacy of students.[19] However the following year, Mark Zuckerberg and others created Facebook in the comfort of their university dormitory.[20] Thereafter it grew to become one of the largest social networking sites globally.[21] Facebook involves building and creating a social profile composed of personal information.[22] After a profile has been created, subscribers can befriend each other and view other subscriber's accounts, communicate with other subscribers by sending electronic based text messages each other join online communities with shared interests upload pictures and videos.[23] Subscribers get apprised when other subscribers add more information to their profile or share activities. Furthermore, consumers can place limitation on their profiles to allow selective sharing of content.[24]

As previously mentioned, in Lesotho the use of Facebook amounts to 80%. Most users predominantly accessing the site from smartphones.

(b)Twitter

Twitter was launched in 2006 by Jack Dorsey, Noah Glass, Bizz Stone and Evan Williams.[25] Twitter has been described as a microblogging site which uses instant electronic text. In the same manner as in Facebook, subscribers construct profiles that permit them to update stubby

[18]S.D, Davis. "Social Media Activity & the Workplace: Updating the status of Social Media" (2012) Vol.39 *Ohio Northern University Review*, 360.
[19] Steve Longo, "What is FaceMash ?Zurkerberg grilled in Congress over Facebook origins"*MailOnline* (11 April 2018)<www.dailymail.co.uk/news/article> accessed 09 March 22.
[20]S.D Davis (n18)360.
[21]Ibid.
[22] Ibid.
[23] Ibid.
[24]Labour Relations Agency "Advice on Social Media and the Employment Relationship" (September2013)<https://www.lra.org.uk/images/publications/copy_of_advisoryguide_social_media_september_2013.
[25] The Editors of Encyclopaedia, "Twitter," *Encyclopaedia Britannica*, (17 February 2022) <https://www.britannica.com/topic/twitter>accessed 09 March 2022.

texts of limited characters, ordinarily of 240 characters or less.[26] These forms of texts are often called tweets. These tweets can be shared, retweeted and liked. They may also be accessed by other subscribers and their followers. Followers are users who have chosen to follow one's profile updates.[27]The majority of Twitter users utilize it to follow and keep up with their preferred celebrities and get quick bulletins about their activities, latest gossip and trending topics of interest.[28] Twitter has been said to offer current and updated information continuously in an endless loop.[29] Twitter is used by approximately 7.9% of users in Lesotho.

(c) LinkedIn

LinkedIn was created in 2002 but officially launched in 2003.[30] It is established by Ried Hoffman, Allan Blue, Konstantin Guericke ,Eric Ly and Jean–Luc Vaillant.[31] Unlike Twitter or Facebook which are usually used for entertainment, LinkedIn is mainly used for professional networking. Users construct profiles that mimic their resumes, in that users can detail their careers, promote their particular skills, and provide their educational qualifications, employment history achievements and awards. Connections are built between subscribers when one approves a request of friendship from another subscriber to join his connections.[32] LinkedIn has reported more than 500 million users globally.[33]LinkedIn is relatively new in Lesotho; it is however gaining momentum with approximately 0.24% users.

(d) Instagram

In 2009 ,Kevin Sytrom ,a 27 year old Stanford University graduate whom while with no formal training in coding built a prototype of a web called Burbn. The name of the web was inspired by his taste for fine whiskeys and bourbons, this was however later revamped into Instagram which was launched in 2010 and racked up 25000 users in one day. It quickly became very popular, by 2012 the site had seen about 27 million users globally.[34]Instagram was purchased by Facebook (now Meta) in April 2012; a key provision was that the company

[26] Ibid.
[27] Ibid.
[28] J.F, Cavico "Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations'' (2013) Vol 11 *New Media and Mass Communication*, 27.
[29] Ibid.
[30] "LinkedIn –About" (LinkedIn Cooperation 2022) <about.linkedin.com> accessed 9 March 2022.
[31]Gregersen Erik, 'LinkedIn,' *Encyclopaedia Britannica,* (14 September2021)<https://www.britannica.com/topic/linkedIn>accessed 9 March 2022.
[32]Ibid.
[33]Ibid.
[34] Dan Blystone "The Story of Instagram ; The Rise of the 1#photo Sharing Application," (*Investopedia* 06 June 2020) <investopia.com/articles > accessed 22 December 2021.

would remain independently managed.[35] Instagram is notably used as a video and photo sharing application mostly used by youths, it has however transcended into a business platform lately, amassing up to 1.4% users in Lesotho.

(e) WhatsApp

The application was launched by former Yahoo employees Brian Acton and Jan Koum in 2009.[36] It is a messaging application for smartphones. WhatsApp was originally invented to focus on statuses. At a later stage however WhatsApp was modernized and developed to optimize Apples new push notification. However, users swiftly adopted it as a quick messaging platform which has shaped the application into what it has become. In February 2014, Facebook seeing WhatsApp as a potential threat moved to acquire it for $19 billion. After the acquisition, WhatsApp quickly escalated to grow; it has over 1.5 billion users in 180 countries.[37]

1.3 Social media misconduct

Misconduct has been described as a contravention of a recognised workplace rule or an outlawed act, a delinquency, improper behaviour and a wilful character at the place of work.[38] It goes further to indicate that misconduct takes place where an employee displays wilful or a deliberately brushes aside workplace etiquette.[39] However a more precise definition of misconduct was provided by the court in the case of *Pearce v Foster*, [40] in which the court pointed that, a misconduct occurs where the helper acts contrary to faithful execution of their duties. To warrant misconduct, the acts of the helper must have the potential to compromise the reputation of the commander. Consequently, the commander would be right to dismiss the servant at any material time when he discovers the misconduct. Thus, misconduct could be understood to involve improper behaviour at the workplace which violates the sanctity of the tacit terms of the employment contract and its explicit terms thereof including the employer's disciplinary code. It includes any unfaithful discharge of

[35] Ibid.
[36] AashishPahwa' The History of WhatsApp,' (*Feedough*8 September 2021) <www.feedough.com/history-of-whatsApp>accessed 9 March 2022.
[37] Al Summers "A brief history of WhatsApp and where WhatsApp for business is Heading'' (ChatWise 28 June 2020) <chatwise.io/post>accessed 22 December 2021.
[38] Black's Law Dictionary 6th Edition
[39] All Answers Itd, "Misconduct as a ground for termination of Employment"(Lawteacher.net,June 2022)https://www.lawteacher.net/free-law-essays/employmentlaw> accessed 30 June 2022
[40] Pearce v Foster[1886] 17 QBD 536 at 542

duties or misdemeanours by the employee. Hence any inappropriate behaviour, negligent and delinquent maybe classified as workplace misconduct.[41]

Chitimira argues that the accepted explication of workplace misconduct does not sufficiently capture the meaning of misconduct in respect of social media misconduct.[42] The author goes on to point out however that that, social media misconduct transpires where a worker intentionally or irresponsibly publishes negative posts either about other individuals or about the business of the employer on social media sites.[43] Social media misconduct can therefore be understood as inappropriate or improper use of social media within the scope of work.

1.4 Statement of research problem

A recent report indicates that owing to the absence of a law that governs social media generally in Lesotho,[44] there have been several misuses of social media platforms where individuals overstep their boundaries.[45] This has subsequently inspired the Government to propose a law titled The Communications (Subscriber Identity Module Registration) Regulations of 2021[46] and the Computer Crime and Cyber Security Bill of 2022, [47]which seek to govern social media.[48] The contents of the Bill are however not yet known except that it will govern the use social media platforms.[49]This research is however not concerned about the general use of social media but its use in the sphere of labour and employment which can be classified as misconduct.

The Labour Code and its amendments are key legislations that govern employment relationships in Lesotho.[50]Both statutes control the relations between employers and employees. They govern issues from health and safety of workers, wage fixing machineries, disciplinary procedure and many other aspects related to labour and employment in

[41]Howard Chitimira&KefilweLekopanye, "A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media-related Misconduct in the South African Workplace" (2019) 15 *DireitoGv L Rev* 1.
[42]Ibid 6-7.
[43]Ibid 6-7.
[44]The Kingdom of Lesotho Combined Human Rights Report (n5) para 83 at 37.
[45]Ibid 37.
[46]Herbert Mayo "GovtApproves Draconian Snooping Law'' *Lesotho Times* (Maseru 10 June 2021) <lestimes.com/govt-approves-draconian> accessed 06 May 2022.
[47]Ibid.
[48]The Kingdom of Lesotho Human Rights Report (n5)37.
[49] Ibid63.
[50] Ibid63.

Lesotho.[51] The mandate of the Labour Code has also been implemented through the Labour Codes of Good Practice which articulates the acceptable standards of conduct in disciplinary matters of employees and outlines strike procedures and collective bargaining.

Under the current laws, which are the Labour Code and the Codes of Good Practice, misconduct is limited to conduct which is improper at the workplace and that which violates the sanctity of the implied terms of the contract. It includes behaviours ranging from neglect of duty, contravention of work rules, defiance of lawful orders, disruptive conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace and other forms. However, both statutes do not explicitly cover social media misconduct.

It follows therefore that the legal system of Lesotho is deficient in regulation of social media misconduct despite the growth of the use of social media platforms in the country. There has been no jurisprudence or any guiding principles on the issue .For instance, where an employee divulges information in regard to their employer on social media pertaining to the workplace environment, it becomes challenging to determine the amount of information shared that may constitute social media misconduct.[52] While in cases of dismissals the burden of proof rests with the employer to furnish evidentiary burden that the dismissal was both substantively and procedurally fair,[53] it becomes increasing difficult to do so in the absence of a guiding statute or principle. The same state of uncertainty occurs where a similar use of social media takes place outside the parameters of the workplace but impacts the business of the employer negatively. Will such conduct still constitute misconducts and therefore warrants a dismissal?

While this is still an uncharted territory of the law in Lesotho it would be ignorant not to anticipate that this issue will be before our courts in future. It is therefore imperative that steps be taken to mitigate the risks of unfair dismissal on the grounds of social media misconduct.

1.5 Hypothesis

The current law is insufficient to cover crimes of social media misconduct in Lesotho. Given the increasing use of social media by both employees and employers, Lesotho will certainly experience rise in litigation regarding the social media misconduct. It is therefore postulated

[51] Ibid63.
[52]Cilliers (n10) 569.
[53] Labour Code Order section 66(2) ,see also section 7(14) of the Codes of Good Practice.

that an enactment of a legislation regulating social media misconduct in respect to labour must be put into place. This is to mitigate the risks of unconstitutional and unlawful dismissals and to also strike balance between two competing interests of the employer and the employee is necessary.

1.6 Significance of research

To start a trailblazer debate on the position that Lesotho is in need of legislative instruments that counter the problem of social media misconduct and strive to find equilibrium between competing factors. In the absence of any instrument regulating social media misconduct, it is no doubt that this area of the law is entirely or at the very least new. Obviously, the law on this issue is still embryonic, be that as it may, this does not preclude legislative bodies from taking preventative measures to anticipate and reduce the hazards. The significance of this research is to set the conversation on social media misconduct in Lesotho and to further try to provide a line of recommendation on the regulation and governance of social media to mitigate dismissal on the grounds of social media misconduct.

1.7 Scope and limitations of the study

As mentioned earlier, this study is based on both the aspects of labour law and constitutional law. It seeks to enquire whether an employer can lawfully terminate the contract of employment on the grounds of social media misconduct. This study examines thoroughly both the conduct that occurs on duty and off duty which gives rise to social media misconduct. It also seeks to discern the test for social media misconduct. This paper is however not concerned with the productivity of employees which may be hampered by the use of social media at a workplace.

It is common that where Parliament enacts a legislation which gives effect to constitutional rights, that legislation ought not to be ignored unless deficient.[54] This study explores whether in the absence of clear rules on social media misconduct in the Labour Code, the extent to which the Constitution could be invoked for protection on the basis of the right to freedom of speech and privacy which must be proportioned against the employer's interests of a good name and brand reputation.

[54] Minister of Health & another v New Clicks SA (Pty) Ltd & Others 2006(1) BCLR 1(CC) at para 437 it is not permissible to seek redress instantly to the Constitution where the Legislature had given effect to the Constitutional rights at issue through a statute without showing the insufficiency of that statute to offer relive Saflii.org/za/cases/ZACC/2005/14.htm

The study draws knowledge from other jurisdictions, the United Kingdom, the United States and South African social media related jurisprudence to inform the future position of Lesotho. It is important to point out the choice of jurisdictions has been influenced by significant amount of literature on social media misconduct and further a shared system of law between Lesotho and South Africa which may be persuasive.[55]

1.8 Literature review

In its judgement in *Commissioner of Railways (NSW) v O'Donnell*,[56] the High Court of Australia held that there must be a variance between misconduct as a private individual and misconduct as a worker within the workplace. This effectively means that an employer cannot discipline an employee for misconduct outside the scope of his work.[57] However the advent growth of the use of social media has blurred this distinction. It has become increasingly difficult to draw a line especially where conduct of the employee outside the scope of work could be disastrous to the employer's reputation. Owing to possible hazards associated with the use of social media, there has been a growing debate surrounding just how equilibrium could be reached to balance the two interests on the part of the employer, such as his good business reputation and on the part of the employee: rights to freedom of expression and privacy.

Cillers analyses the role and effects of social media in the work environment and points out that despite the fact that social media is a novel concept in the field of employment relations, its effects can be malicious where no regulation mechanisms exist.[58] While telematics may prove beneficial in the sphere labour, they can pose a risk at a workplace. He further predicates that during the employment period, the fundamental question is, to what extent can the employer regulate their employee's social media activity, what would constitute as a ground for dismissal on the basis of social media misconduct? In his opinion, while the use of

[55] Sebastian Poulter, "Common Law in Lesotho," (1969) 13 *J Afr L* 127 at 143 South African precedents may be used in Lesotho as persuasive ,Lesotho courts are not bound by them. However Poulter notes that some aspects of English law have been adopted by Lesotho. Significantly the common law in Lesotho could be referred to as Roman-Dutch, Cape Colonial or South African law notwithstanding Lesotho courts have the freedom to decode the law as they see fit ,they are not bound to follow South African decisions though such decisions maybe of persuasive value.

[56] Commissioner of Railways (NSW) v O'Donnell 1938 HCA 43-60 CLR 681.

[57] Karen Fulton & Eva Mudely, "Off Duty Misconduct –to discipline or not to discipline" (*Bowmans*07 April 2008)<www.bowmnaslaw.com/insight.>accessed 12 Mar. 2022Generally ,what an employee does after work hours is of no concern to his employer ,who has no right to institute disciplinary proceedings against an employee.

[58] Cilliers (n10)567.

social media may pose a risk on the part of the employer, it also compromises the interests of the employee.

In a similar manner Nel admits that the impacts e of social media are seen in our everyday life. This influence has also extended to the sphere of employment and the workplace.[59]He observes that in South Africa, there has been a significant rise in the number of cases where remarks posted by workers have led to disciplinary proceedings or even dismissals. He further goes on to point out that the right to freedom of speech is not without limitations and should be interpreted in view of the interests of the employer namely; a good reputation and a good name. Nel further notes that flowing from the contract of employment an employee assumes an obligation to advance and safeguard the interests of the employer. Therefore, an employee must avoid conduct that will compromise the interests of the employer. While employees may enjoy their right to freedom of speech, they should avoid mishandling social media.

Dekker takes a different route however; his contentions are more intensely inclined to the protection of the employer against an employee who would abuse their social media rights.[60] He contends that an employee is in one way or the other the brand ambassador of the employer. As such, the employee has the duty to carry and defend the good name of the employer. He confronts the question of when the breach is said to have taken place by the employee and outlines the defences which employees have often put in place in defence for their social media misconduct. He further explores how the courts in South Africa have treated those defences. These include among others the right to privacy, freedom of speech, the Protected Disclosure Act.[61] Over and above this, the regular excuse of employees is that "my account was hacked'' or "I didn't mean it."[62] As already indicated, his debate is more inclined towards protecting employers. He provides ways by which employers could draft a good social media policy in protecting their interest. The same approach is taken by Davis who indicates that while social media has revolutionised the world, the concern to the employer is to the extent to which they can control their employee's networking sites. She concludes by also indicating that social media policies must be put in place.[63]

[59]SanetteNel, "Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line'' (2016) 49 *Comp & Int'l LJ S Afr* 182.
[60]Cliffe Dekker Hofmayer "Social Media and the Workplace guide" (2021) cliffdekkerhodmayer.com.
[61] No 26 of 2000.
[62] Dekker (n59) 2.
[63]Davis (n18) 360.

On the other hand Dennis traces the trajectory of social media growth in the context of the United States of America. He reflects on how its usage increased and how it continues to do so. In the face of its popularity, there is a growing concern on how it is affecting the world. He posits that while the use of social media may have emerged around 1997, it never hit the mainstream until early 2000s when the use of MySpace and LinkedIn emerged which were geared towards professionals.[64] Facebook transcended from campus use to the corporate world and eventually became widely available. However, the interesting debate or conversation advanced by him is premised on the fact while the use of social media by employees may have increased, employers are also using social media in a manner that significantly stretches the whole spectrum labour relationships from employment relationship (monitoring) to termination or dismissal. He thus discusses the legal implications of social media in all those instances.

Lastly, Chitimira and Lekopanye comment on the lack of law that prohibits the abuse of social media in the workplace.[65] The position is in essence similar to that of Lesotho; making South Africa a good reference point despite the fact that it has had a significant amount of jurisprudence which shall be dealt with in later chapters. This jurisprudence can essentially be used as persuasive and inform Lesotho's future position in regard to social media misconduct. They point out that as a result thereof, there has been a growing number of dismissals in South Africa on the basis of social media misconduct as well as misapplication of social media by employees within hours of work. Nevertheless, their study is only limited to social media misconduct which only occurs during working hours.

The issues of social media related misconducts have been significantly seen in South Africa. The courts and tribunals in South Africa have developed their fair share of jurisprudence on social media misconduct. Davey points out that it is evident that the Commission for Conciliation, Mediation and Arbitration (CCMA) is taking a sterner approach in respect of social media misconduct.[66] According to her, the CCMA is not fooled by superficial defences raised by employees such as special privacy and anonymity of employees online. She indicates that given the rapid usage of social media, the tribunals are doing everything in their power to deal with the ground given the fact that it is still a relatively new concept which is underdevelopment with no legislation whatsoever to regulate it. The CCMA has recently seen

[64] Corey M. Dennis, "Legal Implications of Employee Social Media Use" (2011) 93 *Mass L Rev* 380.
[65]Chitimira&Lekopanye (n41)2
[66] Rosalind Davey and LenjaDahms –Jansen "Social media in the workplace" (Bowman Gilfillan Seminar Sandton). Page 2.

cases such as *Sedick and Another v Krisray*,[67]*CCMA and another v Jo Barkett Fashions*,[68] and *Media Works Association of SH v Katharus Community Radio*.[69]

1.9 Methodology

The study is heavily based on the qualitative methods of research. It draws on the scrutiny of recent literature to inquire into the relationship between labour laws, constitutional law and social misconduct, how this relationship has been tested in other jurisdictions and what should be concern to Lesotho in light of its labour laws. Great attention is paid to all works of literature relevant to the study in the forms of pre-existing data which has been systematically sourced on scholarly database using key terms such as "social media" and "social media misconduct"

The method involves a desktop research of existing literature. It further involves scrutiny and interpretation of numerous legal texts. This is done to discern emerging legal practices. This also involves conducting background literature review of the sourced materials that include journal articles, case law, relevant legislation, newspaper articles and biographies that provide historical background of social media misconduct.

1.10 Summary of chapters

Chapter one

For effectiveness and coherence this research is divided into four chapters that explore different but relevant topics of the study. Chapter one is a roadmap that gives an insight into the study and how the subsequent chapters deal with those relevant topics. It mainly sets out the introduction and integral parts of the study such as the statement of research, literature review, methodology and others. The chapter also deals with the introduction of key terms such social media and social media misconduct. It also highlights the stages of that misconduct and tries to provide the clear scope of when such social media misconduct can be deemed to have occurred.

Chapter two

[67]Sedick and Another v Krisray(2011) 8 BALR 879.
[68]CCMA and another v Jo Barkett Fashions, [2011] JOL 27923.
[69]Media Works Association of SH v Katharus Community Radio.(2010) 31 ILJ 2217.

Chapter two deals with the advantages and disadvantages of social media and how it relates to the workplace. The chapter also looks into how different jurisdictions have treated the subject of social media misconduct. Specifically, the United States, United Kingdom and South Africa. As already indicated the choice of jurisdiction is influenced by significant amount of literature on social media misconduct and further a shared system of law between Lesotho and South Africa which may be persuasive.[70]

In the United States the chapter specifically looks into case law and content of the National Labor Relations Act (NLRA).[71] While in the United Kingdom legislative instruments such as the Human Rights Act,[72] which incorporates the right to privacy and freedom of expression are explored and further, case law. In South Africa, the chapter analyses case law and rights affected by social media misconduct under the Constitution of South Africa,[73] specifically the right to privacy and freedom of expression.

Chapter three

This chapter is dedicated to the examination of the insufficiency of Lesotho Labour Laws in relation to social media misconduct. Specific legislations that are examined include key labour and employment laws in Lesotho, which are the Labour Code Order and the Codes of Good Practice. It also looks briefly into the two proposed legislations; The Communications (Subscriber Identity Model and Mobile Registration) Regulations[74] and Computer Crime and Cyber Security Bill.[75] Lastly the chapter also examines the Constitutional rights which may in the unavailability of a clear legislation on social media misconduct be affected, which are the right to freedom of speech/expression and the right to privacy.

Chapter four

This final chapter of the study offers a line of recommendations on the labour law reforms in Lesotho to adopt a new legislation that covers and defines social media misconduct and the use of social media policies at a work place.

[70] See part 1,7 at page 10.
[71] National Labor Relations Act (NLRA).
[72] Human Rights Act 1998.
[73] The Constitution of the Republic of South Africa 1996.
[74] Communications (Subscriber Identity Model and Mobile Registration) Regulations.
[75] Computer Crime and Cyber Security Bill.

1.11 Conclusion

The essence of this chapter is to explain the key words pertinent to the study such as “social media’’ and “social media misconduct’’ so as to provide a thorough understanding as to what the research is about. It also gave an insight of key problems that the study seeks to address and how that mandate is going to be archived. The chapter is a road map as to how the study unfolds.

2 CHAPTER 2

2.0 THE IMPORTANCE OF SOCIAL MEDIA AT THE WORKPLACE AND DISCUSSIONS ON THE EXISTING LAW IN THE US,UK AND SA.

Introduction

Social media can be used for various reasons, for personal and corporate use. Cilliers indicates that social media is about sociological,[76] interactions as opposed to telematics.[77] Naturally, humans have the cognitive desire socialise and interrelate with each other and, therefore social media assists to satisfy this need. This essentially means that social media sites make societal interactions easier. However social media can also pose significant risks to the very same society. This chapter aims to explore the importance of social media in the workplace as well as how it can turn into potential harm, thus giving rise to certain legal implications such as social media misconduct in the workplace. The chapter also looks into how different jurisdictions have confronted the issue of social media misconduct, specifically the United States, the United Kingdom and South Africa. These choices as has been previously mentioned were influenced by existence of abundant literature on social media misconduct and a shared system of law.

2.1 Merits and demerits of social media utilisation in the workplace

Social media has several benefits. It makes communication easy. It enables employees the ability to quickly communicate with each other and with their clientele.[78] It further furnishes employees with online meeting capacities that permit remote participation as well as consultations with clients or customers without leaving their desks. For instance, companies such as Lesotho Electricity Company[79] and Econet Telecom Lesotho,[80] operate WhatsApp communication channels whereby customers can easily consult remotely. They also run Facebook pages which keep customers and clients updated on expected power cuts or network disruptions. In essence, social media has contributed to the continual exchange of

[76]Cilliers (n10) 572 Sociology is study of social interactions, it generally examines how the society functions and how its members relate to each other. Dictionary of Social Sciences, Sociology edited by Craig Calhoun (2002) New York: Oxford University Press.
[77]Ibid 572.
[78]Ibid 573.
[79] Previously as a Corporation, LEC was established in 1969 in terms of the Electricity Regulations of 1970. Its main functions are to facilitate electricity generation and connection. LEC customer care WhatsApp line +266 6227 400 https://www.lec.co.ls>accessed 26 April 2022.
[80]Econet Telecom Lesotho is a subsidiary of Econet Wireless International founded in 1993 by a businessman and philanthropist. It mainly facilitates networks. https://www.etl.co.ls, whatsApp Business account +266 6610 0100 accessed 26 April 2022.

information in the place of work and organized forms of communication between clients and employees as well as peer to peer.[81]

Furthermore social media can be used as both an effective marketing and brand building instrument for the company. In this manner, it is used to market and promote the business of the employer. Business pages and social media accounts can serve as a space for good brand awareness. Employers often encourage employees to share company events and values which help establish the employer's brand to attract applicants and customers.[82] Operating social media pages can also act as a platform on which companies advertise their products. For instance, Econet Telecom Lesotho constantly advertises its products on its Facebook page to make users aware of new products.[83]

The use of social media at a workplace further allows employees to build and enhance professional networks.[84]Through social media, employees can enhance professional connections with people outside the company. These connections can lead to increased pools opportunities that would otherwise not have been available. Better networking may result in increased sales, recognition of the business of the employer, interest in employment, business opportunities and fresh ideas. LinkedIn is precisely geared towards these forms of connections and is flooded with obvious business users who are ready to connect.[85]

However, while the use of social media networks in organizations has been on the rise,[86] such employment has not been without undesired consequences. The use of social media networks possesses an enormous capacity for distraction at the workplace. This capacity for distraction has been greatly increased by the advent and popularity of social networking sites.[87] Thus, non work related use of social media at the workplace tends to lower employee productivity

[81]Ibid.
[82]Society for Human Resource Management "What are the pros and cons of using social media in the workplace? What should we include in a policy" (*SHRM)*< www.srhm.org/resourcesandtools/too > accessed 23 March 2022.
[83] m.facebook.com/EconetLesotho
[84] Tony Jeanetta "7 reasons social media in the workplace can help employees"(theoslongroup, 25 April 2017)<theolsongroup.com/5-reasons> accessed 1 June 2022.
[85]Ibid.
[86]FatemehShakki, AkramEsfahaniNia and NassarBai "Negative consequences of using social networks at the workplace from the point of view of the sports and youth department"(2019)7(3) e735 *Am Appl Sports Sci*http://www.assjournal.com.> accessed 23 March 2022.
[87] Darren Subramanien and NicciWhitear "A fresh perspective on South African law relating to the risks posed to employers when employees abuse the internet''(2013) 37 *South African Labour Relations* .

as employees loaf about on social media platforms.[88] This in essence means that employees can be distracted by social media at the workplace hence neglecting their duties.[89]

Furthermore, employee use of social media recreationally or otherwise inappropriately at the workplace tend to abuse the employer's resources and business assets.[90] Superfluous internet usage in the workplace has the potential to compromise the effectiveness of the employer's computer system.[91] This can be challenging, regard given to the simplicity and pace with which files such as pictures, videos and music files can be distributed among co- workers.[92] The exchange of information electronically is the fundamental element of social media platforms. Services and applications are geared towards promoting and advancing this exchange.[93] Studies in South Africa reveal that 64.71% of companies have reported complications with deteriorated system performance because of internet abuse.[94]

In some cases employees may respond lethally to challenging work circumstances by posting diminishing statements, grievances or private information to millions of users.[95] Thus given the ease and speed with which information can be exchanged, this leaves a business strikingly exposed in terms of threats to its professional reputation, by employees posting unbefitting content on social media blogs, forums and chat rooms.[96] This is because there is a risk that the business's name could be associated with inappropriate content posted by its employees online, particularly if coupled with the unauthorised use of the company logo.[97] The risk of the disclosure of confidential information and trade secrets, inadvertent or not, is also significant, as is corporate espionage and sabotage.[98]

As already indicated, the prime purpose of this research is premised mostly on the above t disadvantage. It seeks to examine the lawfulness of a dismissal which occurs as a result of inappropriate use of social media both within and outside the scope of work. The following constituent provides a highlight on how the issue of social media misconduct has been dealt with in the United States of America.

[88]Ibid 10.
[89]Ibid 10.
[90]Ibid 10.
[91]Ibid 10.
[92]Ibid 10.
[93]Ibid 11.
[94]Ibid 11.
[95]SurakshaChandramonhan, "An examination of the employee's conduct on social media and the effect on the employment relationship" (LLM Dissertation University of Kwazulu-Natal 2017).
[96]Darren &Nicci (n87)11.
[97]Ibid 11.
[98]Ibid 11.

2.2 The Law in United States of America

The United States has been described mainly as a common law and federal state.[99] Composed of fifty states and numerous municipal governments; it does not have a particular legislation which governs labour and employment applicable to all employers.[100]However, rules regulating labour emanate from various authorities, notably federal statutes,[101] state statues,[102] local statutes,[103] federal, state and agency regulations,[104] and lastly court decisions.[105]

Commentators have therefore postulated that, the labour relationships in the United States are significantly without protection than in other states.[106]It is important to note that the parties to the employment contract in the United States are typically at liberty to negotiate and agree on the terms and conditions of their relationship.[107]The general stance is that private sector employment relationships are at will basis and therefore enjoy little job security.[108] Under this doctrine either the employee or the employer may bring to an end the employment relationship at any time, for any (non –discriminatory or non-retaliatory) reason with or without notice.[109] Notwithstanding, only a few elements of labour and employment are subject to protection, this include wage and hours and a prohibition to discrimination.

However, this study is not concerned with general protection of workers in the United States; the above paragraphs serve to highlight the legal framework of the employment relationship

[99] A federation is a nation which is made up of several or more states with one central government : Ronald L. Watts 'Federalism, Federal Political Systems,andfederations'*Annual Review of political science*Vol 1:117-137 June 1998.

[100] Jackson Lewis "Employment law overview USA" 2019 – 2020 *L&E Global*.

[101] Ibid 1 in the United States federal laws are laws that generally apply to employers who are involved trading between states. They articulate the minimum employment standards and protections governing employment relationships. They also deal with issues of leave, collective bargaining, trade unions and other aspects of employment.

[102] Ibid 1 in the US state statutes are only applicable in a particular state. In most cases state laws give effect to rights outlined in federal laws.

[103]Ibid 2 Local statutes are applicable at municipal and city levels. This laws can generally offer substantial protections to employees as opposed to federal and state statutes

[104] Ibid 2 Federal, state and agency regulations: these are regulations enacted by Employment Opportunities Commission and the Internal Revenue Services, or the Department of Homeland Security. They articulate on how federal laws state and local laws should be implemented.

[105] Ibid 2 Court decisions: This are court judgements that form precedents which may be binding on the lower courts

[106] Ibid1.

[107] Ibid1.

[108]Ramesh ThilakArjun "An Analysis of Social Media Misconduct in the Workplace" (LLM Dissertation University of Kwazulu Natal 2018) see also AC McGinely& R.P McGinley Stempel "Beyond the water cooler; speech and workplace in an era of social media" (2012)30(1) *Hofstra and Employment law journal*.

[109]Jackson Lewis (n100)3.

in the United States. Only labour legislation dealing with social media related misconduct and constitutional rights relating to privacy and freedom of speech are discussed.

Generally, the First Amendment of the American Constitution[110] offers protection for freedom of speech while the Fourth Amendment protects citizen's privacy. However, legal scholars indicate that these provisions are only applicable to employment relationships between the government and public sector employees.[111] While the constitutional provisions maybe persuasive, they are not applicable to the private sector and employment relations.[112]

It follows that mostly employees are protected by the National Labor Relations Act (NLRA), [113] and the National Labor Relations Board (NLRB).[114] The National Labor Relations Act is regarded as one of the most important labor legislation enacted in the United States.[115] The NLRA was established by the federal government to regulate labour relations.[116] Its main aim was to establish the legal rights of employees (with exceptions in agricultural and domestic employees) to organize and to be part of labour unions and to bargain with their employers.[117] It further established an adjudicative board of three permanent members (later five) termed the; National Relations Board empowered to hear and settle labour disputes through quasi-judicial proceedings.[118] The NLRA empowers the board among others powers to prevent or correct unfair labour practices by employers.[119] It prohibits employers from engaging in unfair labour practices such as setting up a company union and firing or otherwise discriminating against workers who organized or joined unions.[120]

As indicated above, the main purpose of both the NLRA and the NLRB is to protect employees. Recently the board has applied the provisions of the NLRA to protect a variety of employee activities on social media.[121] Herbert indicates that with the advent use of social

[110] The First Amendment offer protection of among other freedom of speech. The Fourth Amendment protects individuals from unjust e search and seizure. The government may not conduct any searches without a warrant, and search warrants must be issued by a judge and based on probable cause: New Jersey State Archives "Text of the 1st -10th Amendments to the U.S. Constitution The Bill of Rights"
[111]Ramesh (n108) 40.
[112]Ibid 40.
[113]National Labor Relations Act 1935.
[114]Chandramoh (n95) 13.
[115]Encyclopaedia Britannica "Wagner Act United States 1935" https://ww.britannica.com/topic/Wagner-Act 5 June 2020 <accessed 26 March 2022.
[116] Ibid.
[117] Ibid. see also abstract/citation of the National Labor Relations Act 1935.
[118] Ibid. see also Section 3 [153](a) of the National Labor Relations Act 1935.
[119]Ibid.
[120]Ibid.
[121]Christine Neylon Obrien " The top ten NLRB cases on Facebook Firings and employer social media policies" 2014 Oregon Law Review vol 92,2 337 at 339

media and social media related misconduct, there has been the rediscovery of this old statute.[122] The Board has issued a significant number of decisions on this issue as well as a number advice reports that provide a significant pool of information about the protections available under the NLRA.[123] The most commonly referred to provisions are section 7 and section 8(a) (1) of the NLRA. Section 7 empowers employees to organize and form trade unions, in essence it promotes and protects collective action. Section 8(a) (1) further makes it an unfair labour practice where employers interpose with the rights in section 7.

These provisions have been used to protect employee's opinions on social media platforms where such opinions fall within what are termed "concerted activities" [124] in terms of section 7. However ,as it shall be discussed below, not all opinions can be classified as concerted activities in terms of section 7.As such, only activities that are classified as concerted activities are protected under section 7 and section 8(a) (1). The starting point is therefore to define what is meant by concerted activities under section 7.

The NLRB has defined concerted activities to occur where an activity by employee is supported by other workers with the aim of collective benefit as opposed to the pursuit of individual benefit.[125] This simply means that an activity is concerted where it's done collectively by employees or where it is endorsed by form of engagement by co-employees. For instance, where a group of employees engage in a discussion on social media about their workplace such a discussion is said to be concerted. In the case of *Myers Industries, Inc v Kenneth P. Prill,*[126]the NLRB made a clarification on the meaning of concerted activity. According to the court, concerted activity occurs where a worker incites a collective action and further where a worker brings a group concern before the employer.

This can therefore be understood to mean that under these provisions of the NLRA protect employee discussions on social media platforms such as Twitter, Facebook and others which are made as a group or which are raised for mutual aid. These activities may be about wages, hours of work, working conditions or union organizing. As such where an employee vents on

[122] William A. Herbert "Symposium Commentary Facebook Firing: The Intersection of Social Media, Employment, & Ethics" Vol. 24.3 (2014)*ALB. L.J. SCI. & TECH.* 407-415.
[123]Ibid 409.
[124] Eric Raphan, & Sean Kirby, Policing the Social Media Water Cooler: Recent NLRB Decisions Should Make Employers Think Twice Before Terminating An Employee For Comments Posted on Social Media Sites (2014)9 *J. Bus. & Tech. L.* 75
[125]Caplin, Nicholas J, "The NLRA and Social Media: Why the NLRB Can Be "Facebook Friends" With Both Employees and Employers"(2016).*Louis Jackson National Student Writing Competition.* 54.
[126]Myers Industries Inc, 281 NLRB 882, 887 (1986).

social media about undesirable working conditions and is supported by other employees by way of "comments or "likes,'' such activity is classified as concerted and protected. It is the opinion of the NLRB that protection of communication on social media platforms is subject to the same criterion as discussions that take place in person at work in actual time medium of discussion is irrelevant.[127]

The notion that social media communication must be afforded the same protection as face to face discussion has been has been reflected in a variety of decisions by the NLRB memorandums.[128] In the case of *Hispanics United of Buffalo,INC v Carlos Ortiz*,[129] the NLRB upheld the decision of the administrative law judge[130] who found that the termination of employment of five employees by a non-profit making organization as a result of their Facebook posts was unlawful. The issues in this case arose when five employees after work, engaged in a Facebook discussion. They complained about their jobs, managers and some of their clients. The employer was ultimately made aware of the posts through one employee who had seen the posts. The five employees were interviewed in connection to the posts and thereafter dismissed. The administrative law judge held that the employee's Facebook discussions were protected concerted activity under Section 7 of the NLRA.[131] In reaching this decision, the administrative law judge pointed out that the conversation was between employees about the terms and conditions of employment, as such their discussion constituted concerted activity thus worthy of protection. The NLRB, affirming this decision indicated that that the discharged employees' postings on Facebook were concerted activity under the Meyers cases.[132]In these cases, the NLRB postulated that an activity is concerted where an employee acts with or on the authority of other workers, and not exclusively by and on the benefit of the worker himself. In essence an activity is only concerted where such a comment or posting is done for a group benefit; it must not be for individual gain. Such an activity must be corroborated by other employees by way of engagement.[133]

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[127]Three D, LLC d/b/a Triple Play Sports Bar and Grille and Jillian Sanzone.
[128] On August 18, 2011 the Acting General Counsel for the NLRB issued a Memorandum OM 11-74, "Report of the Acting General Counsel Concerning Social Media Cases. Terry L. Potter Social Media Cases and the National Labor Relations Board "August 23, 2011 Huscekblackwell.
[129] 3-CA-27872, 2011 WL 3894520 (Sept. 2, 2011).
[130] An NLRB Administrative law judge hears and decides cases on unfair labour practices www.nlrb.gov/cases-decisions/decisions National Labour Relations Board accessed 29 April 2022.
[131]3-CA-27872, 2011 WL 3894520 (Sept. 2, 2011).
[132]Meyers Industries (Meyers I), 268 NLRB 493 (1984), revd.sub nom Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand Meyers Industries (Meyers II), 281 NLRB 882 (1986), affd. sub nom Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
[133] Ibid

The NLRB further held that the Facebook discussions are a textbook example of concerted activity, despite the fact that they occur on social network platforms. The conversation was commenced by one of the employees as an appeal to her co-employees for assistance. This finding of protected activity does not change even where employees made statements through the social media.[134] The comments by other employees who were responding to their co-worker s initial post were described as being directly related to the terms and conditions of employment which were of concern to all employees. Furthermore, these postings were commenced in furtherance of an anticipated meeting with the employer with the aim of discussing issues related to the workplace. Consequently, the NLRB held that the Facebook discussions were concerted activity. They portrayed the ideology of mutual aid or protection under Section 7.

Finally, it was concluded that the expulsed employees would not be deprived the NLRA's protection merely because there was swearing and or sarcasm in a few of the Facebook posts. The discussion was objectively inoffensive. Further that, the discussion was held not to be opprobrious within the test in *Atlantic Steel Co v Kenneth Chastain*[135] which is ordinarily applicable to employees disciplined for public outbursts against superiors.[136]

The same line of reasoning was followed by the NLRB in the case of *Karl Knauz Motors Inc.d/b/s Knauze BMW v Robert Baker*.[137] In this case the NLRB took its time to make a categorisation of social media postings which are worthy of protection under section 7 and those that are not.

The dispute in the Karl Knauz case arose after a termination of employment by the employer following several posts made by an employee. The first post related to the promotional event at a BMW dealership. The second post related was about a car accident that occurred at the Land Rover dealership of the same employer. Regarding the first post, the workers and management had held a meeting before the event. The purpose of the meeting was to discuss the food to be served at the promotional event. The workers had verbalised their unhappiness with the arrangement by the management to serve cheap foods which did not align with the

[134]See also Valley Hospital Medical Center, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009)
[135]245NLRB 814, 816-817 (1979).
[136] In Atlantic Steel Company, the Board outlined the test to determine whether conduct is opprobrious disloyal that it loses protection under the NLRA , under the test factors were enumerated firstly the location at which the discussion transpired, secondly the issue that was being discussed, thirdly the nature of an employee s explosion and lastly whether the outburst was provoked by the employer.
[137] Karl Knauz Motors, Inc., 380 N.L.R.B. No. 164, 2012–2013 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012)

luxury image of the BMW brand. Consequently Mr Robert, one of the employees made several postings on social media (Facebook) in criticism of the management's arrangement. At about the same time as the marketing event, a car accident occurred at a dealership owned by the same employer. The salesperson allowed a thirteen-year-old son of a customer to drive a Land Rover. The child accidently hit the gas, ran over his father's foot, and drove the truck over a small embankment into an adjacent pond. On account of this event, the same worker Mr Robert posted pictures and comments on his Facebook page about the accident.

The main issue to be considered by the NLRB was whether the postings fell under protected or concerted activities. In dealing with the correctness of the dismissal, the administrative law judge considered whether the two postings on Facebook constituted protect concerted activity and therefore worthy of protection under section 7. It was further to determine whether the employee was dismissed solely for postings in respect to the Land Rover accident. In regard to the first postings about the marketing of BMW it was held that such posts constituted protected concerted activity under section 7. This is because the debate on what food to serve had already been discussed at a previous meeting, the judge therefore concluded that it was raised as a continuation to such a discussion.

On the contrary it was held that the postings in respect of the Land Rover accident did not fall within protected, concerted activity. This is because the postings were done exclusively by the employee as a frolic, without any prior discussion with any other co-workers. The postings further had no association to the terms and conditions of the work environment or any link to other co employees. They were made by the employee solely for his own benefit. Finally, the judge found that since the employee was dismissed on the basis of postings in regard to the latter incident, the dismissal was fair. This followed the earlier finding that the postings about the Land Rover incident postings were not protected, concerted activity, his dismissal therefore was not in contravention of the NLRA .The termination was fair, the postings in regard to the Land Rover incident which were the basis of the termination as they did not constitute protected concerted activities. Those comments were the basis of the employer's decision to terminate the contract of employment.

Another notable decision is the case of *National Labour Relations Board v American Medical Response of Connecticut, Inc*.[138] In this case a worker was dismissed after posting

[138]National Labour Relations Board v American Medical Response of Connecticut, Inc 438 F.3d 188(2d Cir .2006).

unfavourable comments about her supervisor on Facebook. The issue was whether such a dismissal was lawful. The dismissal came into being when an employee was ordered by her supervisor to tender an incident report regarding a customer complaint. The employee requested union representation for an investigatory interview but was denied by the employer. Later that day, the employee posted sour statements about her supervisor on her Facebook page, which attracted support from her co-workers.

In deciding the matter, the NLRB concluded that as to the place of discussion the Facebook postings did not disrupt the workplace since they were done off duty. In applying *Atlantic Steel case*,[139] it was further concluded that the employee would not be deprived of the NLRA protection on account that she called her employer a scumbag. The nature of the outburst was held to not surpass the *Atlantic Steel* test[140] as the name calling was not backed up by physical threats. The Facebook postings were further held to have been exasperated by the supervisor s unlawful denial to provide her with a union representative.

One more decision by the NLRB was the case of *Three D, LLC d/b/a Triple Play sports bar and Grill and Jillian Sanzone*.[141] In this case the issue was whether the dismissal of two employees was lawful following a Facebook discussion. And further, whether their dismissal violated section 8(a)(1) of the NLRA. The discussion involved concerns that employees owed additional state income tax because of the respondent's withholding mistakes. In its deliberations the NLRB recognized that in terms of section 7 the workers had the statutory right to act mutually with the aim of improving the terms and conditions of employment [142] including by using social media for that purpose. The NLRB therefore agreed with the decision of the administrative law judge that the Facebook posts constituted concerted activities. Firstly, the two employees were mutually aided by the other two current employees. Lastly, their discussion was part of an on-going sequence of discussions that commenced in the place of work about the respondent's calculation of the employee's tax withholding. The judge further noted that in their Facebook discussion the employees conversed about issues which they hoped to bring up at an anticipated staff meeting as well as possible forums for grievances to government authorities. The judge found that the

[139] Atlantic Steel (n130)
[140] Ibid: an employee was discharged after a confrontation with a foreman an employee insulted the the very same foreman . The Board determined that dealing with outburst some factors must be taken into consideration first the place of discussion, the issue ,the nature of the outburst, lastly whether the outburst was provoked by the employer
[141]Three D, LLC d/b/a Triple Play sports bar and Grill and Jillian Sanzone2014-15CCH 15,855.
[142] Part I page 1.

employees were seeking to facilitate, incite or prepare a collective action and as such their Facebook discussion constituted a concerted activity.[143]

While the respondent did not contest that the activities were concerted, he asserted that the comments were defamatory and derogatory and not worthy of protection in terms of the NLRA. He further asserted that the Facebook posts were published in a public domain obtainable to employees and customers and therefore negatively affected his good reputation. In dealing with this issue the NLRB referred to the *Atlantic steel case*. The NLRB indicated that the postings were not so treacherous to guarantee the loss of protection in terms of the Jefferson standard (*National Labour Relations Board v Local Union NO 1229, International Brotherhood of Electrical Workers).*[144]The comments in issue did not make reference to the respondent's products or services much less defame them. Accordingly, the respondent had the burden to prove that the comments were maliciously untrue. This is to say, they were made with knowledge of their falsity or with reckless disregard for their truth or falsity. The respondent failed to meet this burden. The NLRB therefore deemed the discharge unlawful.

Looking at the case law in the US, what is clear from the review of NLRB decisions is that it is taking a pro employee viewpoint in interpreting an employee's actions and their postings on social media.[145] Generally, these situations are analysed to determine whether the employers actions violated section 7 of the NLRA, which protects an employee s rights to engage in concerted activities. In this manner, the focus is on whether or not the posting is a result of a singular concern of an individual employee towards the management or working conditions or something that is made for the collective benefit of the concerned employees. It therefore suffices to point out that the protection is qualified by collective action rather than individual action.

Additionally a defaming or disparaging comment such as scumbag, asshole does not result in a loss of protection under the Act. [146]

The NLRB has also effected provisions of section 7 and 8 where a social media policy by the employer is seen to be overreaching and thus being in contravention with the two provisions.

[143] Ibid 3.
[144]In Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard) the issue before the Supreme Court was weather the dismissal of employees who were on strike with handbills containing unfavourable information about the employer violated the Act . The NLRB explained that for conduct to lose protection under section 7 of the NLRA it must be disloyal and a direct attack to the employer.
[145]Terry L Potter, "Social media cases and the National Relations Board 2011'' huschblakwell.com >Accessed 29 April 2022.
[146]Ibid 2.

In 2012 the General Counsel released the report on 14 NLRB social media misconduct cases. Most of those cases dealt with the questions concerning the employer's social media policies.[147] A total of 5 policies were declared to be unlawfully extensive. The report therefore underscored that social media policies by employers should not be so pervasive that they forbid the forms of activity protected under federal labour law such as discussions of wages or working conditions among employees.[148]

Curtailing policies that are overreaching have been outlawed in several decisions by the NLRB. For instance, in the case of *Karl Knauz Inc.d/b/s Knauze BMW v Robert Baker* [149], the NLRB held that the employer's policy mandating workers to be courteous violated the NLRA. This was because the policy contained a pervasive interdiction against conduct considered disrespectful and language which injured the good names the employer. The NLRB found this interdiction was far reaching because it could reasonably include employee posts that fall within section 7 activity. In light of the NLRB's findings when drawing a social media policy, employers must be cautions to avoid expansive interdiction that limit discussions on workplace conditions, because such prohibitions may be in contravention with the NLRA.

Furthermore, *In National Labour Relations Board v American Medical Response of Connecticut, Inc*,[150]the NLRB outlawed the respondent's "Blogging and Internet Posting Policy.'' The policy barred employees from uploading images of themselves on any media platforms which portrayed the company in any way, save with prior authorisation. Employees were also prevented from discussing the Company in an unfavourable manner with anyone.

Therefore, NLRB concluded that the first section contravened employees' rights under section 7, as it could sensibly foresee a situation in which the rule would prohibit protected activity. The second rule was held to be ill founded under the theory that it comprised no limiting language that would prevent an employee from believing their section 7 rights were being chilled or supressed. The general understanding is therefore that an employer violates

[147] National Labor Relations Board "The NLRB and Social Media" www.nlrb.gov/about-nlrb/rights-we- >accessed 18 April 2022.
[148] Ibid.
[149]Karl Knauz(n137).
[150]National Labour Relations Board v American Medical Response of Connecticut, Inc438 F.3rd 188(2nd Cir 2006).

section 8(a) (1) through promulgation of a standard if that standard would reasonably tend to inhibit employees' rights in the exercise of their section 7 rights.[151]

Having examined the perspective of social media misconduct in the US and how the courts and tribunal have dealt with. The following section purports to examine how this concept has been dealt with in the United Kingdom.

2.3 United Kingdom

In the United Kingdom (UK), social media misconduct is dealt with by way of existing legislation that governs dismissals.[152] That being so, there is no particular law applicable when discharging an employee on the basis of inappropriate use of social media. The test used by the courts and tribunals is whether the adjudication to discharge an employee fell within the band of reasonable responses available to the employer.[153]Therefore, the applicable law is the Employment Rights Act (ERA).[154] The ERA consolidates provisions relating to employment rights. Under the ERA unfair dismissal is governed by part 10, 5. 94 he provision establishes the right of the employee not to be unjustly discharged. Where an employee is discharged the employer must provide fair reasons for such a dismissal. However, the dismissal of an employee is mechanically unjust where it trumps upon statutory rights, such as health and safety concerns and leave for family reasons in certain prescribed circumstances.[155] As such, the employer must give valid reasons for the dismissal. Valid reasons to discharge an employee are enumerated under section 98(2) of the ERA. They include mainly lack of capacity, behaviour, and redundancy or where an employee breaches an obligation or any other limitation under the law.[156] As such the question of concern is whether section 98(2) (b) of the ERA extends to conduct made on social media whether on or off duty.

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[151] Second Advice Memorandum, Office of the Gen. Counsel, NLRB, January 24, 12 .see also first report 18 2011 and third report May 30 ,2012.
[152]Employment Rights Act 1996.
[153] Workers of England Union, "No special rules for social media misconduct'' (workers of England union, 25 August 2015)www.workersofengland.co.uk/employement>accessed 29 May 2022. See also Ashursts"World @work on misconduct by social media – a global perspective"01 May 2016.
[154] Employment Rights Act 1996.
[155] Anne O'Rourke, Amanda Pyman, Julian Teicher and Bernadine van Gramberg "Old wine in new bottles? Regulating employee social media use through termination of employment law: A comparative analysis 2018 Common Law World Review" (2018) *Common Law World Review* 248-271 (s. 104), health and safety concerns (s. 100), leave for family reasons in certain prescribed circumstances (s. 99) and other statutory rights.
[156]Ibid 257.

Legal scholars point out that notwithstanding section 98(2) (b) of the ERA, while dealing with cases of social media misconduct the courts and tribunals have considered several factors. This includes reputational damage, the reasonableness of the dismissal, and the seriousness of the comments.[157] The courts have also looked into whether the company had a policy or code of conduct in the workplace which regulated the use of email, Internet and social media.[158]

The adjudication of issues about social media misconduct is further influenced by the principles of defamation.[159] This is done by endorsing the perception in delict that published statements raise significant potential injury, in this case to business reputation.[160] Thus comments made on social media are seen as potentially dangerous. In most cases where an employee posts on social media, their conduct is often classified as insubordination.[161] In some cases, it is interpreted as failure by employees to uphold a particular term of the contract or a work code.[162] Similarly posting remarks about frustrations at work is often interpreted as a breach of a contractual provision and yet a similar remark maybe made around the water cooler at a workplace without attracting penalties. The variation is mainly in the form (a posting which amounts to publication) and its potential injury on the good name of the employer.[163] For, instance a comment posted on social media may attract penalties while the same comment made in a face to face conversation may not, this is because written words are regarded or seen as potentially dangerous

Additionally, what is also observable is that the facts about how the employer came to discover the comments trumps the inquiry of whether or not an employee's right to privacy had been encroached upon.[164] As such, the right to freedom of expression and privacy in the Human Rights Act[165] offer a significantly minimum protection to employees.[166] Instead, the underlying notion is that if comments are made on social media, then any privacy right has

[157]Ibid 258.
[158]Ibid 258.
[159]Mangan, D,"Online Speech and the Workplace: Public Right, Private Regulation. Comparative" (2018)*Labor Law and Policy Journal* 39(2), pp. 1-24.
[160]Ibid 2.
[161] Ibid 2.
[162]Ibid 2.
[163]ibid 3.
[164]Ibid 2.
[165]Human Rights Act 1998.
[166]Martin Thomas &Katee Dias "Social media in the workplace – a roadmap for employers'' (The following paper is the summary of a workshop and discussion that took place at the offices of Goodman Derrick LLP May 2019).

been automatically abandoned.[167] The general assertion is that remarks made on social media are public, despite the fact that there may exist privacy settings targeting a selective audience.[168] This assertion cannot be entirely dismissed; the notion of privacy on social media is somewhat an illusionary concept. Social media is a broad space, even where the author selects a certain audience, comments or posts can be shared and go viral. In some cases, comments or postings can create a topic of interest and attract a wider range of engagement. These are often called trends.[169] In this regard, it would be unreasonable to expect privacy on social media even where privacy settings are in place. The following decisions demonstrate how social media misconduct has generally been dealt with in the UK.

In the case of *Gibbins v British Council*,[170] the defendant Ms Gibbons was employed by the British Council. The British Council's patron is the Queen[171] and their scope of work is set out in a Royal Charter.[172] A Facebook post was made by a band called the Dub Pistols, commenting on Prince George's birthday and containing obscene language. Ms Gibbins got involved in the Facebook conversation accompanying this post and added a comment about the Prince's privileged background. Ms Gibbins held Republican views.

The comment made by Ms Gibbins was made at her home during private Facebook chat. She had 150 'friends' who she knew well. Her privacy settings were set at their highest level and she had added a disclaimer wording to her page, making it clear that it was not work related. Her post fell into the public domain and was widely reported in the media, causing an outcry for her dismissal. The British Council had a Code of Conduct in place emphasising that employees should not act in a way that undermines public trust in the organisation and had also issued social media guidance. Ms Gibbins was a very senior employee, well respected within the organisation and had an unblemished disciplinary record. As a charity, the British Council is required to report serious incidents, but it did not feel that this was needed in these circumstances. However, following a disciplinary process, it dismissed Ms Gibbins.

[167]David Mongton (n159) 2.
[168]Ibid 2.
[169] A trending topic is a subject that attracts interest and attention in limited period of time Bigcommerce essentials, "What is a trending topic and how can it be used in ecommerce ?"<bigcommerce.com/ecommerce-answers > accessed 1 June 2022.
[170]Gibbins v British Council 2200088/2017.
[171] The British Council builds networks within the United Kingdom and other countries. Its patron is Her Majesty Queen Elizabeth II.
[172] The scope of work set out in the Royal Charter is to encourage international cultural intercalations between the UK and other states.

In dealing with Gibbins's claim of unfair dismissal, the Employment Tribunal reiterated the section 98 of the ERA.[173] It indicated that in deciding whether an employer dismissing an employee for misconduct acts fairly, the tribunal must decide whether the employer's belief in the employee's guilt was genuine. Put differently, whether that belief was founded on the facts found after a reasonable investigation, and finally, whether a reasonable employer would have dismissed for that reason.[174]

The Tribunal found that the dismissal was fair. The respondent held a genuine belief that the claimant was guilty of misconduct in carelessly posting remarks associated with obscene abuse of a child.[175] It further postulated that her conduct amounted to gross negligence, and did amount to reckless risk taking. Such conduct also brought the respondent into disrepute. It was conduct undermining the respondent's trust in her to express her views responsibly and not to bring them into disrepute.[176]

Another notable decision is the case of *Game Retail Limited v Laws*.[177]The pattern of facts in this case discloses that Laws, an employee of Games Retail was released from his employment after a number of his tweets were identified as offensive by the employer. The employer had concluded that Laws tweets were in a public forum (Twitter) and therefore accessible to all members of the public. After his dismissal Laws appealed to the Employment Tribunal (ET).

At the hearing before the ET,[178] it was not in issue that the reasons for the dismissal was Laws's conduct on Twitter, nor was the inappropriateness of his postings or whether Game Retail had a genuine believe that Laws was guilty. The case was mainly contended on the issue of sanction. The judge held that the decision to terminate Laws' employment did not fall within the band of reasonable responses open to the employer. Therefore, his dismissal was not fair because; firstly, Laws' twitter account was registered for personal use and not for professional ventures; secondly, Laws tweeted at his own leisure time. Also that Laws had also furnished explanations for some of his tweets.

[173]Para 124.
[174]Para 125.
[175]Para 134.
[176]Para 147.
[177]Game Retail Limited v Laws UKEAT/0188/14/DA (3 November 2014).
Ibid para 8.
[178]An independent tribunal which presides and makes decisions on legal disputes on employment law. www.gov.uk/courts-tribunals/employment

The Employment Appeal Tribunal[179] (EAT) allowed an appeal by the respondent, holding that the ET Judge had incorrectly replaced his view for that of a reasonable employer. According to EAT the ET judge had further made inferences that were irreconcilable with his earlier findings.[180] The judge had also failed to consider relevant matters thus his findings were simply perverse.[181] The EAT pointed out that the ET failed to take full consideration of the public nature of Twitter. The ET had further failed to properly apply the band of reasonable responses test as set out in *Iceland Frozen Foods Ltd v Jones*.[182]The EAT concluded that judgement by the ET judge could not safely stand.[183]According to the EAT what was appropriate was for the matter to be remitted to the ET. The EAT further declined to provide a guideline on how cases of social misconduct should be dealt with. [184]Instead, it asserted that to lay down the rules to be followed by ETs in cases of social media misconduct creates the potential to make the law rigid which would be unfitting in unfair dismissal cases, therefore its case should be decided on its own facts.

Another notable decision is the case of *Teggart v Teletech.*[185] In this case Mr Teggart, the claimant worked as a customer service representative. The claimant had a Facebook profile from which he regularly made posts. His Facebook friends included some of his fellow colleagues. While at home, the claimant posted immodest statements in regard to one of his female co-workers on his Facebook wall. The remark came to the attention of some of his Facebook friends including some of the co-workers. While the female co-worker whom the remarks were about was not Mr Teggart's friend, the remarks nonetheless came to her attention. The female whereupon, told Mr Taggart's girlfriend to ask him to remove it. However, Mr Taggart made another immodest remark. The comments were brought to the attention of his employer, who thereupon brought charges of harassment and for diminishing

[179] The Employment Appeal Tribunal is an appellate body which settles disputes from the Employment Tribunal. See also www.gov.uk/courts-tribunals/employment.

[180] In one instance the Employment judge made a finding that (paragraph 5.5) that: it could not be proved that any member of staff had obtained the tweets however in an earlier finding the judge had acknowledged one person had been able to access the tweets (paragraph 5.3) this findings were inconstant with each other.

[181] Para 50 , according to the EAT the Employment Judge had concluded that the Laws had not made unfavourable posts about the respondent or materials that might identify him as employee of the respondent This finding was perverse because the Laws was following about a hundred stores and was followed back by sixty five .

[182]Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 , the court laid down what is meant a band of reasonable responses in applying section 98(4) the courts must take into consideration the reasonableness of the employers conduct the purpose of the of the industrial tribunal ,is to determine whether in those circumstances an employer acted reasonably

[183]Para 51.

[184]Para 52.

[185]Teggart v Teletech NIIT 00704/11.

the reputation of the company. His employer concluded that his behaviour was a breach of a workplace policy which outlawed sexual harassment. He was therefore dismissed.

Mr Taggart an appeal to the Belfast Industrial Tribunal claiming that his human rights under the Human Rights Act have been infringed and further that the dismissal was unfair. In dealing with these claims, the tribunal made the following conjectures. It reiterated that in order establish the fairness of the termination of employment the employer must furnish a sufficient reason for the dismissal. Further, the given reason must not fall within statutory reasons that make a discharge unjust. Where an employer establishes these two requisites, then whether the dismissal was unfair or not rests on whether in the circumstances the employer acted fairly and reasonably.[186] The tribunal further indicated that where an employer terminates the contract owing to the employee's misconduct, the employer must have a genuine belief that the employee has committed an act of misconduct. This belief should be consequent to a fair investigation (to include a reasonable disciplinary hearing and appeal) and dismissal must be within the range of reasonable responses.

The tribunal also considered interconnection or overlaps between the Human Rights Act 1998 and the ERA. It held that when the ET applies section 98(4) (Article 130(4) Employment Rights Order (Northern Ireland) 1996) it must have also given effect to the rights under section of the Human Rights Act. It concluded that it was satisfied that the respondent had identified the reason for the claimant's dismissal namely that, he had committed an act of harassment against an employee and brought the company into disrepute.[187] Further that, the reason for the dismissal was conduct which falls within one of the statutory reasons that warrants a dismissal fair.[188]

In justifying its decision, the tribunal mulled over the nature of the postings, their vulgarity and coarseness. It concluded that it was indispensible that the objective of the claimant was to create undesirable and vulgar distaste for another employee. These elements made the sanction of dismissal for the act of harassment within the band of reasonable responses.[189]

Finally the Tribunal took it upon itself to engage the provisions of the Human Rights Acts which the claimant had relied upon. The tribunal provided the following illumination on Articles 8, 9 and 10. Under article 8 the tribunal concluded that where an employee makes

[186]Para 5(1).
[187]Para 6(1).
[188]Para 6(2).
[189]Para 14.

posts on social media platforms which are obtainable by the public, they lose privacy as far as those posts are concerned. It is illogical to rely on the right to privacy.[190] In dealing with article 9, on freedom of thought concise, religion and beliefs the tribunal postulated that the belief alluded to in the Article 9 does not cover remarks that promoted sexual harassment. However, the belief alluded to a philosophy, set of values, principles, or more.[191] Lastly Article 10 on the right to freedom of expression. The tribunal indicated that the right of freedom of expression did not permit the claimant to post negative remarks which had the tendency damage the reputation or infringe the rights of another.[192]

Likewise, in the case of *Crisp v Apple Retail (UK) Ltd*,[193] Crisp, a worker under the employ of Apple, published unfavourable remarks about the respondent during his leisurely time on his Facebook page. Other depreciatory remarks were made in mockery of Apple and its products.[194] The remarks ultimately came to the attention of the employer through one of the workers who was also Crisp's Facebook friend. A suspension followed and a disciplinary hearing followed. He was discharged for damaging the good name of the company which amounted to gross misconduct. [195]Crisp appealed to the ET. The tribunal was to consider whether in terms of section 98 of the ERA the dismissal was fair in light of the reasons furnished by the employer. The ET had to further consider whether the dismissal did not violate provisions of the Human Rights Act particularly the right to respect for private and family life under Article 8 and the right to freedom of expression under Article 10.[196] The ET, taking all material factors into consideration such as the good name of Apple and the fact that the company had a social media policy which was known to the employee, held that the resolution to discharge Crisp fell within the band of reasonable response under the circumstances. It asserted that the claimant should have been aware that the posts could have detrimental effects to Apples good reputation and degrade its name.

In dealing with the issue of rights, the ET considered whether under Article 8 Crisp had a reasonable expectation of privacy over his Facebook remarks. The ET rejected the submission by the responded that the claimant's postings constituted posting in a public domain. This was owing to the fact that his settings were "private'' hence limiting access

[190]Para 17.
[191]Para 17.
[192]Para 17.
[193]Crisp v Apple Retail (UK) Ltd ET/1500258/11.
[194]Ibid para 14.
[195]Ibid para 20.
[196]Ibid para 31.

however the tribunal found that the claimant could reasonably expect to have privacy over the postings.

In regard to freedom of expression under Article 9, the ET found that this right was engaged and as such the claimant was exercising his right to freedom of speech when posting the remarks. However, the respondent's social media policy restricted this right in order to protect its own reputation; such a restriction was justifiable under Article 9. The ET further considered that the opinions by the claimant were not that significant to freedom of expression such as political opinions, they were rather potentially damaging.

Furthermore, looking at the case law in the UK, Employment tribunals have often found that discharging an employee for social media related misconduct to be unjust in some cases. This often occur where a nexus is not established between the said social media misconduct and the employer and where the comments are proved to be potentially harmless.

This issue was reflected by the case of *Whitham v Club 24 Ltd t/a Ventura*.[197]Where an employee made remarks on her Facebook account that were perceived by the employer to be injurious. The posting was engaged on by some of her co-workers. Some of the co-workers noticed the remarks and immediately reported them to the employer. An inquiry was launched. The employer was worried that since Whitham's Facebook page identified her as an employee of Skoda UK, the postings could by association have an injurious effect on the relationship between Skoda UK and its major client Volkswagen. Whitlam was suspended. She later admitted that behaviour was inappropriate. A disciplinary hearing found that Skoda had suffered a significant amount of shame due to her conduct and was ultimately dismissed. However, the ET was extremely critical of the manner taken by Skoda UK. It found that the dismissal was unreasonable; it did not fall within a range of reasonable responses. The ET further pointed out that Whitlam had a clean record; good working relationship with her clients; and most importantly the language used in the Facebook posts would not likely cause embarrassment to Volkswagen. The tribunal further indicated that it could not be proved that Volkswagen endured any injury.

Another similar decision is that of *Smith v Trafford Housing Trust*,[198] in this case a manager, Adrain Smith was demoted after he made a post on his Facebook page which was against gay marriage. The post was seen by a co-worker colleague. Smith was suspended from his

[197]Whitham v Club 24 Ltd t/a Ventura ET/1810462/2010, at para. 5.
[198]Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch).

employ while the investigation was on-going and thereafter a disciplinary hearing followed. His conduct was held was found as a gross misconduct. He was however not dismissed but striped off his managerial position with a lessened salary. In response, Smith lodged court proceedings alleging that it was a breach of contract for the Trust to demote him and reduce his pay when he was not guilty of any misconduct.

One of the issues before the court was whether Smith's Facebook posts constituted a contravention of the Trafford Housing Trust's Code of Conduct and/or its Equal Opportunity Policy.[199] The Trust contended that Smith's remarks had the potential to damage the name of the Trust and further the posts were a direct assault on the church's stance of neutrality on controversial issues. Lastly that his post did not promote a fair treatment and respect to co-workers including being non-judgmental as required by Trust's code of conduct. The Court declined these contentions and delivered the judgment in favour of Smith.

The Court held that no reasonable reader of Smith's Facebook page could associate the postings by Smith as the stance of the Trust. It went to indicate that in viewing Smith's postings it could be deduced that Smith used the account for his personal use as opposed to work purposes. Even worse, there was no proof that Smith's comments had injured the name of the Trust.

Therefore, what the UK decisions demonstrate is that they can be biased and inclined to protected business reputation.[200] The decisions are interpreted in light of section 98 which requires that the employer had a genuine belief that the employees conduct amounted to misconduct. While no specific legislation exists dealing with social media misconduct, section 98 plays a very important role in deciding the fairness of a dismissal on account of social media misconduct. The provisions of the Human rights Act also offer minimum protection. This in essence means that the law is more inclined to protect business reputation, thus giving employers discretion to dismiss employees based on their perception of what could bring their business into disrepute.

Having looked at how social media misconduct is dealt with in the UK. This next part scrutinizes how South Africa, which generally has a shared system of law with Lesotho has dealt with social media misconduct.

[199] Ibid 4 para 9.
[200] Mangan, D. (n159) 3.

2.4 South Africa

The South African jurisdiction has no law that deals precisely with of social media misconduct within the place of work.[201]This has led to an increase in a number of unjust and unconstitutional dismissals of employees for social media related misconduct by employers.[202] However the absence of the said legislation has also increased given rise to pervasive misapplication of social media sites by employees both within the place or work and outside the scope of work. This movement shows that the use of social media should be regulated by labour laws.[203]

Generally, the South African employment relations are governed by the Labour Relations Act.[204] The LRA further gives effect to the constitutional right to fair labour practices enshrined in section 23(1) of the Constitution.[205] It guarantees protection to all employees who fall within the LRA from being unjustly discharged through section 188.[206] Under the same provision the dismissal is fair where it is based on the employee's conduct, capacity or operational requirements.[207] Schedule 8 of the Code of Good Practice found in the Act lays down the procedure to determine the fairness of dismissals. What is considered fair is usually dependant the circumstances of each case.

Lekopanye indicates that the current lacuna in the law of South Africa in regard to social media misconduct has caused numerous constitutional dilemmas for all parties privy to the employment alliance.[208] For instance, the employers punitive regulations restraining the use of social-media on or off duty could unjustly encroach upon an employees' rights to freedom of expression and privacy. Similarly, where an employee makes a post on social media and is regarded by the employer as unsavoury and with the potential to cause his name disrepute, the employer might see it fit to dismiss the employee on grounds of social media misconduct. In this way, there emerges a convergence between the constitutional rights of the employee to express himself and the interests of the employer to a good name.

[201]Chitimara&Lekopanye (n41)2.
[202]Ibid 2.
[203]Cilliers (n10) 575.
[204]Labour Relations Act 66 of 1995.
[205]The Constitution of the Republic of South Africa 1996.
[206] A dismissal is just where the employer provides an evidentiary burden relating to conduct, capacity and operational requirement.
[207] Ibid section 188.
[208]Chitimara&Lekopanye (n41)3.

The general perspective under South African law therefore is that a discharge of an employee for social media related misconduct would be unjust where it encroaches upon the fundamental rights of that employee.[209] Additionally, a discharge of employee on account of social media misconduct is unjust where a misconduct is not dreadful to warrant discharge.[210] A dreadful misconduct that permits discharging an employee may arise in cases such as when the employee posts demeaning remarks, racial and unfavourable statements about the employer or other co-workers social media platform.[211] Such misconduct would effectively damage the employer's good name. This perspective has also been maintained by the courts and tribunals decisions which are discussed below.

2.4.1 Dismissal for social media misconduct and the right to privacy

The South African Constitution remains one of the most important cornerstones that that serve to protect citizens 'right to privacy.[212] It further enshrines the provisions that workers must be substantially entitled to privacy in their work environments; this may be understood to include having privacy even where they use social media sites.[213] Section 14 the Constitution of South Africa provides that everyone has the right to privacy, as well as the protection against specific violations of privacy; including the right not to have their private communications encroached.[214] This in essence means that employees have the right not to have their accounts hacked or intercepted by the employer.[215] In most cases, employees often raise the defence that employers had no right to access their posts made on social media.[216] This is usually owing to restrictions that employees implement on their social media accounts. The primary question therefore, is whether an employer encroaches upon workers' right to privacy where an employer accesses comments of any nature on social media by the employee. And simultaneously, whether the employer has the right to confirm such posts where they are brought to his attention by either the public or the other employees. Can this materially impair the employee's right to privacy? This section below demonstrates how the courts in South Africa have confronted this dilemma.

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[209] K. Lekopanye " Selected challenges associated with the dismissal of employees for social media-related misconduct in the South African workplace"(LLM Dissertation North West University 2018) 20.
[210]Ibid 74.
[211]Ibid 74.
[212] Section 14, see also Darren &Nicci (n82)16.
[213]Darren &Nicci (n87) 10.
[214]ibid 16.
[215]Simphiwe P Phungula"The Clash between the Employee's Right to Privacy and Freedom of Expression and Social Media Misconduct: What Justifies Employee's Dismissal to Be a Fair Dismissal?" (Nelson Mandela University Labour Law Conference on "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond July 2019).
[216]Sedick (67).

In the case of *Sedick v Krisray* (Pty) Ltd[217] an employer terminated the employment of two employees De Reuk and Sedieck on account that they damaged the good name of the company in a public forum. The employees had posted negative remarks the business of the employer and his family on Facebook. The applicants challenged the dismissal both procedurally and substantively. Both applicants did not refer to the respondents expressly but made references that were clear.

The respondent contended that the gravity of the comments had to be examined in the ambience of firstly, the applicant's status in the company, secondly the applicant mouthpiece of the company and engaged in its daily business dealings with both clients and suppliers and lastly the remarks were posted in public platform where they could easily be obtained by the members of the public.[218] On the other hand, the applicant who had not restricted her page contended that her right to privacy had been invaded and questioned the respondent's right to investigate the old postings.[219]

The CCMA Commissioner rejected the applicants' contentions. Confronting the matter of the defence of privacy, the Commissioner held that social media; the internet and Facebook are naturally public forums except where entry to a Facebook page has been constrained by its owner.[220] However the applicants had not placed any limitations to their Facebook walls consequently, the posts were deemed to be a in a public forum. As such, it was held that the respondent was entitled to access the posts by the applicants that had been made by the applicants.[221] The Commissioner held that by failing to restrict access to their Facebook accounts, the applicants abandoned their right to privacy.

In dealing with issue of damaging the good image of the employer the Commissioner indicated that it was true the two employees had damaged the reputation of the employer in a public forum. In reaching this decision, the Commissioner took into regard the nature of the posted material, where they were posted and to whom they were directed, who could access them and lastly their authors.[222] Therefore, the commissioner held that the posts had the aptitude to injure the image of the employer among its clients, suppliers and competitors.[223]

[217] Ibid
[218]Para 34.
[219]Para 42.
[220]Para 50.
[221]Para 52.
[222]Para 57.
[223]Para 57.

In *Fredericks v Jo Barkett Fashions*,[224] an employee was discharged from her duties on account of diminishing the employer's reputation publicly. The pattern of facts follows that an employee had posted unfavourable comments about the employer's General Manager on Facebook. The comments could possibly be seen by about ninety employees and key customers who generated revenue for the employer. The applicant was therefore charged and dismissed. She objected to the termination of her employed as being unfair as it infringed her right to privacy.

The Commissioner held that the dismissal was fair. In reaching the decision, the Commissioner determined the fairness of the dismissal by interpreting Schedule 8 Item 7 of the Code of Good Practice.[225]While it could be established that the employer had no policy governing the use of Facebook, the Commissioner held that the respondent's actions were not justifiable, and therefore the dismissal was fair. Comparing the facts before it with *Sedick v Krisray (Pty) Ltd*,[226] the Commissioner took the perception that the employee had not restricted restrict access to her Facebook profile it was open to the public and therefore could be accessed by anyone as it was open to the public and anybody could access it.

In *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton*,[227] Ms Haliwell, was released from her employ after she posted negative comments about her manager on Facebook. The posts ultimately came to the attention of the employer through a co-worker who was also Ms Haliwell's Facebook friend. She was consequently dismissed on the grounds of gross insubordination and grossly disrespectful behaviour. The matter proceeded before the Commission for Conciliation Mediation and Arbitration (CCMA). Ms Haliwell argued that her dismissal was unfair. She raised the defence that her right to privacy had been infringed by the co-worker who has accessed her posts. She also indicated that her actions were the result of provocation from her boss.

On the other hand they argued that Ms Haliwell had accepted the friend request from the co-worker , by so doing they become Facebook friends and thus the co-worker could access her posts .Ms Haliwell was also a Facebook individuals who had notified the employer about the post. In dealing with these issues however the commissioner rejected privacy and provocation defence. The Commissioner held that it was Ms Haliwell s unhappiness which ignited her

[224]Fredericks v Jo Barkett Fashions [2011] JOL 27923 (CCMA).
[225]Codes of Good Practice.
[226]Sedick (n67).
[227]SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton, MsHaliwell, (2011)20 (CCMA).

response when the company tried to transfer her and not provocation from the company. Her referral to the CCMA was found to be vexatious and frivolous and costs were awarded against her.

2.4.2 Dismissal for misconduct and the right to freedom of expression

Under the South African Constitution, the right to freedom of expression is protected under section 16.[228] This right is accorded to every individual in South Africa.[229] Freedom of expression is associated with liberty that permits citizens to hold opinions and to receive or disseminate those opinions as information and ideas on other individuals.[230]

Given the ease and speed in which information can be exchanged on social media site it could be a stand point that social media platforms have therefore provided novel routes and means by which every individual could vocalize their ideological standpoints freely. In this manner, social media has taken a centre stage in defending the right to freedom of expression.[231] The right to freedom of expression also allows individuals to voice their opinions on topical societal issues on social media platforms.[232] By inclusion, employees are members of the society, since this right is granted to every individual citizen it is logical to conclude that the right extends to employees. However this does not give employees carte blanche to posts they please on social media sites.[233] As such it would be legitimate to discharge employees for social media misconduct for their irresponsible and outlawed behaviour on social media that degrades the business of the employer.[234]

While every individual has the right to freedom of expression, this right must be decoded in view of other interests such as the right to dignity or respect of reputation and others rights. This emphasises that the right is not without reservation in South Africa.[235] Furthermore, the employee's freedom of expression and the employer's right to a good name and reputation must be meticulously at equilibrium. This equilibrium should be made in an effort to escape dilemmas that may ensue where an employee's rights are unnecessarily curtailed or the employers interests are tramped upon.

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[228]The Constitution of the Republic of South Africa 1996.
[229]Ibid.
[230]K Lekopanye (n209) 84.
[231]Ibid 19.
[232]Ibid 19.
[233]Verileoosthuzien, "How far is too far for employees on social media" www.labourguide.co.za> accessed 3 June 2022.
[234]K.Lekopanye (n209) 20.
[235]ibid 20. See also Le Roux and others v Dey 2011 (3) SA 274 (CC).

In deciding cases on aspects of freedom of expression, the South African courts and tribunals have given effect to the effect to the limitation clause in section 16 of the Constitution.

In *Motloung v The Market Theatre Foundation,*[236]the employer terminated the employment contract of an employee on the bases of an online remark that was classified as hate speech and which in turn had detrimental effects on the employer. The CCMA Commissioner noted that leaning on the right to freedom of expression did not permit the workers to behave in an irresponsible manner. The Commissioner concluded that it was legitimate for the employer to discharge the worker on the basis of social media misconduct.[237]

The same spirit of the law is maintained in *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Dietlof and Frans Loots Building Material Trust t/a Penny Pinchers*,[238] where the Commissioner held that the discharge of an employee who had falsely accused their employer of racism on social media to be fair. In this case, an employee posted comments on Facebook indicating that his employer the respondent, had acted in a racist manner toward two long-service employees when he (the owner) purposefully kissed the white female employee on the cheek but only hugged the black female employee. The applicant contended that the post did not directly allude to the employer. However, according to the respondent, while there was no direct designation to the employer the connotation from the remarks could be construed to indicate an occurrence that could be tied to the employer. The images posted on Facebook visibly depicted respondent's premises. Further incidents outlined in the remark were those that had transpired at the ceremony by the respondent.

While the responded did not have any social media policies, it was held that the dismissal of the applicant was fair. The Commissioner decided the case on the basis of wrongness of racism. The Commissioner therefore held that to falsely accuse a superior or colleague of being a racist was as revolting as racism itself. The dismissal was therefore fair. Consequently, it can be understood that while employees may exercise their right to freedom of expression, the right does not extend to racist remarks or unfounded allegations of racism.

Likewise, In *Edcon Limited v Cantamessa and others,*[239]the Labour Court upheld the dismissal of an employee who had made racial posts on Facebook while on leave. It held that

[236]Motloung v The Market Theatre Foundation [GAJB4458-11] 2.
[237]Section 16(2) of the Constitution Republic of South Africa.
[238]Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Dietlof and Frans Loots Building Material Trust t/a Penny Pinchers,2016 10 BALR 1060 CCMA.
[239]Edcon Limited v Cantamessa and others, (JR30/17)[2019]ZALCHB

an employer has the ability to discipline an employee as long as the employer can establish the necessary connection between the misconduct and his business.[240]

In the case *SA Pelagic Fishermen's Union on behalf of Mouton and Lucky Star Operations (A Division of Lucky Star Ltd) (at 1929*),[241]an employee, a skipper of a fishing vessel, made an unfavourable comment about coloured people in a WhatsApp group with crew members, many of whom were coloured. He was dismissed, notwithstanding his long tenure and self-reproach. The CCMA approved the dismissal, citing that racial discrimination is unfair and cannot be legitimately justified. The Commissioner further recognised the duty of the courts and tribunals in curbing racism.

In *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arends v Consumer Brands Business Worcestor,a division of Pioneer Foods (Pty)Ltd*,[242]an employee who was , a machine operator, was dismissed for gross misconduct for making diminishing statements about the employer on Facebook. In that regard, the applicant had contravened the employer's Information and Communication Technology General User Policy Information. In his defence, the employee put forth his right to privacy. De Vlieger-Seynhaeva J held that the dismissal would be fair with regard to critical comments placed on Facebook by implementing a three-pronged test. The test was outlined as follows; firstly, where an employee fails to restrict access to his site, secondly, where the postings bring the employer into disrepute and lastly where the postings leads to the working relationship becoming intolerable

The CCMA did however not apply the test entirely. Instead it indicated that respectfully it chose to apply only a t part of the test; it found that the employee had been fairly dismissed because he had not restricted access to his Facebook account.

However, Munian submits that the court had the obligation to apply the test in its entirety to arrive at the conclusion of whether or not unfavourable remarks were so disloyal to amount to a breach of good faith.[243] The court should have assessed whether or not the employee had

[240]Letlhokwa George Mpedi, "Racists beware, some labour law perspectives on racism in the workplace" (2021) vol 86 *The Thinker*
[241] *Highlights of Industrial law Reports* vol 38 August 2017
[242]National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arends v Consumer Brands Business Worcestor, a division of Pioneer Foods (Pty)Ltd 2014(7)BALR 716 (CCMA)
[243]Sherilyn Munian "An analysis of the Labour Law Relations Act 66 of 1995 as it relates to derogatory comments posted by employees on social media,'' (LLM Dissertation University of Kwazulu –Natal 2018)

injured the good name of the employer, and further whether the postings made the employment relationship intolerable.[244]

Additionally, Letlokwa indicates that while the Constitution affirms every person's right to freedom of expression, the right is not absolute. It is subject to certain constitutional restraints. Notably section 16(2) (c) of the Constitution that indicates that the right to freedom of expression does not extend to advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Therefore, it is clear from the above case law that this is generally the perspective that has been adopted by the courts and tribunals. Dismissals were held to be fair where postings by employees were found to be in contravention of section 16(2) (c) of the Constitution, mainly where such posts contain racial slur.

The limitation to freedom of expression also seems to be in effect where such expression has the potential to injure the good image of the employer. Another important factor is that there need not be express mention of the employer, simple reference is sufficient to justify a dismissal. Consequently, as long as it can be established that the comments made on social media had a direct link to the name of the employer then an employee is guilty of misconduct.[245]

In principle what an employee does after work is not of concern to the employer. This is a general rule that has been recognised.[246] However, there are exceptions. There are instances where an employer's disciplinary arm can be long enough to reach and discipline an employee who misconducts himself after work.[247] Where the employer is able to prove a nexus between his affected interests and the alleged misconduct of an employee, the employer has jurisdiction to discipline and consequently sanction a dismissal where he sees fit.

In relation to social media, South African courts have upheld dismissals even where postings on social media were done outside the scope of work. It is notable from the above discussions that while it may be the employee's genuine impression that the comments are made in their

[244]Ibid 20.
[245] Sediek (n67).
[246] Karen Fulton and Eva Mudely "Discipline and dismissal'' The South African Labour Guide www.labourguide.co.za/discipline accessed 3 May 2022.
[247]Ibid.

personal capacity, the objective approach is used to test those remarks.[248] The employee cannot simply escape liability on the grounds that the remarks were subjectively perceived by that employee as a jest. Furthermore, the question of place is insignificant; it is irrelevant and immaterial whether the posts were made at a leisurely hour or during work. What is important however, is whether there exists a *nexus* between the posts and the affected name of the employer. Additionally, an employee cannot escape liability on the basis that the employer did not have a social media policy. This is to say, an employee may be dismissed for what may be perceived by the employer as negative or racially discriminative remarks.[249]

2.5 Conclusion

This chapter illustrates how social media platforms can be beneficial to the employment relationship as well as how they may be hazardous. It goes on to show how various jurisdictions have dealt with mishaps on social media where such may occur in the employer-employee relationship. In the US, the NLRB through the NLRA has taken strides to protect employees who make postings on social media as long as the postings are made for a collective benefit. This are what have been termed concerted activities. Protection is further afforded where an employee may use profanity or strong language. However such protection is not afforded to employees who make posts for their sole benefit. The NLRB has further nullified social media policies which are deemed to go overboard hence restricting freedom of speech by employees. While in the UK, the courts seem to be more inclined to protect employers against employees who would dare bring their name into disrepute. The courts further enforce social media policies made by employers.

In South Africa, the rights to freedom of expression and the right to privacy are interpreted in light of the recognised limitation clauses. Where an employee has not restricted access to their page, the courts have held that such employees had abandoned their right to privacy. Additionally, the employer can also dismiss an employee for misconducts outside the scope of work where they are proved to have affected the employer's business and interest.

[248]Phungula (n215) 516.
[249]ibid 518.

3 CHAPTER 3

3.0 SOCIAL MEDIA MISCONDUCT IN LESOTHO

Introduction

The primary purpose of this chapter is to examine under a close inspection Lesotho's Labour Laws regarding social media misconduct. The chapter further provides a critical analysis of why Lesotho Labour Laws must be amended in relation to social media misconduct. Specific legislations include the key labour and employment laws, such as the Labour Code Order,[250] and the Codes of Good Practice.[251] The Chapter also analyses the two proposed social media regulations which are the Communications (Subscriber Identity Module) Registration [252] and Computer Crime and Cybercrime Security Bill.[253] Lastly, the chapter also looks into Constitutional rights which may, in the absence of a clear legislation on social media misconduct be affected. These rights include the right to privacy and the right to freedom of speech.

3.1 Social media Misconduct under the Labour Code and Codes of Good Practice

On the 10th of September 2021, Lesotho Mounted Police Service,[254](LMPS) issued a memorandum which indicated that no police officer can participate in any media platform except with the permission of the Commander.[255] The Commander thereupon made an order that police officers should shut down their WhatsApp groups and disengage on social media platforms that attack other people.[256] While this was received as an outrage by the public, it nonetheless ruffled debates about the use of social media in the context of employment in Lesotho. The substance of public debates about the memorandum was such that proponents indicated that some police officers use these social media platforms to criticise the police service and its services. It was further an opinion that police officers engage in political

[250]Lesotho Labour Code Order 1992.
[251]Codes of Good Practice 2003.
[252] Communications (Subscriber Identity Module Registration)Regulations 2021.
[253]Computer Crime and Cybercrime Security Bill 2022.
[254] Lesotho Mounted Police Service "About LMPS" (LMPS 2022)<lmps.org.ls/>accessed 1st June 2022, Lesotho Mounted Police Service was founded October 1872. The service was styled the Basutoland Mounted Police and comprised of about one hundred and ten men who were mostly sons of local chiefs. Their functions included supporting and protecting magistrates and act as interpreters and messengers. The Constitution in terms of section 147 placed the responsibility of law and order with the LMPS
[255]KabeloMasoabi, "Cops Ordered to stay out of social media groups"*Metro(*Maseru 12 September 2021)<www.maserumetro.com/news/ > accessed 3 May 2022.
[256]Ibid.

debates which degrade the basic foundation which the civil service lays. According to public perception, every word uttered by a civil servant represents government's position; hence it has several negative impressions on citizens, which may cause communal violence or other social harm. Another notable argument posited that police officers should behave in a respectable manner on these platforms and should not be involved in acts of character assassination. While this occurred in the public sector, it is a perfect analogy to portray how employment institutions can be affected and threatened by the use social media and its potential hazardous effects.[257]

Drawing from the common law duties of employees, it follows that employees have the duty to, among others, refrain from misconduct; to be respectful and obedient. Where an employee contravenes any of the said roles the employer has the authority to subject the said employee to a disciplinary hearing or if fitting, repudiate the contract or discharge such an employee from their duties.[258] Mosito and Mohapi indicated that it is an accepted notion that the employer has the right to conserve and effectuate order within the workplace.[259] The outset of this right is the contract of employment, which is the basis of the alliance between the employer and the employee, referred to as the 'employment relationship.'[260]

The contract of employment presupposes that workers are subordinate to the employer.[261] The employer has the authority to lay rules of conduct in the workplace. On the other hand, an employee has an obligation to observe all legitimate and lawful orders by the employer.[262] These include the rules regulating the employee's conduct or discipline in the workplace. The act of the employee of breaching the standard of conduct prescribed by the employer is referred to as misconduct.[263] It is thus one of the obligations of an employee, to refrain from misconduct. Misconduct falls within a band of reasons for which an employee can be discharged.[264]Mosito argues that dismissal for misconduct must be both substantively and

[257]Ibid.
[258]NthonaKometsi v C & Garments LC/REV/62/12 at para 7.
[259]Mosito, K.E. &Mohapi, T "A Comparative Evaluation Of The Law On Remedies In Cases Of Unfair Dismissal For Employee Misconduct: Lesotho And South Africa In Perspective" LLJ Vol. 24 NO. 1 133.
[260]Ibid 134.
[261]Ibid 135.
[262]Ibid 135.
[263]Ibid 135.
[264] See section 66 of the Labour Code.

procedurally fair,[265] this should be so regardless to the fact that termination of the employment contract is unlawful in terms of the principles pertaining to a contract.[266]

In Lesotho, the requisites for a fair dismissal emanate from the International Labour Organisation (ILO) Termination of Employment Convention.[267] International labour standards are an integral part of the Lesotho legal framework pertaining to employment relations.[268]

As already mentioned, in Lesotho the Labour Code and its amendments are the key legal instruments that govern terms and conditions of employment.[269] They control the relationship between employers and employees ranging from contracts of employment, discrimination in the workplace, health and safety, remuneration, disciplinary measures for misconduct as well as termination of employment.[270] The mandate of the Labour Code has also been implemented through the Labour Codes of Good Practice.[271] It sets the minimum standards of conduct in disciplinary matters of employees. It further provides for conduct of industrial actions and negotiations between both employers and employees.

Under section 66(1) (b) of the Labour Code, misconduct is a justifiable ground to legitimize a dismissal. Furthermore, Section 66(4) entrenches the procedural requirements that an employee must be given an opportunity to be heard before the dismissal. Section 66(4) therefore entrenches the right to a fair hearing often expressed in the maxim *audi alteram partem*.

In the same manner, Sections 9, 10 and 11 of the Codes of Good Practice delve deeper to elaborate on the substantive and procedural aspects of a fair dismissal based on misconduct. Under the Code, substantive aspects of misconduct, dismissals and the role of disciplinary codes are set down in the following manner:

All employers are expected to have disciplinary codes which establish the standards of conduct or behaviour that employees should adhere to.[272] The same codes should contain

[265]Mosito&Mohapi (n259)136.
[266]Ibid 136.
[267]Convention 158 of 1982. Article 4 mandates that a worker should not be discharged of their employ save to where a valid reason such as conduct has been given been proofed see also ILO Termination of Employment Recommendation 119 of 1963 Article 2(1).
[268]Mosito (n259)136.
[269]The Kingdom of Lesotho Combined Human and Report April 2018 (n5)37at 83.
[270]Ibid 37.
[271]Ibid 37.
[272]Section 9(1).

sanctions/penalties which the employees should expect in the event that they breach the established rules. Section 9(3) of the Codes of Good Practice mandates that the rules put in place must be certain and consistently applied in all similar cases of discipline. The guidelines must further be unambiguous and known by all employees.

The lawmakers have adopted the progressive discipline approach which indicates that as a general rule, "discipline should be progressive and not punitive."[273] Section 9(4) further states that, employers should try to rectify employees' conduct by less strict disciplinary formalities such as counselling and warnings. However, there are circumstances where summary dismissals have been justifiable.[274]

In the same manner, Section 9(5) provides a guideline on how progressive discipline should ideally take place:

- Firstly, the employer must not resort to formal procedures every time an employee contravenes a workplace rule.
- Secondly, the employer should consider issuing a friendly guidelines and correction. This is viewed as one the finest and most constructive ways for an employer to deal with slight breaches of workplace regulations.
- Thirdly, where misconduct is recurring, warnings are justified, which may be graded in view of the gravity of the offence.
- Fourthly, an extremely serious infractions or a recurring misconduct may legitimize issuing a final warning or suspension.
- Lastly dismissals should be resorted to as a last measure for serious misconduct or repeated offences.

The dismissal must also be substantively fair; this means a fair reason must be provided to justify the dismissal. A fair reason based on misconduct implies therefore that a workplace disciplinary rule was contravened.[275] There is a criterion that workplace rules/standards must meet in order for a dismissal to be substantively fair;

- first the standard must be reasonable and fair;
- second, the standard must be clear and concise;

[273]Section 9(4).
[274]Section 10 (2).
[275]Section 10(1) (a) (b).

- third, the employee must have been aware of the rule; and
- fourth, the rule must be constantly applied and lastly the dismissal must be an appropriate sanction.

As already above it is a general understanding that it is improper to discharge an employee in instance of a first infraction; however, termination of an employment may be valid where the misconduct is so dreadful that it renders the continued employment relationship unendurable.[276] Section 10(2) goes further to indicate instances which summary dismissal is appropriate. These include the following: gross dishonesty, wilful damage to property, wilfully endangering the safety of others, gross negligence, assault on a co-employee or any person associated with the employer and gross insubordination. In determining whether the dismissal is the appropriate sanction, the employer should consider past infringements and previous disciplinary record, the employee's personal circumstances, the likelihood of repetition, the strictness of rule/standard, and the employee's length of service, the nature of the job, health and safety.[277] After this investigation, it may then be that an employee maybe dismissed.

Employees have been dismissed summarily where the misconduct was so dreadful that it impaired the employment alliance.[278] In terms of the common law principles, whether an employee's conduct constitutes a serious misconduct rests on the circumstances of each case.[279] Statutorily, section 10(2) the Labour Code prescribes instances where summary dismissal maybe appropriate and these include dishonesty, theft, fraud, gross negligence or incompetence, wilful disobedience of lawful orders

In the case of *Lehlohonolo Khoboko v Lesotho Building Finance Corporation*,[280]The court found that an employee who had referred to the managing director as a psychotic individual armed with a gun, which he used in a perilous way as an occurrence of a dreadful misconduct on the part of the employee. Therefore, the employee was rightfully summarily dismissed. In certain circumstances, misconduct outside the place of work may attract summary dismissal if there is an adequate and explicit connection between such misconduct and the employer's

[276]Section 10(2).
[277]Section 10(3).
[278] Lehlohonolo Khoboko v Lesotho Building Finance Corporation(CIV\APN\37791)[1994]LSCA 61(22 March 1994).
[279] ACCA global Corporate Business Law (Lesotho) 2013.
[280]Lehlohonolo Khoboko(n278).

business or if the misconduct is such that it seriously diminishes the capacity of the employee to execute his functions to the satisfaction of the employer.[281]

As seen from the above discussion, the Labour Code and the Codes of Good practice deal with general misconduct. Both pieces of legislation provide the substantive and procedural aspects on how to deal with misconduct. However, there is nothing within the content of the Labour Code or the Code of Good practice that deals with social media related misconduct. Both the Labour Code and Codes of Good Practice fail to give an elucidation on the aspects of social media misconduct. They do not provide the extent to which an employee can be said to have committed misconduct or the aspect of how social media misconduct must procedurally be dealt with. These primary legislations do not expressly prohibit social media related misconduct. It is further not contained under section 10(2) of the Codes of Good Practice. While it can be argued that the courts can deal with social media related misconduct as a general misconduct, the approach tends to cause problems because it affects Constitutional rights of an employee such as the right to freedom of expression and the right to privacy.

This next section purports to deal with how the two legislations the; Communications (Subscriber Identity Module) Registration and Computer Crime and Cyber Security Bill may affect aspects of social media in Lesotho. It further analyses whether the content of these acts will affect or seek to regulate social media in the sphere of employment.

3.2 The Communications Subscriber Identity Module Registration) Regulations and Computer Crime and Cyber Security Bill

In terms of section 4 of the Communications (Subscriber Identity Module Registration) Regulations, they aim to provide a regulatory framework for the registration and subscription of mobile telecommunications services utilising SIM cards,[282] and Mobile devices in Lesotho. The purpose of this registration is to establish, control, administrate and manage the national central database.[283]

[281] Section 10(2).
[282] A SIM card ,also known as a Subscriber Identity Module ,is a smart card that stores identification information that pinpoints a smartphone to a specific mobile network. Alexander S Gillies , SIM card (www.techtarget.com>SIM-card)> accessed 30 August 2022.
[283] Herbert Moyo (n46).

The regulations therefore require every mobile phone user to have their SIM card, handsets, address and biometrics registered and stored in a central database. [284] However, the regulations received unfavourable public reception because they were considered as unconstitutional and intrusive. According to the public, this registration and subscription would give the state full powers to "snoop on and access "citizen's mobile phone and internet communications.[285] Initially, the LCA,[286] had also proposed that the regulations should compel individuals with at least hundred or more followers,[287] on any of the social media platform including Facebook and WhatsApp to register with LCA.[288] However, it would seem that such a provision never became part of the Communications (Subscriber Identity Module Registration) Regulations, as it notably not present in the content of the regulations. It would therefore seem that the regulations did not necessarily seek to regulate social media misconduct in the sphere of labour law since they do not have specific enumerations that outlaw social media misconduct as far labour relations are concerned.

Further, The Computer Crimes and Cyber Security Bill has also been approved by the Parliament after its initial withdrawal in 2021.[289] The Bill is still however under consideration before the Senate for further deliberations. If the Bill accedes into a law, it will effectively provide the state with the capacity to exhaustively surveil the information technology and the internet use, define any forms of criminal use of computers and the internet and designate sanctions for those contravene the act.[290] Notably the Bill defines other infractions such broadcasting false information, expropriation of electronic messages or money transfers and interposing with contents of a message.[291] However there is no provision that explicitly furnishes the regulation of social media misconduct in Lesotho. As such it can therefore be concluded that the Bill is insignificant as far as social media misconduct in Lesotho is concerned. It cannot be used to solve the dilemma of social media misconduct in the sphere of labour and employment.

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[284]Ibid.
[285]Ibid
[286] Lesotho Communications Authority, "Corporate Identity" 2018<www.lca.org.ls/about-us/identity/ Lesotho Communications Authority is a creature of the statute endowed with the powers to regulate and control telecommunications.
[287] In social media a follower is someone who has subscribed to an account in order to receive all updates. It refers to a user who consciously chooses to see all posts of another user in their newsfeed (socialBee)
[288]Ibid.
[289]BerengMpaki "National Assembly Approves Cyber-Crime Bill" (*Lesotho Times* 17 May 2022) <lestimes.com/national-assembly-approves> accessed 2nd June 2022.
[290]Ibid.
[291]Ibid.

3.3 Constitutional rights affected by social media misconduct

Social media misconduct further cuts through the spectrum of labour relations into certain constitutional rights. The crosscut is seen specifically where the right to freedom of speech/expression and the right to privacy are concerned.

Inasmuch as Lesotho has a system of rights that are enshrined in the Constitution, Mosito indicates that it is not as rich, in provisions relating to labour relations.[292] In this regard, most rights affected in the spectrum of social media misconduct are in Chapter II of the Constitution. Chapter II contains generic rights that include, among others, freedom of peaceful assembly, association and expression which are potentially important to labour.[293] On face value, these rights offer workers no more or less protection than anyone else in trouble with the law.[294]The following section delves into these rights, freedom of expression and the right to privacy in relation to social media misconduct in Lesotho. Moreover, it assesses if these rights can be used to protect employees who find themselves dismissed on the bases of social media misconduct

3.3.1 Freedom of expression

Freedom of expression is a constitutional right under section 14(1) of the Constitution of Lesotho. The section endows every citizen with the liberty to hold ideologies, to disseminate those ideologies and receive information freely.

In the case of *Pete v Minister of Law, Constitutional Affairs and Human Rights*,[295] the court made an illuminating and informative assertion on the meaning and value of freedom of expression. The court theorized that freedom of expression has two rationales namely, instrumental and constitutive justifications. Instrumentally, freedom of expression is vital because every person inherently has the right to say what they want. Furthermore, free expression has the tendency to allow creativity to thrive. In terms of constitutive conception, freedom of expression is vindicated on the principle that it is an integral component of a just

[292]Mosito, Kananelo E. KC "The Constitutionalisation of Labour Law In Lesotho" *LLJ*. NO. 21 Special Edition 33-58.
[293]Ibid 34.
[294]Ibid 34.
[295]Pete v Minister of Law, Constitutional Affairs and Human Rights (CC 11/2016)[2018]LSHC 3 (18 May 2018)

political society that the government should treat all its citizens as accountable moral agents.[296]

According to the court, freedom of expression further assists in the quest for truth by individuals, stimulates foments political decision making and helps individuals to attain fulfilment.[297] The court opined that the importance of freedom of expression is reinforced by its incorporation in international instruments. The court went further to add that freedom of expression acts as a breeding ground for fresh and diverse ideas. Most importantly freedom of expression is not only limited to ideas that are well received but also those that are regarded as inoffensive but it is also afforded to ideas or opinions that offend shock or disturb. However, freedom of expression is subject to limitations that must be interpreted strictly, and such limitations must be established convincingly.

It can therefore be understood that freedom of expression is a vital part of our society; it promotes breeding of ideas and heterogeneity of ideas and opinions. While the right is just as important, it doesn't exist without checks. The Constitution therefore places limitations on freedom expression, as such, the right is not absolute. Section 14 (2) of the Constitution makes a provision for these constraint, in terms of these provision freedom of expression is limited to promote public safety, order and morality. It is further curtailed with an effort to protect the rights of other individuals such as the right to dignity, prohibiting divulgation private information and control of electronic communications.

In the case of *Phafa v Commissioner of Police and Others*,[298] freedom of expression was said to be governed by the common law. The court went further to point out that limitations to freedom of expression are necessary in a democratic society. In the opinion of the court, such limitations exist to protect individual's rights which may be at stake. Under the law of defamation, such rights may be the protection of reputation or *fama*, which is a facet of one's personality together with *dignitas* and *corpus*.[299] In a constitutional context such rights include among others the right to privacy.[300]

[296] Ibid 11-12.
[297] Ibid 12.
[298] Phafa v Commissioner of Police and Others (CIV/T/391/04) (CIV/T/391/04)[2006]LSHC 148(23June 2006).
[299] Ibid 41.
[300] Ibid 41.

Mosito attempts to crisply capture the right to freedom of expression in the sphere of labour relations and employment law in Lesotho.[301] However, his articulation is more inclined towards the democratic importance of the right to freedom of expression. He asserts that this right is the very soul of democracy due to its ability to safeguard democratic liberties associated with it.[302] He further recognises the value of freedom of expression in the quest for the truth.[303] He swiftly mentions that freedom of expression can be used to protect the rights of individuals, including workers and employers alike. This protection is not only limited to dissemination and holding of idea it also extents to formation of common groups and associations.[304]

However, the aspect of social media misconduct has not been tested against the right to freedom of expression in Lesotho. It is not clear whether criticising an employer on social media would be tolerated. As already indicated earlier, section 14(2) (b) of the Constitution restricts the right to freedom of expression for the purpose of protecting the reputations, rights and freedoms of other persons. It is thus arguable that an employer must be protected from comments or postings that have a tendency to derogate their name. However, it is submitted that fair criticism of working conditions should be tolerated. For instance, where an employee posts defamatory, racial or prejudicial remarks about his or her employer or other employees on social media platforms, he or she can be lawfully dismissed by the employer for social media-related misconduct.[305] However it would be unfair to dismiss an employee for expressing their views on social media platforms. For example, if an employee authors content on social media with the potential to diminish the name the employer or injure co-workers, such an employee maybe justifiably dismissed for social media misconduct.[306] However where an employee authors a non-demeaning content about the employer or co-workers on social media such an employee should not incur the consequences of social media misconduct. Lekopanye and Chitimira however assert that excessive and unjust administration of social media regulations could encroach upon the employees' rights to freedom of expression.[307]

[301]Mosito&Mohapi (n259) 35.
[302]Ibid 35.
[303]Ibid 35.
[304]Ibid 35.
[305]Chitimira&Lekopanye (n41) 4.
[306] Ibid.
[307]Ibid 5.

3.3.2 The right to privacy

The right to privacy can be described as an individualized personal right to be left solitarily. It guarantees that personalised information about an individual should not be disclosed save with their consent. It protects individuals from prying societal eyes and intrusion by the state.[308] In Lesotho, the right to privacy is espoused under section 11(1) of the Constitution which entitles every individual to their private and family life. The Constitution however places a limitation to this right, under which it provides that the right to privacy shall be limited by public safety, health ,order and others

There have been no key cases testing the Constitution's privacy provisions in Lesotho.[309] However, in giving a clearer perspective of this right the court in *Metsing v Director General Directorate of Corruption and Economic Offences and Others*,[310] made reference to South African case law.[311] Borrowing the words of Ackermann J in *Bernstein and Others v Bester and Others NNO*,[312]the court described the right to privacy as lying along a continuum, where the more a person inter-relates with the world, the more the right to privacy becomes attenuated. It stated further that extreme protections must be endowed to the individual's innermost personal sphere of life. This innermost sphere of a person's life is so important so much that, no justifiable restriction can be placed. However this innermost core becomes narrowly existent when an individual interrelates with individuals external to this closest innermost sphere; in this instance where an individual moves into the public space, their activities then become subject a social dimension and the right of privacy in this context becomes subject to constraints.[313]

The court indicated however that, while the right to privacy may thin out with increased social interactions it does not mean that it becomes totally non-existent. Individuals still retain their right to privacy in other social capacities. For instance, when one is in their car, office or mobile phone individuals still retain the right to be left alone save for certain exceptions. Wherever a person is, they have the ability to decide what he or she wishes to

[308]Bernstein and Others v Bester No and Others 1996 2 SA 751 (CC) 94.
[309] Ethan Mudavanh&TshepisoHadebe" Lesotho – Data protection Overview " April 2021 , www.datagiudance.com/notes/lesotho accessed May 3rd 2022.
[310]Metsing v Director General Directorate of Corruption and Economic Offences and Others No 11 of 2014 [2015]LSHC 1 (25 February 2015) at para 73 and 74.
[311] SEO and Others v Hyundai Motor Distributors (Pty) Ltd 2001 (1)SA 545 (CC) at para 15 and 16.
[312]In Bernstein and Others v Bester and Others NNO, (CCT23/95)[1996] ZACC 2.
[313]Mesting (n310) at para 73.

disclose to the public. The expectation is that such a decision will be respected is reasonable, the right to privacy will come into play.[314]

It can therefore be understood that according to the court, the right to privacy is more intense the closer it is to the intimate personal sphere of the life of human beings and less intense as it moves away from that core. The further it moves away from the core the less it is afforded any protection.

However, the aspect of social media misconduct has not been tested against the right to privacy before in the courts of Lesotho. It can therefore be hypothesized that, in view of the approach given by the courts of Lesotho regarding the right to privacy, it would be difficult for an employee to argue that his right to privacy was violated by employer who accessed his social media posts. This is because as the court theorized in *Metsing*,[315]that the more an individual moves out of the sphere of intimate personal space the less the protection. Social media is a public domain it is therefore logical that it does not qualify as a personal space. However, one might counter argue this assertion with the notion of restricted privacy settings, be that as it may, it would be interesting to see how the courts of Lesotho would deal with these issues should they come to pass.

3.4 Conclusion

The purpose of this chapter was to examine the current law in Lesotho in regard to social media misconduct. Both principal laws in Lesotho that govern labour relations exclude social media misconduct. The laws deal with misconduct at large but do not expressly mention the use of social media. These current laws are not adequate to deal with social media misconduct. Neither the Labour Code nor the Codes of Good practice define social media misconduct. Moreover the examples of serious misconducts as enumerated under section 7(4) of the Codes of Good Practice such as theft, fraud, gross insubordination, assault on co employees do not include social media misconduct.[316] It is also not included in the provision dealing with fair reasons for dismissals in section 10 of the Codes of Good Practice as discussed above.[317]

In the same light, both Codes do not indicate whether social media misconduct should be dealt with as any other misconducts that are outlawed. Neither do they provide the procedural

[314]Ibid 73.
[315]Ibid 74.
[316]Section 7(4) of the Codes of Good Practice 2003.
[317]Section 10 of the Codes of Good Practice 2003.

and substantive aspects on how social media misconduct should be dealt with, either within the workplace or outside. Notably section 66 (1) (b) of the Labour Code,[318] limits misconduct in the workplace, it is therefore fitting to contemplate on whether in cases of social media misconduct the disciplinary arm of the employer could overreaching to cases outside the scope of work.

Employers are empowered to implement workplace disciplinary codes which establish the standards of conduct or behaviour that employees should adhere to in terms of section 9(1) of the Codes of Good Practice.[319] It is recognised that a workplace code could come in useful where it regulates social media misconduct. However, such a code must be reasonable. It is further asserted there are instances where no mention of an existing workplace disciplinary code is in place but an employee is dismissed. Such a dismissal would be unfair because that employee would not have contravened any workplace rule.[320]

While it may be argued that social media related misconduct could be dealt with in the same manner as general misconduct at the workplace, this is likely to result in unconstitutional and unfair dismissals. This is because a dismissal that infringes on an employee's freedom of expression and arguably the right to privacy would be unfair. In cases of social media misconduct section 66(1) (b) of the Labour Code,[321] must be interpreted in light of section 14 and 11 of the Constitution.[322] Care must be taken not to unnecessarily place a limitation on the rights of employee. As already seen in the UK, (section 98 of the Employment Rights Act),[323] the right to freedom of expression is often interpreted in light with Human Rights Act,[324] where such rights are involved.

Furthermore, the proposed regulations, the Computer and Cyber Crime Bill and the Communication Subscriber do not expressly deal with social media misconduct in the realm of labour law; their application is thus general and imposed on every individual citizen. Even in that aspect of holistic application there are no provisions alluding to prohibition of social media misconduct. This next chapter aims to provide an insight with how best social media misconduct can be dealt with in light of existing Constitutional rights.

[318]Section 66 (1) (b) of the Labour Code 1992.
[319]Section 9(1) of the Codes of Good Practice 2003.
[320]Section 10(1) (b) of the Codes of Good Practice 2003.
[321] Section 66(1)(b) of the Labour Code 1992.
[322]Section 11 & 14 of the Constitution of Lesotho 1993.
[323] Employment Rights Act
[324] Human Rights Act 1996 article 8,9 and 10.

4 CHAPTER 4

4.0 CONCLUSION AND RECOMMENDATIONS

It is no doubt that social media has become an essential part of everyday life. In the workplace environment, its usage ranges from advertising, communication and clientele support. It is can also be used in private capacity by employees. In some instances, private use of social media can give rise to a dismissal of an employee on the basis of social media misconduct. Such instances may arise where an employee posts comments that bring the name of the employer into disrepute. The courts and tribunals engage in a balancing exercise; an employee's right to freedom of expression and privacy must be balanced against an employer's interests such as reputation and a good name. Where the dismissal of an employee infringes the rights of an employee such a dismissal may be deemed unfair by the courts.

In this regard, this last chapter renders a conclusion to the study, which is followed by recommendations. This research calls for amendments of statutes to accommodate social media misconduct. It will impart an opinion on the line of submissions that could be adopted by policy makers or law making bodies to adequately address social media misconduct. It will further outline means by which employers can combat social media misconduct such as training or implementation of social media policies.

Summarily, this research outlined how several jurisdictions have dealt with social media misconduct. In the United States, the National Labor Relations Act and National Labor Relations Board have protected employees who have been dismissed for social media misconduct. The basis of this protection stems from section 7 of the NLRA. It is only afforded where employees act collectively to improve their work conditions.[325] The protection typically does not extend to instances where employees act for their own benefit. The board has also outlawed social media policies which are overreaching and have the tendency to chill or inhibit employees' rights.

The position in the UK is slightly different. While there is no special statute dealing with social media misconduct, the courts have used section 98 of the Employment Rights Act to deal with this misconduct. The Act simply requires that the dismissal be fair. The employer must have a genuine believe that an employee is guilty of a misconduct. Section 98 is further

[325] See part 2.3.

interpreted in light with the Human Rights Act, notably article 8, 9 and 10. However freedom of expression does not extend to instances such as harassment.

In South Africa, the Labour Relations Act does not expressly deal with social media misconduct. Scholars have aligned views that this gap has resulted in employee misuse of social media.[326] This has resulted in unconstitutional dismissals of employees for social media misconduct.[327] Employee freedom of speech is curtailed by section 16(2) of the Constitution of the Republic of South Africa, which outlaws advocacy of hatred based on race, ethnicity and other statuses. Therefore, the courts have enforced dismissals for social media misconduct where comments or postings contained prohibited content under section 16.[328] The courts have also enforced dismissals for social media misconduct where postings had the tendency to bring the employer's name into disrepute. Notwithstanding, scholars maintain that laws must be promulgated or amended to deal with this form of misconduct.

This study has further addressed the issue pertaining to social media misconduct in Lesotho. It established that Lesotho Labour laws fail to adequately deal with social media misconduct. Both the Labour Code and Codes of Good Practice are silent about social media misconduct. These key statutes of employment do not indicate whether social media misconduct should be dealt with in the same manner as misconducts under section 7(4) of the Codes of Good Practice. Neither do they shed light on whether social media misconduct is a fair reason to dismiss an employee under section 10(2) of the Codes of Good Practice.

While there may have been no case of social media related misconduct before the courts of Lesotho, it can be anticipated that sooner or later such a case will be before our courts. This is because; firstly, as statistics have indicated, the use of social media platforms continues to grow in Lesotho. With such growth comes the possibility of misuse of social media platforms. Secondly, there has been a record of misuse of social media platforms in Lesotho.[329] Moreover, through an issued memo, the Commissioner of police impliedly acknowledged the misuse of social media by employees (police).[330] It is therefore not a far-fetched scenario that sooner or later our courts maybe confronted with this issue.

[326] Davey(n66)3 and Lekopanye (n41)2.
[327] See part2.5.
[328]Section 16(2) of the Constitution of the Republic of South Africa.
[329] See part 1.4.
[330] Herbert Moyo (n46).

The right to privacy and freedom of expression have not been tested against social misconduct in Lesotho. It would therefore be interesting to see how own courts will deal with this issue. However, it has been theorized in this research that it would be difficult for an employee to argue that his right to privacy was violated by employer who accessed his social media posts. This is because in the case of *Metsing*[331] the court pointed, that the more an individual moves out of the sphere of intimate personal space, the less the protection. In respect of the right to freedom of expression, it is possible that the courts may give effect to limitations under section14 (2) (b) of the Constitution of Lesotho.

This research therefore advocates for the amendment of Lesotho labour laws to accommodate social media misconduct. The laws must expressly deal with substantive and procedural aspects of social misconduct. They must engage questions of a reasonable expectation of privacy and a valid reason to dismiss an employee for social media misconduct. It further provides a line of recommendations which employers may consider when drafting and implementing a good social media policy. These are discussed below.

4.1 Recommendations

4.1.1 Relevant Laws and Labour laws should be amended to suitably confront with social media misconduct.

While the existing cyber laws such as the Computer and Cyber Crime Bill and the Communication Subscriber are not specifically labour oriented, they can be amended to outlaw social media misconduct. These laws can be used to prevent misapplication of social media by employees while also protecting the rights of employees from infringement.

Of paramount importance, the two key labour legislations in Lesotho should be amended to suitably tackle social media misconduct. The Labour Code and the Codes of Good practice should be amended to explicitly prevent social media misconduct. It is submitted that the Labour Code as the principal legislation of labour law should be amended to enact suitable clauses that define social media misconduct in Lesotho. Substantively, the Codes of Good Practice should also provide a definition of what constitutes a just rational to dismiss an

[331]Metsing(n310).

employee for social media misconduct.[332] For instance, hate speech, online harassment of co employees and derogatory remarks that bring the name of the employer into disrepute. However, fair comments[333] about workplace conditions should not be regarded as a fair reason to dismiss an employee. Employees should be entitled to their freedom of speech in this regard; they should be able to discuss their conditions of work regardless of any medium. Further views that are not necessarily linked to the employer should not attract the charge of social media misconduct. Comments or postings should only be labelled as social media misconduct where they are proved to be vicious and of malicious intent. It is submitted that employees should be entitled to freely express their ideas, as long as they do not diminish the name of the employer. Nonetheless, Employees should be able to express their opinions freely.

Additionally, it is recommended that section 7(4) of The Codes of Good Practice should be amended to enumerate social media misconduct as one of the serious misconducts that goes to the core of the employment contract. In the absence of a rule as prescribed in terms of section 10(1) of the Codes of Good Practice, social media misconduct should be itemized under section 10(2) of the Codes of Good Practice as one of the fair reasons to dismiss an employee.

The Labour Code should additionally be amended to incorporate appropriate sanctions for social media-related misconduct such as suspension, disciplinary hearing or summary dismissal. The Code must also provide the scope of application and the manner in which social media misconduct both outside and within the workplace should be dealt with. The Labour Code should be amended to incorporate standards on how to avoid social media-related misconduct in the workplace, such as training and implementation of social media policies.

The Codes of Good Practice should further outline the procedural aspects in cases of social media misconduct.[334] It must outline when it is reasonable for an employer to obtain an employee's social media postings. Accordingly individuals should be granted the ability to

[332]*Standard Lesotho Bank v LijaneMorahanye (LAC/CIV/A06/08)* [2008] the court remarked that substantive fairness means the presence of a legitimate reason to discharge an employee.
[333]*Tlali v Litaba and Others* (CIV/T/42/01)(NULL) [2004] LSHC 130 (26 October 2004) In determining whether the words constitute a comment or statements of fact the test applied must be an objective one ; how a reasonable reader may understand the words.
[334]*Standard Lesotho Bank v Morahanye* (n3) With regard to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure.

determine what individualized content may be obtained by employers.[335] It is therefore suggested that the ascertainment of social media individualized information that the employer is permitted to obtain rests with the employee. In this regard an employee exercises their right to privacy. Where the employer is not part of the selected audience, the employer must reasonably not access such information. Where an employee restricts access, the employer must reasonably respect such a right. It should accordingly be impermissible for the employer to obtain information on an employee's profile where the employer is not part of the selected audience save where an employer has the reason to believe that such an employee is causing injury to the employer's name.[336]

Where an employee disassociates themselves with the business of the employer on social media by way of a disclaimer, privacy settings restrictions and exclusion of workplace colleagues on their friends list, an employer should not be allowed access without prior consent of the employee. The employer should only be allowed access where there is a reasonable belief that conduct by an employee is being associated with his business thereby causing harm. The employer should further be allowed access for the purposes of section 11(1) of the Codes of Good Practice,[337] even then, the employee should be informed. As such, circumstances under which an employer can access an employee social media posts without prior consent of an employee should be outlined.

In regulating social media misconduct, the Labour Code and the Codes of Good Practice should strive to create a balance between the interests of the employer and those of an employee. While the right of employees to express themselves flows from the Constitution, that right comes with a limitation where reputations of others are in peril. Employees must use social media responsibly. Employees who vocalize ideas that are by nature demeaning either to the employer or other employees on social media sites opinions could impair the constitutional rights of others such as the right to dignity, privacy and good reputation.[338] They should not be afforded any protection.

On the other hand, employers who place limitations on the right of employees to express themselves as a way of protecting their good name must do so reasonably. Restrictions

[335]K.Lekopanye (n209) 80.
[336] Ibid.
[337] Section 11(1) employers must launch inquiry proceedings to determine whether there exist possible grounds for dismissal.
[338]K .Lekopanye (n209)108.

should not go overboard thus hampering on the employee's right to freedom of expression.[339] The right to freedom of expression should grant employees the means to responsibly air their opinions either within or outside the workplace.[340] Thus, where an employee mishandles their right to freedom of expression on social media to the detriment of either the employer or other co-workers, they may be dismissed for social media misconduct and such a dismissal will be fair. This is to say, Employees should be aware that while they may have freedom to express themselves, it does not entitle them to misuse social media by posting derogatory comments, hate speech, xenophobic remarks about others or launch malicious attacks against the employer on social media.[341]

To regulate the workplace, employers are empowered by the Codes of Good Practice to lay down codes of conduct that dictate acceptable standards of behaviour expected from employees.[342] Therefore, to regulate the use of social media within or outside the workplace, employers can implement social media policies. This next part aims to explore what could be deemed a good social media policy to combat social media misconduct.

4.1.2 Employers should implement clear social media policies

A social media policy is a code of conduct that dictates the procedure and protocols on the use of social media either during working hours or at a leisurely time acceptable forms of behaviour.[343] The policy sets expectations for appropriate behaviour on social media and ensures that employees will not expose the company to reputational harm.[344] Such policies also encompass instructions for when employees should identify themselves as a representative of the company. They further include restrictions on disclosure of information by an employee.[345]

Hidy posits that in implementing a good social media policy employers should presuppose best practices.[346] These best practices are in essence specifications and considerations that make a good social media policy. He asserts that specifications for a good social media policy

[339]Ibid.
[340] Ibid.
[341] Ibid.
[342]Section 9(1) of the Codes of Good Practice.
[343]K.Lekopanye(n209)105 see also Wendy Schuchart "Social media policy" (TechTarget)<www.techtarget.com> accessed 7 June 2022
[344]Ibid.
[345] Ibid.
[346] Kathleen McGarveyHidy, 'Social Media Policies, Corporate Censorship and the Right to Be Forgiven: A Proposed Framework for Free Expression in an Era of Employer Social Media Monitoring' (2020) 22 *U Pa J Bus L* 346.

include interpreting and explaining that the term social media, ideally social media should be articulated extensively.[347] Secondly the police should outline permitted and disallowed forms of online behaviour.[348] Disclaimers should also be incorporated to help employees define their social media accounts [349]

It is recommended that company social media policies should also include other forms of prohibited online behaviour such sexual harassment and discrimination. This in essence means that a social media policy will be interpreted in line with other work policies.[350] This is done to specifically indicate that employees who are involved in acts of discrimination and harassment of co employees on social media will be accountable to social media misconduct.

It is submitted that a good social media policy should mirror provisions of the law. However, in instances such as Lesotho where a lacunae exist in Labour laws to regulate social media misconduct a good social media policy should seek to create balance between the rights of an employee and the interests of the employer. It should protect the good name of the employer while at the same time allowing freedom of expression by employees.

In light of the discussed case law and legal principles in previous chapters, it is submitted therefore that, a good social media policy could at its very best consist of the following elements;

(a) Aim of a social media policy

A good social should explicitly set out its mandate. It should expressly state that its aim is to regulate the use of social media within or outside the place of work. Where such a policy aims to regulate social media misconduct outside the place of work, it should clearly assert that. It should further outline the nature or its scope of application on out of work misconduct. The justification for dictating such regulation is that misapplication of social media can impair employment relationships significantly as well as on the business of the employer.[351]

(b) Definitions

Bearing in mind the complexity of social media, a good social media policy should define what social media is and what it entails. Scholars endorse the view that defining social media

[347]Ibid 359.
[348] Ibid
[349]Ibid .
[350]Ibid .
[351]Ibid.

is considered to be one of the most important aspects of a good social media policy.[352] This is because it offers a precise definition for both employers and employee. It also sets out the scope of application within defined borders. This is to avoid over extensive definitions that could restrict employees conduct. However, because of social media's nebulous form and endless streams of channels, employers are advised adopt an expansive and holistic interpretation of social media.[353] This is to ensure that the definition stays relevant as aspects of social media evolve. Where the definition is too narrow the employer has to constantly keep the policy up to date every time a new platform emerges.[354] A policy should further include a demonstrative compilation of social media channels to reinforce the definition.[355] It should be a clear list that is all encompassing as to the forms of social media sites enfolded in the policy.[356]

The policy should further define what is meant by social media misconduct and what it entails. It can even go further to offer an illustrative list of conduct that can be classified as social media misconduct. This is to ensure that employees are aware of conduct that can be classified as misconduct.

(c) A defined code of conduct

The employer must further dictate the expected form of behaviour while using social media for work related purposes or for recreational purposes,[357]It is advisable that employers adopt a general scope of application. This is done so as to ensure that the policy covers a wide spectrum of employee actions without demanding the employer to predict employee actions. The employer may simply require employees to act with due diligence or ethically while using social media.

The employer may further place limitations to about elements of hate speech, derogatory comments, xenophobic speech and posts that have a tendency to defame the employer, harassment and discrimination and other prohibited forms of speech. This is to provide employees with forms of conduct that could be regarded as unethical.

(d) Employers should also define employee's expectation of privacy

[352] Susan C Hudson & Karla K. Roberts , "Drafting and implementing an effective social media policy '' (2012)18 *Tex Wesleyan L Rev* 767.
[353]Ibid 769.
[354]Ibid .
[355]Ibid .
[356]Ibid .
[357]Ibid 771.

The policy should additionally contain definite expectations of privacy when using personal social media. Both employees and employers should be aware of when to and not to expect privacy. It should be clear whether there is a reasonable expectation of privacy where an employee authors remarks on social media to the public at large either during work hours or off duty. Alternatively, whether there is a reasonable expectation of privacy where an employee posts information on their own page. On the former, an employee has no reasonable expectation of privacy where he posts to the general public.[358] This is because the information is widely available to and specifically to their audience. For instance, where an employee makes a comment on a public page which is unrestricted, there is no reasonable expectation of privacy that can be said to exist. In the case of *Gibbins*,[359] the claimant posted or engaged in a debate on a public page. While her privacy settings were on their highest level, she had not posted directly to her selected audience. It is important to note that courts have undeviating taken the approach that it is illogical to expect privacy in respect of information exchanged on social media. This is because according to the courts the essence of social media is interchange of information.[360]

On the latter, the policy should specify the employee's expectation of privacy when using social media channels in a private capacity.[361] Moreover, the privacy expectation should be attached to rationales of access and authorization; this should encompass preventing the employer from obtaining information to which he is not privy to or not among the selected audience. To enforce access of social media platforms of an employee the employer should show a valid work associated reason.[362]

An employee's right to privacy becomes complex where the employee authors content on social media that audience selective.[363] This may occur in cases where an employee restricts their settings. It therefore becomes challenging to establish whether it was right for the employer to access the employee's posts or not. This is because by way of restrictions, the employee excludes the employer. However, it could be stand points that access could be justified where the employer has a reasonable belief that an employee is misusing social media platforms to the employer s detriment.

[358]Ibid 783.
[359] Gibbins(n161) para 18.
[360]Susan C Hudson & Karla K. Roberts (n352) 783.
[361]Ibid.
[362]Ibid.
[363]Ibid 784.

(e) Disclaimers

Commentators have submitted that one of the vital aspects of a good social media policy is disclaimers. Good social media policies often contain a disclaimer which prevents employees from using the employer's name on any social media channels without prior authorization.[364] Therefore, this effectively places an unreserved limitation on employees not to discuss the name of the employer on social media.

However, while disclaimers may be reasonable, they may curtail employees' freedom of expression. It would be unfair if employees were to be hindered from sharing their views in respect of the employers. Such restrictions have been quashed by the employment tribunals such as the National Labor Relations Board under the notion of concerted activity. Disclaimers will hurdle employees' right to express themselves. It is therefore submitted that while disclaimers may serve a good purpose, they should not extend to expression of a fair comment. Employees should be allowed to fairly critique the business of the employer on social media without incurring liability for social media misconduct.

(f) Sanctions

In most cases, disciplinary codes provide for some forms of sanctions or penalties.[365] These are typically penalties imposed on employee for a contravened rule. Sanctions ensure compliance with a workplace policy. The matter of imposing sanctions for a contravened rule in the workplace remains largely a discretionary power of an employer.[366] However it is the opinion of the courts that this discretion must be fairly exercised by the employer. Accordingly, a sanction must, in the circumstances be reasonable.[367] It follows therefore that a social media policy should be backed by fair sanctions. This is to deter those who would not adhere to the policies and thus exposing the employer to possible risks.

The Codes of Good practice mandates a corrective form of discipline; the employer must therefore try to correct employee behaviour.[368] It is thus recommended that employers adopt

[364] K. Lekopanye (n209) 106.
[365] Kathryn Bolton ''Disciplinary Sanctions '' (LincsLaw 18 February)< lincslaw.co.uk/blog/disciplinary-sanctions/>accessed 14 June 2022.
[366]Lepamo and Associates (Pty) Ltd t/a Main North One Services v Masenyetse and Another (LC/REV /101/11) [2014] LSLC 57(16 June 2014).
[367]Ibid.
[368]Section 9 (4).

corrective approach for minor instructions such as warnings. However, an employee can be dismissed summarily where social media misconduct is of a serious nature.

4.1.3 Training

A good social media policy is not enough on its own to reduce risks of social media misconduct. Employees must also be trained on aspects of social media. Employers must ensure that employees are informed about social media and social media misconduct. In his work on this issue Holmes claims that a social media skill gaps are significantly increasing as social media becomes more intricate and complex, older populations find themselves at the risk of being bamboozled by social media platforms. He asserts that formal training becomes a necessity so that all employees are updated.[369] As such, it becomes necessary to train employees on the use of social media and the challenges that could arise out of its misuse. Training employees on aspects of social media further ensures compliance with a social media policy put in place.

Consequently, it is pertinent that employees acquire fundamental social media literacy training.[370] This is done to arm employees with the necessary tools on how to use social media appropriately and accountably. Training could further focus on training employees on how to post reasonably and ethically. Employees need to know the acceptable standards of behaviour that is recommended by their policies.[371] Additionally, employee training could also encompass guidelines for privacy settings and for identifying posts that could potentially give rise to social media misconduct. Effective social media training should be made customarily annually this is to ensure that employees are made aware of the expanding social media landscape.

4.2 Concluding remarks

In conclusion, this section suggests ways in which Lesotho can learn from the UK, US and South Africa. As mentioned earlier, [372]the UK and the South African positions in regard to social media misconduct are relatively the same to that of Lesotho. In these jurisdictions,

[369]Ryan Holmes ‘’The social media skill gap in the workplace has fast become a perilous chasm’’ Financial post 16 February 2017 < financialpost.com/entrepreneur/the-social> accessed 16 June 2022 : see also ShahnaazBismillia ‘’ Social media the context of employment law ‘’ Cowan Harper attorneys.

[370] Social media literacy is refers to the ability to use and communicate effectively through social media ; ShahnaazBismillia ‘’ Social media the context of employment law ‘’ Cowan Harper attorneys.

[371]Michael Hansen , ‘’Beyond Facebook : Social Media Training for Todays Employees” (eLeaning Industry 23 February 2020) <elearningindustry.com/social-media> accessed 7 June 2022.

[372] See part 4.0 at page 59

there are no special laws that regulate social media misconduct. This lack has created a host of problems such as unconstitutional and unfair dismissals. The issue of social media misconduct has challenged the courts to engage into a balancing exercise between the interests of the employer such as the right to a good name and those of an employee such as the right privacy and freedom of expression. The challenges in these two jurisdictions, the United Kingdom and South Africa should be construed as a learning opportunity for Lesotho, of consequences that could arise where laws regulating social media misconduct are not implemented. Lesotho should not wait in vain to adopt jurisprudence from the said counter parts. It should develop its own laws. Nonetheless, while waiting for amendments of legislation, if faced with labour disputes on social media misconduct, the Lesotho courts can evaluate the situation to see if it fits under the ambit of misconduct laid down by the Labour Codes of good practice, just like the UK.

Notwithstanding, Lesotho could learn from the US. Not all social media conduct should be classified as misconduct. The concept of concerted activity allows employees to exercise their freedom of expression. Employees should be able to express their views about workplace terms and conditions. This privilege should be allowed so long as the discussions are not malicious or an attack on the employer. Employees should be allowed to make fair comments about the employer without being liable to social media misconduct. This ideology of concerted activities is in line with principles of freedom of expression.

5. Bibliography

Journal Articles

Baum KJ "E-mail in the Workplace and the Right of Privacy" 1997 *Villanova Law Review* 1

Caplin, N.J., "The NLRA and Social Media: Why the NLRB Can Be "Facebook Friends" With Both Employees and Employers"(2016) *Louis Jackson National Student Writing Competition* 54

CavicoJ.F, "Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations'' (2013)11 *New Media and Mass Communication* 27

Chitimira&Lekopanye, "A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media-related Misconduct in the South African Workplace" (2019) 15 *DireitoGv L Rev* 1

Cillers F. Q, "The Role and Effect of Social Media in the Workplace" (2013) 40 *N Ky L Rev* 567

Cornish R &Tranter K, "The Cultural, Economic and Technical Milieu of Social Media Misconduct Dismissals in Australia and South Africa" (2019) 36 *Law Contexts: A Socio-Legal J* 17

Davis D.S, "Social Media Activity & the Workplace: Updating the Status of Social Media" (2012) 39 *Ohio NU L Rev* 359

Dennis C. M, "Legal Implications of Employee Social Media Use" (2011) 93 *Mass L Rev* 380

Dennis C.M, "Legal Implications of Employee Social Media Use" (2011) 93 *Mass L Rev* 380

Genaro B, "Access Denied: An Analysis of Social Media Password Demands in the Public Employment Setting (2013)" 40 *N Ky L Rev* 665

HerbertW.A "Symposium Commentary Facebook Firing: The Intersection of Social Media, Employment, & Ethics" 24.3 (2014)*ALB. L.J. SCI. & TECH.* 407

Hidy K.M, “Social Media Policies, Corporate Censorship and the Right to Be Forgiven: A Proposed Framework for Free Expression in an Era of Employer Social Media Monitoring” (2020) 22 *U Pa J Bus L* 346

Hook S &Noakes S, “Employer Control of Employee Behaviour through Social Media” (2019) 1 *Law, Tech & Hum* 141

Hudson S.C & Roberts K. K, “Drafting and Implementing an Effective Social Media Policy” (2012) 18 *Tex Wesleyan L Rev* 767

Ireton J, “Social Media: What Control Do Employers Have over Employee Social Media Activity in the Workplace” (2013) 14 *Hous Bus & Tax LJ* 144

Kietzmann JH, Herrnkens K, McCarthy IP and Silvestre BS "Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media" (2011)*Business Horizons* 241

Lewis J “Employment law overview USA” 2019 – 2020 *L&E Global*1

Mangan, D,“Online Speech and the Workplace: Public Right, Private Regulation. Comparative” (2018)39(2) *Labor Law and Policy Journal* 1

McGinely AC & R.P McGinley“ Beyond the water cooler; speech and workplace in an era of social media” (2012)30(1) *HofstraLaborand Employment law journal 75*

Mosito, K.E. &Mohapi, T “A Comparative Evaluation of the Law on Remedies in Cases of Unfair Dismissal for Employee Misconduct: Lesotho and South Africa in Perspective” *LLJ* 24(1)133

Mosito, K.E. “The Constitutionalisation of Labour Law In Lesotho” *LLJ. 21 Special Edition*33

Mpedi L.G, “Racists beware, some labour law perspectives on racism in the workplace” (2021) 86*The Thinker* 1

Nel S, “Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line” (2016)49 *Comp & Int'l LJ S Afr* 182

Nel S, “Social Media and Employee Speech: The Risk of Overstepping the Boundaries into the Firing Line’’ (2016) 49 *Comp & Int'l LJ S Afr* 182

O'Rourke A,Pyman A, Teicher J and Van Gramberg B "Old wine in new bottles? Regulating employee social media use through termination of employment law: A comparative analysis 2018 Common Law World Review" (2018) *Common Law World Review* 248

Obrien C.N "The top ten NLRB cases on Facebook Firings and employer social media policies" (2014)92(2) *Oregon Law Review* 337

Poulter S, Common Law in Lesotho (1969) 13 *J Afr L* 127

Reddy S, "Establishing a Test for Social Media Misconduct in the Workplace" (2018) 2018 *J S Afr L* 789

ShakkiF,Nia A.E and Bai N "Negative consequences of using social networks at the workplace from the point of view of the sports and youth department"(2019)7(3)*Am Appl Sports Sci*753

Subramanien D and Whitear N "A fresh perspective on South African law relating to the risks posed to employers when employees abuse the internet'' (2013) 37 *South African Labour Relations* 9.

Tess P "The role of social media in higher education classes (real and virtual)A literature review" (2013) 29 ,issue 5 *Computers in Human Behaviour* A60 ,A68

Newspaper Articles

Masoabi K, "Cops Ordered to stay out of social media groups" *Metro News* (Maseru 12 September 2021)<www.maserumetro.com/news/ > accessed 3 May 2022.

Mayo H " Govt Approves Draconian Snooping Law'' *Lesotho Times* (Maseru 10 June 2021)<lestimes.com/govt-approves-draconian> accessed 06 May 2022

Mpaki B.B "National Assembly Approves Cyber-Crime Bill" *Lesotho Times* (Maseru 17 May 2022)<lestimes.com/national-assembly-approves> accessed 2nd June 2022

Blogs and Websites

about.linkedin.com

Arno C, "Worldwide Social Media Usage Trends in 2012'', (2012)SEARCH ENGINE WATCH(08/03/2022), http://searchenginewatch.com/article/2167518/Worldwide-Social-

Media-Usage-Trends-in-2012. See also Statista Research Department, ‘’Number of global social network users 2017-2025

Blystone D ‘The Story of Instagram ; The Rise of the 1#photo Sharing Application, ‘ (Investopedia 06 June 2020) <investopia.com/articles > accessed 22 December 2021

Bolton K ‘’Disciplinary Sanctions ‘’ (LincsLaw 18 February)< lincslaw.co.uk/blog/disciplinary-sanctions/>accessed 14 June 2022.

Dekker H.C “Social Media and the Workplace guide” (2021) cliffdekkerhodmayer.com

Erik G, ‘LinkedIn,’ Encyclopaedia Britannica, (14 September 2021)<https://www.britannica.com/topic/linkedIn>accessed 9 March 2022

Fulton K &Mudely E, ‘Off Duty Misconduct –to discipline or not to discipline’ (Bowmans 07 April 2008)< www.bowmnaslaw.com/insight .>accessed 12 Mar. 22

Hansen M, ‘’Beyond Facebook: Social Media Training for Todays Employees” (eLeaning Industry 23 February 2020) <elearningindustry.com/social-media> accessed 7 June 2022.

Holmes R ‘’The social media skill gap in the workplace has fast become a perilous chasm’’ financial post 16 February 2017 < financialpost.com/entrepreneur/the-social> accessed 16 June 2022

Kemp S ‘’Digital 2022; Lesotho ‘’ (Datareportal 16 February 2022)<datarpotal.com/reports/digital -2022>accessed 03 March 2022

Labour Relations Agency ‘Advice on Social Media and the Employment Relationship’ (September 2013)<https://www.lra.org.uk/images/publications/copy_of_advisoryguide_social_media_september_2013

Longo S, ’What is FaceMash ?Zurkerberg grilled in Congress over Facebook origins ‘ MailOnline (11 April 2018)< www.dailymail.co.uk/news/article > accessed 09 March 22

Maddox E and Lovell J “World @work on misconduct by social media – a global perspective” (Ashurst 01 May 2016) www.ashurst.com/en/news- > accessed 22 March 2022

Mudavanh E&HadebeT“Lesotho – Data protection Overview ” April 2021 , www.datagiudance.com/notes/lesotho accessed May 3rd 2022.

Pahwa A ‘The History of WhatsApp,’ (Feedough 8 September 2021) < www.feedough.com/history-of-whatsApp>accessed 9 March 2022

Potter T.L, “Social media cases and the National Relations Board 2011’’ (HuschBlakwell, 23 August 2011) < www.huschblackwell.com >Accessed 29 April 2022

Schuchart W, “Social media policy” (TechTarget)< www.techtarget.com > accessed 7 June 2022

Society for Human Resource Management “What are the pros and cons of using social media in the workplace? What should we include in a policy” (SHRM)< www.srhm.org/resourcesandtools/too > accessed 23 March 2022

Summers A ‘A brief history of WhatsApp and where WhatsApp for business is heading,’ (ChatWise 28 June 2020 <chatwise.io/post>accessed 22 December 2021

The Editors of Encyclopaedia Britannica “Wagner Act United States 1935” Encyclopaedia Britannica (5 June 2020)<https://ww.britannica.com/topic/Wagner-Act <accessed 26 March 2022

The Editors of Encyclopaedia, ‘Twitter,’ Encyclopaedia Britannica, (17 February 2022) <https://www.britannica.com/topic/twitter >accessed 09 March 2022

Verileoosthuzien, “How far is too far for employees on social media” (Labour Guide)< www.labourguide.co.za> accessed 3 June 2022.

Workers of England Union Admin, “No special rules for social media misconduct’’ (Workers of England Union, 25 August 2015)<www.workersofengland.co.uk/employement>accessed 29 May 2022

Conference and Symposium papers

ACCA global “Corporate Business Law (Lesotho)” 2013

Thomas M & Dias K, “Social media in the workplace – a roadmap for employers’’ (The following paper is the summary of a workshop and discussion that took place at the offices of Goodman Derrick LLP May 2019)

Davey R and Jansen L.D "Social media in the workplace" (Bowman Gilfillan Seminar Sandton)

Phungula S.P "The Clash between the Employee's Right to Privacy and Freedom of Expression and Social Media Misconduct: What Justifies Employee's Dismissal to Be a Fair Dismissal?" (Nelson Mandela University Labour Law Conference on "Labour Dispute Resolution, Substantive Labour Law and Social Justice Developments in South Africa, Mauritius and Beyond July 2019).

Dissertations

Arjun R.T, "An Analysis of Social Media Misconduct in the Workplace" (LLM Dissertation University of Kwazulu Natal 2018)

Chandramonhan S, "An examination of the employee's conduct on social media and the effect on the employment relationship" (LLM Dissertation University of Kwazulu-Natal 2017).

Lekopanye K," Selected challenges associated with the dismissal of employees for socialmedia-related misconduct in the South African workplace"(LLM Dissertation North West University 2018)

Munian S, "An analysis of the Labour Law Relations Act 66 of 1995 as it relates to derogatory comments posted by employees on social media,'' (LLM Dissertation University of Kwazulu –Natal 2018)

Reports

Highlights of Industrial law Reports vol 38 August 2017

On August 18, 2011 the Acting General Counsel for the NLRB issued a Memorandum OM 11-74, "Report of the Acting General Counsel Concerning Social Media Cases. Terry L. Potter Social Media Cases and the National Labor Relations Board "August 23, 2011 Huscekblackwell

The Kingdom of Lesotho Combined Second To Eighth Periodic Report Under The African Charter on Human and Peoples Rights and Initial Report Under The Protocol To The African Charter On The Rights of Women In Africa April 2018

ShakuntalaBanji, ‘Social Media and Literacy,’ International Encyclopaedia of Digital Communication & Society 1-13

United States Case law

Meyers Industries (Meyers I),268 NLRB 493 (1984)

Karl Knauz Motors, Inc., 380 N.L.R.B. No. 164, 2012–2013 NLRB Dec. (CCH) ¶ 15620 (Sept. 28, 2012)

Atlantic Steel Company Co 245NLRB 814 (1979) [2]

National Labour Relations Board v American Medical Response of Connecticut, Inc 438 F.3d 188(2d Cir .2006)

Three D, LLC d/b/a Triple Play sports bar and Grill and Jillian Sanzone 2014-15CCH 15,855

NLRB V Local Union No. 1229, Int'l Bhd. of Elec. Workers (Jefferson Standard) 346 US 464 1953

Hispanics United 3-CA-27872, 2011 WL 3894520 (Sept. 2, 2011).

United Kingdom Case law

Commissioner of Railways (NSW) v O’Donnell 1938 HCA 43-60 CLR 681

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

Game Retail Limited v Laws UKEAT/0188/14/DA (3 November 2014)

Gibbins v British Council 2200088/2017

Iceland Frozen Foods Ltd v Jones[1982] IRLR 439

Pearce v Foster [1886] 17 QBD 536 at 542

Smith v Trafford Housing Trust[2012] EWHC 3221 (Ch)

Teggartv Teletech NIIT 00704/11.

Whitham v Club 24 Ltd t/a Ventura ET/1810462/2010

South African case law

Bernstein and Others v Bester No and Others1996 2 SA 751 (CC) 94.

Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Dietlof and Frans Loots Building Material Trust t/a Penny Pinchers 2016 10 BALR 1060 CCMA

Edcon Limited v Cantamessa and others (JR30/17)[2019]ZALCHB

Fredericks v Jo Barkett Fashions [2011] JOL 27923

Le Roux and others v Dey 2011 (3) SA 274 (CC).

Media Workers Association of SA obo Mvemve v Kathorus Community Radio (2010) 31 ILJ 2217

Minister of Health & another v New Clicks SA (Pty) Ltd & Others 2006(1) BCLR 1(CC)

Motloung v The Market Theatre Foundation [GAJB4458-11]

National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arends v Consumer Brands Business Worcestor 2014(7)BALR 716 (CCMA)

SA Pelagic Fishermen's Union on behalf of Mouton and Lucky Star Operations (A Division of Lucky Star Ltd) (at 1929)

SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton(2011)20 (CCMA)

Sedick and Another v Krisray (Pty) Ltd (2011) 8 BALR 879

SEO and Others v Hyundai Motor Distributors (Pty) Ltd 2001 (1)SA 545 (CC)

Lesotho Case Law

Metsing v Director General Directorate of Corruption and Economic Offences and OthersNo 11 of 2014 [2015]LSHC 1 (25 February 2015)

Lepamo and Associates (Pty) Ltd t/a Main North One Services v Masenyetse and Another (LC/REV /101/11) [2014] LSLC 57(16 June 2014)

Pete v Minister of Law, Constitutional Affairs and Human Rights (CC 11/2016)[2018]LSHC 3 (18 May 2018)

Tlali v Litaba and Others (CIV/T/42/01)(NULL) [2004] LSHC 130 (26 October 2004)

NthonaKometsi v C & Garments LC/REV/62/12

Standard Lesotho Bank v LijaneMorahanye (LAC/CIV/A06/08) [2008]

Legislation : Lesotho

Labour Code Order1992

Labour Code (Codes of Good Practice) Notice 2003

Communications (Subscriber Identity Model and Mobile Registration) Regulations 2021

Computer Crime and Cyber Security Bill 2022

UK

Human Rights Act 1998

Employment Rights Act 1996

US

National Labor Relations Act of 1935

South Africa

The Constitution of the Republic of South Africa 1996

Labour Relations Act 66 of 1995