

# DISMISSAL AND RELATED PROBLEMS OF SOCIAL MEDIA-RELATED MISCONDUCT IN THE SOUTH AFRICAN WORKPLACE<sup>1</sup>

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## **Abstract**

*The advent of social media-related platforms has directly and/or indirectly affected the employer-employee relationship in the South African workplace. The misuse of social media by employees in the workplace during office working hours has resulted in numerous dismissals of employees for social media-related misconduct in South Africa. While such dismissals of employees for social media-related misconduct could be justifiable, some employees have been sometimes unfairly dismissed for their mere use of social media platforms and/or for the innocent comments made through such platforms in the South African workplace during office working hours. Owing to this conundrum, the article investigates the procedural and substantive fairness of social media-related dismissals of employees in accordance with the South African employment laws. This is done to unpack problems associated with social media-related misconduct in the workplace and related flaws in the South African employment laws. Moreover, examples of social media-related misconduct by employees are discussed and possible recommendations that could be adopted to combat such misconduct are provided.*

**Keywords:** social media-related misconduct, dismissal, workplace, cyber bullying, harassment.

**JEL Classification:** K24, K31

## **1. Introductory remarks**

Social media is a very broad and difficult term to define. Nonetheless, for the purposes of this article, social media includes, *inter alia*, any formal and informal communications between individuals through the Internet, online communication platforms and technological gadgets such as smart cell phones.<sup>3</sup> The advent of social media-related platforms has directly and/or indirectly influenced and transformed the employer-employee relationship in the South African workplace.<sup>4</sup> The use and misuse of social media by employees in the workplace during office working hours has given rise to numerous dismissals of employees for social media-related misconduct in South Africa.<sup>5</sup> Such misconduct is usually perpetrated through social media platforms during working hours when an employee culpably disregards the workplace rules that are indicated by express and implied terms of their employment contract and/or their employer's disciplinary code.<sup>6</sup> It is submitted that misconduct is the most common justification for employee dismissals in South Africa.<sup>7</sup> Dismissals for misconduct occur when employees are deemed to have breached a material term of their employment contract by the employer.<sup>8</sup> The Labour Relations Act<sup>9</sup> provides some grounds that may legitimately justify the termination of employees' employment by their employers for misconduct.<sup>10</sup>

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<sup>3</sup> R. Russell, and M. Stutz, 'Social Media: What Employers Need to Know', 17 *Journal of Internet Law* (2014), p. 3, 3-5; R. Davey, 'Dismissals for Social Media Misconduct', 6 *De Rebus* (2012), p. 80, 81-83; P. McDonald, and P. Thompson, 'Social Media(ation) and the Reshaping of Public/Private Boundaries in Employment Relations', 18(1) *International Journal of Management Reviews* (2016), p. 69, 70-81; K. Lekopanye, (2018), p. 14-32; H. Chitimira and K. Lekopanye, 'The Liability and Constitutional-Related Legal Consequences for Social Media-Related Misconduct in the South African Workplace', *Namibia Law Journal* (2019), p. 295, 296-314.

<sup>4</sup> J. Grogan, *Dismissal*, 5ed, (Cape Town, Juta and Co, 2013), p. 143.

<sup>5</sup> K. Lekopanye, (2018), p. 14-32; J. Grogan, (2013), p. 142-143.

<sup>6</sup> J. Grogan, (2013), p. 142-143.

<sup>7</sup> J. Grogan, (2013), p. 142.

<sup>8</sup> J. Grogan, (2013), p. 142.

<sup>9</sup> Section 188(1)(a)(i) and (ii) of the Labour Relations Act 66 of 1995 as amended (LRA).

<sup>10</sup> Item 2(2) of schedule 8 Code of Good Practice: Dismissal of the LRA.

Such grounds include, *inter alia*, the conduct of the employee, the capacity of the employee and the operational requirements in relation to the employer's business.<sup>11</sup> The LRA also provides guidelines for dismissal of employees for general misconduct in the workplace.<sup>12</sup> Dismissal on the ground of disciplinary reasons or negative and/or unlawful conduct of the employee is generally regarded as dismissal for a misconduct.<sup>13</sup> In this regard, it is crucial to note that dismissal of employees for contravening disciplinary rules and/or refusing to follow instructions of their employer in the workplace could be regarded as insubordination and a misconduct that is justified under the LRA.<sup>14</sup>

Furthermore, the dismissal of an employee for their unlawful conduct through social media platforms during working hours could also amount to a misconduct although the LRA does not expressly provide for social media-related misconduct.<sup>15</sup> While such dismissals of employees for social media-related misconduct could be justifiable, some employees have been sometimes unfairly dismissed for their mere use of social media platforms and/or for the innocent comments made through such platforms in the South African workplace during office working hours.<sup>16</sup> Owing to this conundrum, the article investigates the procedural and substantive fairness of social media-related dismissals of employees in accordance with the South African employment laws.<sup>17</sup> This is done to unpack problems associated with social media-related misconduct in the workplace and related flaws in the South African employment laws. Thus, although some persons could argue that definitional aspects of the terms "employees" and "employers" as well as the requirements for procedural and substantive fairness of employee dismissals ought not to be discussed, the author argues that these and other relevant aspects must be carefully discussed in this article to enable the reader to understand the meaning of such concepts in the context of possible unfair dismissals of employees for social media-related misconduct during normal working hours in the South African workplace. In this regard, the author concurs with the second anonymous reviewer of this article who correctly submitted that aspects of procedural and substantive fairness of employee dismissals should be discussed to evaluate the appropriateness of the procedural and substantive fairness approaches that are adopted during the dismissals of employees for social media-related misconduct in South Africa. To this end, the article only provides an overview and basic analysis of selected key and relevant concepts of substantive and procedural fairness in respect of the dismissals of employees for social media-related misconduct in the South African workplace during working hours. This is done in accordance with the relevant employment legislation and case law on social media-related misconduct in South Africa. Accordingly, the procedural and substantive fairness of social media-related employee dismissals is discussed in order to recommend measures that could be utilised to curb any unfair, unlawful and/or unconstitutional social media-related dismissals of employees in the South African workplace during working hours. It is further important to define the terms "employer", "employee" and other relevant terms in order to understand the employment relationship and/or the legal link between employers and their employees which creates reciprocal rights and obligations between them. Moreover, examples of social media-related misconduct by employees are discussed and possible recommendations that could be adopted to combat such misconduct are provided.<sup>18</sup>

## 2. Scope and limitation

The article only focuses on the employees' misuse of social media during office working hours and their subsequent dismissal for social media-related misconduct in the South African

<sup>11</sup> Item 2(2) of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>12</sup> Item 7 of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>13</sup> J. Grogan, (2013), p. 79; item 5 of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>14</sup> J. Grogan, (2013), p. 79; item 2(2) of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>15</sup> J. Grogan, (2013), p. 79.

<sup>16</sup> F.J. Cavico, B.G. Mujtaba, S.C. Muffler, and M. Samuel, 'Social Media and Employment-At-Will: Tort Law and Practical Considerations for Employees, Managers and Organizations', 11 *New Media and Mass Communication* (2013), p. 25, 25-39.

<sup>17</sup> K. Lekopanye, (2018), p. 14-32; S.J. Venezia, 'The Interaction of Social Media and the Law and How to Survive the Social Media Revolution', 52(4) *New Hampshire Bar Journal* (2012), p. 24, 25-39.

<sup>18</sup> J.H. Kietzmann, K. Hermkens, I.P. McCarthy, and B. Silvestre, 'Social Media? Get Serious! Understanding the Functional Building Blocks of Social Media', 54(3) *Business Horizons* (2011), p. 241, 243-251.

workplace. The author argues that any lawful use of social media by employees during normal working hours in the South African workplace should not give rise to social media-related misconduct and/or social media-related dismissals of such employees. Put differently, notwithstanding the fact that it might not really matter where and when (place and actual time) the misuse of social media by employees occurs, any abuse of social media by employees at their own leisure time outside the normal working hours, away from the workplace is beyond the scope of this article. Where the misuse of social media by employees outside normal working hours affect their employers' business or reputation, such employees should be held personally liable for their conduct through civil proceedings other than their employers' workplace social media-related rules. Any draconian prohibition of the misuse of social media platforms by employees outside the workplace working hours could create further problems of over-criminalisation and infringement of their constitutional rights to privacy, freedom of expression and freedom of association.<sup>19</sup>

In addition, the article highlights some of the gaps and flaws that are imbedded in the relevant South African employment-related legislation. This is mainly done to propose some measures and recommendations that could be utilised by the policy makers to combat unfair dismissals of employees for social media-related misconduct in the South African workplace. However, due to space constrains, a detailed analytical critique of all recommendations and possible amendments to the relevant legislation is beyond the scope of this article. Accordingly, the article mainly provides that any unclear, rigid and inadequate social media laws and/or rules in the workplace could give rise to vicarious liability on the part of the employers for their employees' social media-related misconduct. Consequently, social media laws and rules must clearly and adequately distinguish between lawful and unlawful social media conduct in the workplace to protect both employers and employees from violating social media laws and rules ignorantly. Nonetheless, a more detailed evaluation of all the possible theoretical assumptions, labour law principles, statutory provisions and relevant case law on social media-related misconduct is beyond the scope of this article.

### 3. Definition of key terms and concepts

It must be noted that there is no legislation that expressly outlaws and defines social media-related misconduct in the South African workplace. As a result, some unlawful, unfair and unjustified dismissals of employees for social media-related misconduct have continued to occur in the South African workplace during office working hours.<sup>20</sup> In relation to this, the article is mainly focused on the misuse of social media by employees during office working hours as well as the lawfulness of their subsequent dismissals for social media-related misconduct in the South African workplace.<sup>21</sup> It is submitted that the term "social media-related misconduct" could be defined as an unlawful conduct where employees deliberately and/or recklessly post negative derogatory comments about other persons, including their employer's conduct or business, on social media platforms. Such conduct could give rise to social media-related misconduct dismissals of the affected employees in the South African workplace.<sup>22</sup> Thus, social media-related misconduct is mostly perpetrated through the improper and/or unlawful use of social media by employees in the workplace during office hours to the detriment of their employers, employers' business or other persons.<sup>23</sup> It is, however, submitted that social media-related misconduct must not be restricted to derogatory comments but it should be extended to all racial, prejudicial, harmful, defamatory and other unlawful comments by both

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<sup>19</sup> K. Lekopanye, (2018), p. 15-19.

<sup>20</sup> K. Lekopanye, (2018), p. 74-99; Pen, J., '“Never Tweet?” Social Media and Unfair Dismissal', 41(4) *Alternative Law Journal* (2016), p. 271, 272-274; Mtuze, S.S., 'Social Media-Reasonable Use and Legal Risks', 16(6) *Without Prejudice* (2006), p. 18, 18-20.

<sup>21</sup> K. Lekopanye, (2018), p. 74-99; D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective', 13(1) *Human Rights Law Review* (2013), p. 125, 125-151.

<sup>22</sup> F.Q. Cilliers, 'The Role and Effect of Social Media in the Workplace', 40(3) *Northern Kentucky Law Review* (2013), p. 567, 568-592; J.M. Buchbach, *Social Media Policies and Work: Reconciling Personal Autonomy Interests and Employer Risk* (PhD Thesis Queensland University of Technology 2017), p. 15-255.

<sup>23</sup> K. Lekopanye, (2018), p. 14-32.

employees and employers on social media platforms in the workplace during office working hours.<sup>24</sup> Furthermore, the definition of, and/or prohibition on social media-related misconduct should adequately outline all the consequences of social media-related misconduct in the South African workplace. Nonetheless, the LRA and other labour-related legislation do not expressly define the term “social media-related misconduct” and there is no statutory provision that specifically prohibit all the forms of social media-related misconduct in the South African workplace.

The term “misconduct” relates to any intentional, deliberate or negligent wrong doing, delinquency, unacceptable and/or improper conduct that is perpetrated by an employee in the workplace.<sup>25</sup> In this regard, social media-related misconduct could be committed by employees who intentionally, deliberately or negligently post derogative, negative and harmful comments against their employers and other persons on social media platforms in the workplace during office working hours.<sup>26</sup> The LRA does not expressly define “misconduct” and it is not statutorily clear what constitutes a misconduct for the purposes of social media-related misconduct in South Africa.<sup>27</sup> However, it is expected that employees who violate their workplace rules on social media platforms could be dismissed for social media-related misconduct.<sup>28</sup> There are several flaws in this regard and some employers are reportedly dismissing their employees for social media-related misconduct unfairly.<sup>29</sup>

The term “social media” is not expressly defined under the LRA<sup>30</sup> and the Basic Conditions of Employment Act.<sup>31</sup> Nonetheless, for the purposes of this article, “social media” relates to any online social communications by one or more persons that are conducted through technological gadgets such as cell phones, involving any combination of words, pictures, videos, email sharing, documents or audio sharing.<sup>32</sup> In addition, social media includes any mobile and/or Internet-based technologies that allow people to interact, share and consume information through emails and social media platforms.<sup>33</sup> Social media is a conduit for interactive communication on Internet-based technological social media platforms.<sup>34</sup> Notwithstanding the possible advantages of social media, social media platforms have unfortunately created new challenges and avenues for employees that misuse social media in the South African workplace during office working hours to be dismissed by their employers for social media-related misconduct.<sup>35</sup>

It is submitted that a “social media communication” refers to the interaction, sharing and/or exchange of information on virtual and other social media platforms by any persons, including employees and employers. In addition, social media communication includes any online

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<sup>24</sup> R. Davey, ‘Off Duty Misconduct in the Age of Social Media’, (2016) <https://www.golegal.co.za/off-duty-misconduct-in-the-age-of-social-media/> accessed 09 July 2020 page number unknown; S.A. Coetzee, ‘A Legal Perspective on Social Media Use and Employment: Lessons for South African Educators’, 22 *PER* (2019), p. 1, 2-27.

<sup>25</sup> K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, ‘A Conspectus of Constitutional Challenges Associated with the Dismissal of Employees for Social Media-Related Misconduct in the South African Workplace’, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 2-35.

<sup>26</sup> J. Grogan, (2013), p. 143; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>27</sup> See section 213 read with sections 186-188 of the LRA.

<sup>28</sup> J. Grogan, (2013), p. 143; G. Mushwana, and H. Bezuidenhout, ‘Social Media Policy in South Africa’, 16(1) *Southern African Journal of Accountability and Auditing Research* (2014), p. 63, 64–72.

<sup>29</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 80–83; G. Walsh, M. Schaarschmidt, and H. Von Kortzfleisch, ‘Employees’ Company Reputation-Related Social Media Competence: Scale Development and Validation’, 36 *Journal of Interactive Marketing* (2016), p. 46, 48–59; V. Pillay, ‘Jessica Leandra and the Racist Tweet’, (2012) *Mail & Guardian* <https://mg.co.za/article/2012-05-04-jessica-leandra-and-the-racist-tweet> accessed 09 July 2020; M. Potgieter, *Social Media and Employment Law*, (Cape Town, Juta and Co, 2014), p. 20-120.

<sup>30</sup> See section 213 read with sections 186-188 of the LRA.

<sup>31</sup> 75 of 1997 as amended (BCEA), see section 1.

<sup>32</sup> S.J. Venezia, 52(4) *New Hampshire Bar Journal* (2012), p. 24, 25-39; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>33</sup> J.H. Kietzmann, K. Hermkens, I.P. McCarthy, and B. Silvestre, 54(3) *Business Horizons* (2011), p. 241, 243-251; M.C. Smith, ‘The Interaction of Social Media and the Law and How to Survive the Social Media Revolution’, 52(4) *New Hampshire Bar Journal* (2012), p. 24, 24-39.

<sup>34</sup> J.H. Kietzmann, K. Hermkens, I.P. McCarthy, and B. Silvestre, 54(3) *Business Horizons* (2011), p. 241, 251.

<sup>35</sup> S. Naik, ‘Model’s Racist Rant Costs Her’, *IOL News* (2012) <https://www.iol.co.za/news/south-africa/models-racist-rant-costs-her-1289774> accessed 18 November 2019; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1,6-10.

communications that are posted by any persons on social media platforms.<sup>36</sup> However, the term “social media communication” is not defined in the LRA<sup>37</sup> and the BCEA.<sup>38</sup> There is no adequate and clear statutory provision that stipulates how and who should interact through social media communications in the South African workplace during office working hours.

The LRA broadly defines the term “workplace” to include a place or places where employees work under their employer.<sup>39</sup> For instance, under the LRA,<sup>40</sup> the definition of “workplace” includes aspects of public service and other purposes such as collective bargaining, dispute resolution, national and provincial administration. However, this definition does not specifically provide for its application and related aspects in relation to the different types of workplaces for temporal, fixed term and/or permanent employees in South Africa.<sup>41</sup> Accordingly, “workplace” should be interpreted as a place where any person carries out their work-related duties during office working hours on a temporal, fixed term or permanent basis in South Africa. Consequently, any social media-related misconduct by employees outside the workplace and outside office working hours is not discussed in this article.<sup>42</sup>

Under the LRA, “dismissal” occurs, *inter alia*, when an employee’s employment contract is terminated for various reasons by the employer with or without prior notice.<sup>43</sup> Dismissal also occur when an employer refuses to renew a fixed term contract of employment of the employee,<sup>44</sup> or where the an employer blocks an employee from resuming work after maternity leave or collective agreement or absence from work for four to eight weeks before and/or after the expected date of the child’s birth.<sup>45</sup> Moreover, dismissal is effected when an employer refuses to re-employ an employee, or when the employer makes intolerable employment conditions for the employee, or when the employer makes less favourable employment conditions for the affected employee.<sup>46</sup> It appears this definition is applicable to different instances and types of employees who are dismissed in the workplace for various reasons, including misconduct as outlined in the LRA.<sup>47</sup>

The LRA does not define “termination of employment”.<sup>48</sup> Nevertheless, termination of employment occurs when a contract of employment is terminated at the instance of the employer or a relevant party to that contract and the affected party must be notified in respect thereof.<sup>49</sup> It appears this definition is unfair since it empowers the employer to terminate the employment contract with or without prior notice to the affected employee.

Additionally, the term “employer” is unfortunately not expressly defined in the BCEA<sup>50</sup> and the LRA.<sup>51</sup> However, the term “employer” refers to a person or a legal entity that hires, controls, directs and pays employees for conducting their employment duties in accordance with their employment contracts in the South African workplace.<sup>52</sup> The employer usually hire various persons according to the need, expertise and services required and pays a remuneration to such person as

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<sup>36</sup> Merriam-Webster Online Dictionary, ‘Social Media Communication’, (2016) <http://www.merriam-webster.com/dictionary/social%20media> accessed 13 June 2016; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>37</sup> See section 213 read with sections 186-188 of the LRA.

<sup>38</sup> See section 1.

<sup>39</sup> Section 213 of the LRA.

<sup>40</sup> Section 213 of the LRA.

<sup>41</sup> K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>42</sup> K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>43</sup> Section 186(1)(a) of the LRA; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>44</sup> Section 186(1)(b) of the LRA; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>45</sup> Section 186(1)(c) of the LRA; K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

<sup>46</sup> Section 186(1)(d)-(f) of the LRA.

<sup>47</sup> Section 186 read with section 213 of the LRA.

<sup>48</sup> Section 186 read with section 213 of the LRA.

<sup>49</sup> Section 37(1) of the BCEA.

<sup>50</sup> Section 1.

<sup>51</sup> Section 213.

<sup>52</sup> K. Lekopanye, (2018), p. 15-19; H. Chitimira, and K. Lekopanye, 15(1) *Revista Direito GV Law Review* (2019), p. 1, 6-10.

stipulated in the BCEA and the LRA.<sup>53</sup> For the purposes of effective compliance in the South African workplace, the term “employer” should be statutorily defined in the BCEA and the LRA to include the meaning and obligations of the employer in terms of the employment contract.

A relatively similar definition of the term “employee” is stipulated in the LRA and the BCEA. Accordingly, an “employee” is any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive a remuneration from the employer.<sup>54</sup> An “employee” also refers to any person who assists in carrying on or conducting the business of their employer.<sup>55</sup> Notably, all persons that work for another person are entitled to be remunerated by such person.

#### **4. The procedural and substantive fairness of social media-related dismissals under the South African employment laws**

##### **4.1. Procedural and substantive fairness under the LRA**

The dismissal of employees for general misconduct and/or social media-related conduct must be procedurally and substantively fair.<sup>56</sup> Procedural fairness means that the dismissal of an employee by the employer, for whatever substantive reasons, must be conducted fairly after all the relevant procedures are followed. Moreover, procedural fairness could relate to the employees’ rights that must be respected as well as the relevant procedures that must be undertaken prior to the imposition of any disciplinary measures and/or dismissal of the affected employees. Thus, procedural fairness entails that the employer must take all relevant measures when making administrative and other relevant decisions that affect their employees to ensure objectivity and fairness of their decisions. Dismissal of an employee for general misconduct and/or social media-related misconduct would be unfair if no procedure for procedural and substantive fairness was followed by the employer.<sup>57</sup>

Substantive fairness refers, *inter alia*, to a just, fair and equitable decision that is taken by the employer to terminate the employment contract of the affected employee. Such decision must be consistent with the LRA.<sup>58</sup> For instance, item 7 of the Code of Good Practice provides guidelines that must be followed by employers to ensure substantive fairness in cases of employee dismissals for misconduct under the LRA.<sup>59</sup> Thus, substantive fairness requires the employer to consider a number of factors such as the contravened rule, how it was contravened and its validity before dismissing the affected employee.<sup>60</sup> The employer must follow a fair procedure and provide valid reasons to the employees prior to their dismissal.<sup>61</sup> Failure to do this will give rise to automatically unfair dismissals that require the employer to reinstate the dismissed employees to their positions and pay them compensation in respect thereof.<sup>62</sup> In this regard, substantive fairness entails that any termination of the employees’ employment by the employer should be objectively made.<sup>63</sup> However, it appears that a subjective test is employed by the courts to determine if the employer’s decision to dismiss the affected employee was substantively fair.<sup>64</sup> The author submits that the courts and the employers should carefully consider the employees’ conduct or capacity and/or workplace operational requirements to determine whether the employees’ dismissals were effected objectively in accordance

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<sup>53</sup> See sections 1 and 213 of the BCEA and the LRA respectively. See further J. Gelms, ‘High-Tech Harassment: Employer Liability under Title VII for Employee Social Media Misconduct’, 87(1) *Wash. L. Rev* (2012), p. 249, 250-279.

<sup>54</sup> Section 1 of the BCEA; section 213 of the LRA.

<sup>55</sup> Section 1 of the BCEA; section 213 of the LRA.

<sup>56</sup> Section 188 of the LRA.

<sup>57</sup> Section 188 of the LRA.

<sup>58</sup> Section 188 of the LRA read with schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>59</sup> Item 7 of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>60</sup> Section 188 of the LRA read with item 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>61</sup> Items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>62</sup> Section 193(1) of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>63</sup> Sections 187 and 188 of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA; Commission for Conciliation, Mediation and Arbitration, ‘The Disciplinary Procedure for Misconduct’, (2016) <https://www.labourguide.co.za/discipline-dismissal/642-the-disciplinary-procedure-for-misconduct> accessed 12 July 2020.

<sup>64</sup> Sections 187 and 188 of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

with a procedural and substantive fair procedure as well as in accordance with the relevant Code of Good Practice under the LRA.<sup>65</sup>

Any dismissal of employees who contravened a rule contained in the disciplinary code of their employment contract by the employer could be justified if all procedural and substantive procedures were followed. In this regard, the dismissal of such employees for a general misconduct in the South African workplace could be regarded as a fair dismissal.<sup>66</sup> Despite this, the LRA and related legislation does not provide specific guidelines and/or provisions for social media-related misconduct in the South African workplace. Therefore, in light of this, the dismissal of employees in instances where no social media policy or code of conduct is provided by the employer to explain how employees should express their opinions on social media platforms in the workplace during office working hours will be regarded as procedurally and substantively unfair.<sup>67</sup> Put differently, the dismissal of an employee for general misconduct or social media-related misconduct would be unfair if the employee did not breach any disciplinary codes and if no adequate social media policy guidelines were provided by the employer in respect thereof.<sup>68</sup> Failure by the employer to provide valid reasons for dismissing an employee for social media-related misconduct would give rise to an unfair dismissal.<sup>69</sup> Furthermore, the dismissal of an employee for social media-related misconduct would be unfair if it infringes the fundamental rights of that employee.<sup>70</sup> In this regard, the requirements for procedural and substantive fairness will be violated if an employee is dismissed for social media-related misconduct without holding a disciplinary hearing to allow the employee to state his or her defence.<sup>71</sup> The LRA does not provide any guidelines for procedural and substantive fairness for social media-related misconduct in the South African workplace. Given this status *quo*, notwithstanding possible useful jurisprudence and principles of procedural and substantive fairness that could be derived from the courts and other jurisdictions, it is prudent for the policy makers to seriously consider amending the LRA to enact specific provisions and guidelines for procedural and substantive fairness in respect of social media-related misconduct in the South African workplace. This follows the fact that social media-related misconduct is still relatively new in South Africa and it is at times generally confused with general misconduct under the LRA,<sup>72</sup> to the detriment of the affected employees in the South African workplace. The author submits that the current regulatory approach of merely relying on the courts to apply some general collective principles on procedural and substantive fairness to all misconduct cases wrongly treats social media-related misconduct as a general misconduct under the LRA.<sup>73</sup> Yet, the general misconduct provisions of the LRA and its Code of Good Practice do not adequately cover all the unique elements of social media-related misconduct in South Africa.

#### 4.2. The procedural and substantive fairness under the employment equity act

The Employment Equity Act<sup>74</sup> provides that every employer must take the necessary steps to

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<sup>65</sup> Section 188 of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>66</sup> Section 185 read with sections 186-189A of the LRA; item 7 of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>67</sup> *Beurain v Martin NO and Others* (C16/2012) (2014) 35 ILJ 2443 (LC), where an employee was dismissed after publishing photographs and allegations on Facebook that the health of patients and staff was being compromised since the toilets at the Groote Schuur Hospital were very dirty and unhealthy. He argued that his publication on Facebook was a protected disclosure and thus, his dismissal was automatically unfair as stipulated section 187(1)(h) of the LRA. Nonetheless, the court dismissed these arguments and held that his Facebook post was not a protected disclosure and his dismissal was not automatically unfair. The court further held that the employee knew clear instructions from the employer regarding social media communications but he deliberately defied them. Accordingly, he was found guilty of gross insubordination.

<sup>68</sup> *Beurain v Martin* paragraphs 5-13.

<sup>69</sup> Item 2(4) of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>70</sup> I. Currie, and J. De Waal, *The Bill of Rights Handbook* 6ed (Cape Town, Juta and Co, 2013), p. 295; item 2(3) of schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>71</sup> I. Currie, and J. De Waal, (2013), p. 295; K. Mugabe, 'Substantive and Procedural Fairness in Employment Law', (2014) <https://www.polity.org.za/article/substantive-and-procedural-fairness-in-employment-law-2014-07-16> accessed 19 May 2020.

<sup>72</sup> Section 188 of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>73</sup> Section 188 of the LRA read with items 2; 4 and 7 of the schedule 8 Code of Good Practice: Dismissal of the LRA.

<sup>74</sup> 55 of 1998 (Employment Equity Act), sections 5-6.

eliminate any form of discrimination in the South African workplace. The steps that should be taken by employers include the adoption of anti-discrimination policies and related practices to combat unfair discrimination in the South African workplace.<sup>75</sup> Employers are further obliged to avoid policies and practices that unfairly discriminate employees, directly or indirectly, based on the grounds such as race, gender, sex, pregnancy and other grounds in the South African workplace.<sup>76</sup> If a dismissal of an employee constitutes any form of discrimination as proscribed in the Employment Equity Act, it is regarded as both procedurally and substantively unfair.<sup>77</sup> Thus, any dismissal of an employee on discriminatory grounds is deemed procedurally and substantively unfair unless if it was based on an inherent requirement of a particular job, or on age, especially, where an employee has reached the agreed retirement age, or based on affirmative action.<sup>78</sup> To curb unlawful and unfair dismissals, relevant provisions and guidelines in the Code of Good Practice under the LRA must be carefully considered in addition to those of the Employment Equity Act before any employee dismissals are effected. Any discriminatory dismissals of employees by employees without following due processes and procedures is procedurally and substantively unfair. Although the Employment Equity Act does not provide for social media-related misconduct, employers must not dismiss or discriminate their employees on the basis of their sexual orientation, religion and/or political views that are posted on social media platforms.<sup>79</sup> Such dismissals would be discriminatory and substantively unfair on the part of the affected employees.<sup>80</sup> However, the enforcement of the employees' rights is difficult in this regard since the Employment Equity Act does not make any provision for procedural and substantive fairness in respect of employee dismissals for social media-related misconduct in the South African workplace.

### 4.3. The procedural and substantive fairness under BCEA

The BCEA provides that a contract of employment can be terminated when a party to the contract is notified of such termination.<sup>81</sup> This suggests that any failure to notify the affected employee of the termination of their employment contract will constitute a procedural and substantively unfair dismissal.<sup>82</sup> Thus, if a termination of the employment contract or a dismissal for social media-related misconduct is effected without prior notice to the affected employees, it would be regarded as a substantively unfair dismissal by the courts and/or other relevant enforcement authorities.<sup>83</sup> Nevertheless, the BCEA is silent on the use and/or misuse of social media by employees in the South African workplace, especially, during office working hours. It is, therefore, not clear how employees could utilise social media platforms during office working hours under the BCEA. Be that as it may, it appears that employees who post reckless comments about their working conditions or derogatory comments against other persons on social media in the workplace during office working hours will be liable for a misconduct under the LRA but not necessarily under the BCEA.<sup>84</sup> This flaw is exacerbated by the fact that the BCEA does not provide guidelines on how procedural and substantive fairness should be considered in respect of the employees' dismissals for social media-related misconduct in the South African workplace. Despite this, the dismissal of such employees for social media-related misconduct would be substantively unfair under both the LRA

<sup>75</sup> Section 5 of the Employment Equity Act.

<sup>76</sup> Section 6 of the Employment Equity Act; W.S. Jacobson, and S.H. Tufts, 'To Post or Not to Post: Employee Rights and Social Media', 33(1) *Review of Public Personnel Administration* (2013), p. 84, 86-107.

<sup>77</sup> Section 6 of the Employment Equity Act; T. Adonis, *The Employment Recruitment and Promotion Process: Legal Regulation and Practice* (MPhil labour law-dissertation University of Cape Town 2015), p. 17-44.

<sup>78</sup> Section 6 of the Employment Equity Act.

<sup>79</sup> F.Q. Cilliers, 40(3) *Northern Kentucky Law Review* (2013), p. 567, 568-592.

<sup>80</sup> F.Q. Cilliers, 40(3) *Northern Kentucky Law Review* (2013), p. 567, 579-592.

<sup>81</sup> Section 37 of the BCEA.

<sup>82</sup> T. Adonis, (2015), p. 17-44; International Labour Organisation (ILO), 'Employment Relationship', *ILO Bulletin* (2016) [http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS\\_CON\\_TXT\\_IFPDIAL\\_EMPREL\\_EN/lang-en/index.htm](http://ilo.org/ifpdial/areas-of-work/labour-law/WCMS_CON_TXT_IFPDIAL_EMPREL_EN/lang-en/index.htm) accessed 13 July 2020.

<sup>83</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83.

<sup>84</sup> M. Potgieter, (2014), p. 20-120; A.M. Singh, 'Managing Employee Internet Abuse', 6(3) *South African Journal of Information Management* (2004), p. 1, 1-5.



and the BCEA if their social media communications were *bona fide* and no fair procedures were employed prior to such dismissals.<sup>85</sup> Accordingly, it is submitted that the BCEA should be amended to clearly provide adequate provisions for the employees' dismissals in relation to social media-related misconduct in the South African workplace.<sup>86</sup>

#### **4.4. The procedural and substantive fairness under Promotion of Equality and Prevention of Unfair Discrimination Act**

The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>87</sup> prohibits unfair discrimination of all persons in South Africa. Precisely, PEPUDA provides that no state or any person may unfairly discriminate against any other person<sup>88</sup> on the grounds of race,<sup>89</sup> gender<sup>90</sup> and disability.<sup>91</sup> PEPUDA promotes equality and human dignity of all persons in the South African workplace and it reinforces sections 9 and 10 of the Constitution of the Republic of South Africa, 1996 (Constitution). If it is established that an employer has unfairly discriminated against their employee on the grounds of race, gender and/or disability, and subsequently dismissed that employee for social media-related misconduct after he or she complained in respect thereof on social media, such dismissal will be substantively and procedurally unfair.<sup>92</sup> It is, however, very difficult to determine the fairness of social media-related dismissals under PEPUDA since it does not have any provision for procedural and substantive fairness in respect of social media-related misconduct dismissals of employees in the South African workplace. Although PEPUDA prohibits hate speech and harassment and provides some guidelines for the determination of fair discrimination,<sup>93</sup> it does not have any provisions for social media-related misconduct and related dismissals in the South African workplace. On this account, PEPUDA should be amended to enact adequate provisions for procedural and substantive fairness in respect of social media-related misconduct dismissals of employees in the South African workplace.

### **5. Selected problems associated with social media communications**

#### **5.1. Liability for innocent and reckless statements on social media**

Paul Chambers was amongst the first employees who abused his social media platform stating that: "Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky-high!".<sup>94</sup> *Chambers* case illustrates that any social media post, even one intended as a joke, may have far-reaching consequences on any person including employees who post reckless comments about the employer or other persons on social media platforms. Employees who abuse social media in the workplace could be dismissed for social media-related misconduct. Social media abuse could give rise to reputational damage and other negative consequences to the employer or any other affected persons. For instance, in *Chambers* case, the Crown Prosecution Services was accused of wasting public funds by prosecuting this case as some thought it was too trivial.<sup>95</sup> The district judge convicted and fined Chambers for posting a menacing

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<sup>85</sup> M. Potgieter, (2014), p. 20-120; K. Young, 'Policies and Procedures to Manage Employee Internet Abuse', 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471.

<sup>86</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471.

<sup>87</sup> 4 of 2000 as amended (PEPUDA), sections 6-15 read with sections 24-29.

<sup>88</sup> Section 6 of the PEPUDA.

<sup>89</sup> Section 7 of the PEPUDA.

<sup>90</sup> Section 8 of the PEPUDA.

<sup>91</sup> Section 9 of the PEPUDA.

<sup>92</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471; R. Davey, 6 *De Rebus* (2012), p. 80, 81-83.

<sup>93</sup> Sections 10-15 of the PEPUDA.

<sup>94</sup> *R v. Paul Chambers* where Paul Chambers was initially found guilty of sending a menacing tweet in 2010 and later won his appeal against his conviction in *Chambers v Director of Public Prosecutions* [2012] EWHC 2157 (QB) (*Chambers* case).

<sup>95</sup> *Chambers* case paragraph 2157.

tweet and derogatory comments on his social media platform. Furthermore, Chambers' initial defence that his post was a mere "joke" got rejected on the basis that his tweet was regarded as menacing since the airport staff were afraid of the posted derogatory comments. In this regard, the senior prosecutor issued guidelines stipulating how posts on social media platforms should be dealt with.<sup>96</sup> As earlier stated, Chambers' subsequent appeal was successful and his conviction was set aside. Nevertheless, Chambers' trial and initial conviction for his reckless joke on a social media platform shows that one can be held liable even for their innocent comments that are posted on social media.

An employee at Netcare Linksfield Hospital (Carmen Hartmann) was dismissed for a social media-related misconduct at her workplace.<sup>97</sup> Hartmann attacked President Jacob Zuma on social media after his wife was admitted at the hospital for a medical procedure.<sup>98</sup> The employee breached the health profession rules by revealing the details of the medical treatment of Zuma's wife without her consent as the patient. The employer stated that the employee had breached the code of practice of the Healthcare World and contravened relevant legislation as well as company policies. Furthermore, the employer argued that the employees' conduct was contrary to the values of the company and its commitment to maintaining confidentiality of all patients' details. The employee was subsequently dismissed for social media-related misconduct. Although Hartmann's conduct was not expressly prohibited in the LRA and its Code of Good Practice, her dismissal for social media-related misconduct and contravening the code of practice of the Healthcare World was fair and justifiable since she unethically discussed the internal issues of her workplace on a social media platform. This case shows that an employee that post innocent and/or reckless comments on social media will be liable for social media-related misconduct in the South African workplace.

In relation to the workplace, it is important to note that employees share various information on social media platforms during and outside office working hours and such information is usually viewed online by a large number of people at a time.<sup>99</sup> One of the problems associated with such social media posts is that many employees are ignorant of, and/or do not consider the liability and consequences that could ensue from their posts.<sup>100</sup> The statements made on social media platforms by employees, for instance, on Facebook may constitute an unlawful conduct when they post derogatory comments in the workplace during office working hours about their employer, fellow employees or other persons.<sup>101</sup> In this regard, employers may dismiss or suspend their employees for inappropriate, racist or insensitive social media posts.<sup>102</sup> Such social media posts may also warrant disciplinary sanctions against the offenders.<sup>103</sup> Thus, if an employee is dismissed or suspended for his or her inappropriate, racist or insensitive social media posts, such dismissal or suspension will be fair and justifiable under the LRA.

In *Cliff v. Electronic Media Network (Pty) Ltd*,<sup>104</sup> Mr Gareth Cliff was relieved of his duties

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<sup>96</sup> *Chambers* case paragraph 2157.

<sup>97</sup> M. Malefane, 'Nurse Fired over Zuma and Wife Facebook Rant', (2017) <https://www.sowetanlive.co.za/news/2017-03-07-nurse-fired-over-zuma-and-wife-facebook-rant/> accessed 15 July 2020.

<sup>98</sup> M. Malefane, 'Nurse Fired over Zuma and Wife Facebook Rant', (2017) <https://www.sowetanlive.co.za/news/2017-03-07-nurse-fired-over-zuma-and-wife-facebook-rant/> accessed 15 July 2020.

<sup>99</sup> B. Barry, 'The Cringing and the Craven: Freedom of Expression in, Around, and Beyond the Workplace', 17(2) *Business Ethics Quarterly* (2007), p. 263, 265–296; G. Mushwana, and H. Bezuidenhout, 16(1) *Southern African Journal of Accountability and Auditing Research* (2014), p. 63, 64–72; J.S. Hoy, *Employee Behaviour in Social Media Environments Impacting Corporate Reputational Risk* (Master of Business Administration, University of Pretoria 2012), p. 2-29.

<sup>100</sup> N. Moosa, and M. Vries, 'The Laws Around Social Media', 15(9) *Without Prejudice* (2015), p. 39-40.

<sup>101</sup> B. Barry, 17(2) *Business Ethics Quarterly* (2007), p. 263, 265–296; G. Mushwana, and H. Bezuidenhout, 16(1) *Southern African Journal of Accountability and Auditing Research* (2014), p. 63, 64–72.

<sup>102</sup> G. Mushwana, and H. Bezuidenhout, 16(1) *Southern African Journal of Accountability and Auditing Research* (2014), p. 63, 64–72; Anonymous, 'Yes, Your Boss Can Fire You for Social Media Posts', (2016) <https://www.news24.com/you/Archive/yes-your-boss-can-fire-you-for-social-media-posts-20170728-2> accessed 15 July 2020.

<sup>103</sup> I. Pagura, 'Social Media and the Law', 24(1) *Journal of the Australian Traditional-Medicine Society* (2018), p. 41, 42–45; A. Mills, 'The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in 'Facebookistan'?', 7(1) *Journal of Media Law* (2015), p. 1, 2–35.

<sup>104</sup> [2016] 2 All SA 102 (GJ) (*Cliff* case); N. Pelletier, 'The Emoji that Cost \$20,000: Triggering Liability for Defamation on Social Media', 52 *Washington University Journal of Law & Policy* (2016), p. 227, 228–254.

on the Idols show<sup>105</sup> for commenting during the Penny Sparrow race debacle.<sup>106</sup> Cliff allegedly tweeted that people did not understand freedom of speech.<sup>107</sup> This led other people to make assumptions that he supported Sparrow's right to label black beachgoers as monkeys. As a result, Cliff was fired by his employer for social media-related misconduct. Put differently, Cliff was dismissed by his employer for allegedly posting racist comments on a social media platform and for bringing the employer's name into disrepute. Thereafter, Cliff lodged an urgent application to challenge his dismissal in the Johannesburg High Court<sup>108</sup> and M-Net was ordered to re-instate him.<sup>109</sup> This case clearly shows that an employee may be suspended or fired for exercising his or her constitutional right to freedom of expression on social media platforms. It appears Cliff's dismissal was not fair and justifiable since he did not directly contravene any Code of Good Practice by the employer or the provisions LRA. Therefore, it is imperative that social media-related misconduct should be adequately regulated to combat such unfair dismissals.<sup>110</sup> Social media legislation and/or regulation that is mainly aimed at curbing the misuse of social media by employees as well as protecting the employer's own business interests should be enacted in South Africa.

In *Radebe v. JD Group (Pty) Ltd*,<sup>111</sup> an employee was dismissed for posting insulting statements on Facebook after having been confronted by the employer regarding his poor time keeping and in-productive conduct which were both contrary to his employment contract. The Commission for Conciliation, Mediation and Arbitration<sup>112</sup> held that the employee should have exhausted internal measures instead of addressing his grievances on a social media platform. The Commission for Conciliation, Mediation and Arbitration also held that employees represent the face and voice of their companies. In relation to this, it was further stated that the employee's conduct indicated that he had no regard to the possible risks that could ensue to the company due to his reckless social media comments. The dismissal was subsequently upheld and regarded as fair and justifiable. This case shows that social media can be wrongly used by employees as an outlet to try and address their workplace problems.<sup>113</sup> When this occur, it gives rise to a conflict of interest in relation to the protection and balancing of the employer's rights to dignity and good name (business interests) and the employee's right to freedom of expression which empowers them to freely share their grievances.<sup>114</sup> However, in this instance, the employee was clearly wrong to insult the employer on social media without pursuing internal and other relevant measures to have his grievances addressed. Therefore, the dismissal was fair and justifiable because the employee was liable for a social media-related misconduct for bringing the employer's name into disrepute.<sup>115</sup>

Moreover, in *Motloung v. The Market Theatre Foundation*,<sup>116</sup> an employee was dismissed for posting hate speech statements that had a negative impact on the employer on Facebook. The CCMA held that the employee abused social media to foster hate speech in the workplace. It is obvious that the employee overstepped the boundaries of freedom of expression by posting hate speech statements on social media.<sup>117</sup> The CCMA held that the dismissal was fair and justified since the employee was

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<sup>105</sup> The South African Idols is a television show on the South African television network M-Net and the show has participants who compete to be selected as a best singer in South Africa.

<sup>106</sup> The Penney Sparrow debacle came to the fore when Sparrow made comments on her social media platform and referred black people as monkeys. Consequently, Sparrow was dismissed by her employer for social media-related misconduct, as the comments were seen as racist.

<sup>107</sup> *Cliff* case paragraphs 1-37.

<sup>108</sup> *Cliff* case paragraph 2.

<sup>109</sup> *Cliff* case paragraph 37.

<sup>110</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83.

<sup>111</sup> [GAJ12297-14] (*Radebe* case).

<sup>112</sup> The Commission for Conciliation, Mediation and Arbitration (CCMA).

<sup>113</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471; R. Davey, 6 *De Rebus* (2012), p. 80, 81-83.

<sup>114</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471.

<sup>115</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471.

<sup>116</sup> [GAJB4458-11] (*Motloung* case).

<sup>117</sup> M. Potgieter, (2014), p. 20-120; K. Young, 26(6) *Computers in Human Behavior* (2010), p. 1467, 1468-1471; R. Davey, 6 *De Rebus* (2012), p. 80, 81-83; M. Heins, 'The Brave New World of Social Media Censorship', 127(135) *Harvard Law Review Forum* (2013-2014), p. 325, 326-330.

liable for advocating for hate speech on social media in contravention of the Constitution.<sup>118</sup>

Both *Radebe* and *Motloung* cases show that employees sometimes do not consider the negative consequences of their actions on social media platforms. For this reason, the author argues that the dismissal of employees for their reckless comments that are posted on social media platforms is mostly likely to be substantively and procedurally fair.<sup>119</sup>

## 5.2. Liability for derogatory statements on social media

Derogatory statements that are posted on social media platforms by employees may fairly result in the dismissal of such employees by their employers for social media-related misconduct.<sup>120</sup> The CCMA stipulates that derogatory posts that are carelessly made by employees on social media platforms may result in the dismissal of such employees.<sup>121</sup> However, such dismissals of employees for social media-related misconduct must be fairly conducted to avoid unfair dismissals in the South African workplace.<sup>122</sup> In *Media Workers Association of SA obo Mvemve v. Kathorus Community Radio*,<sup>123</sup> an employee criticised the organisation's board on social media and alleged that its station manager was a criminal. In response to this, the employer issued a final written warning against the employee and stipulated that the employee must post an apology on Facebook but he refused to do so. Thereafter, the employee was dismissed for failing to comply with the employer's instructions and conditions. The CCMA correctly held that the employee was fairly dismissed since he posted derogatory and unfounded allegations against the employer on Facebook. The employee made untrue statements against his employer on Facebook and this constituted a social media-related misconduct. Therefore, the decision of the CCMA was correct, fair and justified since the derogatory remarks tarnished the reputation of the employer.<sup>124</sup>

In *Smith v Partners in Sexual Health*,<sup>125</sup> a manager accidentally accessed the employee's e-mail and intentionally and unfairly read and printed some of her e-mails. The manager found e-mails between the employee and former employees, as well as persons outside the organisation, which made reference to internal confidential matters. The employee was charged with a number of offences, including bringing the employer's name into disrepute. The employee argued that the e-mails were accessed in violation of her right to privacy and in contravention of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA). The CCMA held that the intentional access of the employee's email by the manager contravened the provisions of the RICA and the employee's right to privacy as enshrined in the Constitution. Although the *Smith* case did not expressly deal with social media-related posts, the CCMA correctly held that the alleged derogatory evidence obtained by the manager through the illegal access to the employee's private e-mail was inadmissible because it infringed upon her constitutional right to privacy. Consequently, the employee's dismissal was procedurally and substantively unfair.

Although it is clear that employees can be dismissed for their social media-related misconduct, the dismissal of the employee in the *Smith* case was procedurally and substantively unfair because the manager accessed the employee's private e-mail account without her prior consent.<sup>126</sup> Therefore, there is a need for a careful regulation of social media-related misconduct to protect both the employee's rights and the employer's interests in the workplace. This could be done by enacting a specific social media legislation or amending the LRA and other related labour laws in order to expressly prohibit employees, employers and all relevant persons from misusing social media in the

<sup>118</sup> See section 16.

<sup>119</sup> *R v VL (NBCRFI)* (RFBC 35099 31 August 2015).

<sup>120</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83; M. Heins, 127(135) *Harvard Law Review Forum* (2014), p. 325, 326-330.

<sup>121</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83; M. Heins, 127(135) *Harvard Law Review Forum* (2014), p. 325, 326-330.

<sup>122</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83; M. Heins, 127(135) *Harvard Law Review Forum* (2014), p. 325, 326-330.

<sup>123</sup> (2010) 31 ILJ 2217 (CCMA).

<sup>124</sup> M.S. Hornung, 'Think Before You Type: A Look at E-mail Privacy in the Workplace', 11(1) *Fordham Journal of Corporate & Financial Law* (2005), p. 115, 116-160.

<sup>125</sup> (2011) 32 ILJ 1470 (CCMA) (*Smith* case).

<sup>126</sup> *Smith* case paragraph 1470.

workplace. Additionally, such legislation should also prohibit employers from adopting any policies or codes of good practices that unlawfully interferes with their employees' rights to freedom of expression, privacy, dignity and freedom of association in the workplace.<sup>127</sup> The other option is to carefully and expressly regard social media as a self-regulatory practice in South Africa. Failure to adopt any of the stated options could result in unfair consequences and dismissals of employees for social media-related misconduct in the South African workplace.<sup>128</sup>

## 6. Examples of employee misconduct through social media

Every employee has the responsibility to manage his or her social media platform well. Failure to do so could give rise to various negative consequences for social media-related misconduct.<sup>129</sup> Such misconduct occurs in various ways as discussed below.

### 6.1. Cyber-bullying by employees

Cyber-bullying is the use of Internet and digital technologies to send, post or share negative, harmful, false or threatening content or information about another person intentionally. It can be conducted through social media, messaging platforms, mobile phones and related gadgets as well as Internet platforms. In most instances, the perpetrator of cyber-bullying sends or posts content or messages that are intended to harm or embarrass another person on social media platforms.<sup>130</sup> The examples of cyber-bullying include malicious and/or threatening emails or short message service communications (sms) sent to the victim's phone or public platforms. It also include offensive comments that are posted by the perpetrator about an employee or employer on social media platforms.<sup>131</sup> Cyber-bullying may have a negative impact on the employee-employer relationship and it may affect the overall productivity of the employer's business<sup>132</sup> when an employee's morale and self-confidence is destroyed by cyber-bullying on social media.<sup>133</sup>

In *Juda Phonyogo Dagane v. South African Police Services*,<sup>134</sup> an employee who was a member of the South African Police Service made comments on Facebook which were construed as cyber-bullying, racist and derogatory against white people in South Africa. Such commentary was made on the Facebook page of Julius Malema, a leader of the Economic Freedom Fighters political party. An investigation was conducted by the employer and a disciplinary enquiry was held for the employee's social media-related misconduct. The employee was found guilty of the misconduct and dismissed. However, the employee was not satisfied with the verdict and he referred the matter of unfair dismissal to the Safety and Security Sectoral Bargaining Council (SSSBC) which found that his dismissal was fair. The employee also referred the matter to the Labour Court for further review. The Labour Court held, *inter alia*, that the use of racial language is unacceptable. The Labour Court considered the serious nature of the misconduct and the employee's review application was dismissed.<sup>135</sup> The conduct of the employee in *Dagane* case constitutes cyber-bullying since it was harmful, malicious and threatening to a specific racial group (white people) and this could have negatively impacted other white co-employees of the South African Police Service. Therefore, the

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<sup>127</sup> A. Marsoof, 'Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression', 19(2) *International Journal of Law and Information Technology* (2011), p. 110, 111-132.

<sup>128</sup> C. Mischke, 'Social Networks, Privacy and Dismissal: Facebook, Twitter Et Al: The Employer's Reputational Risk', 21(2) *Contemporary Labour Law* (2011), p. 11, 12-17.

<sup>129</sup> C. Mischke, 21(2) *Contemporary Labour Law* (2011), p. 11, 12-17.

<sup>130</sup> C. Piotrowski, 'From Workplace Bullying to Cyberbullying: The Enigma of E-Harassment in Modern Organizations', 30(4) *Organization Development Journal* (2012), p. 44, 45-53.

<sup>131</sup> C. Piotrowski, 30(4) *Organization Development Journal* (2012), p. 44, 45-53.

<sup>132</sup> C. Piotrowski, 30(4) *Organization Development Journal* (2012), p. 44, 45-53; M. Potgieter, (2014), p. 20-120; A.M. Singh, 6(3) *South African Journal of Information Management* (2004), p. 1, 1-5.

<sup>133</sup> C. Piotrowski, 30(4) *Organization Development Journal* (2012), p. 44, 45-53; M. Potgieter, (2014), p. 20-120; A.M. Singh, 6(3) *South African Journal of Information Management* (2004), p. 1, 1-5.

<sup>134</sup> [2018] ZALCJHB (16 March 2018) (*Dagane* case), shows that racist comments that are posted on social media constitutes a serious social media-related misconduct and a fair ground for dismissal in the workplace.

<sup>135</sup> *Dagane* case paragraphs 50-52.

employee was correctly dismissed for social media-related misconduct in the South African workplace.

## 6.2. Harassment

Harassment include threatening, yelling, insulting or cursing at a victim in public or in private, which is deliberately and/or intentionally done by the perpetrator. Harassment could also mean an act where one person subjects the other to hostile or prejudicial remarks and/or actions. Harassment further entails the systematic conduct of annoying and/or unwanted actions, including threats and unreasonable demands that are made by one person against another person or a group of persons.<sup>136</sup> This is usually done for racial prejudice, personal malice and/or to force someone to quit a job or grant sexual favours to the perpetrator. Examples of harassment include *quid pro quo* sexual harassment and hostile work environment harassment. In terms of the Protection from Harassment Act,<sup>137</sup> harassment means directly or indirectly engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonable means.<sup>138</sup> For instance, this is done by following, pursuing or accosting the complainant outside of, or near the building or place where the complainant resides, works, carries on business or studies.<sup>139</sup> Furthermore, harassment is committed by engaging in verbal, electronic or any other communication aimed at offending the complainant or causing hostility and prejudice to that person.<sup>140</sup> Harassment is also effected through sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or leaving such objects where they will be found by, or given to the complainant with the aim of causing them harm.<sup>141</sup> If an employer or employee engages in any conduct that amounts to sexual harassment or in electronic communication that is hostile and prejudicial to others on social media, they will be liable for social media-related misconduct.<sup>142</sup> Moreover, an employer may be held liable for any harassment that is perpetrated by his or her employee against other employees or other persons through social media in the South African workplace during office working hours.<sup>143</sup> This constitutes a serious misconduct that may lead to the dismissal of the perpetrator for social media-related misconduct in the South African workplace.

In *Bramford and Others v. Energiser (SA) Ltd*,<sup>144</sup> employees circulated pornographic and sexual offensive material using the company's Internet system in the workplace.<sup>145</sup> The arbitrator submitted that the employee's actions were not socially acceptable and that the jokes and material circulated between the employees in the workplace were so offensive. The circulated material was also said to be having a harassment and negative racial connotation that is unwanted in the South African workplace.<sup>146</sup> The arbitrator submitted further that although employees may enjoy the circulated material in private, such practices cannot be condoned in the South African workplace.<sup>147</sup> It is obvious that the distribution of pornographic material by employees in the workplace is not acceptable and their dismissal for a social media-related misconduct was justified. In this regard, both the court and the Commission for Conciliation, Mediation and Arbitration rejected the employees' defence of unlawful invasion of privacy by the employer and correctly held that the conduct of the employees was offensive and damaging to the reputation of the employer.

<sup>136</sup> The Free Dictionary, 'Harassment', (2016) <https://legal-dictionary.thefreedictionary.com/harassment> accessed 18 July 2020.

<sup>137</sup> 17 of 2011 (Harassment Act).

<sup>138</sup> Section 1 of the Harassment Act.

<sup>139</sup> Section 1 of the Harassment Act.

<sup>140</sup> Section 1 of the Harassment Act.

<sup>141</sup> Section 1 of the Harassment Act.

<sup>142</sup> Section 1 of the Harassment Act.

<sup>143</sup> D. Subramanien, and N. Whitear-Nel, 'A Fresh Perspective on South African Law Relating to the Risks Posed to Employers when Employees Abuse the Internet', 37(1) *South African Journal of Labour Relations* (2013), p. 9, 10-20.

<sup>144</sup> 2001 12 BALR 1251 (P) (*Bramford* case).

<sup>145</sup> *Bramford* case paragraph 1251.

<sup>146</sup> *Bramford* case paragraphs 20-46.

<sup>147</sup> *Bramford* case paragraphs 20-46.

Any harassment that is perpetrated through social media could create an abusive and hostile working environment for the employee that was subjected to the harassment.<sup>148</sup> Perpetrators of harassment in the workplace are liable for a social media-related misconduct and the courts may impose a protection order, warrant of arrest and an order for the search and seizure of documents or weapons that are in possession of such perpetrators.<sup>149</sup> The Harassment Act stipulates further that the harassment offenders are liable to a fine not exceeding R10 000 and/or imprisonment for a period ranging from three months but not exceeding five years.<sup>150</sup>

### 6.3. Employee productivity and evaluation

The term “productivity” could entail the effectiveness of one’s productive effort towards their work or industry, that is aimed at bringing, creating or enhancing their goods and services. Productivity also refers to the efficiency of an employee in executing his or her duties and responsibilities in order to produce the required outcome according to the set standards of the employer.<sup>151</sup> Employees gain access to company equipment such as computers and the Internet to complete their given tasks more efficiently and effectively.<sup>152</sup> However, the excessive time that is spent on social media platforms by employees in the workplace could affect their productivity.<sup>153</sup> Moreover, the time that is wasted by employees on social media platforms could result in the loss of profit to the employer.<sup>154</sup> Put differently, excessive use of social media platforms by employees in the workplace could give rise to the loss of productivity and profits on the part of the employer.<sup>155</sup> The excessive and unlawful use of social media in the workplace can also overburden the employer’s computer and Internet systems.<sup>156</sup> This has prompted other employers to block access to social media sites through company computers and other electronic gadgets at their workplaces.<sup>157</sup> However, this does not entirely prevent employees from accessing social media through their smartphones.<sup>158</sup> The employees always have some ways to get around the controls of their employer’s computers in order to gain access to blocked websites in the workplace.<sup>159</sup> This abuse of social media in the workplace during office working hours has culminated in low productivity and security risks on the employers, especially, when employees share private and non-public data of the company to external persons. Some employers monitor how their employees utilise social media platforms in the course of their working hours to minimise the loss of profits due to poor productivity in the workplace.<sup>160</sup> Although some persons argue that placing restrictions on the use of social media by employees in the workplace violates, *inter alia*, the employees’ rights to freedom of association and freedom of expression,<sup>161</sup> other employers have either restricted or totally banned the use of social media by their employees in the workplace during office working hours to curb poor productivity and related malpractices of their

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<sup>148</sup> J. Gelms, 87(1) *Wash. L. Rev* (2012), p. 250-279.

<sup>149</sup> Sections 10-18 of the Harassment Act.

<sup>150</sup> Section 18 of the Harassment Act.

<sup>151</sup> A. Ferreira, and T. Du Plessis, ‘Effect of Online Social Networking on Employee Productivity’, 11(1) *South African Journal of Information Management* (2009), p. 1, 2-11.

<sup>152</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, ‘Social Networking and its Effects on Companies and their Employees’, *Neumann Business Review* (2011), p. 1, 2-11; F. Awolusi, ‘The Impacts of Social Networking Sites on Workplace Productivity’, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>153</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 4-11.

<sup>154</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 4-11.

<sup>155</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 4-11.

<sup>156</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>157</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>158</sup> R. Davey, 6 *De Rebus* (2012), p. 80, 81-83.

<sup>159</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>160</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>161</sup> B.L.S. Coker, ‘Freedom to Surf: The Positive Effects of Workplace Internet Leisure Browsing’, 26(3) *New Technology, Work and Employment* (2011), p. 238, 239-246.

employees. For instance, employers could face lawsuits, a decline in employee morale and bad publicity due to social media-related misconduct of their employees.<sup>162</sup> This could be detrimental on the business of the employer and it could result in the loss of business profits.<sup>163</sup> As a result, any employee who violates their employer's workplace rules and restrictions on social media will be liable for social media-related misconduct.

The misuse of social media by employees in the workplace during office working hours negatively affects their productivity as they could be ignoring their core duties and responsibilities within the workplace while paying much attention to social media interactions.<sup>164</sup> If such behaviour is not properly regulated, it may negatively affect the employees' productivity in the workplace.<sup>165</sup> The perpetrators of social media-related misconduct in this regard could be fairly dismissed by their employers.

## 7. Concluding remarks

The article has unpacked the procedural and substantive fairness of social media-related dismissals of employees in the workplace in accordance with the South African employment laws. In this regard, it was noted that the LRA, the BCEA, the PEPUDA and the Employment Equity Act do not have specific provisions and/or guidelines for procedural and substantive fairness in respect of social media-related misconduct in the South African workplace. Consequently, this gap has at times, culminated into several unfair dismissals of employees for social media-related misconduct in the South African workplace. The article has also exposed various problems associated with social media-related misconduct in the workplace and related flaws in the LRA, the BCEA, the PEPUDA and the Employment Equity Act. In addition, some examples of social media-related misconduct by employees such as harassment, cyber-bullying and poor productivity were discussed. It was argued that any dismissal of employees for social media-related misconduct should be procedurally and substantively fair. Accordingly, employers should carefully adopt specific guidelines and/or codes of good practice for social media-related misconduct in the workplace. This could be done by amending the LRA to provide specific guidelines for procedural and substantive fairness in respect of social media-related misconduct in the South African workplace. Such provisions should further provide how employees could utilise social media in the workplace without violating their employers' social media guidelines and/or codes of good practice. This approach could promote and foster procedural and substantive fairness in respect of social media-related misconduct dismissals of employees in the South African workplace.

Moreover, notwithstanding the recent changes that have occurred in the employment workplace globally, particularly with the advent of cutting edge technology, the fourth industrial revolution, social media platforms and the adoption of various labour-related legislation that directly and/or indirectly impact on the employer-employee (employment) relationship, more still needs to be done to curb unfair, unlawful and unconstitutional dismissals of employees for social media-related misconduct in the South African workplace. The aforesaid changes have given rise to a wide range of conduct that could potentially amount to more than general misconduct on the part of the affected employees, such as social media-related misconduct that is currently not expressly regulated *ex lege*. While this does not mean that on each occasion of such changes, policy makers should haphazardly adopt new legislation or merely amend current legislation, as that could create overlapping challenges, double-jeopardy and over-criminalisation problems, it is submitted that the relevant employment laws and/or Codes of Good Practice must be adequate and carefully revamped from time to time to robustly deal with the unavoidable changes that impacts on the employer-employee

<sup>162</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>163</sup> D. Baker, N. Buoni, M. Fee, and C. Vitale, *Neumann Business Review* (2011), p. 2, 2-11; F. Awolusi, 28(1) *The Journal of Technology, Management, and Applied Engineering* (2012), p. 1, 2-5.

<sup>164</sup> A.G. Munene, and Y.M. Nyaribo, 'Effect of Social Media Pertication in the Workplace on Employee Productivity', 2(2) *International Journal of Advances in Management and Economics* (2013), p. 141, 142-149.

<sup>165</sup> A. Ferreira, and T. Du Plessis, 11(1) *South African Journal of Information Management* (2009), p. 1-11.



(employment) relationship such as the use of social media platforms in the workplace and the possible social media-related misconduct that could ensue in respect thereof. The other pragmatic approach is to statutorily empower employers to adopt their own comprehensive Codes of Good Practice and penalise those that do not comply, so as to effectively regulate and curb all general misconduct and/or new specialised misconduct such as social media-related misconduct in the South African workplace. In this regard, it is submitted that employers should be statutorily empowered to enact some *ex contractu* provisions and/or best practices on social media-related misconduct in their Codes of Good Practice to enable the reasonable and fair use of social media platforms by both employers and employees in the South African workplace during working hours. Such provisions and/or best practices must be adequate, reasonable and consistently applied to all employees in the South African workplace.

In addition to the usual test applicable to procedural and substantive fairness as outlined in the Code of Good Practice: Dismissal under the LRA, the courts should carefully guide employers, policy makers and other relevant persons on the extent that additional procedural and substantive requirements could be employed in cases of social media-related misconduct and related dismissals in the South African workplace.

The other option is to amend the BCEA, PEPUDA and the Employment Equity Act to clearly provide adequate provisions for the employees' dismissals in relation to social media-related misconduct in the South African workplace. Such provisions should adequately provide for procedural and substantive fairness in respect of social media-related misconduct dismissals of employees in the South African workplace. It is hoped that the relevant authorities will consider the exposed flaws and gaps as well as the recommendations made in this article to improve the enforcement of the employees' rights and procedural and substantive fairness in respect of employee dismissals for social media-related misconduct in the South African workplace.

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