Social media and employee speech: the risk of overstepping the boundaries into the firing line

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Abstract

The influence of social media has filtered through to every facet of our daily lives, including the workplace and employment relationships. There are an increasing number of cases where the messages of employees posted on social network sites have led to disciplinary proceedings or even dismissal. The traditional 'water cooler discussions' have now moved online where they have a greater impact – for all practical purposes there is now a permanent written record of communication and a potentially wider audience can be reached. The right to freedom of speech is not an absolute right – it has to be weighed against other rights, including the right to a good name and the right to privacy. In terms of an employment contract an employee undertakes to promote the interests of the employer. This means the right to freedom of speech must also be balanced against the rights of the employer. The misuse of social media by employees who post defamatory, undesirable, or offensive comments may defame the employer or co-employees and negatively affect the working environment. This article is a comparative study to determine how the courts have demarcated the boundaries of freedom of speech on social networking sites used in the workplace in order to determine whether there are guidelines that can be applied to the South African context.

INTRODUCTION

In an early decision considering whether the termination of an employee's employment for messages posted on Facebook was unfair, the Fair Work Commission said that 'it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity to the consequences'. (*Dianna Smith T/A Escape Hair Design v Sally-Anne Fitzgerald* [2010] FWA 1422).

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Social media has been incorporated into our daily lives in every area imaginable. But it can also have a tremendous impact on the workplace and employment relationships. There are an increasing number of cases where the messages of employees posted on social networking sites have led to disciplinary proceedings or even dismissal.[1] The traditional 'water cooler discussions' have now moved online where they have greater impact – for all practical purposes there is now a permanent written record of all communication. This means potentially wider audiences, particularly when using search engines that can provide continuing publicity to a comment on

[1] In the UK Lisa McCance tweeted about her employer and asked readers to bomb the nursery with hashtags such as #sackthebitch and #cow. When confronted and threatened with disciplinary proceedings, Ms McCance tweeted her views using the hashtag #couldn'tgiveaf–k #spinonit. Her employment was terminated and she is now banned from working with children. Stevens 'The dangers of social media in the workplace' available at: https://inforrm.wordpress.com/2015/05/20/the-dangers-of-social-media-in-the-workplace-aimee-stevens/ (last accessed 7 June 2015). Recently, there were a number of South Africa cases falling into this category. The DA MP in parliament and shadow Minister of Safety and Security, Diane Kohler Barnard, reposted on her Facebook wall a post in which the original author praised former apartheid State President PW Botha. A twitter storm raged after the publication of her post, she was removed from her position and demoted to a shadow Minister of Public Works. During disciplinary proceedings she was found guilty of misconduct and her membership of the party was terminated. Britton & Qukula 'Why the DA decided to dismiss Dianne Kohler Barnard' available at: http://www.capetalk.co.za/articles/6131/da-dianne-kohler-barnard (last accessed 1 November 2015). In another case, the Equality Court ordered Penny Sparrow to pay a R150 000 fine to the Oliver and Adelaide Tambo Foundation for her controversial Facebook comment in which she compared black beach-goers to monkeys. 'News24: Equality Court judgment served on Sparrow's daughter' available at: http://www.news24.com/SouthAfrica/News/equality-court-judgment-served-on-sparrows-daughter-20160617 (last accessed 2 August 2016). In another case, Standard Bank suspended the economist Christ Hart pending an inquiry for the following tweet: 'More than 25 years after apartheid ended, the victims are increasing along with a sense of entitlement and hatred towards minorities'. Soon after this Mr Hart resigned. Salie 'Standard Bank suspends Chris Hart over "racist" tweet' available at: http://mg.co.za/article/2016-01-05-standard-bank-suspends-chris-hart-over-racist-tweet (last accessed 2 August 2016); 'News24: Standard Bank's Chris Hart resigns after "racist" Twitter row' available at: http://www.news24.com/SouthAfrica/News/standard-banks-chris-hart-resigns-after-racist-twitter-row-20160314 (last accessed 2 August 2016). After complaints received by the Judicial Service Commission for a controversial comment (that rape is part of black men's culture) on social media that was considered to be racist, Judge Jansen was placed on special leave pending the finalisation of the complaint in a trial before a judicial tribunal. 'Judge Jansen placed on special leave after complaint over Facebook post' available at: http://www.timeslive.co.za/local/2016/05/11/Judge-Jansen-placed-on-special-leave-after-complaint-over-Facebook-post (last accessed 2 August 2016).

a social networking site, coupled with automated programmes that 'mine' publicly available data on such sites.[2]

The right to freedom of speech is not absolute – it must be weighed against other rights, such as the right to a good name or reputation, the right to privacy, *etcetera*. In terms of an employment contract, an employee undertakes to promote the interests of the employer. This means that the employee's right to freedom of speech must also be balanced against the employer's rights. Employees often post messages on social networking sites or repeat the messages of other users, or 'like' or 'share' the comments of 'friends' without realising that they are defaming their employer or a fellow-employee. The misuse of social media by employees who post defamatory, undesirable or offensive comments may defame the employer or co-employees, and negatively affect the working environment. It is important for both employers and employees to understand the benefits and risks embedded in social media, and how to negotiate these often turbulent waters. This article will give an overview of the benefits and legal risks of social networking in the workplace. It is often difficult to determine where the line should be drawn between conduct that may be said to have taken place within or outside of the workplace. Although the conduct of an employee in any aspect of their life may potentially affect the reputation of their employer, the question is to determine at what point the after hours conduct of an employee constitutes a workplace issue?[3] A comparative study will be carried out referring to the position in the United Kingdm (UK), Australia and the United States of America (US) to determine how the courts have demarcated the boundaries of freedom of speech on social networking sites in the employment context, in order to determine whether there are guidelines that can be applied to South Africa.

DEFINITION OF SOCIAL MEDIA

Social media has been defined as websites and other forms of online electronic communication used by people to share information, ideas,

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2 McGoldrick 'The limits of freedom of expression on Facebook and social networking sites: a UK perspective' 2013 *Human Rights Law Review* 125 at 150.

3 Catanzariti 'Out of hours conduct – when is it a workplace issue?' available at: https://www.dlapiper.com/en/australia/insights/publications/2013/12/out-of-hours-conduct--when-is-it-a-workplace-issue/ (last accessed 7 January 2015); Lo 'The social networking dilemma: Safeguarding employer rights' 2014 available at: https://www.academia.edu/7080085/The_Social_Media_Dilemma_Safeguarding_Employer_Rights (last accessed 7 January 2015).

personal messages and other content (such as videos) with online communities and to develop social and professional contacts.[4] Social networking[5] sites have also been defined as

> …web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.[6]

The defining characteristic of social media appears to be the fact that the end user is given the opportunity to generate at least part of the content.[7] The content can be distributed by, for example, a web-based platform for the home computer or a scaled mobile platform for mobile 'smart' phones and tablets, *etcetera*.[8] The type of media is not as important as the 'social' aspect.[9] One of the key elements of social media seems to be the fact that the user can participate in the conversation of a community that is connected.

Social media is also loosely termed 'web 2.0',[10] and the one aspect common to all the definitions is interactivity.[11] But the development of the Internet

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4 See definition of social media at: http://www.merriam-webster.com/dictionary/social%20media (last accessed 16 January 2015). See also http://dictionary.reference.com/browse/social+media (last accessed 16 January 2015). Many businesses are utilising social media to generate sales.

5 The terms 'social network site' and 'social networking sites' are often used interchangeably in literature.

6 Boyd & Ellison 'Social network sites: definition, history, and scholarship' (2007) 13/1 *Journal of Computer-Mediated Communication* 210–230 available at: http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (last accessed 16 January 2015). The terms 'social networking sites' and 'social network sites' are both found in the literature and can be used interchangeably.

7 McGrady *McGrady on social media* (2011) 1–1.

8 *Ibid*.

9 *Ibid*.

10 Murray *Information technology law: the law and society* (2010) 108. We have left behind web 1.0 and moved to web 2.0. Murray points out that although examples of web 2.0 successes may be identified as social networking sites Facebook and MySpace, social messaging site Twitter, blogging site Blogger, and videosharing site, YouTube, there is no agreed definition of web 2.0.

11 Murray n 10 above at 109 explains that '[w]hereas much of web 1.0 was unidirective: content was held on central servers and directed to users, web 2.0 is about interactivity. Web 1.0 may be seen to be an extension of traditional broadcast media with content being radiated out from a central source. Sites such as BBC News, university websites like lse.ac.uk and traditional e-commerce sites such as Amazon simply…transported a traditional media/communications model to cyberspace. Web 2.0 sites such as eBay and Craigslist did not: they harnessed the network effects to create user interactivity on a previously unparalleled scale'.

from web 1.0 to web 2.0 has brought with it both challenges and opportunities. These developments are the classic double-edge sword: while web 2.0 came with many positive applications, it also facilitated social networking, the ease of access and the empowering of individuals to distribute their own content, which gave rise to negative activities such as defamation, cyberstalking and cyberbullying.[12] Before focusing on these potentially harmful effects against the backdrop of freedom of speech, I will contextualise the discussion by way of a brief overview of the advantages and risks of social media in the workplace.

ADVANTAGES AND RISKS FOR BUSINESS

Companies rely increasingly on social media for feedback on products, services, to gauge sentiment, and to create favourable brand impressions. Several surveys have revealed that a company's reputation is of the utmost importance.[13] Companies are encouraged to make use of social media in their marketing campaigns and to build a relationship with customers since 'customers would rather buy from a company that they feel they have a relationship with, one that's approachable and engaging, rather than some faceless corporation.'[14]

This contact with customers and the relationship that is built via social media also carry certain risks. The employees of the company who are engaged in forging relationships with the customers should know and understand the 'voice' of the company[15] and be able to speak with one voice.[16]

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12 Murray n 10 above at 109; McGrady n 7 above at 1–2.

13 Potgieter *Social media and employment law* (2014) 10. Statistical analysis indicates that social media is being used 'as a tool to listen to customers, monitor sentiment and create favourable brand impressions. Reputation was of the utmost importance in several surveys – in one, seeing a thirty-six per cent increase as a social business tactic between 2011 and 2012, according to execs surveyed by MIT Sloan School of Management and Deloitte University Press, and nearly tying with building brand affinity, in importance'.

14 Hendricks '5 Ways companies can use social media to manage customer relations' available at: http://www.techi.com/2013/06/5-ways-companies-can-use-social-media-to-manage-customer-relations/ (last accessed 7 January 2015).

15 'Employees active in social media are becoming brand ambassadors for their respective brands, often out-performing the brand themselves on social media. Brands need to understand how to empower these influencers to take the brand forward.' Stopforth *Social media landscape* 6 as quoted in Potgieter n 13 above at 34.

16 ' … A business that has a unique voice, a new perspective, and the quality products and services to back it up will quickly find their audience online. Interacting with customers and encouraging followers to respond to the content the business posts makes that company more of a person.' Hendricks n 14 above.

> How to do this internally has not been given as much attention by companies as time spent on their external marketing strategies. It has never been more important for companies to unite their employees behind their brand. Not only is this important for companies from a branding point of view, it is critical to manage the risk that extended exposure to social media poses.[17]

Apart from problems that misuse of social media by employees can cause within a company itself – for example, it may affect morale among employees if an employee falls victim to cyberbullying. There may also be adverse consequences for any business facing a situation where defamatory, undesirable or offensive comments are posted by one of its employees – all the more so if the company is named or receives complaints by social media users and customers. It takes years to build a company's goodwill and reputation – it could take hours, or less, to destroy it through social media misuse.[18]

The same way anyone is able to copy, distribute and comment on content posted on social media, a business can fall prey to so-called 'online persecution' by Internet users, which may lead to real and serious financial consequences.[19]

> On the other hand, overly controlling employees and restricting their social media presence also causes resentment from employees: 'his company trusts me with handling a multi-million rand hedge fund, but not with managing my own time on Facebook.' As trust and mutual respect are cornerstones of a successful employment relationship, employers must find the balance between trusting their employees and monitoring their behaviour to curb the kind of damage caused by employees in these public forums. Besides, employees have access to any site of their choosing, via their smartphones, rendering restrictions during working hours meaningless.[20]

Before we discuss the limits of freedom of speech in the workplace, it is important to highlight some aspects of the employer-employee relationship.

THE EMPLOYER-EMPLOYEE RELATIONSHIP

Most employer-employee relationships are based on a contract of employment which sets out the rights and obligations of both parties. To a large extent these contracts incorporate the principles of the common-law contract of employment

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17 Potgieter n 13 above at 10.

18 Ni 'The rise of social media issues in employment' available at: http://www.mst.com.au/news/the-rise-of-social-media-issues-in-employment (last accessed 17 January 2015).

19 *Ibid*.

20 Potgieter n 13 above at 35.

with additional provisions depending on the nature and circumstances of the employment. There are certain implied rights and duties of the respective parties to a common-law contract of employment.[21] On the one hand, the employer has an obligation to accept employees into service and to provide them with work, to pay the agreed remuneration, to comply with statutory duties, and most important of all, to provide a safe working environment.[22] On the other hand, the employee implicitly agrees to obey the employer, to make his/her services available to the employer, to be subordinate, to maintain bona fides, exercise reasonable care, and most importantly, refrain from misconduct.[23] So employees who misuse social media may be subject to disciplinary procedures or dismissal.

Should an employee who is seen as the voice of the organisation, makes defamatory allegations on social media, it can lead to vicarious liability[24] of the employer. To determine whether the employee acted within the scope of his or her employment (in cases where the act complained of was forbidden by the employer) would be to evaluate whether the specific conduct fell within the risk created by the employer.[25] As Midgley points out, where an employee sends out e-mails (containing defamatory comments about a co-worker) during office hours, it may be regarded as an instance in which an employer may incur vicarious liability for online defamation.[26]

DEFINING THE RIGHT TO FREEDOM OF SPEECH

Freedom of speech is a treasured human right in most democracies and in the process of communicating via any social network, a user is exercising his right to freedom of speech. In terms of article 10(1) of the European Convention on

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21 Du Plessis & Fouche *A practical guide to labour law* (7ed 2012) 5 point out that these include core rights of employees that may not be altered, save for constitutional changes.

22 In *Media 24 & Another v Grobler* (2005) 26 ILJ 1007 (SCA) 1028 par 77, it was held that due to psychological damages that the employee suffered at the hands of her employer (sexual harassment that occurred in the scope of her employment), she was entitled to sue both her employer and her harasser. See also Smit *Bullying in the workplace: towards a uniform approach in South African labour law* 2014 (unpublished doctoral thesis, University of the Free State) 258–259.

23 *Id* at 254; Du Plessis & Fouche n 21 above at 20.

24 An employer can be held liable for a delict committed by an employee, if (a) an employer–employee relationship existed when the delict was committed; (b) the employee committed a delict; and (c) the employee acted within the scope of his or her employment when the delict was committed. Neethling & Potgieter *Neethling-Potgieter-Visser Law of Delict* (7ed 2014) 339–343. For the position in English law, see Smith *Internet law and regulation* (2007) 213–217. The last-mentioned requirement is not always easy to determine.

25 *Minister of Police v Rabie* 1986 1 SA 117 (A) 134; *Minister van Wet en Orde v Wilson* 1992 3 SA 920 (A) 927–928; *Grobler v Naspers Bpk* 2004 4 SA 220 (C).

26 Midgley 'Cyberspace issues' in Burns *Communications law* (2009) 396.

Human Rights (ECHR), '[e]veryone has the right to freedom of expression. This right shall include the freedom to hold opinions to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[27] However, it is important to note that nowhere is freedom of speech an absolute right.[28] It is generally limited by other rights, such as the right to privacy, the right to a good name or reputation, etc.[29] In the workplace it is also limited by the rights of the employer. In such cases a balancing of rights needs to take place to determine which right enjoys precedence.[30] So, when users of social networks publish and share information with others online, their right to freedom of speech will normally be subject to the same restrictions and prohibitions that would normally apply off-line. When users of social networking sites share information, photos, and other materials, they may be held liable to others as 'publishers' of the information in the same way that offline content publishers such as radio or newspapers are responsible.[31]

The type of conduct that forms the main focus of this article is defamation and other forms of misconduct[32] falling under the umbrella term 'cyberbullying'. However, as emerges from the discussion, one of the legal issues with which the courts and tribunals are grappling is the scope of employees' right to privacy.

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27 See also Art 19(2) of the International Covenant on Civil and Political Rights (1966).

28 See also Art 19(3) of the International Covenant on Civil and Political Rights (1966).

29 In terms of s 16 of the Constitution of South Africa, 1996, everyone has the right to freedom of expression which includes freedom of the press and other media; the freedom to receive or impart information or ideas; of artistic creativity; academic freedom and freedom of scientific research. However, in terms of s 16(2), certain types of expression fall outside the realms of the right and therefore protection does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement of harm. In addition to this, the limitation clause in s 36 of the Constitution provides for the limitation of all rights to some extent as no right is absolute. In the UK, although the individual's rights found in art 10 of the European Convention of Human Rights and art 19 of the Universal Declaration of Human Rights are recognised and protected, defamation has always been subject to strict regulation. See also Murray n 10 above at 135.

30 See *S v Mamabolo* (*Etv and others intervening*) 2001 3 SA 409 (CC), 2001 5 BCLR 449 (CC).

31 Moloney 'Legal implications of using social networking sites' available at: http://www.beatricewhelan.ie (last accessed 16 January 2015).

32 Racist remarks and hate speech are not protected in terms of s 16 of the Constitution and it speaks for itself that it will fall into the category of offensive speech and misconduct.

RESTRICTIONS ON FREE SPEECH: DEFAMATION AND CYBERBULLYING

Defamation law attempts to find a balance between two often conflicting rights – an individual's right to a good name or an unimpaired reputation,[33] and another's right to freedom of expression.[34] In South African law, the right to a good name is protected as an independent personality right under the right to dignity in section 10 of the Constitution of the Republic of South Arica, 1996, (the Constitution).[35] The law of defamation lies at the intersection between freedom of speech and the protection of dignity.[36] Defamation is the

> … wrongful intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation.[37]

Many employees do not realise that anyone who uses social media today, becomes a 'publisher' with all the attendant responsibilities and obligations. It does appear, however, that people labour under the misconception that if they post something privately, it cannot be seen.[38] It is important to note that anything posted online can make its way into the public domain:

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33 The right to a good name or reputation (*fama*), although being recognised as part of our common law, is not specifically mentioned in the Bill of Rights as a constitutionally protected right. However, it is generally accepted that the right to a good name forms part of and can be protected under the right to dignity in terms of s 10 of the Constitution. Neethling & Potgieter n 24 above at 330; Neethling *Neethling's law of personality* (2ed 2005) 27 fn 283; Roos 'Freedom of expression' in Van der Merwe (ed) *Information and communications technology law* (2008) 399 401. See also *Khumalo v Holomisa* 2002 5 SA 401 (CC) 418–419; *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1215.

34 The right to freedom of expression is guaranteed in s 16 of the Constitution. *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1207. Burns n 26 above at 196; Burchell *Personality rights and freedom of expression* (1998) 139.

35 Neethling & Potgieter n 24 above at 109.

36 *Khumalo v Holomisa* 2002 5 SA 401 (CC) 418–419; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 6 SA 329 (SCA) 338; *Marais v Groenewald* 2001 1 SA 634 (T). Hastie 'Freedom of speech versus the right to dignity' available at: http://www.polity.org.za/article/freedom-of-speech-versus-the-right-to-dignity-2012-05-31 (last accessed 7 January 2015).

37 Neethling & Potgieter n 24 above at 352. The authors explain that from this definition the elements are as follows: the act (publication of words or behaviour), an injury to personality (the defamatory effect of words or behaviour), wrongfulness (the infringement of the personality right to good name) and intent (*animus iniuriandi*). Regarding last mentioned aspect, there are instances where *animus iniuriandi* has been replaced by negligence as requirements for defamation – see fn 113 as well as page 365.

38 Burrows 'Social media changes the disciplinary landscape' available at: http://mg.co.za/article/2013-11-01-00-social-media-changes-the-disciplinary-landscape (last accessed 7 January 2015).

> Anything sent digitally could become public, whether you intended it to or not. A nice rule of thumb would be if you would be comfortable putting it on a billboard or the seven o'clock news, it should be safe to say it online.[39]

According to Deosaran, another popular misconception[40] is that people believe that they are anonymous online, but there are ways and means of uncovering a person's identity. Anyone who links to, shares, or re-tweets a defamatory post will be liable for defamation as a 'publisher'. If, for instance, an employee happens to 'like' a Facebook post that is subsequently deemed defamatory, that simple 'click' could have far-reaching consequences as the employee is in actual fact 'publishing' the defamation.[41] The same applies to tagging slanderous pictures with erroneous or defamatory captions.[42]

Anyone who republishes a defamatory comment will be equally as liable for such a defamatory comment as the person who originally published it. So, disseminating a defamatory comment by linking to it, sharing it, re-tweeting it or clicking the 'like' button,[43] will be the equivalent of re-publishing the defamatory statement. This is in line with the established principle that everyone who repeats, confirms or draws attention to a defamatory statement will be held responsible for its publication.[44]

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39 *Ibid*. Landsberg points out that if employees are not willing to have their pictures, names and views put on a poster next to the highway, they probably shouldn't be putting it online. The legal and reputational consequences are the same – 'You insta-twit-face – social media in the workplace' available at: http://www.seesa.co.za/posts-labour/you-insta-twit-face-social-media-in-the-workplace.html/ (last accessed 5 Feb 2015).

40 Deosaran, an IT law specialist, as quoted in Burrows n 38 above explains that '[t]here are ways and means of finding the identities of people who have posted something online. Take for example the University of Cape Town Exposed blog, where three students tracked down the identity of the person behind an offensive anonymous blog …. Anyone wanting to lay charges against someone over anonymous online posts could also obtain a court order to get the social media platform to release the IP address of the originator and the Internet Service Provider to release the identity of the person using that IP address …With the new Protection from Harassment Act, the police and courts have the power to conduct these investigations on your behalf.'

41 Landsberg n 39 above.

42 This has been confirmed in *Ispa v Richter* 2013 6 SA 529 (GP).

43 Robbins 'What is the meaning of "like"?: The First Amendment implications of social media expression' 2013 *The Federal Courts Law Review* 127.

44 *Hassen v Post Newspapers* (Pty) Ltd 1965 3 SA 562 (W) 564–565; Neethling & Potgieter n 24 above at 354.

If employees use abusive language, including swearing or remarks that instigate racism,[45] religious discrimination,[46] sexism,[47] or any other discriminatory action, they will be guilty of misconduct.[48] An evaluation of the abusive nature of the remarks will depend on the context. Employees may also be held responsible for defamatory speech. This is not limited to social media platforms, but to any type of written communication, including e-mail.[49]

Defamation and misconduct of this nature may also fall under the umbrella term cyberbullying. Of course the evaluation will depend on the facts of each case. Cyberbullying is an umbrella term which has been defined to include amongst others, defamation:

> Cyberbullying techniques use modern communication technology to send derogatory or threatening messages directly to the victim or indirectly to others, to forward personal and confidential communication or images of the victim for others to see and to publicly post denigrating messages.[50]

Cyberbullying has been defined in the UK as an 'aggressive intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend himself'.[51] According to Badenhorst, there are numerous definitions of cyberbullying in South Africa, most of which include acts involving bullying and harassment through the use of electronic devices or technology.[52] Cyberbullying can be divided into four categories of behaviour: written-verbal behaviour (such as phone calls, text-messages, e-mails, instant messaging, and others); visual behaviour (*eg* posting, sending or sharing compromising pictures); exclusion (eg intentionally excluding someone from an online group); and impersonation (including stealing or revealing of personal information).[53]

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45 *National Union of Mineworkers & Another v CCMA* (2010) 31 ILJ 703 (LC).

46 *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA).

47 *Rautenbach v Relyant Retail (Pty) Ltd* (2005) 8 BALR (CCMA).

48 McGregor *Labour law rules* (2012) 131.

49 Landsberg n 39 above.

50 Privitera & Campbell 'Cyberbullying: the new face of workplace bullying?' (2009) 12 *Cyberpsychology and behavior* 395 396.

51 See Smit n 22 above at 58 fn 379 and the sources mentioned there.

52 Badenhorst 'Legal responses to cyberbullying and sexting in South Africa' 2011 *CJCP Issue Paper No 10* 1 2. She points out that there are a number of ways in which cyberbullying can occur, namely: text messages; picture/video clips (via mobile phone cameras); mobile phone calls; e-mail; chat rooms; instant messages; websites and blogs; social networking sites (such as Facebook, Twitter).

53 Smit n 22 above at 59 and the sources mentioned there. *Id* at 2 points out that six types of cyberbullying have been identified, namely harassment, denigration, impersonation or identity theft, cyberstalking, happy slapping and sexting.

Research has indicated that there appears to be a direct link between ordinary face-to-face bullying in the workplace and cyberbullying:[54] those who have experienced cyberbullying must also have reported face-to-face bullying. The aim of cyberbullies is to victimise other persons. Cyberbullies, other than face-to-face bullies, can now (due to technology) be physically distanced from their victims and the impact of their actions.[55] Due to the proliferation of the Internet, bigoted or defamatory messages can be sent with great ease to a much larger audience than ever before:

> Despite the overlap with traditional bullying, certain aspects are unique to cyberbullying, such as the fact that the perpetrator can conceal his or her identity and that it can transcend the boundaries of time and space. As harassment now increasingly occurs via electronic media, most of the messages can be retrieved outside the workplace – hence the suggestion that the negative consequences of virtual harassment are more wide spread than those of traditional forms of harassment, or bullying.[56]

Messages falling into this category could bring the employer into disrepute and be construed as bullying, irrespective of whether these remarks were made during working hours or in the workplace.[57] Employees who are subjected to messages that constitute cyberbullying may for example, complain[58] that the employer did not provide a safe working environment.[59] This may lead to claims on the basis of discrimination[60] or constructive or

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54 See Smit n 22 above at 56.

55 Privitera & Campbell n 50 above at 398.

56 Henry 'Beyond free speech: novel approaches to hate on the Internet in the United States' 2009 *Information and Communications Technology Law* 235; Smit n 22 above at 57 and the sources mentioned there.

57 Smit n 22 above at 57. In *Sedick & Another v Krisnay (Pty) Ltd* 2011 JOL 27445 (CCMA); (2011) 8 BALR 879 (CCMA) the commissioner found the summary dismissal based on Internet postings about so-called 'bad new managers' to be fair.

58 In *Media 24 & Another v Grobler* (2005) 26 ILJ 1007 (SCA) 1028 par 77, it was held that due to psychological damages that the employee suffered at the hands of her employer (sexual harassment that occurred in the scope of her employment), she was entitled to sue both her employer and her harasser. See also Smit n 22 above at 258–259.

59 In *Media 24 ibid,* the SCA held that an employer owed a legal duty to its employees to create and maintain a safe working environment and to take reasonable care for its employees' safety – ENSafrica 'Do you have a bully in the workplace?' available at: http://www.lexology.com/library/detail.aspx?g=f18fc836-949f-432e-9808-80480f6a3d3b (last accessed 7 January 2015). See also Du Plessis & Fouche n 21 above at 20; Smit n 22 above at 254.

60 In terms of s 6(3) of the Employment Equity Act 55 of 1998 (EEA), 'harassment' is recognised as a form of unfair discrimination and this behaviour is prohibited on the grounds of race, colour, sexual orientation, etc. As soon as an employer is notified of such an act, such an employer is required to consult with all relevant parties and to take the necessary steps to eliminate the alleged conduct. If an employer fails to take the

unfair dismissal because employers are vicariously liable for the conduct of one employee towards another in the course of their employment.[61]

LESSONS FROM CASE LAW REGARDING MISUSE OF SOCIAL MEDIA IN THE EMPLOYMENT CONTEXT

Social media policies and the impact of statements on the employer

The following two UK cases illustrate the point that social media and bullying policies should be updated to clearly stipulate what kind of behaviour is acceptable and extend the scope to include cyberbullying outside the workplace. In *Young v Argos Ltd*,[62] it was held not to be reasonable to dismiss an employee for 'liking' a comment made on Facebook that her manager was 'as much use as a chocolate teapot', and further that it had been her worst year at the company and she was glad her colleague had escaped. It was held that this was not serious enough to constitute bullying or harassment. However, in *Teggart v Tele Tech*,[63] an employee made vulgar comments about the sexual promiscuity of a colleague, refused to remove them, and instead posted further comments. This was considered harassment and his dismissal was considered to have been fair.[64]

In *Australia in Pearson v Linfox Australia Pty Ltd*,[65] an employee was dismissed on the ground, amongst others, that he refused to acknowledge Linfox's social media policy because he believed it infringed on his private life.[66] The employee's dismissal was upheld. The Fair Work Commission[67] held that a social media policy cannot be restricted to operate only in an 'at

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necessary steps to (1) eliminate the alleged conduct and (2) comply with the provisions of the EEA, such employer will be deemed to have also contravened the provisions of the EEA. In case of a contravention of the provisions of s 60, an employee may be entitled to compensation and/or damages. ENSafrica 'Do you have a bully in the workplace?' available at: http://www.lexology.com/library/detail.aspx?g=f18fc836-949f-432e-9808-80480f6a3d3b (last accessed 7 January 2015).

61 McGregor n 48 above at 119–126. See the discussion of vicarious liability below.

62 Unreported case – see discussion in Linklaters *Social media and the law: A Handbook for UK companies – January 2014* available at: http://www.linklaters.com (last accessed 7 January 2015).

63 [2012] NIIT 00704_11IT.

64 Linklaters n 62 above.

65 [2014] FWC 446. See also Mattson 'No more "foxing" on social media' available at: http://www.bartier.com.au/publications/publicationDetail.aspx?PublicationID=434 (last accessed 7 January 2015).

66 ' … because the policy sought to constrain his actions outside of working hours' at par 45.

67 The Fair Work Commission (FWC) is the Australian industrial relations tribunal created by the Fair Work Act 2009. It was formerly known as Fair Work Australia (FWA).

work' context. A social media policy can seek to prevent employees damaging the business or releasing confidential information whether the employee engages in that behaviour during or outside working hours.[68] The commissioner explained

> … in an employment context the establishment of a social media policy is clearly a legitimate exercise in acting to protect the reputation and security of a business. It also serves a useful purpose by making clear to employees what is expected of them. Gone is the time (if it ever existed) where an employee might claim posts on social media are intended to be for private consumption only. An employer is also entitled to have a policy in place making clear excessive use of social media at work may have consequences for employees.[69]

Apart from the social media policy, several other issues were dealt with in the UK case of *Weeks v Everything Everywhere Ltd*[70] where the employee, Weeks, posted several comments on his Facebook wall referring to his workplace as 'Dante's Inferno'. When Weeks became aware of the fact that a fellow-employee, Ms Lynn, had complained to the manager about the posts, he threatened her directly on his Facebook page.[71] The social media policy of the company expressly stipulated that it applied to postings made in the employee's own time, and included a requirement not to criticise the company, or post comments that could be seen as bullying, harassment, or discrimination. When confronted by his team leader, Weeks flatly refused

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68 At par 47 it is pointed out: ' … However, it is difficult to see how a social media policy designed to protect an employer's reputation and the security of the business could operate in an "at work" context only. I accept that there are many situations in which an employer has no right to seek to restrict or regulate an employee's activities away from work. However, in the context of the use of social media, and a policy intended to protect the reputation and security of a business, it is difficult to see how such a policy could operate in this constrained way. Is it suggested that an employer can have a policy in place that seeks to prevent employees from damaging the business's reputation or stopping them from releasing confidential information while at work, but leaving them free to pursue these activities outside of working hours? This would be an impractical approach and clearly there are some obligations employees accept as part of their employment relationship that have application whether they are at work or involved in activities outside of working hours.'

69 *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446 at par 46.

70 ET/2503016/2012.

71 Mr Weeks posted 'It saddens me that people request to be your friend and then stab ya in the back – I'm a big believer in karma, what goes around comes around … I ain't changing what I say on my Facebook page so eat cake bitch! … still reeling from the knife in the back … If you perceive my light and jovial manner as a sign of weakness you may get a very unpleasant surprise. If you come to hurt me I'm f**n ready for ya! No more words from me, next its action.' Potgieter n 13 above at 39; Linklaters n 62 above.

to stop making such posts and refused to sign his letter of warning – he was suspended and subsequently dismissed. He referred his case to the labour tribunal where he was found guilty of gross misconduct relating to his references to his workplace as 'Dante's Inferno', but was also found to have been guilty of cyberbullying and harassment of a fellow-employee. The tribunal pointed out that an employer need not show actual harm to its reputation resulting from social media postings – the potential to cause harm was enough to find an employee guilty.[72] Regarding the argument of the employee that his postings were private, it was pointed out:

> Many individuals using social networking sites fail to appreciate, or underestimate, the potential ramifications of their 'private' online conduct. Employers now frequently have specific policies relating to their employees' use of social media in which they stress the importance of keeping within the parameters of acceptable standards of online behaviour at all times and that any derogatory and discriminatory comments targeted at the employer or any of its employees may be considered grounds for disciplinary action. There is no reason why an employer should treat misconduct arising from the misuse of social media in any way different to any other form of misconduct.[73]

In response to Weeks's argument, that he had never given the employer permission to view his Facebook pages, the employer stated that Ms Lynn, who had access to his posts as one of his 'friends', had given permission to the employer to visit her social media website – this was accepted by the tribunal.[74]

In contrast to this case, the employment tribunal held that a dismissal was unfair in the case of *Trasler B&Q*[75] where an employee was summarily dismissed after he posted on Facebook that his 'place of work is beyond a

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72 Potgieter n 13 above at 40.

73 Potgieter n 13 above at 41, fn 18 points out that this catch-all phrase in a policy has been found to be too broad to offer protection to the employer, and has been found to be in breach of the employee's rights.

74 Potgieter *op cit* points out that courts and employment tribunals followed a similar approach in other cases, where this aspect was raised as a defence by the particular employee.

75 *Trasler v B&Q* ET 1200504/2012; Huffer 'Facebook dismissals: gross misconduct or stress relief and letting off steam after a bad day?' available at: K"http://www.employmentbuddy.com/Article/1291/Facebook-dismissals--gross-misconduct-or-stress-relief-and-letting-off-steam-after-a-bad-day-"http://www.employmentbuddy.com/Article/1291/Facebook-dismissals--gross-misconduct-or-stress-relief-and-letting-off-steam-after-a-bad-day- (last accessed 7 January 2015).

f****** joke' and that he would soon be 'doing some busting'. This was read by a colleague and reported to the employer. The tribunal concluded that the comments posted by the employee had not posed any threat to the business, and did not accept the company's argument that the employee could damage company property through the comments made. Therefore, it was decided that the decision to dismiss was outside the band of reasonable response.[76] In contrast to the *Weeks* case, the tribunal found that there was no evidence that anyone felt threatened by the employee's comments. Although the comments were in breach of the company's social media policy, the tribunal held that it did not undermine trust and confidence to such an extent that the employee could no longer be employed. The employee had a clean disciplinary record and four years of service. He explained his comments as letting-off steam after a frustrating day. The tribunal found that the employee had contributed to his dismissal by failing to show remorse or to understand the consequences of his actions – therefore his compensatory and basic award was reduced by fifty per cent.[77] Huffer explains this decision as follows:

> The key lesson for employers, when taking the decision to dismiss, is not to focus merely on what is said by employees on social media sites but what the effect of what is said on the business, including its employees. What employees say on these sites in relation to their employment can clearly be extremely rude, vulgar, indiscrete or otherwise wholly inappropriate. However, in the light of decisions such as Trasler v B&Q, it seems that what tribunals are likely to be looking for is hard evidence of how particular individuals are likely to be offended, threatened or undermined by the comments or how the business is likely to be adversely affected. In the Trasler case, the employee was able to explain away his comments on the basis that he needed to let off steam, perhaps in the same way that an employee would have done to a colleague verbally before the days of social media.[78]

When evaluating the conduct of employees during disciplinary action, employers must consider the actual impact on business rather than assumed

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[76] In the UK an employment tribunal has to find, *inter alia*, that the decision to dismiss must fall within the range of reasonable responses of a reasonable employer – Potgieter n 13 above at 40.

[77] See also *Walters v Asda Stores Ltd* (2008) where the employee posted a comment on Facebook that it would make her happy to hit customers on the back of the head with a pick axe. The tribunal also found the dismissal to be unfair. Also, Huffer n 75 above.

[78] Huffer n 75 above.

or feared impact.[79] This means a number of social media factors should be taken into account. One of these is the seriousness of the damage to the employer's reputation. In contrast to the *Weeks* case, the employee in *Witham v Club 24*[80] posted the following comment after a difficult day at work: 'I think I work in a nursery and I do not mean working with plants.' The comment was directed at her fellow-colleagues, was relatively mild, the employer was not identified, and there was no evidence of harm to the employer's reputation. The employee's dismissal for damaging her employer's reputation was found to be unfair.[81] Another factor which should be taken into account is whether the employee is remorseful and withdraws the posting. In *Stephens v Halfords plc*,[82] an employee posted: 'Halfords workers against working 3 out of 4 weekends' on a Facebook page he set up after a workplace reorganisation. The tribunal held that the fact that the employee had taken immediate action to remove the comment when he realised that it was in breach of the social media policy, and that he was apologetic, was sufficient to render his dismissal unfair.[83]

Taking mitigating circumstances into account (as was done in these cases) is always important in reaching a decision to dismiss an employee.[84] In South Africa an employee in the position of Stephens in *Stephens v Halfords plc*[85] will also be able to rely on section 78 of the Basic Conditions of Employment Act,[86] in terms of which employees are entitled to discuss the terms and conditions of their employment with fellow employees.

It appears from these cases that the exact details of how the posting was made are generally less important. There is limited focus on whether it is made in or outside of normal working hours, or whether the employer's computer system has been used. However, it seems to be more important to determine whether there is a clear connection to work (as a result of the

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79 Linklaters n 62 above.

80 ET/1810462/2010.

81 'Social media and the law: a handbook for UK companies: January 2014' available at: http://www.linklaters.com (last accessed 7 January 2015).

82 ET/1700796/10.

83 Lane et al 'Social status' available at: http://www.newlawjournal.co.uk/nlj/content/social-status (last accessed 7 January 2015).

84 McGregor n 48 above at 129.

85 Note 82 above.

86 In terms of s 78 (1) of the Basic Conditions of Employment Act of 1997, every employee has the right to – '(b) discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person'.

nature of the posting or naming of the employer) and the *impact in practical terms* of the posting on the employer and the business.[87]

Statements on Twitter have also arisen in the employment context. In the UK it was recently held by the Employment Appeal Tribunal (EAT) that a personal remark on a personal Twitter feed can be reasonable grounds for disciplinary action by an employer. In *Game Retail Ltd v Laws*,[88] an employee of Game Retail, Laws, was dismissed after posting offensive, non-work related tweets outside work time on his personal Twitter account. Mr Laws, a risk and loss prevention investigator, was responsible for around 100 of the company's 300 stores. He set up his personal Twitter account (which contained no information to link him to Game or to identify himself as a Game employee) from which he followed the stores' Twitter accounts. When he set up his account, he did not use the restriction settings – his tweets were therefore publicly visible by default. Most of the stores started following him although he did not request them to do so. He then tweeted a range of derogatory tweets (about football clubs and the NHS) several of which contained 'offensive, threatening and obscene' language and were of an 'intimidating, racist and anti-disability' nature. Despite the fact that he had not identified himself as an employee of the company, Game, he was found guilty of gross misconduct as his tweets were in the public domain and could be accessed by the stores. Laws was summarily dismissed. The Employment Tribunal initially held that his dismissal was unfair as he was tweeting from his personal account. This was appealed by the employer. The Appeal Tribunal (EAT) held that the issue of whether the use of Law's Twitter account could be 'described as private usage' or not, had not been properly tested by the lower tribunal – this aspect needed more careful thought.[89] As people were in all probability making a mental connection between his account and those of his workplace, it should perhaps not be regarded as private. The case has been remitted to the lower tribunal for rehearing.

The EAT acknowledged the conflict between the rights and interests of the employer on the one hand, and the rights and interests of the employee on the other, at play here. It stated that every case will be 'intensely fact-

87 Murray 'Unfair dismissal and Twitter use' available at: http://rresonate.rradar.com/unfair-dismissal-and-twitter-use/ (last accessed 7 January 2015).

88 UKEAT/0188/14/DA.

89 At par 47.

sensitive' in terms of whether or not the use of media in question had become work-related. The EAT concluded:

> We do not say that private usage is an irrelevant question. We recognise that there is a balance to be drawn between an employer's desire to remove or reduce reputational risk from social media communications by its employees and the employee's right of freedom of expression.[90]

The implication for employers is to remove any ambiguity as to what is permitted and what is not. Employers need to ensure that they have a clearly worded and robust social media policy spelling out social media use both during work time and in the employee's private time.[91] As social media is constantly evolving, this policy should be updated on a regular basis and employees should be reminded of the sanctions that can be expected if the policy guidelines are breached. Employees' attention should be drawn to the fact that they should restrict the use of 'work Twitter accounts' to work matters, and, if they wish to have a Twitter account for personal use, they need to set up a separate account for this purpose.[92]

If the test to be applied is whether there is a link between the employee and the employer, the fact that a personal Twitter account has been used is irrelevant. From the facts of the case it would appear that the employee could be identified as a Game employee. He was responsible for about one third of the Game's stores. Although he did not ask the other sections of the company to follow him, when this was suggested by someone else, he supported the suggestion. He was also well aware that many sections of the business followed him. In my view, this shows a definite link to the employer.

The defences most often raised

It appears that the typical defences raised by employees for posting defamatory claims or opinions, is a claim related either to privacy or to freedom of expression.[93]

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90 At par 46.
91 Murray n 87 above.
92 *Ibid*.
93 Landsberg n 39 above.

The defence of the right to freedom of speech

Raising this defence, an employee argues that restricting his use of social media infringes his right to freedom of expression. In a UK case, *Smith v Trafford House Trust,*[94] an employee posted strongly-worded comments on social media about the proposal to introduce gay marriage in the UK. He was subject to his employer's code of conduct which prohibited 'conduct which may make another person feel uncomfortable, embarrassed or upset', and further provided that employees should not 'promote their political or religious views'. However, the code did not expressly extend to personal communications and, in view of Smith's right to freedom of expression and freedom of speech, the High Court interpreted the code as applying only to work-related communications.[95] It held that frank, but lawful expressions of private views on social media – as on any other platform – may upset those who hold opposing views, but that this is 'the price of freedom of speech'.[96] It was held that it would be unreasonable to apply the code to every situation outside work where an employee might come into contact with other work colleagues. In this case, the employee's social media 'friends' consciously elected to be his friends. The court felt that there was no link between the Facebook posting and his employer, and his demotion was therefore unlawful.

In evaluating the nature of the comments, the court explained:

> This issue is of course a matter of fact and degree. It is not difficult to imagine the use of Facebook, for example to pass judgment on the morality of a named work colleague, which would contravene this part of the Code and the Policy.… some objectivity needs to be applied to the analysis of Mr Smith's postings… Statements about religion or politics may be more prone to misinterpretation than others, but I do not consider it to be a reasonable interpretation of those provisions that they should be taken to have been infringed if language which is non-judgmental, not disrespectful nor inherently upsetting nonetheless causes upset merely because it is misinterpreted.[97]
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> In my judgment Mr Smith's postings about gay marriage in church are not, viewed objectively, judgmental, disrespectful or liable to cause upset or offence. As to their content, they are widely held views frequently to be heard on radio and television, or read in the newspapers. The question remains whether the manner or language in which Mr Smith expressed his

94 [2012] EWHC 3221 (Ch).
95 At par 82–83. Linklaters n 62 above.
96 At par 82.
97 At par 83.

> views about gay marriage in church can fairly or objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or upset. Again, it seems to me that it was not. He was mainly responding to an enquiry as to his views, and doing so in moderate language.[98]

In dealing with the right to freedom of speech on social media, a South African court held that:

> Expression may often be robust, angry, vitriolic, and even abusive. One has to test the boundaries of freedom of expression each time. The court must be alive to the issues involved, the context within which the debate takes place, the protagonists to the dispute or disagreement, the language used as well as the content of which is said, written and published and about whom it is published.[99]

In Australia in the case of *Banerji v Bowles*,[100] Ms Banerji – a public servant who tweeted comments critical of her employer, fellow employees, the government, the opposition and the then Prime Minister – relied on her right to political speech when she was investigated for breaching the Australian Service Code of Conduct. She argued that as the comments she tweeted were made in her private time, any disciplinary action would infringe her constitutionally protected right to engage in political communication. The court rejected her argument and held that there is no unbridled right to political speech – any right to communicate on political matters 'does not provide a licence … to breach a contract of employment'.[101] Ms Banerji had to comply with the Public Service Act and the Code of Conduct which required her to 'behave in a way that upholds the good reputation of Australia' and 'behave honestly and with integrity'.[102]

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98 At par 84.

99 *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Divine World Ministries* 2012 3 All SA 322 (GSJ) par 23. In *Case and another v Minister of Safety and Security and others*; *Curtis v Minister of Safety and Security and others* 1996 3 SA 617 (CC), 1996 5 BCLR 609 (CC) par 23, the court stated that freedom of expression extends: 'even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.'

100 [2013] FCCA 1052.

101 *Id* at par 101–104. In par 103 it is pointed out that '…the Australian Constitution does not contain provisions similar to the First and Fourteenth Amendments of the United States' Constitution, or Article 5 of the German Constitution, both of which provide expressly for a right of freedom of expression'.

102 Mattson n 65 above.

Although the right to freedom of expression (speech) has not yet been raised as a defence in the cases before the South African Commission for Conciliation, Mediation and Arbitration (CCMA),[103] if it were to arise, an opinion expressed online – and in particular one which is widely supported and expressed in language which is non-judgmental and not disrespectful or inherently upsetting – would be preferred.

The defence of the right to privacy and 'friends'

Freedom of speech rarely takes place in a vacuum – it is dependent on surrounding circumstances. In certain instances the right to freedom of speech and the right to privacy may overlap. Under this rubric, employees would claim that their social media postings are private and therefore should not be subject to their employer's disciplinary policy. Users of social media may set up their accounts so that postings and other information are only available to their 'friends'. In many instances an employer only becomes aware of offending postings once they are reported to the employer by the poster's 'friend'.[104]

In the UK[105] these claims by employees have had limited success. In *Gosden v Lifeline Project* [106] an employee, Gosden, used his personal e-mail account to forward a sexist and racist e-mail to another employee's personal e-mail account. In response to the: 'IT IS YOUR DUTY TO PASS THIS ON' phrase in the e-mail, the other employee sent it to a third employee's work e-mail address. When the employer became aware of the e-mail on its system, and that it had initially been sent by Gosden, Gosden was dismissed. It was found that the dismissal was justified as the express encouragement to pass the e-mail on indicated that it was not a purely personal communication.[107] In *Preece v JD Wetherspoons*,[108] it was held that the

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103 The CCMA is an independent labour dispute resolution body established in terms of the Labour Relations Act 66 of 1995. See also http://www.ccma.org.za/. It is the primary forum for the determining of dismissals for misconduct in South Africa. Although the rulings by the CCMA are legally binding on the parties to the dispute, these rulings are not binding legal precedent for legal practitioners or the courts. The value of these cases lie in the fact that they demonstrate the approach of the CCMA in respect of dealing with specific issues of labour law.

104 Linklaters n 62 above.

105 There is no specific protection of privacy in the UK and labour tribunals have interpreted this right in line with arts 8–10 of the European Convention on Human Rights. See also Potgieter n 13 above at 69.

106 ET/2802731/2009.

107 Linklaters n 62 above. See also *Martin v Gabriele Giambrone* [2013] NIQB 48.

108 ET/2104806/10.

posting which the pub manager relied on was too widely available to be considered a personal communication. The pub manager, who made derogatory comments about her customers, argued that the comments were private communications available only to her 'friends'. The court, however, found that she had too many 'friends' (some 646!) – the comments could consequently not be classified as private communication.[109] The European Court of Human Rights has also held that there are limits to an individual's privacy which may be overridden by other factors. In *Pay v UK*[110] the dismissal of an employee who had posted pictures of himself involved in bondage, domination, and sadomasochism on the Internet, was held to be justified because it conflicted with his employment which involved working with sex offenders.

It appears that in most cases employers are notified of offending content by 'friends'. However, employers who want actively to monitor their employees' social media postings should respect their right to privacy and data protection laws.[111]

The South African legal system recognises the right to privacy.[112] However, this notion of privacy of an individual which should be protected from invasion, is changing dramatically in the social media context. Facebook users display intimate details and photos on their profiles and status messages which are available for the world to see unless specific privacy settings are used. According to Neethling,[113] it is up to each individual to decide or determine for him- or herself whether certain facts relate to his or her seclusion (privacy) and should be excluded from the knowledge of others. In other words, such a person must cause the facts to be private.[114] If a person has no wish for privacy, he or she usually has no interest in its legal protection. This subjective expectation of privacy must be objectively reasonable and the right is restricted by the rights of the community as a

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109 Linklaters n 62 above.

110 [2009] IRLR 139, Linklaters n 62 above.

111 It is noted that in the UK employers should comply with Part 3 of the Information Commissioner's Employment Practices Guide: Monitoring at work. This suggests for example notifying employees through an appropriate policy and carrying out a privacy impact assessment. Linklaters n 62 above.

112 The right to privacy is a constitutionally protected right in terms of s 14 of the Constitution. See also discussion of this right in *Khumalo v Holomisa* 2002 5 SA 401 (CC); Rautenbach 'The conduct and interests protected by the right to privacy' 2001 *TSAR* 118.

113 Neethling n 33 above at 30.

114 *Id* at 31.

whole.[115] In other words, the user who leaves messages on a Facebook page cannot rely on an expectation of privacy if the settings of his or her Facebook account have not been set on private.

In *Bernstein v Bester*,[116] the judge held that 'privacy is acknowledged as in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly'.[117] Article 8 of the European Convention simultaneously offers protection in terms of which the employee must have an expectation of privacy, which must fulfil two tests: (a) there must at least be a subjective expectation of privacy; and (b) the expectation of privacy must be recognised as reasonable by society.[118] The instant the employee enters into relationships with persons outside of this close intimate sphere, his or her activities acquire a social dimension and the right of privacy in this context becomes subject to limitation.[119]

To date, the CCMA has to date adopted a blanket approach – a person who does not protect his or her personal information on social media and whose privacy settings are not engaged, does not have a right to complain, should that post come to the notice of his or her employer. They are deemed to have waived their right to privacy. The question is what would the position be when an employee has made use of privacy settings to allow only close friends to view his or her Facebook post? In other words, do privacy settings protect the employee?

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115 Rautenbach n 111 above at 118; Potgieter n 13 above at 65. See also Roos & Slabbert 'Defamation on Facebook: *Isparta v Richter* 2013 6 SA 529 (GP)' (2014) 17/6 *Potchefstroom Electronic Law Journal* 2845; Singh 'Social media and the *Actio Injuriarium* in South Africa – an exploration of the new challenges in the online era' 2014 *Obiter* 616.

116 *Bernstein and Others v Bester and Others NNO* 1996 2 SA 751 (CC). In par 94: 'privacy is an individual condition of life characterised by seclusion from the public and publicity.'

117 At par 67.

118 At par 76.

119 At par 77.

Courts in Australia have held that social media interaction is not considered to be private interaction and that privacy settings[120] provide no legal protection for users against employer action.

In *Dianna Smith T/A Escape Hair Design v Sally-Anne Fitzgerald* Commissioner Bissett held:

> What might previously have been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be seen by an unlimited number of people. Posting comments about an employer on a website (Facebook) that can be seen by an uncontrollable number of people is no longer a private matter but a public comment.[121] It is well accepted that behaviour outside working hours may have an impact on employment 'to the extent that it can be said to breach an express term of [an employee's] contract of employment'.[122] A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see. A Facebook posting comes within the scope of a *Rose v Telstra* consideration but may go further. It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.[123]

Due to the nature of the Internet, it is suggested that as a rule of thumb, no user of a social network site should post any information that he or she is not willing to have displayed on a public notice board for all to see, irrespective of whether privacy settings are used or not. There are too many ways in which the information can become known – for instance, when one of the close 'friends' may disclose the information to co-employees or the employer.

As far as could be ascertained, there have been no reported cases on social media in the South African Labour Court, but the following decision by the CCMA is instructive on this issue.

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120 At the Workplace Research Centre's 2014 Labour Law Conference, Thornthwaite quoted from a survey that found that twenty per cent of people had never updated the privacy settings on their social media accounts and a further nineteen per cent did so less often than annually – Toten 'Social media: employer policy v freedom of speech' available at: http://workplaceinfo.com.au/hr-management/communication-in-the-workplace/analysis/social-media-employer-policy-v-freedom-of-speech#.VaWH5Pmqqko (last accessed 7 January 2015).

121 At par 50.

122 At par 51. *Rose v Telstra*, AIRC Print Q9292 (4 December 1998).

123 At par 52.

In *Sedick & Another v Krisray (Pty) Ltd*,[124] the employees posted derogatory remarks on Facebook about their employer and senior managers. In their defence both employees stated that their Facebook accounts had been restricted, and one employee cited that her right to privacy had been breached when the employer extracted the information from her Facebook site. Both employees stated that in their derogatory remarks there was no reference to the company and the posts could not be linked to the company.

In analysing the evidence and the right to privacy, the commissioner dealt with the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 and found that it did not apply in this case – 'any person …may intercept any communication if he or she is a party to the communication, unless such a communication is intercepted by such person for purposes of committing an offence'. The commissioner was of the opinion that the Internet is a public domain and Facebook users have the option to restrict access to their profiles as well as the information that they publish.[125] The commissioner found that neither employee had restricted the settings on their Facebook pages and as a result their pages fell into the public domain.[126] As a consequence of their failure to make use of the privacy options, they had 'abandoned their right to privacy and the protections of the Act 70 of 2002.'[127] Since the site was in the public domain, the information extracted from the site was admissible as evidence. It was found that the employees were intentionally making derogatory and demeaning remarks about the employer, management and ex-employees. It was found that it was highly likely that the people were aware

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124 (2011) JOL 27445 (CCMA); 2011 8 BALR 879 (CCMA).

125 The Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 defines 'interception'. It was found that it is questionable whether accessing an Internet site can be regarded as an interception of communication for purposes of the Act. See *Sedick* case 2011 JOL 27445 (CCMA); (2011) 8 BALR 879 (CCMA) at pars 46–48. See also Du Toit 'Social Media: Guidelines on the policy for employees using social media for non-business purposes' available at: http://www.labourguide.co.za/most-recent/1358-social-media-guidelines-on-the-policy-for-employees-using-social-media-for-non-business-purposes (last accessed 7 January 2015).

126 The commissioner stated that 'in the absence to the pages being restricted, De Reuck and Sedick's pages remained wholly in the public domain. By extension, any person using the Internet qualified as a party to the communications, including Ms Coetzee, and as a consequence, she was entitled to intercept, that is to read, download and print, these communications in whole or in part. De Reuck and Sedick's postings were, to all intents and purposes, available to the public in the same way that blogs and public comments in news media sites, or letters published in newspapers are available.' 2011 JOL 27445 (CCMA) 9.

127 2011 JOL 27445 (CCMA) 9.

of the identity of the employer. The actual damage to the reputation of the company amongst customers was not proved, but the potential was there. The comments were found to be serious, constituting gross insolence and encouraging a lack of respect for management. It also brought management into disrepute. The commissioner found that despite the fact that the employer may not have proved actual damage to reputation, the potential for damage was enough to find against the ex-employees and uphold their dismissals.[128]

As in the UK cases, the commissioner concluded that:

> The internet is a public domain and its content is, for the most part, open to anyone who has the time and inclination to search it out. If employees wish their opinions to remain private, they should refrain from posting them on the internet.[129]

It is clear that the general trend is that there is nothing private about anything said on any social media pages, despite what employees might say or raise in their defence.[130]

From the above one can conclude that, as long as the employer follows the correct procedures and that the evidence used against the employee has not been illegally[131] obtained, a dismissal under these circumstances could be fair. It is therefore very important that employers have a social media policy in place which stipulates the rules for the use, monitoring and interception of communication in the workplace. [132]

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128 The commissioner stated that some of the comments were 'extremely serious and, if not constituting insubordination, certainly constituted gross insolence' at par [54] and further, 'I find that the comments served to bring the management into disrepute with persons both within and outside the employment and that the potential for damage to that reputation amongst customers, suppliers and competitors was real' at par [55]. For other cases dealing with Facebook postings that brought the employer into disrepute with similar findings see also *Fredericks v Jo Borkett Fashions* 2011 JOL 2793 (CCMA); (2011) 20 (CCMA) and *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton* (2012) 3 BALR 286 (CCMA). For other cases dealing with Facebook postings that brought the employer into disrepute with similar findings see also *Fredericks v Jo Borkett Fashions* (2011) JOL 2793 (CCMA); (2011) 20 (CCMA) and *SACCAWU obo Haliwell v Extrabold t/a Holiday Inn Sandton* (2012) 3 BALR 286 (CCMA).

129 *Sedick & another v Krisray (Pty) Ltd* (2011) 8 BALR 879 (CCMA) at par 62.

130 Potgieter n 13 above at 55.

131 In terms of the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002.

132 Du Toit n 125 above explains that social media policy should establish the principles for employees using social media for official and private purposes when the employee's

In South Africa an employer may take disciplinary steps against an employee for any misconduct committed using social media by invoking the provisions of the Labour Relations Act, 1995, and the Code of Good Practice: Dismissal, attached to the Act.[133] In terms of the Act, any termination of employment must be both procedurally and substantively fair, and must follow due process in terms of the code.[134]

The code prescribes the application of the principle of progressive discipline.[135] This would mean that if an employer wishes to dismiss an employee for misconduct committed through social media, the offence must be sufficiently serious, or there must be repeated offences to warrant dismissal on the basis of a breakdown of trust between the parties.[136]

In the code, a dismissal requires certain grounds for substantive fairness.[137] In order to prove that a dismissal for misconduct is fair, an employer must prove that: 1) there is a rule or standard governing the conduct; 2) the rule is valid and reasonable; 3) the employee is aware of or could reasonably have been expected to be aware of the rule or standard; 4) the rule is applied consistently by the employer; and 5) dismissal is the appropriate sanction for contravention of the rule.[138]

It is, therefore, important for an employer to have rules (if they do not already exist), in terms of which it is an offence to make inappropriate comments, defame an employer or co-employees on any public forum, or be guilty of conduct which constitutes cyberbullying. An employer may go further and stipulate that a public forum includes social media.[139] Burrows explains that employers should create comprehensive social media policies rather than incorporate policies into employment contracts, as policies may be amended without an employee's consent, provided they do not form part of the employee's employment contract.[140]

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affiliation to the employer is identified, known, or presumed. Such a policy must clearly define 'social media' as well as guidelines on how to use these public platforms.

133 The main provisions regarding dismissal are found in ss 186 and 188. See also Sch 8 to the Labour Relations Act 66 of 1995, which contains the Code: Dismissal.

134 McGregor n 48 above at 129; Burrows n 38 above.

135 See the Code: Dismissal, items 3(2) and 3(3); McGregor n 48 above at 127.

136 McGregor n 48 above at 127–128; Burrows n 38 above.

137 McGregor n 48 above at 129.

138 *Ibid*.

139 Burrows n 38 above.

140 *Ibid*.

The general approach of the CCMA and in-house disciplinary enquiries in South Africa has been that nothing posted on Facebook is private.[141] Potgieter explains that even if an offending post is removed by an employee, it is never truly erased from memory and can and will probably be retrieved by the employer to be used in evidence – if the post contains a remark that is damaging to the reputation of the company or its clients, it will result in the employee's dismissal. Even the risk of *potential* reputational harm has resulted in the dismissal of the employee. This was the case in the UK in *Weeks v Everything Everywhere Ltd*[142] and *Trasler B&Q*,[143] but also in the South African case of *Sedick & Another v Krisray (Pty) Ltd*,[144] where the commissioner found the potential harm with regard to customers and suppliers to be legitimate, even though actual harm had not been proved.[145]

Conduct outside working hours

The use of social media has also led to debate as to what extent behaviour outside of business hours could constitute adequate grounds for dismissal. In the Australian case of *Rose v Telstra*,[146] it was stated that the modern law of employment has its basis in contract (in contrast to the status of master and servant). Therefore, the behaviour of employees outside of business hours will only have an impact on their employment to the extent that such conduct breaches an express or implied term of the contract of employment. This case provides guidance as to when termination of an employee's employment on the basis of his or her conduct outside of working hours will be justified. The court held that:

> It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:
> - the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
> - the conduct damages the employer's interests; or
> - the conduct is incompatible with the employee's duty as an employee.

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141 Potgieter n 13 above at 66.
142 ET/2503016/2012.
143 *Trasler v B&Q* ET1200504/2012; Huffer n 75 above.
144 2011 JOL 27445 (CCMA); (2011) 8 BALR 879 (CCMA).
145 *Sedick & Another v Krisray (Pty) (Ltd)* (2011) 8 BALR 879 (CCMA) at par 54.
146 [1998] AIRC 1592 available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AIRC/1998/1592.html?stem=0&synonyms=0&query=title(Rose%20and%20Telstra%20) (last accessed 7 January 2015).

> In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee. Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct. In this regard. I agree with the following observation of Finn J in *McManus v Scott-Charlton*:[147] "I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified."[148]

For the dismissal to be lawful, it is essential that there at all times be a *nexus* between the employee's conduct and the employer.[149] Any conduct by an employee that threatens to damage an employer's relationship with third parties has also been established as a ground for lawful dismissal.[150]

In recent years, the Australian Fair Work Commission has considered a number of unfair dismissal cases alleging breach of one or more of the terms of an employment contract, which offer an insight into how online profiles can impact on employment law.[151] These general principles have been applied in the following cases where employees vented their frustrations with their employers and fellow employees on social media.

The case of *Dianna Smith T/A Escape Hair Design v Sally-Anne Fitzgerald*[152] falls within the principle that an employee's conduct outside of work could lead to dismissal if the conduct breaches an express term of his or her employment contract.[153] Here the employee posted her dissatisfaction with her employer on her Facebook status: 'Xmas "bonus" alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWSOME!!!' Her employment was

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147 [1996] FCA 1820; (1996) 140 ALR 625 at 636.

148 *Rose v Telstra* n 146 above.

149 *Paul Warner Dobson v Qantas Airways Ltd* (2010) FWA 3532; Lo 'The social networking dilemma: Safeguarding employer rights' 2014 available at: https://www.academia.edu/7080085/The_Social_Media_Dilemma_Safeguarding_Employer_Rights (last accessed 7 January 2015).

150 *Anthony Farquharson v Qantas Airways Ltd* (2006) 155 IR 22; Lo n 149 above.

151 Denton 'Privacy considerations and social media in the workplace' available at: http://www.gordonandjackson.com.au/uploads/documents/articles/Andrew_D_H_Denton_-_Privacy_Considerations_and_Social_Media_in_the_Workplace_May_14.pdf (last accessed 7 January 2015).

152 [2011] FWAFB 14422.

153 Anonymous 'Excessive Use of Social Media – Valid Reason for Termination?' available at: http://www.aaoa.com.au/TheToolbox/KeyNewsUpdates/ExcessiveuseofSocialMedia/tabid/2484/Default.aspx (last accessed 7 July 2015).

terminated and she lodged a claim for unfair dismissal with Fair Work Australia. She was ultimately successful in her claim. The commissioner took into account that the comments by the employee were not of a nature to cause damage to the business of her employer.[154] However, the commissioner did warn against such foolish outbursts, which may undermine the trust and confidence in employment relationships:

> Posting comments about an employer on a website that can be seen by an uncontrollable number of people is no longer a private matter but a public comment. It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.[155]

In *Dover-Ray v Real Insurance Pty Ltd*,[156] the commissioner found that although the employer was not identified by name in the blog, the employee was clearly identified, the blog was dated, and described her workplace experience. Together these identifiers would have been a clear indication for anyone who knew the employee that she was referring to her employment with Real Insurance. The blog, in which she attacked the integrity of her employer, was published in the public domain.[157] Despite requests by the employer to remove the blog, she left it on her MySpace page for several weeks. The commissioner noted that if the employee had removed or modified the blog and offered an apology for her behaviour within a reasonable time, her conduct could have been excused. However, due to her failure to do so, it was found that her behaviour constituted a valid reason for her dismissal.[158]

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154 The employee did not name her employer (only the hairdressing industry), and there was no evidence that the posting had been viewed by any clients of the employer.

155 Osborne 'Australia: Social media and work' available at: http://www.mondaq.com/australia/x/180196/Employee+Rights/Social+media+and+work (last accessed 7 July 2015).

156 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544. The employee, Ms Dover-Ray, posted a sneerful comment on her MySpace page after the conclusion of an investigation by her employer into her allegations of sexual harassment against a co-worker, that were found to be unsubstantiated. She repeatedly accused her employer, Real Insurance, of corruption and bias in the course of the investigation and labelled management of the company as 'nothing but witch hunters' and the company's values as 'absolute lies' and of 'chasing dollars over safety'. The FWA found her failure to remove the blog entry after being requested to do so by her employer to be a valid reason for dismissal. Osborne n 155 above.

157 The blog could be accessed via a simple Google search by any member of the public and also by the employee's MySpace 'friends', some of whom were fellow-employees of the same employer, Real Insurance. Justitia 'Social networking and the workplace' available at: http://justitia.com.au/sexual-harassment/social-networking-and-the-workplace (last accessed 7 January 2015).

158 Justitia n 157 above.

Posts on a social networking site can very soon develop a negative connotation and have an adverse effect on a company's reputation.[159] Both the content of a statement and the context in which it is made, are important. Where an employee, who is identifiable as the voice of the organisation, posts defamatory statements on a social network site, it may lead to the vicarious liability for the employer.[160]

In *O'Keefe v Williams Muir's Pty Limited*,[161] the employee had a dispute with a particular female employee at his organisation over payment of incorrect wages. He vented his frustration by posting several comments littered with profanities on his Facebook status. Despite the fact that he had blocked this female employee with whom he was in dispute from seeing his posts, he had not blocked other co-workers and eventually the posts came to her attention. The employee was fully aware of the organisation's policies about courtesy between workers. The commissioner concluded:

> Even in the absence of the respondent's Handbook warning employees of the respondent's views on matters such as this, common sense would dictate that one could not write and therefore publish insulting and threatening comments about another employee in the manner in which this occurred.[162]

The commissioner referred to the proximity between work and home in a digital world and concluded:

> The fact that the comments were made on the applicant's home computer, out of work hours, does not make any difference. The comments were read by work colleagues and it was not long before Ms Taylor was advised of what had occurred. The respondent has rightfully submitted, in my view, that the separation between home and work is now less pronounced than it once used to be.[163]

Fair Work Australia found that 'while it is accepted that the applicant was frustrated by his unresolved pay issues, the manner in which he ultimately dealt with the issue warranted his dismissal for misconduct.'

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159 Osborne n 155 above.
160 *Ibid*.
161 *Mr Damian O'Keefe v Williams Muir's Pty Limited T/A troy Williams The Good Guys* [2011] FWA 5311.
162 *Id* at par 42.
163 *Id* at par 43.

In *Linfox Australia Pty Ltd v Glen Stutsel*,[164] the Full Bench of FWA upheld the decision that a Linfox truck driver had been unfairly dismissed and that he should be reinstated and compensated for some lost wages.[165] FWA found the termination of employment constituted unfair dismissal, taking into account the differential treatment by Linfox of other employees who also posted offensive comments on the truck driver's Facebook page, his extremely good employment record over some twenty-two years, his age, his regret and his employment prospects. Linfox did not have a social media policy in place, and it was held that the induction training material and handbook upon which Linfox relied were inadequate to ground the action taken against the driver. FWA took into account the driver's limited understanding of Facebook and its privacy settings in concluding that the dismissal was unfair. However, the Full Bench warned that with increased use and understanding of Facebook in the community and the adoption by more employers of social networking policies, some of these factors (like age and ignorance) could be accorded less weight in future cases.[166]

This case stresses the need for a clear, up-to-date and consistently applied social media policy when considering disciplinary action against employees for misuse of social media. In this case, the Full Bench considered Linfox's lack of a specific social media policy and its selective application of the disciplinary policy to the employees involved to be particularly important.[167] An employee's opinions can become a disciplinary matter if

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164 [2012] FWAFB 7079. The Full Bench of FWA upheld the decision by Commissioner Roberts in *Glen Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444.

165 The employee posted sexist and distasteful comments on Facebook about a female manager and his boss. Despite their warning that employees should not post comments about their managers on social media, the Full Bench also pointed out that some of the statements in this case were 'so exaggerated or stupid' that they did not to amount to any 'credible threat' against the managers.

166 In par 34 the Full Bench points out that'[i]t is apparent from the recital of these matters that the findings of the Commissioner as to the Applicant's understanding about the use of Facebook were an important part of the circumstances taken into account in concluding that the dismissal was unfair. It is also apparent that, with increased use and understanding about Facebook in the community and the adoption by more employers of social networking policies, some of these factors may be given less weight in future cases. The claim of ignorance on the part of an older worker, who has enthusiastically embraced the new social networking media but without fully understanding the implications of its use, might be viewed differently in the future. However in the present case the Commissioner accepted the Applicant's evidence as to his limited understanding about Facebook communications. We have not been persuaded, having regard to the evidence and submissions presented, that such a finding was not reasonably open.' *Linfox Australia Pty Ltd v Glen Stutsel* [2012] FWAFB 7079. Mattson n 65 above.

167 See Burns 'Anti-social media: Linfox Full Bench sets a framework for assessing misuse' available at: http://www.herbertsmithfreehills.com/insights/legal-briefings/anti-social-

they damage the employer's reputation or viability, or destroy the employer's trust in the employee.

The boundaries between the personal and the professional have always been easily blurred. As both move increasingly online, employers and employees need a clear understanding of what online behaviour is (and is not) subject to workplace disciplinary processes. Some employees hold the mistaken belief that whatever they post on social media, is always a private matter and has nothing to do with their employers.[168] This may often be the case, but not always – sometimes their postings are incompatible with the duty and fidelity they owe to their employers.[169] This is clearly illustrated in the case of *Bradford Pedley v IPMS Pty Ltd T/A Peckvonhartel*,[170] where an employee sent an email through the social network LinkedIn to his 'connections' (clients of his employer) in an attempt to solicit work to expand his own business in competition with his employer. The Fair Work Commission upheld the termination of his employment and found that the employee 'owed an obligation to his employer to faithfully promote his employer's interests.'[171]

A recent case sets out some useful guidance. In *Little v Credit Corp Group Limited*,[172] a young employee was dismissed for the inappropriate use of his personal Facebook account. He criticised an organisation with which his employer had professional dealings and made sexually suggestive comments

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media-linfox-full-bench-sets-a-framework-for-assessing-misuse (last accessed 7 January 2015), where the author stated that 'of greater ongoing significance is the Full Bench's view that employee ignorance of the implications of social media misuse may be given less weight over time as more employers adopt social media policies. Employers can best protect their position (and their right to legitimately discipline employees) by implementing and effectively communicating dedicated social media policies to employees. However, a breach of even the most sophisticated policy does not mean that a termination in all cases will be "fair". All relevant matters must be considered in this context, and particularly so where employees have access to the unfair dismissal regime.'

168 Thornthwaite 'Social media, unfair dismissal and the regulation of employees' conduct outside work' 2013 *Australian Journal of Labour Law* 164.

169 In certain occupational fields the risks associated with social media are greater, *eg* in some cases teachers have been scrutinised for any form of relationship with their students. *Queensland College of Teachers v Genge* (2011) QCAT 163.

170 [2013] FWC 4282.

171 '[The email] clearly stated that he wished to build to a full-time operation and that his interest was not confined to small jobs that his employer would not take on. The applicant was clearly intending to set up a business that could be in opposition to his employer, albeit in a small way. He was soliciting work from current clients of his employer in clear breach of his obligation to put the interests of his employer before his own interests' at par 46.

172 [2013] FWC 9642.

about a new employee of the company. He maintained that his Facebook page was private, but accepted that a document, said to be a printout of his Facebook page, disclosed posts which he had made. In addition, he claimed that he did not understand how Facebook worked. The Commission placed the blame on the employee, referring to the warning of the Full Bench in *Linfox Australia Pty Ltd v Glen Stutsel*:[173]

> ... I have trouble accepting that the applicant believed his Facebook page was 'private' and he did not understand how Facebook worked. For a young person who seemingly frequently used Facebook, it strikes me as highly implausible that he was incapable of adjusting his privacy settings. In any event, the maintenance of his privacy settings was his responsibility.[174]

In response to a defence that the offending comments were made *outside of work hours,* Deputy President Sams pointed out that

> the applicant is perfectly entitled to have his personal opinions, but he is not entitled to disclose them to the 'world at large' where to do so would reflect poorly on the Company and/or damage its reputation and viability… the fact the applicant made both Facebook comments in his own time is of no consequence. It was not when the comments were made which is important, but the effect and impact of those comments on the respondent, its other employees and on the new employee.[175]

It is thus clear that the divide between work and home is of less importance given the nature and reach of social media.

I have focused on the restrictions on the right to freedom of speech, which leads to the next question – whether there are circumstances in which employee speech, which would normally be considered defamatory, can be protected?

Employee protection

Employees' speech enjoy greater protection in certain circumstances. The position in the US illustrates this point well. In the US,[176] employees who are

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173 *Linfox Australia Pty Ltd v Glen* Stutsel [2012] FWAFB 7079.

174 *Little v Credit Corp Group Limited* [2013] FWC 9642 at par 73.

175 *Id* at pars 74–75.

176 Berman-Gorvine 'Employer ability to silence employee speech narrowing in private sector, attorneys say' available at: http://www.bna.com/employer-ability-silence-n17179890580/ (last accessed 7 January 2015) explains that private-sector employees

communicating with fellow-employees about their terms of service, fall in the 'protected concerted activity'[177] category – a concept that appears to have evolved from the right to collective bargaining.[178] If a post (in this category) is made and fellow-employees agree and comment on, for example, the unfairness of the company's actions towards its employees, then such a post will be deemed to be protected since it was supported by colleagues and highlighted an unfair practice in the organisation.

In the first case of its kind, the US National Labor Relations Board (NLRB) issued a complaint against an employer – American Medical Response of Connecticut (AMR) – for the suspension and dismissal of an employee who posted negative comments about her supervisor on her Facebook page.[179] In *American Medical Response of Connecticut*,[180] the employee, Dawnmarie Souza, initially posted '…looks like I am getting some time off' and, using her workplace numeric code for a psychiatric patient, she stated 'love how the company allows a 17 to become a supervisor'. She also referred to her supervisor as 'being a d***' and later responded 'yep, he's a scum*** as usual'. Her Facebook friends sympathised and responded with supportive remarks.[181] However, the comments by Ms Souza resulted in her dismissal. The NLRB found that the employer retaliated against the terminated employee for her postings and for requesting the presence of her union representative at an investigatory interview that led to discipline.[182] It was further found that the employer's rules on Internet postings, which included

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have very little protection against 'at will' dismissals by their employers: 'Traditionally, widespread "at-will" employment is thought to severely restrict most of the rights of private-sector employees while they are at work. Employment relationships that are not subject to collective bargaining agreements or other formal contracts usually are at-will arrangements that either party can terminate at any time for any reason or no reason, which would seem to include employer dissatisfaction with the way employees express themselves.'

177 The NLRB explains the principle as follows: 'The law we enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union. If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court.' Available at: https://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last accessed 7 January 2015).

178 Potgieter n 13 above at 66.

179 O'Brien 'The first Facebook firing case under section 7 of the National Labor Relations Act: Exploring the limits of Labour law protection for conduct communicated on social media' 2011 *Suffolk University Law Review* 29.

180 NLRB Reg 34 No 34-CA-12576 (Oct 27, 2010); O'Brien n 179 above at 29.

181 O'Brien n 179 above at 35.

182 *Id* at 29.

social media use, and standards of conduct relating to discussing co-workers and superiors[183] were overbroad, interfering with employees' right to engage in concerted activities for protection and mutual aid in terms of section 7 of the National Labor Relations Act (NLRA).[184] This case has set the tone for all subsequent cases – it signalled that the NLRB, the federal agency that enforces the statutory rights of all employees covered by the NLRA, is ready to prosecute companies with policies that unduly interfere with employee communication about work matters such as wages, hours, and working conditions, even on social media.[185]

The NLRB broadly interprets 'concerted activity' in terms of section 7 as follows:

> Generally, this requires two or more employees acting together to improve wages or working conditions, but the action of a single employee may be considered concerted if he or she involves co-workers before acting, or acts on behalf of them.[186]

By contrast, protected 'concerted activity' does not include purely personal gripes without any contemplation of group action, and the protection in terms of section 7 can be forfeited if an employee engages in malicious behaviour[187] or sabotages, or defames the company's product or discloses trade secrets.[188] The 'concerted activity' protection was lost in the following ruling: two employees of a non-profit youth centre engaged in concerted activity when they discussed their workplace concerns on Facebook, but they forfeited any legal protection under federal labour law when they made

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183 In terms of the company's policy, employees were prohibited from making 'disparaging, discriminatory or defamatory comments when discussing the company or the employee's supervisors, co-workers and/competitors'. O'Brien n 179 above at 29.

184 Section 7 of the NLRA protects the right of employees to ' … form, join, or assist labor organizations … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' S 8(a)(1) of the Act further provides that employers may not 'interfere with, restrain, or coerce employees in the exercise of' their s 7 rights.

185 O'Brien n 179 above at 35.

186 See http://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last accessed 15 January 2015).

187 *Richmond Distr Neighborhood Ctr* NLRB ALJ No 20-CA-91748, 11/5/13; 31 HRR 1253, 11/25/13. Berman-Gorvine n 176 above.

188 See http://www.nlrb.gov/rights-we-protect/protected-concerted-activity. (last accessed 15 January 2015). Alaniz 'When employees rant online – the NLRB weighs in on workers' rights' available at: http://www.accountingweb.com/aa/standards/when-employees-rant-online-the-nlrb-weighs-in-on-workers-rights (last accessed 7 January 2015).

comments indicating they intended to be uncooperative or insubordinate to their employer. McDonald points out that an ironic result of this aspect of the law is that in 'union-protected speech' employees are allowed to make remarks that 'directly trash' their employer, whereas other kinds of remarks they make that may be equally offensive are not protected at all.[189] However, it is suggested that employers should carefully craft the rules of their social media policies to outline what types of online communication would damage the company, and what conduct would therefore result in discipline and dismissal, while clearly indicating that employers may still engage in protected concerted activities.[190] If workplace policies and rules are ambiguous and broad, resulting in employees believing that they cannot engage in protected discussion, it will be deemed to be overbroad.[191]

In the South African context, section 78(1)(b) of the Basic Conditions of Employment Act 78 of 1997 provides protection for employees when discussing terms of service with colleagues:

> Every employee has the right to discuss his or her conditions of employment with his or her fellow employees, his or her employer or any other person.

As far as could be ascertained, there is no case law interpreting this section in the social media context. Although cases have been mentioned in note 1 above where the messages of employees on social media have led to disciplinary proceedings, at the time of writing this article, there does not appear to be any case law interpreting this section in the social media context. However, in view of the fact that an ongoing discussion on social media between employees relating to their grievances that fall into this category of concerted activity, and which may be fully accessible to anyone (including customers and clients) to read, has the potential of causing reputational harm to the company. In the meantime companies should implement policies in terms of which employees are made aware of the risk of reputational harm to the company, and that in terms of section 78(1)(b) of the Basic Conditions of Employment Act 78 of 1997, social media should not be used for discussing matters.[192]

Vicarious liability

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189 Berman-Gorvine n 176 above.
190 O'Brien n 179 above at 66.
191 *Ibid.*
192 Potgieter n 13 above at 68.

Where an employee, who is seen as the voice of the organisation, makes defamatory allegations on social media, it can lead to vicarious liability of the employer. In the UK case of *Otomewo v Carphone Warehouse Ltd*,[193] the employment tribunal examined the vicarious liability of the company for the conduct (Facebook postings) of its employees. Two of Otomewu's colleagues took their manager's phone without his permission and posted on his Facebook page: 'Finally came out the closet. I am gay and proud'. These comments were posted in the course of employment, the employees' actions took place during working hours, and they involved dealings between staff and a manager. The employer was found vicariously liable for the conduct which constituted harassment on the ground of sexual orientation. It was held that the employer should have created an environment where these types of action by fellow employees did not take place.[194]

In Australia vicarious liability refers to the situation where an employer is held liable towards a third party for the delictual acts of an employee on the basis that the employer has expressly or impliedly authorised such acts.[195] The Australian case of *Menere v Poolrite Equipment Pty Ltd*[196] illustrates that when an employer takes proactive steps to develop an appropriate policy which is not only accessible and distributed in the workplace, but also operates effectively in practice, it can escape liability for sexual harassment. For an employer to be held vicariously liable for the wrongdoing of her/her employee, that wrongdoing must have occurred 'in the course of the employment' of the employee. 'In the course of employment' has been interpreted broadly by the courts. However, it is a defence if the employer has taken all reasonable steps to prevent the contravention.[197]

It is clear that employers can be held vicariously liable for the conduct of employees on social networking sites if such conduct occurs 'in the course of employment'. However, this does not mean that employers should disregard all the actions of the employee which occur outside of the workplace. The employer has to take steps whenever the conduct of the employee is linked to the employer, damaging to the business, or is offensive to other employees. Even where the online harassment was directed at a co-

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193 [2012] EqLR 724 (ET/2330554/2011, 8 May 2012).

194 Potgieter n 13 above at 48.

195 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36.

196 (2012) QCAT 252. See also *Hughes v Narrabri Bowling Motel* Limited (2012) NSWADT 161.

197 *Menere v Poolrite Equipment Pty Ltd* (2012) QCAT 252; *Hughes v Narrabri Bowling Motel* Limited (2012) NSWADT 161. See also 'Employer avoids liability for sexual harassment by employee' available at: http://www.hwlebworth.com.au (last accessed 7 January 2015).

employee and took place outside of working hours, it can still lead to the vicarious liability for the employer. An employee should deal with complaints of online harassment/cyberbullying irrespective of whether it occurs during or outside of working hours.

GUIDELINES FROM CASE LAW

Based on the evaluation of the court decisions discussed above, the question regarding misconduct and whether dismissal is unfair depends on the specific facts and will differ in each case. An employee's conduct before and after the offending post and his record of service will be taken into consideration. The content, context, tone and language used in the statement are important and must be evaluated and interpreted objectively. An apology, remorse, and removal of the offending post will help mitigate any damage.

When evaluating the conduct of employees during disciplinary action, employers must consider the actual impact on business rather than any assumed or feared impact. This means a number of factors must be considered. These include the seriousness of the damage to the employer's reputation, whether the employee is remorseful and withdraws the posting, whether there is a clear connection between the posting of the defamatory statement and the employer and the impact of the statement on the business. The employer need not show actual harm to its reputation by social media postings – the potential to cause harm is sufficient to find an employee guilty. Employees should have separate social networking accounts for work and home use respectively.

It is important for employers to draft and distribute well-conceived social networking policies, which are updated regularly and clearly state the rules applicable to the use of social media by employees and the repercussions of not complying with these rules. The policies should state clearly what conduct is and is not acceptable within and outside of the workplace, and in the event that cyberbullying does take place, the steps which will be taken to deal with such conduct. Training should be given to employees to ensure that they understand the social media policy.

Where an employee posts a 'widely held view' on a specific topic (as long as these posts are not defamatory, racist or sexist), such employee will not be at risk of disciplinary action. A reliance on the defence of freedom of speech does not provide a licence to breach a contract of employment. The courts in Australia have held that social media interaction is not considered to be private interaction and that privacy settings do not provide legal

protection for users against employer action. It is clear that locally the trend is that there is nothing private about anything said on any social media pages, despite what employees might say or raise in their defence.[198] The boundaries between the personal and the professional have always been easily blurred. As both increasingly move online, employers and employees need a clear understanding of what online behaviour is (and is not) subject to workplace disciplinary processes.

CONCLUSION

Employees have a duty of good faith towards their company (the employer), including fellow-colleagues and the company's clients.[199] By making negative or offensive comments about a company or anyone directly linked to the company, employees face the risk of being disciplined or even dismissed.[200] There is no clear-cut answer which neatly explains exactly what constitutes speech on social media that would be seen as reflecting badly on an employer – the test is the extent to which the comment made or opinion expressed has the ability to destroy the trust relationship between the employer and employee, and impacts negatively on the employer and the business.

In South Africa, the court stated in *George Miyambo v CCMA,* that a 'successful business enterprise operates on the basis of trust'.[201] As to whether the particular comment made or opinion expressed has in fact broken down the trust relationship, will in each case depend on the circumstances of that particular case. There may be nothing sinister if an employee merely voices concerns or complaints about his or her working conditions in isolation, but if the employee's comments have the effect of portraying the employer in a bad light, it may impact on the trust relationship.

198 Potgieter n 13 above at 55.
199 Landsberg n 39 above.
200 *Ibid.*
201 *Miyambo v Commission for Conciliation Mediation and Arbitration and Others* (JA 51/09) [2010] ZALAC 30; [2010] 10 BLLR 1017 (LAC); (2010) 31 ILJ 2031 (LAC) (2 June 2010) at par 13.