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The conflict between the employee's right to disconnect and the employer's prerogative to dismiss for off-duty misconduct: A comparative study of South Africa, USA and UK

1. *The right to disconnect defined*

The digital age has transformed work dynamics, offering remote and flexible options with advantages like autonomy, work-life balance, and productivity. However, excessive digital device use may strain employee's accessibility, causing health problems and work-life imbalance. Hence, the "Right to Disconnect" emerges as a proposed human right, granting individuals the freedom to disengage from work-related electronic communication outside work hours. Since France passed legislation on the "Right to disconnect" other countries have followed suit. Italy, Spain, and Ireland have passed similar laws, and the European Union is thinking about doing the same[1].

[1] European Parliament, *Parliament wants to ensure the right to disconnect from work*, 2021, January 21, 2021, https://www.europarl.europa.eu/news/en/headlines/society/-20210121STO96103/parliament-wants-to-ensure-the-right-to-disconnect-fromwork#:-

The 2022 Eurofound report defines the right to disconnect as the right of employees to refrain from engaging in work-related electronic communications such as emails or messages after work hours[2]. Lagutina identifies three key components of the right to disconnect: 1) the employee's freedom from regular work outside normal hours, 2) protection from penalties for declining work-related matters after hours, and 3) the responsibility to respect others' right to disconnect, refraining from excessive communication outside normal working hours[3].

The author argues that the right to disconnect encompasses protection against dismissal for lawful off-duty activities unrelated to the employer. Article 2 of the EU Directive 2003/08 defines "working time" as any period when an employee is available to the employer and performs tasks, while Article 5 stipulates that the concept of "rest" must be quantified in terms of days, hours, and/or fractions[4].

The "right to disconnect" protects employees from engaging in work-related electronic communications during their off-duty time and shields them from negative consequences for being unavailable to their employers[5]. This right offers benefits to both employees and employers by promoting work-life balance, preventing burnout, and enhancing productivity[6]. With the increasing trend of remote and flexible work arrangements, employees can work from anywhere, blurring the boundaries between work and personal life[7]. The "right to disconnect" prevents abusive employment practices and ensures that employees can truly dis-

~:text=The%20right%20to%20disconnect%20is%20not%20defined%20in,consequences%20and%20setting%20minimum%20standards%20for%20remote%20work.

[2] Gaude, Eurofound, *Workplace innovation in European companies: A report on the fifth European Company Survey* (Report No. 01), 2019, p. 39, https://eurlex.europa.eu/legalcontent/-EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT.

[3] Lagutina, *"Right to disconnect" as one of the employee's digital labours right*, in JES, 2022, http://jes.nuoua.od.ua/archive/3_2022/5.pdf.

[4] *EU Directive 2003/08 concerning certain aspects of the organisation of working time*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003-L0088&from=EN.

[5] Lungu, *The Right to Disconnect-A Necessary Demarcation between Professional and Private,* in *LICD Studii Europene si Relatii Internationale IX*, 2021, p. 178.

[6] Lagutina, *cit.*, p.2.

[7] Von Bergen, Bressler, Proctor, *On the grid 24/7/365 and the right to disconnect*, in *ERLJ*, 2019, p. 113.

connect from work after hours[8]. The author aims to contend that the right to disconnect extends beyond merely refraining from responding to work emails. It encompasses the broader entitlement to privacy and the freedom to choose off-duty activities without interference, as long as these activities do not adversely impact the employer's business. The discussion on the conflict between employee rights and employer prerogatives revolves around this premise, emphasising the need to strike a balance between an individual's right to personal space and an employer's prerogative to dismiss for off-duty misconduct.

2. *The right to disconnect and the International Labour Organisation (ILO)*

Ensuring employee well-being is a vital aspect of labour relations, aligning with the International Labour Organization's (ILO) mission to promote social justice and uphold human and labour rights globally[9]. The ILO's commitment to social justice as a foundation for lasting peace is reflected in its Decent Work Agenda, which aims to establish economic and working conditions benefiting employees, employers, and governments[10]. The right to disconnect, often associated with a safe and healthy workplace, finds support in modern international human rights frameworks mandating workplace safety. These frameworks, including ILO Conventions, Recommendations, and Protocols, the International Covenant on Economic, Social, and Cultural Rights, and the World Health Organization's Constitution, emphasise the fundamental right to a secure and healthy work environment[11]. The ILO Global Commission on the Future of Work and the 2022 International Labour Conference further underscore the significance of safety and health

[8] JOCHMAN, *Effects on employees' compensation under the right to disconnect,* in *MB& SW Law Review*, 2021, 22, p. 209.

[9] Mission and impact of the ILO, https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang—en/index.htm.

[10] The ILO Decent Work Agenda, https://www.ilo.org/global/topics/decent-work/lang—en/index.htm.

[11] *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-declaration/documents/normativeinstrument/wcms_716594.pdf#:~:text=The%20Declaration%20on%20Fundamental%20Principles%20and%20Rights%20at,working%20environment%20as%20a%20fifth%20principle%20and%20right.

as fundamental workplace rights[12]. The author highlights the right to disconnect as an expression of privacy and freedom of expression. Governments must respect this right to support employee well-being and uphold the Decent Work Agenda's goal of advancing peace, prosperity, and growth for employees.

3. *The right to connect and employee off-duty private life*

Informal work patterns have led to widespread adoption of mobile work aided by ICT. This change has changed work and permitted continual employer-employee contact. The line between work and personal life has blurred, making work/life balance harder to attain[13].

Employers must follow maximum working hours and protect workers' privacy and freedom of expression. Avoiding activities that interfere with an employee's personal life during non-work hours can improve their downtime. Employees should be able to set boundaries between work and personal life by disconnecting from digital tools and responsibilities outside of work hours[14].

The addictive nature of the digital world and organisational practises that encourage continual connectedness affect workers' well-being and productivity. Maintaining work-life balance requires addressing these concerns[15].

As stated above, the right to disconnect allows employees to enjoy and exercise other fundamental rights during their off-duty hours. These rights and their protection in select countries are discussed below.

[12] *Ibid*.

[13] Mitrus, *Potential implications of the matzak judgment (quality of rest time, right to disconnect,* in *ELLJ*, 2019, 10, 4, p. 395.

[14] Lungu, *cit.*, p. 2.

[15] Pansu, *Evaluation of "Right to Disconnect" Legislation and Its Impact on Employee's Productivity*, in *IJMAR*, 2018, 5, 3, p. 100.

4. *Employee off-duty rights to privacy and freedom of expression*

The Universal Declaration of Human Rights (UDHR) guarantees global geographical and communications privacy[16]. Article 12 of the UDHR prohibits arbitrary interference with family, home, communications, honour, or reputation[17]. Balancing privacy with social interaction is essential as humanity values privacy and dignity. Privacy is described as a sanctuary for exploring one's thoughts, bodily autonomy, solitude at home, personal data control, freedom from surveillance, reputation safeguarding, and protection from searches and interrogations[18]. Both the 1976 International Covenant on Civil and Political Rights (ICCPR) and UDHR protect freedom of expression, emphasising its universal importance as a human right and a cornerstone of democracy.

In South Africa, the Bill of Rights, particularly Section 14 of the Constitution, safeguards privacy by preventing unwarranted searches, investigations, seizures, and interruptions. Several laws in the country bolster privacy rights, including the 1992 Interception and Monitoring Prohibition Act for telecommunications, the 2002 Electronic Communications and Transactions Act's Section 51 requiring written consent for personal data collection, and the Promotion of Access to Information Act (PAIA) defending information access rights. Additionally, the 2002 Regulation of Interception of Communications and Provision of Communication Related Information Act (RICA) prohibits unauthorized communication interceptions. The SA Constitution's Section 16 emphasises freedom of expression, a crucial element in a democratic state.

In the United States of America, the Fourth Amendment safeguards citizens against unreasonable searches and seizures of their homes and possessions. While it doesn't directly apply to private-sector employment, constitutional interpretations of privacy have extended rights, serving as a guide for courts and employers[19]. Privacy tort law aligns with Fourth

[16] Burchell, *The legal protection of privacy in South Africa: A transplantable hybrid,* in *EJCL,* 2009, 13(1), p. 3.

[17] Burchell, *cit.*, p. 5.

[18] Carbone, *To be or not to be forgotten: Balancing the right to know with the right to privacy in the digital age*, in *Va. J. Soc. Pol'y & L*, 2015, 22, p. 525.

[19] Abril, Levin, Del Riego, *Blurred boundaries: Social media privacy and the twenty-first-century employee*, in *Am. Bus. LJ*, 2012, 49,1, p. 7.

Amendment reasonableness standards[20]. The Electronic Communication Privacy Act (Wiretap Act) prohibits electronic communication interception, including employee social media monitoring[21]. However, this does not cover public electronic communication, allowing employers to monitor if digital information is publicly disclosed. The First Amendment protects freedom of expression, press, assembly, and petition, considered essential for preserving other liberties and democratic processes[22].

In the United Kingdom, privacy is an important workplace right, guaranteed under Article 8 of the European Convention on Human Rights and the Data Protection Act of 2018. Section 2 of the Data Protection Act defines "Data Protection Regulation" as protecting natural people's data and its free movement. Furthermore, Section 1(3) of the Regulation of Investigatory Powers Act prohibits employers from reading emails, scanning inboxes, or monitoring calls or websites without legal authorisation. UK law, together with the legislation of the European Union and international human rights law, protects the right to freedom of speech. The European Convention on Human Rights guarantees, in particular, Article 10's guarantee of freedom of speech. The ECHR governs domestic law under Section 3 of the 1998 Human Rights Act. The Human Rights Committee (HRC) has never had an issue applying that Article to online freedom of speech. All technological and internet-based communication is considered expression by UK courts[23].

Although employees should enjoy their off-duty rights, sometimes they get dismissed for conduct that occurred outside of working hours and away from the employer's premises. This is called dismissal for off-duty conduct.

5. *The right to disconnect and dismissal for off-duty misconduct*

The "right to disconnect" implies that employees have the freedom to engage in legal activities during their off-duty hours without being connected to the workplace. However, employers retain the prerogative to terminate employees for off-duty misconduct, creating a potential conflict between these rights. Generally, what employees do on their own time is

[20] Abril, Levin, Del Riego, *cit.*, p. 6.

[21] 18 U.S.C. section n. 2511.

[22] *Palko v Connecticut*, 302 U.S. 319/1937 319.

[23] *Handyside v United Kingdom*, 1 EHRR 737/1976, para 49.

their business, but exceptions exist[24]. Off-duty misconduct occurring outside working hours, away from the workplace, can lead to dismissal if it negatively affects the employer's business, especially in cases of off-duty social media misconduct. Dismissals often result from activities irreparably damaging the employment relationship, assessed through the "nexus" and "breakdown of the employment relationship" tests[25].

These two tests are discussed below.

5.1. Nexus and Breakdown of employment relationship tests

Before an employee is dismissed for off-duty misconduct, there must be a plausible nexus or connection between the misconduct and the employer's business interests, furthermore, the conduct must have a substantial effect on the employer's business[26]. An example of a substantial impact is the company's profitability or reputation[27].

When assessing guilt for off-duty misconduct, the nexus test is employed to determine the employee's culpability in the alleged misconduct. In the second stage, it is examined whether the employee's actions have sufficiently damaged the employment relationship to warrant dismissal.

The case for dismissal is strengthened if the employee posts derogatory or insulting comments about the employer on social media albeit off-duty. This was the situation in the SA case of *Edcon v Cantamessa*[28]. In this case, the employee was dismissed for posting derogative comments about the SA government on Facebook while she was off-duty. The same applied to a recent BBC employee Gary Lineeker who was suspended after a tweet criticising the UK government's refugee policy. In an American case *York University Staff Association v York University*[29], an arbitrator upheld York University's dismissal of a Laboratory Technologist for discriminatory Facebook posts.

[24] SANDERS, *The law of unfair dismissal and behaviour outside work*, in *LSt*, 2014, 34, 2, p. 332.

[25] *Council for Science & Industrial Research v Fijen*, 1996, n. 17 in *ILJ* 18,1999; 20 *ILJ*, par. 39, pp. 2437-2449.

[26] NEL, *Social media and employee speech: the risk of overstepping the boundaries into the firing line,* in *Comp. Int. LJ of SA*, 2016, 49(2), p. 88.

[27] *Dolo v. Commission for Conciliation, Mediation, and Arbitration and Others*, in *ILJ*, 2011, 32, par. 19.

[28] ZALCJHB 273/2019.

[29] Grievance, 47-16.

5.2. Employer's prerogative to dismiss for off-duty misconduct to protect reputation

Employer's prerogative encompasses an organization's right to effectively manage its resources and operations to achieve its goals[30]. In the employment context, it grants employers the authority to oversee work arrangements for optimal functioning[31]. While employees are safeguarded against unfair dismissal, employers retain the right to terminate employees who compromise business interest[32]. This power imbalance often leads to tension between employee rights and employer prerogatives, especially regarding off-duty activities[33]. Employers, driven by reputation concerns, may react strongly to off-duty misconduct, but proving reputational harm can be subjective and challenging in some off-duty cases. Evaluating such damage often lacks objective assessment[34].

6. *Adjudication and regulation of dismissal for off-duty misconduct in select countries*

6.1. South Africa

SA does not have a legislative framework that governs dismissals for off-duty misconduct. All forms of misconduct are governed by the Labour Relations Act 1995 (LRA) and the Code of Good Practice Dismissal (Code). Section 185 of the LRA prescribes that every employee has the right not to be unfairly dismissed and not to be subjected to an unfair labour practice[35]. The Code outlines some of the most essential aspects of dismissals for con-

[30] Bergen, *Management prerogatives*, in *HBR*, 1940, 18, 3, p. 279.

[31] Asvanyi, *Content and limitations of the managerial prerogative doctrine,* in *Jura: Pecsi Tudomanyegyetem Allam- es Jogtudomanyi Karanak Tudomanyos Lapja*, 2017, p. 268.

[32] Racabi, *Abolish the employer's prerogative, unleash work law*, in *BJELL*, 2022, 43, p. 79.

[33] Chambers Jr, *Employer Prerogative and Employee Rights: The Never-Ending Tug-of-War*, in *MLR*, 2000, 65, p. 881.

[34] Hill, *Discipline and discharge for off-duty misconduct: What are the arbitral standards*, in *Proceeding of the National Academy of Arbitrators*, Bureau of National Affairs, 1986, 152, p.152.

[35] See *National Education, Health and Allied Workers' Union v University of Cape Town* 3 SA 1/2003 (CC), par 42.

duct and capacity[36]. The Code emphasises fairness in dismissals for misconduct, allowing flexibility based on unique circumstances.

Case law shows that employers' rights and employees' rights compete and, in most situations, employee's rights are sacrificed at the expense of the employer's rights to business interests such as reputation.

In *Sedick & others v Krisray (Pty) Ltd*[37], two employees were dismissed for criticising their employer on Facebook. Since neither the company nor specific persons were mentioned, the employees complained to the Commission for Conciliation, Mediation and Arbitration (CCMA) that their posts did not tarnish the employer's image. The employees also cited privacy violations[38]. The CCMA ruled that the employees' privacy was not breached since they had not restricted their Facebook privacy settings and anybody could see their posts, including non-Facebook "friends"[39]. The CCMA also found that the employer's identity was quite likely to be discovered and that the prospect of damage was sufficient to warrant dismissal. Since the posts targeted the employer, the CCMA found a strong nexus between the employees' activity and the company's business. Since the post criticised the employer, it risked reputational damage and dismissal was a fair sanction[40].

In *Chemical Energy Paper Printing Wood & Allied Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pincher*[41] *(Chemical Energy)*, the applicant claimed on Facebook that the respondent discriminated against two long-serving employees by purposefully kissing the white female employee on the cheek and hugging the black female employee[42]. The employee testified that the social media post was unrelated to the employer. The employer testified that it could be identified by the comments even though its name was not mentioned[43]. The employer's event matched the Facebook posts, and the photos seemed to have been taken on the employer's property[44]. According

[36] Section 8(1) of the Code.

[37] 32 *ILJ* 752/2011 (CCMA).

[38] *Sedick & another v Krisray (Pty) Ltd*, par. 42.

[39] Facebook available at https://www.facebook.com/community/understanding-your-privacy-settings/, a Facebook friendship is a two-way relationship. When one accepts to be someone's friend, they can see each other's posts.

[40] *Sedick & another v. Krisray (Pty) Ltd*, par. 53.

[41] 38 ILJ 1922/2017 (CCMA)

[42] *Chemical Energy*, par. 5.

[43] *Chemical Energy*, par. 14.

[44] *Chemical Energy*, par. 28.

to the Commissioner, falsely accusing a supervisor or co-worker of racism was as heinous as racism itself[45]. The Commissioner found the applicant's dismissal procedurally and substantively fair even though the employer did not have a social media policy.

In *Gordon v National Oilwell Varco*[46], an employee was dismissed for social media racism. He wrote on Facebook, "My mother has been in the hospital since yesterday night after her ambulance was kidnapped by sh★t k★★★★★s[47] looking for a ride to their f★★★★★g knife stabbing, I'm tired of his country. Will everything return to normal? I doubt it – maybe I should leave the country"[48]. The employer provided proof that the applicant signed the company's social media regulations when he began working there[49]. He claimed desperation prompted the comments. The Commissioner found workplace racist statements unacceptable and upheld the applicant's dismissal[50].

In the case of *Edcon v Cantamessa*[51], an employee posted a Facebook comment criticizing South Africa's president and government, which led to her dismissal by Edcon, the employer [52]. The CCMA initially ruled the dismissal as substantively unfair, stating that Edcon's policy only regulated on-the-job conduct, and her Facebook post was unrelated to the company[53]. However, the Labour Court (LC) overturned this decision, finding a nexus between her off-duty conduct and Edcon's business interests[54]. The court saw no distinction between off-duty and on-duty social media activity and concluded that dismissal was considered fair because there was a nexus and potential reputational harm[55].

In the case of *Makhoba v CCMA*[56], an employee was dismissed for making racist remarks on a politician's Facebook page, advocating violence against a racial group. Despite initially denying the comment and claiming

[45] *Chemical Energy*, par. 28.
[46] 9 BALR 935/2017 (MEIBC).
[47] Kaffir is an exonym and an ethnic insult, notably about black people in South Africa.
[48] *Gordon v National Oilwell Varco*, par. 9.
[49] *Gordon v National Oilwell Varco*, par. 14.
[50] *Gordon v National Oilwell Varco*, par. 55-61.
[51] ZALCJHB 273/2019.
[52] *Cantamessa*, par. 5.
[53] *Cantamessa*, par. 5
[54] *Cantamessa*, par. 11.
[55] *Cantamessa*, par. 11.
[56] 1280-17/2021 (LC).

a hacked account, the employee later admitted to posting it[57]. He argued that the incident occurred outside work hours, did not involve company employees or supervisors, and was on his personal Facebook account, not the employer's[58]. However, the CCMA upheld the dismissal, emphasizing the severe consequences of racist remarks in South Africa[59]. The LC later supported this decision, stating that off-duty misconduct matters if it negatively affects the employer's business, and in this case, the employee's behaviour was linked to the company's diverse workforce[60].

In South Africa, the legalisation of cannabis has raised workplace challenges. Employees have the right to use it privately but can be dismissed for testing positive at work as discussed below.

6.1.1. The recent legalisation of private use of cannabis in South Africa

Cannabis, also known as marijuana, contains nearly 100 cannabinoids that impact brain and body receptors[61]. Tetrahydrocannabinol (THC) is a prominent cannabinoid responsible for the "high"[62]. It can be consumed in various forms like smoking, pills, food, creams, and vaporization, inducing effects like dizziness, fatigue, memory issues, and impaired motor skills[63].

The Constitutional Court of South Africa legalised adult cannabis use in the case of *Minister of Justice and Constitutional Development v Prince*[64], affirming the right to private use and cultivation of cannabis for adults while prohibiting public usage[65]. The ruling was based on principles of human dignity, equality, and freedom in an open and democratic society[66].

However, the legalisation of cannabis in South Africa presents challenges in the workplace. Employees have faced dismissal due to the presence of cannabis in their blood or urine, despite being off-duty and unimpaired dur-

[57] *Makhoba v. CCMA*, par. 2.
[58] *Makhoba v. CCMA*, par. 4.
[59] *Makhoba v. CCMA*, par. 4.
[60] *Makhoba v. CCMA*, par. 19.
[61] SMITH, *Cannabis confusion: criminalization and decriminalization revisited,* in *bachelor's thesis, University of Cape Town*, 1995, p. 4.
[62] SMITH, *cit.*, p.12.
[63] *Ibid*.
[64] CCT 108/17.
[65] *Prince*, par. 110.
[66] *Prince*, par. 110.

ing work hours. Cannabis testing complexities, including the detection of metabolites rather than impairment, lack of consensus on safe consumption limits, and varying effects based on THC content and other factors like alcohol or drug use, contribute to these employment issues[67]. This is because cannabis has been demonstrated to be present in a person's urine for days and weeks after use[68]. Some employees have been dismissed even if they tested positive days after cannabis usage, as employers cite non-compliance with zero-tolerance policies as a justification for termination.

In the *Nhlabathi and Others v PFG Building Glass (PTY) Ltd*[69], the LC defined a zero-tolerance policy as one that unequivocally prohibits any rule violations, making it clear that specific behaviours or activities will not be tolerated under any circumstances[70]. Such a policy, when consistently enforced, disregards factors like an employee's dependents, years of service, or mitigating circumstances[71]. Instead, it focuses on whether the employee was aware of the policy, if it was consistently applied, and whether it was reasonable for the workplace[72].

In this case, employees were dismissed for testing positive for cannabis, violating the employer's zero-tolerance policy on alcohol and drug abuse. Both the CCMA and the LC upheld their dismissal. The judge emphasized that it didn't matter if the employees used cannabis in private, posed no risk on the day of testing, had long employment terms, or had clean disciplinary records. The company implemented a zero-tolerance policy due to the hazardous nature of the workplace and its commitment to safety, and the key factors considered were adherence to the policy, consistent enforcement, and appropriateness for the workplace[73].

In *Mthembu and others v NCT Durban Wood Chips*[74], the CCMA ruled that, due to the high level of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to prohibit the use of substances such as cannabis at the workplace and re-

[67] Liquori, *The Effects of Marijuana Legalization on Employment Law*, in *NAAG*, 2016, p. 4.
[68] Liquori, *cit.*, p. 12.
[69] ZALCJHB 292/2022
[70] *PFG* case, par. 85.
[71] *PFG* case, par. 85.
[72] *SGB Cape Octorex (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*, ZALAC 2022 n. 118, par. 17.
[73] *PFG* case, par. 84.
[74] 4 BALR 369/2019 (CCMA).

porting to work under the influence of such substances[75]. In this instance, the employees confessed to using cannabis off-duty; however, they were terminated for being under the influence of the substance after the presence of cannabis in their urinalysis was detected[76].

In the case of *Enever v Barloworld Equipment*[77], the employer had a strict zero-tolerance policy for alcohol and drug abuse[78]. An employee, who had transitioned from prescription medications to private cannabis use, was dismissed after testing positive for cannabinoids[79]. She argued that her private usage should have been permitted and claimed discrimination and a violation of her privacy rights[80]. However, the dismissal was deemed fair because the company's zero-tolerance policy applied uniformly to all employees, regardless of their roles[81]. The LC emphasized the policy's consistency, upholding the termination, even though the employee's role did not involve heavy machinery operation[82].

These rulings underscore that despite the decriminalization of private adult cannabis use, employers maintain the authority to regulate such usage among employees based on workplace policies. However, the fairness of dismissal as a consequence is subject to scrutiny. Firstly, these decisions overlooked mitigating circumstances, treating employees operating dangerous machinery the same as those in desk jobs. Secondly, the policies failed to distinguish between procedures for dismissing employees for alcohol or cannabis abuse, applying a blanket zero-tolerance approach. This raises concerns because assessing impairment from alcohol is more straightforward than from cannabis, as cannabis can yield positive test results weeks after consumption.

6.2. United States of America

At the federal level, the USA has no Act regulating off-duty misconduct. However, the National Labour Relations Act (NLRA) protects off-duty free-

[75] *Mthembu*, par. 72.
[76] *Mthembu*, par. 72.
[77] *ILJ* 43/2022(LC).
[78] *Enever*, par. 5.
[79] *Enever*, par. 5.
[80] *Enever*, par. 5.
[81] *Enever*, par. 5.
[82] *Enever*, par. 26.

dom of expression speech and limits employer disciplinary options for social media speech, if the off-duty conduct involves concerted activities[83]. Second, employees may voice their opinions on politics and working conditions on social media without a union[84]. Several states have taken a stance to regulate off-duty conduct to balance the employee's right to privacy and freedom of expression and the employer's right to reputation and the right to dismiss for off-duty misconduct. The three chosen states are California, New York and Colorado.

California's Labour Code protects employees' off-duty conduct. Section 96(k) prohibits employers from dismissing employees for legal off-duty activities, enabling the Labour Commissioner to file claims for those facing adverse actions due to non-work-related actions. Section 98.6(a) prohibits discrimination against individuals using Section 96(k) privileges. Section 98.6(b) grants reinstatement and compensation for employees facing adverse employment actions due to protected conduct.

Furthermore, sections 1101 and 1102 of the California Labour Code also prevent employers from controlling or influencing employees' political actions or affiliations under threat of dismissal or benefit loss. This legal framework is used to evaluate fairness in off-duty conduct dismissals. In *Snyder v Alight Solutions LLC*[85], a California-based remote employee faced unfair dismissal claims after participating in US Capitol demonstrations[86]. The case involves allegations of freedom of expression and assembly rights violation and political affiliation discrimination, grounded in California's Labour Code sections 1101 and 1102[87].

In *Martin House Inc v Tricia Blanton*[88], the employee worked for a non-profit residential institution for homeless people with mental conditions. The employee was dismissed for a Facebook conversation with two friends". She

[83] McGinley, McGinley-Stempel, *Beyond the water cooler: Speech and the workplace in an era of social media*, in *Hofstra Lab. & Emp. LJ*, 2012, 30, 75, p. 84.

[84] McGinley, McGinley-Stempel, *cit.*, p. 14.

[85] (8:21-CV-00187).

[86] Docket available at https://www.docketbird.com/court-documents/Leah-Snyder-v-Alight-Solutions-LLC-et-al/NOTICE-OF-MOTION-AND-MOTION-to-Dismiss-Case-Pursuant-to-Fed-R-Civ-P-12-b-6-filed-by-defendant-Alight-Solutions-LLC-Motion-set-for-hearing-on-4-26-2021-at-01-30-PM-before-Judge-Cormac-J-Carney/cacd-8:2021-cv-00187-00010.

[87] *Ibid.*

[88] 34-CA-012950 358 NLRB No.164 2012 WL 4482841.

ridiculed patients' mental issues on Facebook[89]. Since the employee did not contact other employees via her Facebook account and had no other employees as "friends", the NLRB's General Counsel (GC) decided that her speech was neither concerted nor protected. Her Facebook postings were unrelated to her career, and she never discussed them with co-workers[90].

New York Labour Law section 201-D safeguards employees from discrimination and dismissal due to off-duty activities. This law applies to all New York employers and distinguishes between work and off-duty hours. It prohibits the termination of employees engaged in authorized off-duty political activities outside working hours and away from the employer's premises and resources, as long as it doesn't severely conflict with the employer's proprietary interests. This provision aims to protect employees' rights while allowing employers to safeguard their trade secrets and intellectual property.

Justice Yesawich stated in *State of New York v Wal-Mart Stores Inc*[91]. that "the Legislature's primary goal in enacting Labour Law section 201(d) was to limit employers' ability to discriminate based on activities that occur outside of work hours and have no bearing on one's ability to perform one's job, and ensures employees a certain level of freedom to live their lives as they wish during nonworking hours". In this case, the court decided that Wal-Mart Stores' "fraternisation" policy, which prevented married employees from dating, was not subject to off-duty behavioural control. This lawsuit was based on whether "dating" constituted a protected "recreational activity" under the legislation. The court upheld Wal-Mart's policy.

In a recent New York case, *Cooper v Franklin Templeton*[92], Amy Cooper a white lady contacted 911 following a verbal disagreement with black Christian Cooper in Central Park. Mr Cooper shared the experience on Facebook. People called Ms Cooper racist when the video went viral[93]. Social media "detectives" quickly discovered Ms Cooper was Franklin Templeton's Vice President and Head of Investment Solutions. Franklin Templeton was accused of promoting bigotry on social media[94]. Franklin Templeton dis-

[89] *Martin House Inc v Tricia Blanton*, par. 3.
[90] *Martin House Inc v Tricia Blanton*, par. 3.
[91] 1995 N.Y. App. Div.
[92] 1:21-CV-04692.
[93] *Cooper v Franklin Templeton*, par. 1.
[94] *Cooper v Franklin Templeton*, par. 2

missed Ms Cooper because she violated their anti-racism policy[95]. In return, Cooper sued his employer for sexual harassment and defamation. Franklin's dismissal was upheld, hence the court dismissed her claims. The court held that her misconduct affected the company's reputation because clients threatened to leave, endangering the company's operations. The employee was dismissed to protect the company's reputation and to prevent the loss of customers[96].

Colorado's Revised Statute (CRS) section 24-34-402.5's section 1 states that "1) It is discriminatory or unfair for an employer to terminate an employee's employment because the employee engaged in any permitted activity off the employer's premises during nonworking hours unless such a restriction is properly and rationally related to the employment activities and obligations of a specific employee or group of employees, rather than to all employees".

The above law codifies the nexus test. It allows companies to terminate employees for off-duty activity related to the employer's business.

The court decided in *Marsh v Delta Air Lines*[97] maintaining an employee's off-the-job privacy must be balanced against an employer's financial interests[98]. However, an employer has the right to dismiss an employee if there is a conflict of interest[99].

From the analysis of the regulation of off-duty conduct in the three states above, it can be argued that while the right to disconnect may not be explicitly regulated in many jurisdictions, the broader legal framework around off-duty conduct, privacy, and workplace rights can significantly influence the practical application of this right. As work environments evolve, policymakers and employers may continue to reassess and adapt regulations to meet the changing needs of the workforce.

[95] *Cooper v Franklin Templeton*, par. 2.
[96] *Cooper v Franklin Templeton*, par. 2.
[97] 952 F. Supp. 1458 (1997).
[98] *Marsh v Delta Air Lines*, par. 1463.
[99] *Marsh v Delta Air Lines*, par. 1464.

6.3. United Kingdom

In the UK, there are five recognised reasons for a fair dismissal. These are conduct, capacity, redundancy, statutory illegality or breach of a statutory restriction and any other substantial reason[100]. Procedurally, an employer can only terminate an employee's job lawfully if a fair procedure has been followed[101]. The employer's right to dismiss employees for misconduct is limited by unfair dismissal legislation. Section 94 of the ERA provides employees with the "right not to be unfairly dismissed" by their employers, and section 98 delineates the process for determining whether a dismissal is fair or unfair. Section 111 of the ERA gives employees the right to file a case of unfair dismissal at an Employment Tribunal (hereafter ET). ETs are public organisations in the UK that have statutory competence to hear different forms of disputes between employers and employees.

Smith v Trafford Housing Trust[102] a devout Christian who worked for the respondent as a housing manager. He responded to a BBC article by posting on Facebook[103]. In the post, he opposed gay church marriages. After that, he conveyed his worries to two employees with Facebook access. He was suspended with pay for gross misconduct[104]. His long service earned him a demotion. He challenged the demotion. His employer justified the demotion because the postings could embarrass the Trust[105]. The employer further alleged that the claimant violated the Code of Conduct and Equal Opportunities Policy by failing to treat co-workers with dignity while promoting his religion[106]. However, Briggs J found that a demotion unfairly dismissed the claimant under current legislation. His dismissal was unfair since his Facebook wall lacked a work-related context to trigger the ban on political or religious advocacy[107]. The court also held that whether off-duty misconduct affects the working relationship is the most important issue in terminating an employee[108]. The court held further that it should be assessed if there was

[100] Employment Rights Act 1998 section 98 (1)-(2).
[101] Employment Rights Act 1998 section 98A.
[102] IRLR 86/2013.
[103] *Smith v Trafford Housing Trust*, par. 10.
[104] *Smith v Trafford Housing Trust*, par. 10.
[105] *Smith v Trafford Housing Trust*, par. 11.
[106] *Smith v Trafford Housing Trust*, par. 50.
[107] *Smith v Trafford Housing Trust*, par. 51.
[108] *Smith v Trafford Housing Trust*, par. 51.

an intentional infringement of corporate policy, a negative impact on the employer-employee trust relationship, damage to the employer's reputation, or a violation of employee duties.

In *Game Retail Ltd v Laws* (Game case)[109], an employee was dismissed for making rude personal insults on Twitter[110]. The ET found the dismissal unfair. The tweets were sent from Mr Law's phone, outside of office hours and for personal reasons[111]. It was unclear whether the public had linked Mr Law to the corporation through his Twitter account. Game's disciplinary policy did not specifically state that using social media in this manner constituted serious misconduct[112]. The EAT ruled on appeal that the dismissal was fair since the tweets were made on a public platform and stressed that Game Retail's shops relied on Twitter and other social media as marketing and communication tools, indicating a strong nexus[113].

In March 2023, the British Broadcasting Corporation (BCC) suspended broadcaster Gary Lineker after he tweeted against the UK government's treatment of refugee seekers. A few days later, the BBC and Lineker struck a deal, and BCC is currently examining its social media standards[114]. The BBC lifted his suspension, striking an agreement to get him back on air[115].

The UK cases above reveal that having well-defined policies and considering mitigating factors before dismissing an employee for off-duty misconduct is vital for safeguarding their right to disconnect. This practice creates a framework that respects the boundaries between professional and personal life while maintaining fairness and accountability in the workplace.

[109] UKEAT 0188/14.

[110] *Game Retail Ltd v Laws*, par. 4.

[111] *Game Retail Ltd v Laws*, par. 13.

[112] *Game Retail Ltd v Laws*, par. 31.

[113] *Game Retail Ltd v Law*, par. 31.

[114] UK Labour Law is available at https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/.

[115] Lander, *BBC Ends Suspension of Top Sports Host After Staff Mutiny*, in *The NY Times,* 13/03/2023, https://www.nytimes.com/2023/03/13/world/europe/gary-lineker-bbc-return-motd.html.

7. *Concerns about the conflict between the employer's prerogative and employee rights*

Discussed cases bring to light the complex interplay between employee rights and employer prerogatives concerning off-duty conduct. While employees possess off-duty rights, it's evident that these rights can be constrained by the employer's authority to dismiss for off-duty misconduct. However, there is a legitimate concern when employees are dismissed for conduct unrelated to their employer's business, especially in cases where no company policy regulates such behaviour. This scenario raises questions about the infringement of employee rights, with a potential bias in favour of employer interests.

The decisions rendered by tribunals and South African courts suggest that certain ethical standards are implicitly expected of employees, even without explicit inclusion in workplace policies. Balancing the rights of employers and employees equitably is crucial, particularly when it comes to respecting employees' right to privacy. Dismissing employees for off-duty conduct completely unrelated to the workplace, especially when unregulated by company policies, may be seen as excessive.

The notion that dismissal is akin to a "death sentence" in labour law underscores the importance of employing this sanction judiciously. In cases where off-duty misconduct lacks company policy regulation, employers should consider implementing progressive discipline measures rather than immediate dismissal. Dismissal should be reserved for instances where there is a clear and substantial connection between the employee's conduct and the employer's business, and where the conduct is so egregious that it renders the employment relationship irreparable. Employers must demonstrate that no alternative or lesser sanction could effectively remedy the harm suffered by the employer. This balanced approach seeks to safeguard both employee rights and employer interests within the framework of fair labour practices.

SA can learn from the USA's well-defined legislative frameworks for off-duty misconduct and dismissals, as these provide structured procedures. Additionally, the UK's emphasis on policies governing off-duty behaviour offers insights, suggesting that South Africa could benefit from implementing a similar policy requirement to reduce ambiguity and protect the rights of all parties involved.

8. *Conclusion*

The concept of the "right to disconnect" encompasses not only the freedom to disengage from work but also fundamental rights such as privacy and freedom of expression. There is conflict between the employer's authority to dismiss employees for off-duty misconduct and employees' rights.

To mitigate this conflict and achieve a harmonious balance between employer prerogatives and employee rights, several recommendations are proposed below. These solutions aim to reconcile the rights of both parties involved in a fair and equitable manner.

9. *Recommendations*

To effectively uphold and balance the rights of both employers and employees, states must enact legislation that regulates and protects off-duty conduct. In doing so, these legislative efforts should also incorporate and elucidate the "right to disconnect", outlining its scope and implications within the legal framework.

Such legislation should provide a clear demarcation between work hours and rest hours, thereby distinguishing between on-the-job and off-duty hours. Furthermore, in consideration of contemporary technological advancements, it is essential to establish a modern nexus that objectively links an employee's conduct to the employer's business, with clear guidelines on what off-duty behaviour warrants dismissal.

To ensure compliance and clarity, legislation should mandate that employers institute off-duty conduct policies that strike a balance between employer prerogatives and employee rights.

Lastly, it falls upon the courts and tribunals to interpret and apply this legislation in a manner that upholds internationally recognized human and labour rights, fostering a fair and just working environments for all parties involved.

Abstract

Labour rights are an integral component of human rights, encompassing various entitlements for employees aimed at safeguarding them from potential exploitation by employers. Among these rights, the right to privacy and the right to disconnect from the workplace have gained prominence. The contemporary challenges posed by the widespread off-duty use of social media and the legalisation of private cannabis use (in some countries) have not only intensified the conflict between employees' privacy rights and employers' authority but have also underscored the relevance of the right to disconnect. As employees engage in off-duty activities that may inadvertently impact the workplace, the line between personal life and professional obligations becomes increasingly blurred. This becomes apparent when considering off-duty misconduct, where legal principles limit an employer's disciplinary actions unless a clear detriment to business interests is demonstrated. The right to disconnect, which advocates for employees' autonomy over their non-working hours, aligns with the need to address the evolving dynamics of off-duty conduct. The paper's comparative analysis across jurisdictions, including South Africa and selected United States of America states aims to shed light on how legal frameworks navigate these complexities, emphasising the interconnectedness of the right to disconnect with contemporary labour rights challenges.

Keywords

Employee rights, Right to disconnect, Freedom of expression, Privacy, Off-duty misconduct.