

The Cultural, Economic and Technical Milieu of Social Media Misconduct Dismissals in Australia and South Africa

By **René Cornish**, (PhD Candidate at the Queensland University of Technology School of Law), **Orchid:** <https://orcid.org/0000-0002-0859-3280> and **Kieran Tranter**, (Chair of Law, Technology and Future at Queensland University of Technology School of Law), **Orchid:** <https://orcid.org/0000-0003-1683-2939>

Queensland University of Technology, Brisbane

ABSTRACT

The intersection between social media activity and employment is an emerging global issue. This article examines the cultural, economic and technical milieu that has generated contested social media misconduct dismissals in Australia and South Africa. Through an analysis of 42 Australian and 97 South African decisions, it is argued that the ubiquitous, enduring and open nature of social media affects employment quite differently depending on country specific factors. In Australia, the absence of entrenched political rights has meant that employee social media use is not subject to reasonable expectations of privacy. However, there is also tolerance for a certain level of larrikin behaviour. In South Africa, the existence of enshrined rights manifests differently in the context of social media dismissal. Within a culturally diverse population with deeply fractured race relations, the decisions reveal a White minority still perpetuating dominance over a historically disadvantaged Black workforce.

Keywords – *Employment, Dismissal, Social Media, Facebook and Twitter*

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1. INTRODUCTION

In the space of 10 years social media has become a significant factor in human life. The 2016 US Presidential election has particularly turned attention to the impact of social media – as media – on public institutions and public trust (Sunstein 2018). Simultaneously, there has emerged significant literature focused on the impact of social media on individuals, from their sense

of wellbeing and mental health to their feelings of security and optimism for the future.¹ One of the obvious impacts of social media is where claims of social media misconduct by employees is used by employers as the basis for dismissing the employee (Davis 2015).

¹ On the changing emphasises and concerns with social media, see generally Lomborg (2017).

The primary focus of this growing literature and knowledge about the impacts of social media has been nations with developed economies. A mostly unmentioned and unmediated upon assumption has been that social media and its consequences—such as employment dismissal for social media misconduct—is a problem only within the Global North where digital technologies and infrastructure are well established. Limiting social media and its impact to the Global North ignores the substantial diffusion of digital communication into the Global South and with it ignores how these technologies are shaping and disrupting these societies, economies and cultures.

Global statistics indicate that there are approximately 3.48 billion active social media users worldwide (Global Digital Report 2019) with almost 1.23 billion users connecting on social media platforms daily.² In Australia, a nation that is usually considered part of the Global North,³ 79% of the population use social media (Yellow Social Media Report 2018)⁴ and in South Africa, a nation considered belonging to the Global South,⁵ 40% of the population are active social media users, with 38% being mobile social media users (Global Digital Report 2019). While there is still a noticeable gap in overall percentages, the diffusion of social media in Africa is accelerating due to increases in mobile cellular connectivity and the reduced costs of digital devices (Tchamyu, Erreygers and Cassimon 2019). Indeed, recent figures indicate that there are 216 million active social media users in Africa (Global Digital Report 2019, p. 12).

Further, these users are intensely accessing social media. In South Africa the average time per day that a user is engaging with a social media platform is two hours forty-eight minutes (Global Digital Report 2019, p. 77). That is significantly higher than the Australian average of one hour thirty-one minutes (Global Digital Report 2019, p. 77). Clearly, in South Africa, there is a large and increasingly engaged population of social media users, and it would be expected that it would be generating similar challenges for employment law and policies as has been seen in Global North nations like Australia.

This article aims to begin to address this imbalance. Focusing on social media misconduct dismissal in Australia and South Africa, it identifies how social media use is filtered through very specific national contexts to produce discrete concerns. In Australia social media misconduct is not mitigated by any constitutionally entrenched rights of privacy and freedom of speech, yet a certain degree of “larrikin” joking seems tolerated.

In South Africa, an elaborate regime of rights does not translate into protections for employees. Rather the rights-based system seems to reinforce established racial and economic divides. These findings came from an examination of the available decisions of first instance, lower level employment tribunals and appeals from those tribunals to the general courts. The Australian sample comprised 42 decision; the South African sample was 97 decisions. These were analysed following similar socio-legal studies as windows into the cultural, economic and technical milieu that gives rise to social media misconduct dismissals.

The structure of the article is as follows. The next section locates the analysis within existing studies of social media misconduct dismissals; particularly highlighting that there are few comparative studies and very few studies looking at the Global South. This section also sets out the research method and explains how the samples were collected and analysed. The third section presents findings where there was no particular difference between the Australian and South African samples. There were cases where social media content was used as documentary evidence of employee infractions “at work.” Another commonality was how rights-based arguments had little traction in both jurisdictions. While this finding was unsurprising in Australia given the absence of a formal rights instrument at the Commonwealth level; it was surprising in South Africa with its entrenched system of rights. The fourth section presents what was unique in the samples; how in the Australian sample there was a degree of tolerance for larrikin behaviour and how social media misconduct dismissal in South Africa is fundamentally racialised.

2. SOCIAL MEDIA MISCONDUCT DISMISSAL AND METHOD

This section argues that while there is a significant literature looking at social media misconduct dismissal, there are two gaps. The first is a preponderance of studies focused on superior courts from a single jurisdiction. While this reveals the state of the law in the jurisdiction, by not considering primary decisions, these studies tend to de-emphasise the cultural, economic and technical milieu surrounding social media misconduct dismissal. The second is that, while there are some comparative studies, most of these have been limited to Global North nations. The impact of social media within employment in developing nations has generally been absent. This section

² <https://www.socialmedianews.com.au/social-media-statistics-australia-september-2019/>

³ On Australia as interloper of the Global North in the geographical South see Mann and Daly (2019).

⁴ See also <https://www.sensis.com.au/about/our-reports/sensis-social-media-report> and <https://www.yellow.com.au/wp-content/uploads/2018/06/Yellow-Social-Media-Report-2018-Consumer.pdf>

⁵ On Australia and South Africa as Global North and South see Odeh (2012).

will also introduce the study through reviewing similar socio-legal studies that have used primary “street-level” decisions to gain an insight into the cultural, economic and technical milieu that give rise to legal disputes and outlining how the samples were identified and analysed.

In Australia, there have been several high profile dismissals for “off duty” social media misconduct including *McIntyre v SBS*,⁶ the suspension of La Trobe University educator Roz Ward⁷, *Williams v Cricket Australia*⁸ and the most recent case of *Israel Folau v Rugby Australia*.⁹ Internationally, the dismissal of Justine Sacco attained international notoriety¹⁰ when prior to boarding an aircraft from London to Cape Town she tweeted a racially abhorrent comment that went viral before she landed in South Africa. Foremost, these matters show that employment law does regard social media as evidence of inappropriate employee behaviour (Van Dissel 2014; Thorthwaite 2013). Furthermore, commentators tend to identify several features. The first that social media is depicted as a boundless (Van Dissel 2014) “non-place” (Richardson, Thomas and Trabsky 2012, p. 257) free of “temporal” and “spatial” limits (Banghart, Etter and Stohl 2018, p. 337). The second is that social media has an endurance and permeability; leaving a digital archive of not only the post but also reactions to it (Potgieter 2014; Lindsay 2014; Cilliers 2014; Sleep and Tranter 2018). The third is that contemporary employment should be seen as extending beyond physical structures (McDonald and Thompson 2016) and defined hours to being “everywhere and every when” (Van Gramberg, Teicher and O’Rourke 2014, p. 2235).

Although these high-profile matters were settled in confidence, such as the recent Folau matter,¹¹ there is literature that identifies a growing body of employment decisions pertaining to social media misconduct dismissal in Australia (Forsyth 2014; Stewart et al 2016; Stewart 2018; Thorthwaite 2018) and

elsewhere (Ornstein 2012; Wragg 2015; Thorthwaite 2018). Most of the literature on social media misconduct dismissal focuses on a single jurisdiction. Further, these jurisdictions tend to be developed nations (Thorthwaite 2018).

In Australia, O’Rourke, Teicher and Pyman (2011), Thorthwaite (2013), Forsythe (2014), Corney (2014), Thorthwaite (2016) and Barnes, Balnave and Holland (2018) have analysed select social media misconduct dismissal decisions decided by decision-makers. Thorthwaite’s earlier study found that in Australia, communication on social media was in the public domain (Thorthwaite 2013). In later research she identifies particular decisions that acknowledged employees’ reasonable expectations of privacy when participating in social media whilst off-duty, especially when the posts are on private accounts with maximum privacy settings applied.¹² Further, on the then available decisions, Thorthwaite posited that employees hold the right to voice political views,¹³ and to criticise employers and labour conditions on social media¹⁴ whilst they are not at work (Thorthwaite 2016 and Thorthwaite 2018).

Within the literature on social media misconduct dismissal there are studies that compare the law and decision between Global North nations, such as the examination by Ornstein (2012) of social media misuse decisions in England, France and the United States, and Mangan (2015, 2018) who compares decisions for social media misconduct between Canada and the United Kingdom.

A common feature of all these jurisdiction specific studies is a focus on appeal decisions of superior courts. There is a tendency to focus on identification of the state of the law within the jurisdiction, and in the comparative studies identifying common themes and difference between the identified laws of the different jurisdictions. What is not focused on are lower-level decision-makers dealing with social media misconduct

⁶ *Mr Scott McIntyre v Special Broadcasting Services Corporation T/A SBS Corporation* [2015] FWC 6768. The sports reporter was dismissed for breaching the SBS Code of Conduct and Social Media Policy by making several inappropriate tweets about Anzac Day. A confidential out of court settlement was reached prior to the case being heard in the Federal Court of New South Wales. See generally Kampmark (2017) and Davidson (2016).

⁷ Ward posted a Facebook comment calling the Australian flag ‘racist’ and was suspended. Following union action and public protest, she was reinstated and returned to work. See generally Kampmark (2017).

⁸ The employee was dismissed by Cricket Australia for a series of tweets on her personal social media account wherein she criticised the Tasmanian Government’s policies on abortion. The parties reached a confidential out of court settlement. See generally Henriques-Gomes (2018).

⁹ *Isileli "Israel" Folau v Rugby Australia Limited & Anor*, MLG2486/2019. Folau was dismissed by Rugby Australia for breaching Rugby Australia’s Code of Conduct for posting a post on Twitter that said “Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolators: Hell Awaits You. Repent! Only Jesus Saves.” On 4 December 2019, the parties reached a confidential out-of-court settlement.

¹⁰ The tweet read ‘Going to Africa. Hope I don’t get Aids. Just kidding. I’m white!’ See generally Pilkington (2013), Lucas (2013), Dimitrova, Rahmzadeh and Lipman (2013) and Hill (2013).

¹¹ The parties reached a confidential out-of-court settlement. See generally Hytner (2019) and Robinson (2019).

¹² See, eg, *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644 (‘*Wilkinson-Reed*’); *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394 (‘*Fallens*’).

¹³ See, eg, *Daniel Starr v Department of Human Services* [2016] FWC 1460 [72] (‘*Starr*’).

¹⁴ *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie’s Cake Emporium* [2016] FWC 1168 [20] (‘*Vosper*’).

dismissal at the first instance. While there is some identification and discussion of the technical nature of social media in the existing literature – particularly reflection on its uncontrolled distribution, account settings and its enduring permanence – what can become lost are the cultural and economic factors leading to a contested social media misconduct dismissal.

Furthermore, what is mostly absent from the existing literature is any consideration of how social media misconduct dismissal is being treated in the Global South. Nel (2016) and Reddy (2018) in recent papers compare South African and Australian law, thereby indicating that social media misconduct dismissal is not just a legal issue in the Global North. However, like the other comparative analyses, they both narrowly focus on comparing and contrasting the state of the law rather than analysing the cultural, economic and technical milieu from which social media misconduct dismissal emanate.

This article directly responds to these gaps in the literature. It is not so concerned with the formal identification of the law as declared and applied by superior courts or reasoned argument on how the law should develop. Rather it examines the cultural, economic and technical milieu of social media misconduct dismissal matters as they are occurring in Australia and South Africa through a socio-legal structured analysis of decisions.

There is an increasing socio-legal literature that uses a structured analysis of lower-level decision-making as an insight into how social and legal factors frame and give rise to disputes. For example, Wagstaff and Tranter (2014) and Sleep and Tranter (2018) analysed review decisions by the Refugee Review Tribunal and the Administrative Appeals Tribunal (AAT) to identify how social media use is used in Australian administrative decision-making. Sleep (2019) recently examined AAT decisions of “couple-rule” matters, and decisions of the New Zealand Social Security Appeals Authority to reveal the social and legal factors involved in social security couple decisions. This approach uses the decisions as a social record rather than statements of law, through which the broader context of the dispute can be revealed and examined. A feature is the use of records and reports of lower-level decision-makers – or what

is sometimes referred to as “street-level” decision-makers (Jensen 2018; Cohen 2018; Pivoras and Kaselis 2019).¹⁵ The aim is not to find the law, but the practices and contexts in which application of the law is being contested.

This method has two steps. The first is the identification of the sample of decisions from analysis through the use of a broad set of keywords and multiple searches across relevant archives and digital repositories. This identification involves a first-order of analysis in examining the found decisions to eliminate false positives. Having identified the sample, the second step is the analysis. This analysis follows established content analysis techniques of multiple readings to identify relevant themes and then extraction of material from the decisions coded according to themes. As the study in this article involved two distinct samples, Australian and South African social media misconduct dismissals, the process for identification of each sample needs to be outlined.

In Australia the sample was limited to Commonwealth level decision-making under the *Fair Work Act 2009* (Cth).¹⁶ An employee who has been dismissed for social media misconduct may bring an application to challenge that decision as an “unfair dismissal” at first instance with the Fair Work Commission (FWC).¹⁷ The sample was identified through AustLII using the search terms “social media” together with the words “workplace, employment, off-duty, privacy and dismissal.” The names of particular social media platforms, namely “Facebook” and “Twitter” were also used to further limit the sample to social media platforms rather than private messaging applications such as “WhatsApp,” “Facebook Messenger”¹⁸ or “Snapchat.”¹⁹ This resulted in 58 decisions. Assessing for false positives led to the final sample of 42 decisions. The decisions in the Australian sample are set out in Appendix 1. In addition to 36 FWC decisions, 2 were from the Federal Court of Australia,²⁰ 1 decision apiece in the Federal Circuit Court of Australia,²¹ the High Court of Australia,²² the Administrative Appeals Tribunal,²³ and the Supreme Court of Victoria.²⁴

The South African sample comprises written decisions of the Commission for Conciliation, Mediation and Arbitration

¹⁵ The phrase “street-level” to refer to primary decision-makers has its origins in Lipsky (1980).

¹⁶ *Fair Work Act 2009* (Cth) s 26 which provides the referral of State power of industrial relations to the Commonwealth. All States other than Western Australia refer their Industrial Relations powers to the Commonwealth.

¹⁷ *Fair Work Act 2009* (Cth) s 385.

¹⁸ See, eg, the case of *Luke Colwell v Sydney International Container Terminals Pty Ltd* [2018] FWC 174 (‘Colwell’).

¹⁹ See, eg, the case of *Mr Rodney Fussell v Sydney Trains* [2019] FWC 1182 (‘Fussell’).

²⁰ *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 (‘Gaynor FCAFC’); *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370 (‘Gaynor’).

²¹ *Banerji v Bowls* (2013) FCAA 1052 (‘Banerji’).

²² *Comcare v Banerji* [2019] HCA 23 (‘Banerji HCA’).

²³ *Banerji and Comcare (Compensation)* [2018] AATA 892 (‘Banerji AATA’).

²⁴ *Jurecek v Director of Transport Safety Victoria* [2016] VSC 285 (‘Jurecek’).

(CCMA),²⁵ and various Bargaining Council and Labour Court decisions. The sample was identified through Sabinet Legal²⁶ using the same sample keywords as in the Australian search. This identified 161 decisions. After revision for false positives, the sample was reduced to 138 decisions. After preliminary analysis, 31 decisions were excluded as social media misconduct was not the primary focus,²⁷ or when a decision involved a private messenger application.²⁸ This left a sample of 97 decisions (See Appendix 2). Of the 97 cases, 85 were heard in the CCMA, 9 in industry specific Bargaining Councils,²⁹ and 3 were matters before the Labour Court.

Both samples were then subject to a content analysis. This process involves identifying and extracting themes from the samples. Some of the material noted related to the formal legal context (such as date, the decision-maker, the legislation applicable, and whether the employee raised any rights-based defences, the final decision). Some related specifically to the technology such as the platform involved, whether privacy settings were engaged, and the actual or claimed distribution of the material. However, most of the focus was on the cultural and economic factors disclosed in the decision such as the type of work and employer, when and how the social media conduct took place, the nexus of such conduct to employment, the reason for dismissal, the form and offensiveness of the social media conduct, whether actual names were disclosed and how the employer accessed the content. Through analysis some of the common themes emerged in both samples; for example, consideration of technology related factors and the concern with when and where the social media misconduct occurred. While these reflect the findings from the existing literature, an unexpected finding was the similarity between the Australian and South African samples on the ineffective use of rights-based arguments. However, very different themes also emerged; for example, the allowances of “larrikin” behaviour in the Australian sample and the strong manifestation of race in the South African sample.

3. COMMONALITIES IN SOCIAL MEDIA MISCONDUCT IN AUSTRALIA AND SOUTH AFRICA

This section argues that there were areas of commonality between the samples. Two commonalities had been observed in the existing literature; both relate to the socio-technical elements of social media use. The first was social media use by employers as evidence of employee misbehaviour during work or evidence of material posted by employees about their employer. The second was the low consideration given to employee’s claims about ignorance of the workings of social media. The third commonality was more unexpected. Rights and rights jurisprudence is a particular feature of post-apartheid South Africa (Sarkin 1998; Dugard 2015). In contrast, Australia, especially at the Commonwealth level, has been reluctant to embrace formal rights instruments (Galligan and Morton 2006; French 2015; Kampmark 2018). From these differences it could have been expected that rights-based claims would have had more success in the South African sample than in the Australian sample. However, this was not the finding. Rather, rights-based arguments and approaches by employees were not effective in Australia and South Africa.

3.1. SOCIAL MEDIA AS EXTENSION OF MANAGERIAL PREROGATIVE OF CONTROL/ MANIFESTATION OF WORKPLACE POWER DYNAMICS

That social media forms an accessible, digital archive of human lives has made it a boon for entities wanting to gather information about specific persons. It has been found that social media is often used by public decision-makers to collaborate or question an applicant’s entitlement to a benefit (Sleep and Tranter 2018). As has been identified in the existing literature, employers have also accessed social media as a form of extension of managerial prerogatives of control and discipline of employees’ conduct while at work or over of comments by employees about their employer and employment (Du Toit 2016) even whilst “off duty.”

²⁵ Whilst the decisions are final and legally binding on the parties to the dispute, they are not binding legal precedent for the Courts.

²⁶ Sabinet Legal is a fee-for-service repository of legal information at <https://discover.sabinet.co.za>

²⁷ See, eg, *the case of FOSAWU obo Reuben Njiva v Gold Reef City Casino* GAJB18743-11; *Nanthus Augustus v Mass Discounters (Pty) Ltd* ECPE79-15; *M Paulse v Department of Health-Western Cape* PSHS10-17/18.

²⁸ See, eg, *the case of Mr J Ludick v Vodacom Group Ltd (operating as Vodacom)* WECT16371-18.

²⁹ See, eg, *Arthur Leach v Suzuki JHB South* [2015] MIBC MINT 44570 D; *Aubrey Mabaso v UTI South Africa (Pty) Ltd* GPRFBC 35409; *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC); *National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd* MIDB12660; *M Paulse v Department of Health-Western Cape* PSHS10-17/18; *National Union of Metalworkers of South Africa obo Victor and Warikker v Aveng Trident Steel (Pty) Ltd* MEPE 1794; *NEHAWU obo Obakeng Victor Tilodi v Commissioner T Ndzombane, Department of Health and Public Health & Social Development Sectoral Bargaining Council* C30/15; *NUMSA obo Eugene Patterson v PFG Building Glass* CHEM516-16/17; *SOCRAWU obo Elroy Bibby v KSM Distributors* [2018] BC PERFBC 49968; *Thando Templeton Maku v Department of Social Development - Western Cape* PSHS330-16/17).

Consequently, both samples fulfilled expectations. In the Australian sample, 71% (30/42) decisions and in the South African sample, 72% (70/97) involved dismissals due to social medial evidence of misconduct at work or comments about the employer. For example, in Australia, the decisions of *Mayberry*,³⁰ *Connolly-Manga*³¹ and *Gee*,³² social media posts were used as documentary evidence of employee infractions in dismissal hearings. These infractions included being dressed as a car made of Subway branded materials behind a Subway counter, standing on top of mining machinery with its engine running,³⁴ and taking photographs that included company assets and work infrastructure whilst working and operating company equipment respectively.³⁵ In the South African cases of *Molale*³⁶ and *Mabaso*,³⁷ social media evidence of sleeping and drinking on duty was used as grounds for dismissal (Coetzee 2019). In the Australian decision of *Dekort*,³⁸ and the South African decisions of *Bokuva*³⁹ and *Maku*,⁴⁰ posts from Facebook were used by employers in evidence that employees were at social events rather than being ill as their medical certificates claimed.

In these decisions, social media was a source of evidence for employee misconduct. It was not the social media conduct *per se* that led to the dismissal, rather it was employees posting material of their misconduct. In these decisions social media was an archive of on job performance or misuse of leave benefits. In

both circumstances it was the employee's use of social media either while at work or while they should have been at work that led to the dismissal. However, the samples reveal other ways that social media conduct could lead to dismissals.

Employees who posted disparaging comments about their employer, even when those comments were made outside of work and on private devices, were seen in both jurisdictions as a valid basis for dismissal. For example, in the Australian sample in *Dover Ray*⁴¹ and *O'Keefe*⁴² employees were validly dismissed for posting off-duty disparaging remarks about their employers, even where the employer was not specifically mentioned,⁴³ or where the disparaging comments were made whilst off-duty, on the employee's own device and with the maximum privacy settings used.⁴⁴ The South African sample showed employees dismissed for making disparaging remarks about their employers on social media, for example in *Andrew*,⁴⁵ *Dietlof*,⁴⁶ *Shee*⁴⁷ and *Madisha*⁴⁸. Dismissals were substantively fair where "spurious attacks"⁴⁹ were "designed and succeeded in tarnishing the public image"⁵⁰ of the employer, particularly where the conduct destroyed the trust relationship making the continued employment of the employee intolerable.⁵¹ However, where there was no irretrievable breakdown of the employment relationship apparent, or no damage suffered by the employer, decision-makers held in favour of the employee

³⁰ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496 ('*Mayberry*').

³¹ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097 ('*Connolly-Manga*').

³² *Gee v Tasmanian Ports Corporation Pty Ltd t/a Tasports* [2017] FWC 31, [36] ('*Gee*').

³³ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [17]-[18].

³⁴ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097, [1].

³⁵ *Gee v Tasmanian Ports Corporation Pty Ltd t/a Tasports* [2017] FWC 31, [30].

³⁶ *George Roderick Molale v Bosasa Security (Pty) Ltd* [2017] CCMA GAJB27050-17 ('*Molale*').

³⁷ *Aubrey Mabaso v UTI South Africa (Pty) Ltd GPRFBC 35409* ('*Mabaso*').

³⁸ *Mr Antony Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern* [2010] FWA 3389 ('*Dekort*').

³⁹ *UASA obo Siviwe Bokuva v Shoprite Checkers Ltd ECEL2040-17* ('*Bokuva*').

⁴⁰ *Thando Templeton Maku v Department of Social Development - Western Cape* [2017] CCMA PSHS330-16/17 ('*Maku*').

⁴¹ *Dover Ray v Real Insurance Pty Ltd* [2010] FWA 8544 ('*Dover Ray*').

⁴² *O'Keefe v William Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311 ('*O'Keefe*').

⁴³ *Dover Ray v Real Insurance Pty Ltd* [2010] FWA 8544, [53].

⁴⁴ *O'Keefe v William Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311, [42]-[43] ('*O'Keefe*').

⁴⁵ *Stephen Devasagium Andrew v Pick n Pay Supply Chain* [2014] CCMA GAJB5317-14 ('*Andrew*').

⁴⁶ *CEPPWAWU obo Dietlof v Frans Loots Building Material Trust t/a Pennypinchers* [2016] CCMA ECPE7247-15, [24] ('*Dietlof*').

⁴⁷ *Davina Shee v Greystone Trading CC t/a Absolote Pets* [2012] CCMA WECT 2852-12, [20] [22] ('*Shee*').

⁴⁸ *Phillip Madisha v Sandton Plant Hire (Pty) Ltd* [2018] CCMA GAJB 10432-18 ('*Madisha*').

⁴⁹ *CEPPWAWU obo Dietlof v Frans Loots Building Material Trust t/a Pennypinchers* [2016] CCMA ECPE7247-15, [24] ('*Dietlof*').

⁵⁰ *Stephen Devasagium Andrew v Pick n Pay Supply Chain* [2014] CCMA GAJB5317-14, [22] ('*Andrew*').

⁵¹ *CEPPWAWU obo Dietlof v Frans Loots Building Material Trust t/a Pennypinchers* [2016] CCMA ECPE7247-15, [24]; *Palesa Petronella Moloto v Democratic Alliance (DA)* [2017] CCMA LP1723-17, [31] ('*Moloto*').

in the South African context.⁵² This was also reflected in the Australian sample in *Fitzgerald* and *Vosper*.⁵³ Furthermore, the use of social media to harass and bully other employees was a valid basis for dismissal in Australia and South Africa. In the Australian context, these include the cases of *O'Keefe*,⁵⁴ *Natoli*,⁵⁵ and *Bowden v Ottrey Homes*.⁵⁶ Similarly, in the South African sample, the cases of *Motseme*⁵⁷ and *Zulu*⁵⁸ are examples of employees levelling threatening behaviour towards fellow employees.

From the samples, it seems that Australia and South Africa are similar in the use of social media as a source of evidence of workplace infractions or misconduct. This extension of managerial prerogative of control goes from the obvious use of social media as evidence of misconduct on the job or false claims to illnesses, to social media conduct outside of work – especially when the employee posts material damaging to the employer or engages in unacceptable conduct towards another employee.

3.2. EMPLOYEE AWARENESS OF SOCIAL MEDIA

The second commonality between the samples was a particular reluctance by decision-makers to make allowances for the employees' understanding and technical competency in using social media. In the 2011 Australian decision of *Stutsel*,⁵⁹ the dismissal was held to be unreasonable as the decision-maker accepted the employee's contention that he believed his racially derogatory Facebook post about his managers were private.⁶⁰ The two factors that seemed to convince the decision-makers, both at first instant and on appeal, was the employee's age and

low familiarity with Facebook and that the employer did not have a social media policy.⁶¹ However, at the appeal, the Fair Work Australia Full Bench noted that "ignorance on the part of an older worker, who has enthusiastically embraced new social networking media but without fully understanding the implications of its use, might be viewed differently in the future."⁶² Similar allowances for an employee due to the lack of an employer social media policy was also evident in the 2012 decision of *Mitchell*.⁶³

However, this latitude to employees seemed to dissipate in the Australian sample. In the 2013 decision of *Little*⁶⁴ arguments by the employee that he did not comprehend how Facebook functioned and that the employer did not have a social media policy were brushed aside.⁶⁵ Indeed, in *Little* the decision-maker placed responsibility on the employee: one "hardly needs written policies or codes of conduct to understand and appreciate that...[t]he comments made...[w]ere grossly offensive and disgusting and were more than likely to cause hurt and humiliation."⁶⁶ *Little* marked the abandonment in Australia of employees arguing that their social media competence should be a mitigating factor, reflecting a change from the earlier *Stutsel* decision.⁶⁷ In the 2019 decision of *Natoli*,⁶⁸ this approach can be seen as well-established and that posting inflammatory and derogatory material about another employee to social media "was just incomprehensible and foolish in the extreme"⁶⁹ with no excuse or mitigation afforded the dismissed employee due to age, technical competence or existence or otherwise of an employer's social media policy.

⁵² See generally *Crisna Roux v SBF Services (Pty) Ltd* [2017] CCMA GATW8998-17, [54]-[55] ('Roux'); *SACCAWU obo Prescilla Matshidiso Motshogo v Mass Discounters (Pty) Ltd t/a Game Stores* [2015] CCMA GAJB11646-13, [15] ('Motshogo'); *Mahoro v Indube Staffing Solutions* [2012] 4 BALR 395 (CCMA) [38] ('Mahoro'); *Frederick Du Preez v Ster Kinekor* [2011] CCMA GAJB26167-11 ('Du Preez'); *FOSAWU obo Koka, Daniel v Goldreef City Casino* [2011] CCMA GAJB15215-11, [15] ('Koka'); *Willie B Botha v Bid Air Service* [2015] CCMA ECPE3142-15, [24] ('Botha').

⁵³ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [56]-[57] ('Fitzgerald'); *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168 ('Vosper').

⁵⁴ *O'Keefe v William Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311 ('O'Keefe').

⁵⁵ *Ms Nektaria Natoli v Anglian Community Services t/a Anglicare* [2018] FWC 2180 ('Natoli').

⁵⁶ *Bowden v Ottrey Homes - Cobram & District Retirement Village Inc T/A Ottrey Lodge* [2012] FWA 6468 ('Bowden').

⁵⁷ *NEHAWU obo Motseme, I and 1 other v Tsebo Holdings and Operations (Pty) Ltd t/a Fedics* [2017] CCMA NC26-17 ('Motseme').

⁵⁸ *National Union of Metalworkers of South Africa obo Zulu v GUD Holdings (Pty) Ltd* MIDB12660 ('Zulu').

⁵⁹ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 ('Stutsel').

⁶⁰ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444, [78] ('Stutsel').

⁶¹ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444, [79] ('Stutsel'); *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [33] ('Linfox').

⁶² *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097, [34] ('Linfox').

⁶³ *Mitchell v HWE Mining Pty Ltd* [2012] FWA 2721, [19] ('Mitchell').

⁶⁴ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642 ('Little').

⁶⁵ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [73] ('Little').

⁶⁶ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [69] ('Little').

⁶⁷ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 ('Stutsel').

⁶⁸ *Ms Nektaria Natoli v Anglian Community Services t/a Anglicare* [2018] FWC 2180, [222] ('Natoli').

⁶⁹ *Ms Nektaria Natoli v Anglian Community Services t/a Anglicare* [2018] FWC 2180, [222] ('Natoli').

What can be seen in the Australian sample is a charting of the rising ubiquity of particularly Facebook from a “few thousand [Australian] users in May 2007,”⁷⁰ to approximately 18 million domestic users by September 2019 (Global Digital Report 2019). In the sample, 86% of the decisions (36/42) involve Facebook. Facebook is the most active social media platform in Australia with 91% of Australian Internet users maintaining a Facebook profile (Yellow Social Media Report 2018, p. 4) most having on average 239 “friends,” (Yellow Social Media Report 2018, p. 22) and 62% utilising social media daily (Yellow Social Media Report 2018, p. 4). The trajectory of decisions from 2011 when novelty and newness meant that there was a degree of latitude afforded employees to the more recent “no excuse” approach reflects the growing saturation and familiarity with social media – and Facebook particularly – in Australia over the 2010s.

The South African sample tells a slightly different story. There is no decision like *Stutsel*.⁷¹ Rather, in South Africa employee arguments about ignorance of social media or relevant employer social media policies have been consistently unsuccessful. For example, in *Mavundla* and *Zulu*, it was assumed that employees should have realised that posting negative, derogatory or threatening comments may result in irreparable harm to the employment relationship.⁷² In South Africa certain conduct – around showing disrespect for an employer and using racialised language – is so universally inappropriate and unacceptable that it has been repeatedly emphasised that employers do not need social media policies to adequately guide employees on

appropriate conduct.⁷³ Indeed, in *Bibby*,⁷⁴ the “ignorance argument”⁷⁵ was held to be “improbably naïve.”⁷⁶ Even in a decision such as *Ndudzo* which was contemporaneous with *Stutsel*, there was no allowance given to an employee who made, in comparison to the employee in *Stutsel*, fairly tame comments about her employer on Facebook in conversation with a friend.⁷⁷ In that decision it was the “friend” who then provided the comments to the employer. This was also a pattern in South Africa that employees were still validly dismissed even when offending comments allegedly came from hacked accounts or posts made by others such as in *Dlamini*,⁷⁸ *Dagane*,⁷⁹ *Godloza*,⁸⁰ *Jogom*⁸¹ and *Ganger*.⁸² The decision-makers have held that “the onus to protect one’s account...[i]ays with the employee,”⁸³ and that the employee is responsible for their account and all the posts and responses it generates.⁸⁴

It was common between Australia and South Africa that employees cannot plead mitigation based on their technical knowledge and skills in using social media, nor in the absence of an employer social media policy. However, differences can be seen. Australia came to the position over the 2010s as social media, and especially Facebook became more ubiquitous. In South Africa, such allowances were not forthcoming even in decisions from 2010 and 2011. Indeed, the sample suggests that South Africa has a harsh workplace where employees can be fairly dismissed for mild disparaging comments about their employer such as insinuating that their employer was racist and supported xenophobia,⁸⁵ or that if they were White

⁷⁰ <http://laurelpapworth.com/facebook-active-users-in-australia/>

⁷¹ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (‘*Stutsel*’); *Linfox Australia Pty Ltd v Stutsel* [2012] FWA 7097 (‘*Linfox*’).

⁷² *Sithembiso Promise Mavundla v Merchants SA (Pty) Ltd a Dimension Data Company (2019)* CCMA GAJB7904-19 (‘*Mavundla*’); *National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd* MIDB12660, [20] (‘*Zulu*’): as this was in breach of their implied common law obligations to act in the best interests of their employer. See also *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse / Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* [2013] CCMA WECT16781-13, [37] (‘*Arendse*’); *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [49] (‘*Dagane*’); *FAWU obo Martin Du Preez v Casidra (Pty) Ltd t/a Aanhalt Boerdery* [2013] CCMA WEGE 1417–13, [26] (‘*Du Preez*’); *Daniel Rayman Nqani v Else Cole Brioche* [2015] CCMA ECPE4540-15, [16] (‘*Nqani*’).

⁷³ See, eg, *Happiness Harting v Container World (Pty) Ltd* [2015] CCMA GA EK9537-15, [27] (‘*Harting*’); *NUMSA obo Eugene Patterson v PFG Building Glass* CHEM516-16/17.

⁷⁴ *SOCRAWU obo Elroy Bibby v KSM Distributors* [2018] BC PERFBC 49968 (‘*Bibby*’).

⁷⁵ *SOCRAWU obo Elroy Bibby v KSM Distributors* [2018] BC PERFBC 49968, [43] (‘*Bibby*’).

⁷⁶ *SOCRAWU obo Elroy Bibby v KSM Distributors* [2018] BC PERFBC 49968, [42] (‘*Bibby*’).

⁷⁷ *Moreblessing Ndudzo v Studio 05 House of Fashion* [2011] CCMA GAJB28706-11 (‘*Ndudzo*’).

⁷⁸ *NEHAWU obo Sifiso Cyril Dlamini v Dept of Social Development-Kwazulu Natal* [2019] CCMA PSHS901-18/19 (‘*Dlamini*’).

⁷⁹ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114 (‘*Dagane*’).

⁸⁰ *NUM obo Godloza, Sivuyile Yalela v Harmony Gold Mining Company Ltd* [2012] CCMA FS2022-12 (‘*Godloza*’).

⁸¹ *NUMSA obo Ishmael Mpe Jogom v G4S Correction Services (Bloemfontein) (Pty) Ltd* [2016] CCMA FSBF5052-16 (‘*Jogom*’); see also *FAWU obo Myeni, Ntokozo v Imperial Retail Solutions* [2016] CCMA KNDB2662-16 [11.1] (‘*Myeni*’).

⁸² *NTM obo Ms C Ganger v Bidair Services (Pty) Ltd* [2015] CCMA WECT 1273-15 (‘*Ganger*’).

⁸³ *NEHAWU obo Sifiso Cyril Dlamini v Dept of Social Development-Kwazulu Natal* [2019] CCMA PSHS901-18/19 (‘*Dlamini*’).

⁸⁴ *NEHAWU obo Sifiso Cyril Dlamini v Dept of Social Development-Kwazulu Natal* [2019] CCMA PSHS901-18/19, [74]; *NTM obo Ms C Ganger v Bidair Services (Pty) Ltd* [2015] CCMA WECT 1273-15, [20] (‘*Ganger*’).

⁸⁵ *Daniel Rayman Nqani v Els Cole Brioche* [2015] CCMA ECPE4540-15, [7]

they would be treated differently.⁸⁶ This is evident even when the comments were made outside work hours in contexts that the employee thought were private conversations, as was evident in *Gumede*⁸⁷ wherein the employee stated that White people were “wicked” and that “racism is still very much alive in corporate SA”.⁸⁸

3.3. INEFFECTIVENESS OF RIGHTS-BASED ARGUMENTS

The third commonality concerned the ineffectiveness of rights-based arguments in Australia and South Africa. This was both expected and unexpected. In Australia the absence of a formal rights instrument at the Commonwealth level, the piecemeal protections around privacy in the *Privacy Act 1988* (Cth) and the narrow protection of political speech implied in the Commonwealth Constitution suggested that rights-based arguments by employees might have little success. In contrast, South Africa with its post-apartheid constitution and strong emphasis on a rights-based legal order might have suggested more opportunities for employees to make arguments based on rights of privacy or freedom of speech. However, the South African sample revealed otherwise.

Within the Australian sample employees regularly attempted two rights-based arguments. The first was that social media conduct, particularly when not originating on work premises or during work time, was protected by a claim to privacy. The second was that social media conduct was protected by freedom of speech.

Formal privacy protection in Australia is limited (O’Rourke, Pyman and Teicher 2007). The Commonwealth Constitution has no enshrined rights to privacy (Duvenhage 2017) or freedom of speech and only a narrowly implied constitutional freedom of communication on political matters (Pyke 2013).⁸⁹ The *Privacy Act 1988* (Cth)⁹⁰ which applies to government entities and large corporations,⁹¹ concerns how private data is gathered, stored and disseminated (Thorntwaite 2018); does not establish personal rights of action for breach of privacy. There is no general right to privacy established at common law,⁹² nor is there a statutory cause of action for serious invasions of privacy.⁹³ Some States do have human rights frameworks,⁹⁴ which includes the right not to have one’s privacy arbitrarily impeded or one’s reputation attacked,⁹⁵ and the freedom of expression that includes the freedom to acquire and convey information and ideas orally, in writing or in print.⁹⁶ However, there were no decisions in the Australian sample where employees attempted to make arguments under the State human rights law. Also, Australia does not have social media specific privacy law (O’Rourke et al 2007; Buchbach 2017) like the European Union’s *General Data Protection Regulations* protecting user privacy.⁹⁷

Like with the employee’s awareness of social media, in the Australian sample there were changes over time regarding the effectiveness of privacy-based arguments. Early (2010-2013) decisions⁹⁸ assumed social media conduct was public (Thorntwaite 2018) and employees did not have any reasonable expectations of privacy and freedom of expression (Thorntwaite 2016). Between 2014 and 2016 there were a series of decisions, as Thorntwaite has argued, that seem to

⁸⁶ *Happiness Harting v Container World (Pty) Ltd* [2015] CCMA GAEK9537-15, [3]

⁸⁷ *Noluthando Gumede v Mutual and Federal* [2014] CCMA GAJB9817-14, [118]

⁸⁸ *Noluthando Gumede v Mutual and Federal* [2014] CCMA GAJB9817-14, [118]

⁸⁹ However, some States have human rights frameworks, see eg, *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*‘Human Rights Vic’*); *Human Rights Act 2004* (ACT) (*‘Human Rights ACT’*); *Human Rights Act 2019* (Qld) (*‘Human Rights Qld’*).

⁹⁰ *Privacy Act 1988* (Cth) (*‘Privacy Act’*). At a state level, see the *Privacy and Personal Information Protection Act 1998* (NSW); *Privacy and Data Protection Act 2014* (Vic) and the *Information Privacy Act 2009* (Qld).

⁹¹ *Privacy Act 1988* (Cth) s 6D (*‘Privacy Act’*).

⁹² See, eg, *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 (*‘Victoria Park Racing’*); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) HCA 63 (*‘Lenah Game Meats’*); *Kalaba v Commonwealth of Australia* [2004] FCA 763 (2004) 6 (*‘Kalaba’*). See also Van Dissel (2014), Duvenhage (2017), Thorntwaite (2018).

⁹³ Notwithstanding the Australian Law Reform Commission’s recommendation for such establishment in 2014. See generally Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era Report* (2014), [6.2] <https://www.alrc.gov.au/publications/1-executive-summary/should-new-tort-be-enacted>

⁹⁴ See *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld).

⁹⁵ *Human Rights Act 2019* (Qld) s 25.

⁹⁶ *Human Rights Act 2019* (Qld) s 21.

⁹⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council, 27 April 2016 repealing Directive 95/46/EC.

⁹⁸ See, eg, *Dover Ray v Real Insurance Pty Ltd* [2010] FWA 8544 (*‘Dover Ray’*); *O’Keefe v William Muir’s Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311 (*‘O’Keefe’*); *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496 (*‘Mayberry’*); *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642 (*‘Little’*).

acknowledge employees' reasonable expectations of privacy,⁹⁹ the right to voice political views,¹⁰⁰ and to criticise employers and labour conditions¹⁰¹ whilst off-duty (Thornthwaite 2016; Thornthwaite 2018). However, post-2016 decisions suggest a reversal.

An example of the pre-2013 approach was *Fitzgerald*¹⁰² wherein an employee was dismissed for posting comments critical of her employer on Facebook.¹⁰³ The FWC emphasised that whereas in the past complaints about employers happened in private discussions with friends "over a coffee,"¹⁰⁴ they had become posts that can be accessed by an "uncontrollable number of people,"¹⁰⁵ thus "no longer a private matter but public comment."¹⁰⁶ Further, it emphasised the enduring nature of social media comments meant that regardless of when the comment was posted, it would remain public.¹⁰⁷ Moreover, the decision-maker noted that it was "foolish" for employees to trust that they could post on social media and have "total immunity from any consequences."¹⁰⁸ A similar approach towards treating social media as public conduct, to which privacy arguments were not cogent, can be seen in *O'Keefe*,¹⁰⁹ *McDiarmid*,¹¹⁰ *Bowker*¹¹¹ and *Pearson*.¹¹²

The decision of *Wilkinson-Reed*¹¹³ in 2014 suggested a reconsideration of the efficacy of privacy arguments. In that decision, communication between friends through a social

media linked messaging service was regarded as analogous to a private email.¹¹⁴ The employer only came to know the content of the communication through accessing his ex-partner's account without her consent.¹¹⁵ Similarly in *Fallens*, an employer utilised posts originating from the employee's personal privacy-protected Facebook page as accessed from the employee's home computer as evidence of the her misconduct.¹¹⁶ The employer had come about the incriminating material through the actions of the employee's ex-partner¹¹⁷ and the FWC determined that the dismissal was invalid as the complicity of the employer in the invasion of the employer's privacy could not be condoned.¹¹⁸ In the 2016 decision of *Vosper*,¹¹⁹ it was suggested that employees could criticise management and their working conditions on social media when outside of work in their private time,¹²⁰ despite the employer taking umbrage at the comments.¹²¹

However, in the 2016 decision of *Remmert*,¹²² the employee contested his dismissal arguing that his Facebook account was private; the post had been posted whilst he was off-duty and that the comments could only be accessed by his Facebook "friends."¹²³ In a return to the logic in *Fitzgerald*, it was held that there was a sufficient nexus between the off-duty conduct and the employment relationship, as a number of his "friends" were also employees¹²⁴ and that his conduct, in a regional community, impacted the employer's reputation and legitimate business interests.¹²⁵ A similar treatment for social media

⁹⁹ *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644, [13] ('*Wilkinson-Reed*'); *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394 ('*Fallens*').

¹⁰⁰ *Daniel Starr v Department of Human Services* [2016] FWC 1460 ('*Starr*').

¹⁰¹ *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168, [20] ('*Vosper*').

¹⁰² *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358 ('*Fitzgerald*').

¹⁰³ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [19] – [24] ('*Fitzgerald*').

¹⁰⁴ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [50].

¹⁰⁵ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [50].

¹⁰⁶ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [50].

¹⁰⁷ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [52].

¹⁰⁸ *Fitzgerald v Smith T/A Escape Hair Design* (2010) FWA 7358, [52] ('*Fitzgerald*').

¹⁰⁹ *O'Keefe v William Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311 ('*O'Keefe*').

¹¹⁰ *McDiarmid v Commissioner of Police* [2012] NSWIRComm 100.

¹¹¹ *Sharon Bowker & Others v DP World Melbourne Limited T/A DP World Maritime Union of Australia* [2014] FWC 9227 ('*Bowker*').

¹¹² *Pearson v Linfox Australia Pty Ltd* (2014) FWC 446.

¹¹³ *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644 ('*Wilkinson-Reed*').

¹¹⁴ *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644, [66] ('*Wilkinson-Reed*').

¹¹⁵ *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644, [61] ('*Wilkinson-Reed*').

¹¹⁶ *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394, [17] – [18] ('*Fallens*').

¹¹⁷ *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394, [17] – [18] ('*Fallens*').

¹¹⁸ *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394, [20] ('*Fallens*').

¹¹⁹ *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168 ('*Vosper*').

¹²⁰ *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168, [20] ('*Vosper*').

¹²¹ *Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168, [20] ('*Vosper*').

¹²² *Clint Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6036 ('*Remmert*').

¹²³ *Clint Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6036, [9] ('*Remmert*').

¹²⁴ *Clint Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6036, [79] ('*Remmert*').

¹²⁵ *Clint Remmert v Broken Hill Operations Pty Ltd T/A Rasp Mine* [2016] FWC 6036, [79] ('*Remmert*').

misconduct on the employee's own device whilst they were not at work was taken in *Colwell*¹²⁶ and in *Waters*.¹²⁷ The "public" nature of Facebook was also noted in *Campbell*¹²⁸ and in *Oaky Creek Coal*,¹²⁹ where arguments that social media posts were private and were not relevant to the employment relationship were unsuccessful.

The decisions where employees relied on freedom of political communication as an argument against a social media misconduct dismissal also showed promise in the mid-2010s (Thornthwaite 2016; Thornthwaite 2018). These decisions applied to public service employees voicing their political opinions on social media (Buchbach 2017). In the 2013 decision of the Federal Circuit Court in *Banerji*,¹³⁰ a public servant who, outside work hours and using her own device, anonymously tweeted critical comments regarding the government's immigration detention policies, was held to be validly dismissed in terms of the provisions of the *Australian Public Service Code of Conduct*.¹³¹ The employee had argued that her off-duty political speech was protected by the implied protection of political communication in the Commonwealth Constitution. This was rejected by the Federal Circuit Court which held that the constitutional freedom of political expression was not a personal right and did not provide persons with "unfettered rights of communication."¹³² Following dismissal, Banerji instituted a separate application for a workers' compensation claim under the *Safety, Rehabilitation and Compensation Act*¹³³ which was rejected and she appealed

to the AAT. In *Re Banerji and Comcare*,¹³⁴ the AAT found that Banerji's dismissal "unacceptably trespassed on the implied freedom of political communication," was not lawful and did not amount to reasonable administrative action.¹³⁵

In the 2016 decision of *Starr*,¹³⁶ the disciplining of a public servant for making comments critical of social security administration outside of work was held to be wrong; suggesting a protected sphere of political speech on social media.¹³⁷ Additionally, in *Gaynor*¹³⁸ the employee was dismissed for comments critical of the Defence Force's policies regarding gay, lesbian and transgender issues made in his private social media accounts.¹³⁹ He contended that his dismissal encroached upon his implied freedom of political communication.¹⁴⁰ The Federal Court held that the "offensive" and "insulting"¹⁴¹ comments were a form of "political discourse"¹⁴² and the dismissal was set aside.¹⁴³

However, reliance on a protected right of political speech did not endure. *Gaynor* was overturned on appeal to the Full Federal Court.¹⁴⁴ The Court held that the constitutional "implied freedom" was not a personal right but rather a limit on legislative power.¹⁴⁵ As such, Gaynor's "extreme comments" were not protected and could be evidence of serious misconduct.¹⁴⁶ This approach was endorsed in 2019 by the High Court in the latest appeal of *Banerji*.¹⁴⁷ The High Court held that the sections of the *Public Service Act 1999* (Cth) that allowed for the dismissal of a public servant whose misconduct was political speech on social media were suitable,¹⁴⁸ reasonably necessary,¹⁴⁹ and

¹²⁶ *Luke Colwell v Sydney International Container Terminals Pty Ltd* [2018] FWC 174 ('*Colwell*').

¹²⁷ *Marc Waters v Mt Arthur Coal Pty Limited T/A Mt Arthur Coal Pty Limited* [2018] FWC 3285 ('*Waters*').

¹²⁸ *Stephen Campbell v Qube Ports Pty Ltd T/A Qube Ports & Bulk* [2017] FWC 1211, [8] ('*Campbell*').

¹²⁹ *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd* [2017] FWC 5380 in which the Union averred their communication on the Union website was private and not in the public domain ('*Oaky Creek Coal*').

¹³⁰ *Banerji v Bowls* (2013) FCAA 1052 ('*Banerji*').

¹³¹ *Banerji v Bowls* (2013) FCAA 1052, [104] ('*Banerji*').

¹³² *Banerji v Bowls* (2013) FCAA 1052, [2], [4], [101] – [102], [104] – [105].

¹³³ *Safety, Rehabilitation and Compensation Act 1988* (Cth).

¹³⁴ *Banerji and Comcare* [2018] AATA 892 ('*Banerji AATA*').

¹³⁵ *Banerji and Comcare* [2018] AATA 892, [128] ('*Banerji AATA*').

¹³⁶ *Daniel Starr v Department of Human Services* [2016] FWC 1460 ('*Starr*').

¹³⁷ *Daniel Starr v Department of Human Services* [2016] FWC 1460, [72] ('*Starr*').

¹³⁸ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370 ('*Gaynor*').

¹³⁹ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370, [117] – [127] ('*Gaynor*').

¹⁴⁰ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370, [205] ('*Gaynor*').

¹⁴¹ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370, [247] ('*Gaynor*').

¹⁴² *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370, [248] ('*Gaynor*').

¹⁴³ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370, [290] ('*Gaynor*').

¹⁴⁴ *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 ('*Gaynor FCAFC*').

¹⁴⁵ *Chief of the Defence Force v Gaynor* [2017] FCAFC 41 ('*Gaynor FCAFC*').

¹⁴⁶ *Chief of the Defence Force v Gaynor* [2017] FCAFC 41, [111] ('*Gaynor FCAFC*').

¹⁴⁷ *Comcare v Banerji* [2019] HCA 23 ('*Banerji HCA*').

¹⁴⁸ *Comcare v Banerji* [2019] HCA 23, [33] – [34] ('*Banerji HCA*').

¹⁴⁹ *Comcare v Banerji* [2019] HCA 23, [194] – [201] ('*Banerji HCA*').

adequate in balance.¹⁵⁰ Accordingly, they did not impinge upon the implied freedom of political communication and Banerji's dismissal was lawful.¹⁵¹

What the sample shows is that social media conduct is not protected by privacy or free speech style rights in Australia. There has been some unsteadiness in this; with a group of decisions in the mid-2010s that did allow social media conduct to be protected by privacy or an iteration of freedom of speech. However, towards the end of the decade, this trend reversed with strong statements that social media conduct is public, and employees face dismissal if their employer considered the conduct to be a breach of the employment contract. Further, there is no personal right to free speech in Australia that could protect public servants from dismissal for their social media political comments.¹⁵²

In South Africa, notwithstanding numerous rights instruments, there is no reasonable expectation of privacy for an employee's social media misconduct; nor are social media comments regarded as protected by various freedom of expression rights. Unlike Australia, in South Africa the right to privacy,¹⁵³ freedom of expression¹⁵⁴ and fair labour practices¹⁵⁵ are conferred on individuals by the *Constitution of the Republic of South Africa*,¹⁵⁶ and are enshrined in the *Bill of Rights*.¹⁵⁷ Whilst the rights of privacy and freedom of expression are guaranteed,

no right is paramount to any other, but must be balanced with other rights¹⁵⁸ such as equality and dignity.¹⁵⁹ Nor is any right absolute; rights may be limited (Reddy 2018).¹⁶⁰ Moreover, privacy is also protected at common law¹⁶¹ and in statute by the *Regulation of Interception of Communications and Provision of Communication Act*.¹⁶²

In the sample, South African decision-makers have consistently determined social media to be in the public or "quasi-public"¹⁶³ domain, accessible by "thousands of Facebook users."¹⁶⁴ Additionally, South African decision-makers have also emphasised the "permanent," enduring quality of social media posts that often extend beyond the control of the author,¹⁶⁵ and that the removal of an offensive post by an employee is akin to "closing the gate of the stable once the horse has bolted."¹⁶⁶ For example in *Dladla*,¹⁶⁷ the employee's argument that Facebook posts are akin to a conversation in a "restaurant," was sharply rejected.¹⁶⁸ Rather, the CCMA referred to the analogy of using a "megaphone in a public space."¹⁶⁹

Further, in South Africa the non-implementation of privacy settings was a significant factor in determining the reasonable expectations of privacy in online communications.¹⁷⁰ In the early decision of *Sedick*,¹⁷¹ that employees had not implemented privacy settings on their Facebook accounts was taken as a waiver of any rights that the employees might have had under

¹⁵⁰ *Comcare v Banerji* [2019] HCA 23, [202] – [206] ('*Banerji HCA*').

¹⁵¹ *Comcare v Banerji* [2019] HCA 23, [1] ('*Banerji HCA*').

¹⁵² *Comcare v Banerji* [2019] HCA 23, [135] ('*Banerji HCA*'); *Chief of the Defence Force v Gaynor* [2017] FCAFC 41, [47]-[52] ('*Gaynor FCAFC*').

¹⁵³ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 14 ('*Constitution RSA*').

¹⁵⁴ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 16 ('*Constitution RSA*').

¹⁵⁵ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 23 ('*Constitution RSA*').

¹⁵⁶ *Constitution of the Republic of South Africa* 1996 (South Africa) ('*Constitution RSA*').

¹⁵⁷ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 ('*Constitution RSA*').

¹⁵⁸ See especially *S v Mamabolo (E TV Intervening)* 2001 3 SA 409 (Constitutional Court) ('*Mamabolo*'); *Khumalo v Holomisa* 2002 5 SA 401, [25] (Constitutional Court) ('*Khumalo*').

¹⁵⁹ *Khumalo v Holomisa* 2002 5 SA 401, [25] (Constitutional Court), ('*Khumalo*'); *Le Roux v Dey* 2011 3 SA 274, [34] (Constitutional Court).

¹⁶⁰ See especially the limitation clause *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 36.

¹⁶¹ *O'Keefe v Argus Printing and Publishing Company Limited* 1954 3 SA 244 (Constitutional Court) ('*Argus Printing*').

¹⁶² *Regulation of Interception of Communications and Provision of Communication Act 2002* (South Africa) ('*RICCA*').

¹⁶³ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [49] ('*Dagane*').

¹⁶⁴ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [49] ('*Dagane*'). See also *Robert Naysmith v Merchant SA (Pty) Ltd* [2015] CCMA GAJB8124-15 ('*Naysmith*'); *Happiness Harting v Container World (Pty) Ltd* [2015] CCMA GA EK9537-15 ('*Harting*'); *NUMSA obo Komane, Mike v Middleburg Ferrochrome MEMP3151*, [79] ('*Komane*'); *Smit v Partners in Sexual Health (Non-profit)* (2011) 32 ILJ 1470 (CCMA) ('*Smit*').

¹⁶⁵ *Hanniker v One and Only Cape Town* [2017] CCMA WECT4369-17, [63] ('*Hanniker*').

¹⁶⁶ *Arthur Leach v Suzuki JHB South MINT 44570 D*, [5.31]; See also *Motloung v The Market Theatre Foundation* [2011] CCMA GAJB 4458-11, [3.5.4] ('*Motloung*'); *Daniel Rayman Ngani v Else Cole Brioché* [2015] CCMA ECPE4540-15, [17] ('*Nqani*').

¹⁶⁷ *Praxydis Lungile Dladla v E SAT (E.TV)* [2011] CCMA GAJB948-11 ('*Dladla*').

¹⁶⁸ *Praxydis Lungile Dladla v E SAT (E.TV)* [2011] CCMA GAJB948-11, [5.2] ('*Dladla*').

¹⁶⁹ *Praxydis Lungile Dladla v E SAT (E.TV)* [2011] CCMA GAJB948-11, [5.3] ('*Dladla*').

¹⁷⁰ See generally *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse/ Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* [2013] CCMA WECT16781-13, [16 E - F] ('*Arendse*'); *EAMWUSA obo Duncan van Wyk v Dart Stationers CC* WECT14283-11, [27]-[28] [33] ('*Van Wyk*').

¹⁷¹ *Sedick and Another v Krisray* [2011] 8 BALR 879 (CCMA) ('*Sedick*').

the *Regulation of Interception of Communications and Provision of Communication Act 2002*.¹⁷² In the sample, 8 other decisions closely followed this reasoning.¹⁷³ This was similar to the Australian decisions of *Wilkinson-Reed*¹⁷⁴ and *Fallens*.¹⁷⁵ The decision of *Arendse*¹⁷⁶ also addressed that the factors of when, where and what device the employees engaged in social media misconduct was “irrelevant”.¹⁷⁷ Finally, the South African sample showed a wholly negative perception towards employees who utilise social media as a platform to express workplace grievances.¹⁷⁸ In *Beaurai*,¹⁷⁹ the decision-maker stated “[p]ublishing the allegations on the Internet was unlikely to solve the perceived problems,” and was “unnecessary to publish to the international community, who could do little to help.”¹⁸⁰ Indeed, comments highly critical of employees who posted negative statements about their employers were present in 12% (11/97) of decisions.¹⁸¹

While privacy rights claims were seemingly more ineffective in South Africa than in Australia, there was a difference in how political speech-based arguments were treated. In the sample there did seem to be some tolerance of speech on social media directed towards African political leaders. In *Leach*,¹⁸² racially

disparaging remarks about the ANC Government prior to employment was not sufficient to ground dismissal; “the applicant in reality was being punished for exercising a right that the law afforded him.”¹⁸³ In *Cantamessa*,¹⁸⁴ posts criticising government leaders by a White employee on her Facebook account, notwithstanding the account also disclosed her employer, was likewise not sufficient.¹⁸⁵ “the mere fact that a White person... [s]tates that President Zuma is stupid does not constitute racism.”¹⁸⁶ Although both decisions did not directly involve recourse to the right to freedom of expression as enshrined in the *Bill of Rights*,¹⁸⁷ the decisions evidence a tolerance for political commentary, even if reflected through racialised lexicon that seems in contrast with the wider sample. However, this finding was not absolute.

In *Msimang*,¹⁸⁸ an African political reporter posted comments critical of the Presidency on his personal Facebook page. The decision-maker held that at the workplace, the employee had agreed to abide by the policies which limited his freedom to comment on social media, and held that the employee’s Facebook posts rendered him partisan.¹⁸⁹ That decision seems similar to the Australian position on the limitation on political

¹⁷² *Sedick and Another v Krisray* [2011] 8 BALR 879, [52] (CCMA).

¹⁷³ See *Fredericks v Jo Borkett Fashions* [2012] 1 BALR 28 (CCMA) (*‘Fredericks’*); *Jikela v Smit Amandla Marine WECT* [2012] CCMA 16547-12, [61] [64] (*‘Jikela’*); *Toni Muir v Neo Africa* [2012] CCMA GAJB 7546-12, [5.3] (*‘Muir’*); *Lucia Nhlapo v Delta EMD* [2013] CCMA MP5131-13, [15]-[16] (*‘Nhlapo’*); *William Kerekere v Onelogix* [2015] CCMA KNDB9649-15, [106] (*‘Nduma’*); *Khanya Zowia Nduma v Fowkes Brothers (Pty) Ltd* [2018] CCMA WECT 5340-18, [56] (*‘Nduma’*).

¹⁷⁴ *Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota* [2014] FWC 644 (*‘Wilkinson-Reed’*).

¹⁷⁵ *Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison* [2015] FWC 8394 (*‘Fallens’*).

¹⁷⁶ *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse/ Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* [2013] CCMA WECT16781-13 (*‘Arendse’*).

¹⁷⁷ *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse/ Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* [2013] CCMA WECT16781-13, [15B] (*‘Arendse’*). See also *Noluthando Gumede v Mutual and Federal* [2014] CCMA GAJB9817-14 (*‘Gumede’*); *Masemola v Commission for Conciliation, Mediation and Arbitration and Others* (JR1025/2013) [2016] ZALCJHB 183; *FAWU obo Ngomane, Thabiso v Radisson BLU Hotel Sandton* [2018] CCMA GAJB20280-18, [8.18] (*‘Ngomane’*); *Lindokuhle Ngcobo v EOH Avanti(Pty)Ltd t/a Highveld PFS* [2012] CCMA GAJB 20141-14, [14] [35]-[36] (*‘Ngcobo’*); *Iteseng Joseph Nkgwang v Eskom Holdings Ltd* MEMP351 (*‘Nkgwang’*); *Sithembile Portia Zulu v SATAWU* [2015] CCMA MP814-15, [20] (*‘Portia Zulu’*); *Portia Ndlovu-Nzama v Ithala Development Finance Corporation* [2011] CCMA KNDB11884-11, [61] (*‘Ndlovu-Nzama’*); *Daniel Rayman Nqani v Else Cole Brioche* [2015] CCMA ECPE4540-15, [118] (*‘Nqani’*).

¹⁷⁸ *Fredericks v Jo Borkett Fashions* [2012] 1 BALR 28, [6.3 H] (CCMA) (*‘Fredericks’*).

¹⁷⁹ *Beaurain v Martin NO and others* (C16/2012)[2014] ZALCCT 16.

¹⁸⁰ *Beaurain v Martin NO and others* (C16/2012)[2014] ZALCCT 16, [33].

¹⁸¹ *Beaurain v Martin NO and others* (C16/2012)[2014] ZALCCT 16, [33]; *Media Workers Association of SA obo Mvemve and Kathorus Community Radio* 2010 31 ILJ 2217 (CCMA); *Portia Ndlovu-Nzama v Ithala Development Finance Corporation* [2011] CCMA KNDB11884-11, [61] (*‘Ndlovu-Nzama’*); *Pamela Matiso v Nelson Mandela Tourism* [2012] CCMA ECPE2825-12, [12] (*‘Matiso’*); *Amakhosi Radebe v JD Group (Pty) Ltd* [2014] CCMA GAJB12297-14, [41] (*‘Radebe’*); *Mr T Mabele v SGRP Meridian (Pty) Ltd* WECT: 4669- 16, [25] (*‘Mabele’*); *Ms Muthoni Kimani v Cape Peninsula University of Technology* [2017] CCMA WECT 18824-17, [35] (*‘Kimani’*); *Mmakwena Martin Mokgehele v Imvula Quality Protection* [2017] CCMA GAJB24628-17, [17] (*‘Mokgehele’*); *Suretha Nass v Little Green Beverages (Pty) Ltd* [2017] CCMA ECEL2930-17, [40] (*‘Nass’*); *Melusi Nelson Mthabela v Arcelor Mittal SA Ltd* MEKN9239 (*‘Mthabela’*).

¹⁸² *Arthur Leach v Suzuki JHB South MINT 44570 D* (*‘Leach’*).

¹⁸³ *Arthur Leach v Suzuki JHB South MINT 44570 D*, [5.68] (*‘Leach’*).

¹⁸⁴ *Cantamessa and Edcon Group* (2017) 38 ILJ 1909 (CCMA) (*‘Cantamessa’*).

¹⁸⁵ *Cantamessa and Edcon Group* (2017) 38 ILJ 1909, [51] – [52], [57] (CCMA) (*‘Cantamessa’*). This finding was overturned on appeal.

¹⁸⁶ *Cantamessa and Edcon Group* (2017) 38 ILJ 1909, [74] (CCMA) (*‘Cantamessa’*).

¹⁸⁷ *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 s 16.

¹⁸⁸ *Broadcasting, Electronic, Media & Allied Workers Union obo Msimang v South African Broadcasting Corporation* KNDB14983-16 (*‘Msimang’*).

¹⁸⁹ *Broadcasting, Electronic, Media & Allied Workers Union obo Msimang v South African Broadcasting Corporation* KNDB14983-16, [65] (*‘Msimang’*).

communication in *Gaynor*¹⁹⁰ and *Banerji*.¹⁹¹ Similar, in the recent Labour Court appeal of *Cantamessa*¹⁹² that overturned the first tier decision, it was held that the “[d]erogatory terms used manifested a deep-rooted racism which has no place in a democratic society. [D]ismissal was an appropriate sanction, in the circumstances.”¹⁹³

Something critical must be observed in the South African sample at this point. The issue of race remains central and paramount in South Africa.¹⁹⁴ An examination of the racial dimension of the South African sample reveals striking conclusions.¹⁹⁵ First, in 73% (71/97) decisions where it was held that the social media misconduct dismissal was substantively fair, the employee was Black (African, Indian or Coloured), and in 54% (52/97) decisions where the misconduct was derogatory material about the employer, the employee was Black. From the sample, the South African workplace seems to be revealed as both highly racialised – with 58% (56/97) Black employees dismissed by White employers or managers as opposed to 5% (5/97) White employees dismissed by Black employers or managers – and intolerant of (Black) employees expressing grievances or dissatisfaction in the digital realm. Yet in two decisions, racialised political comments by White employees was held to not be grounds for dismissal. At this point, the sample seems to show a particular racial lens through which both social media misconduct and the effectiveness of rights-based arguments occur in South Africa. This finding is further pursued in the next section.

In summary, both the Australian and South African samples showed that claims by employees that their social media should be protected by a reasonable expectation of privacy have little support. Rather, social media in both countries is strongly regarded as in the public record and employees engage with social media at their own peril. Further, in Australia the sample shows a particular ineffectiveness of employee arguments that political comments were protected by rights to free speech.

¹⁹⁰ *Gaynor v Chief of the Defence Force* (No 3) [2015] FCA 1370 (*‘Gaynor’*).

¹⁹¹ *Comcare v Banerji* [2019] HCA 23 (*‘Banerji HCA’*).

¹⁹² *Edcon Limited v Cantamessa and Others* (JR30/17) [2019] ZALCJHB 273.]

¹⁹³ *Edcon Limited v Cantamessa and Others* (JR30/17) [2019] ZALCJHB 273 [21].

¹⁹⁴ See generally Gibson (2015).

¹⁹⁵ Determining the race of the employee and employer/manager from the texts of the decision is not an exact science. Nevertheless, we are confident with our assessment. In most decisions, the race of the players is specifically mentioned (see *Samuel Mokwoane Shayi v Quality Pallets CC* [2015] CCMA GAJB4751-15 where the decision states “the general manager is Junita Schultz, a coloured lady” and the employee spoke Sepedi and required an interpreter [10]. See also *WOCFOFO obo Siphokazi Pitseng v Royal Trading Pty Ltd* [2013] CCMA GATW11253-13 where the applicant referred to Indians in her postings and Mr Khan (Assistant General Manager) and other employees were Indians who were in the employ of the respondent company [26]). In other decisions the race of the parties is obvious from the context of the matters, and particularly the form of racialised hate speech involved. For example see *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC) where the receptionist stated “Working for and with Indians is pits; they treat their own like dirt” [12]. The manager and the directors (Ronie Singh and Avi Singh) are all Indians [19] and *Ahmad Mahri v Mather Dangor Financial Services* GAJB15475-18 wherein the employee is specifically labelled as of the ‘Muslim-faith’ [14] and used derogatory terms such as the “k-word” [15]. A full list of how we identified the race of the parties in each case is available from the authors.

¹⁹⁶ *Arthur Leach v Suzuki JHB South* MINT 44570 D (*‘Leach’*).

¹⁹⁷ *Cantamessa and Edcon Group* (2017) 38 ILJ 1909 (CCMA) (*‘Cantamessa’*).

While in Australia the absence of a robust formal rights framework could explain this absence, it seems more peculiar in the strong rights-based legality of South Africa. Given this strong characterisation, the decisions in *Leach*¹⁹⁶ and first tier *Cantamessa*¹⁹⁷ involving White employees being unfairly dismissed for posting what was held to be “private” racialised criticism of the government seem like outliers.

4. UNIQUE FACTORS WITH SOCIAL MEDIA MISCONDUCT IN AUSTRALIA AND SOUTH AFRICA

The previous section focused on common findings drawn from the Australian and South African sample. In doing so, two contrasting differences began to emerge. The first was the Australian workplaces and employment law, at times, seemed to be more accommodating of employees than in South Africa where there seemed to be very little tolerance and allowances for employees. The second was a strong and enduring racial dimension to workplaces and the application of employment law in South Africa. This section focuses on these unique factors. In Australia the (slightly) more tolerant approach towards employees is further explained in relation to larrikinism. In South Africa the effect and consequences of the racialised nature of the workplace is further revealed.

4.1. LARRIKIN CONDUCT IN AUSTRALIA

As disclosed in the previous section, Australian decision-makers have over the 2010s vacillated concerning allowances towards employees and their social media conduct. While there was a clear trajectory of this swinging towards employers since 2015, a factor that was evident in the sample that might explain some of the vacillation, was a degree of tolerance for “larrikin” behaviour. 17% of decisions (7/42) involved claims or allowances made for larrikin conduct. The term “larrikin” has British roots referring to “a mischievous or frolicsome

youth.”¹⁹⁸ In Australia, the original pejorative denotation has moved somewhat: a larrikin is a person who is “a rough diamond,”¹⁹⁹ or “cheeky prankster” (Bellanta 2013, p. 1) with a “lovable-scallywag air” (Bellanta 2013, p. 3) and “waggish humour” (Bellanta 2012, p. 180) who engages in “taking the mickey” of someone or something (Bellanta 2013, p. 1).

“Waggish humour” was evident in *Mayberry*.²⁰⁰ The misconduct involved the posting to Facebook a photograph of the employee clothed as a motor vehicle made from Subway branded materials²⁰¹ behind a Subway counter.²⁰² Subway summarily dismissed the employee for irreparable damage to the employer’s reputation arising from the posted image.²⁰³ The FWA found that dismissal, let alone summary dismissal, was too harsh a sanction,²⁰⁴ as there was “no damage to the company’s name, let alone irreparable damage”²⁰⁵ to its reputation.

“Nonconformity, anti-authoritarianism, exceeding limits, audacity” (Vine 2009, p. 106) and apparent “careless disregard for social or political conventions”²⁰⁶ are further characteristics associated with Australian larrikinism. In *Singh*,²⁰⁷ an airline employee was dismissed for posting “We all support ISIS” on an Islamic extremist group’s Facebook page.²⁰⁸ The employee argued that the post was sarcastic, and that he really did not support ISIS.²⁰⁹ The FWC found that the company had failed to read the entire Facebook post that would have led them to

the conclusion that the employee was not an ISIS supporter.²¹⁰ Although the FWC found that the post did not demonstrate “sarcasm” as “[i]t was not witty. It was not funny”²¹¹ but was “a ridiculous”²¹² and “incredibly stupid”²¹³ post, it still held the dismissal unfair.²¹⁴

A common characteristic of Australian larrikinism is “strident masculinity” (Pearl 1958, p. 8). In *Renton*, an employee tagged two of his work colleagues on a sexually explicit video with a statement naming them in the video and left blobs of white Sorbolene cream on his male colleague’s desk.²¹⁵ The employee’s defence was he was “playing an annoying practical joke,”²¹⁶ and that this “banter”²¹⁷ was merely to “generate humour”²¹⁸ done with “the intention of them having a laugh.”²¹⁹ While the FWC found his actions to be “boorish,”²²⁰ “crass, careless”²²¹ and demonstrating a serious lack of sound judgement,²²² it held the termination to be “harsh in that it was disproportionate to the gravity of the misconduct.”²²³ The sharing of a sexually explicit video that also involved body-shaming the woman with colleagues that the employee had named, following up with the “practical” joke of the Sorbolene cream, was inappropriate but not a dismissible offence. This seems to reflect an Australian acceptance of a misogynist larrikinism that objectifies and fails to see harms towards women (Manne 2017; Tomsen 2017).²²⁴

¹⁹⁸ <https://slll.cass.anu.edu.au/centres/andc/meanings-origins/1>

¹⁹⁹ <https://slll.cass.anu.edu.au/centres/andc/meanings-origins/1>

²⁰⁰ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496 (‘*Mayberry*’).

²⁰¹ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [17] (‘*Mayberry*’).

²⁰² *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [18] (‘*Mayberry*’).

²⁰³ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [20] (‘*Mayberry*’).

²⁰⁴ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [73] (‘*Mayberry*’).

²⁰⁵ *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway* [2011] FWA 3496, [42], [69] (‘*Mayberry*’).

²⁰⁶ <https://slll.cass.anu.edu.au/centres/andc/meanings-origins/1>

²⁰⁷ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186 (‘*Singh*’).

²⁰⁸ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [15] (‘*Singh*’).

²⁰⁹ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [34] (‘*Singh*’).

²¹⁰ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [315] (‘*Singh*’).

²¹¹ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [318] (‘*Singh*’).

²¹² *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [318] (‘*Singh*’).

²¹³ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [315] (‘*Singh*’).

²¹⁴ *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186, [338] (‘*Singh*’).

²¹⁵ *Renton v Bendigo HealthCare Group* [2016] FWC 9089 (‘*Renton*’).

²¹⁶ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [30] (‘*Renton*’).

²¹⁷ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [13] (‘*Renton*’).

²¹⁸ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [71] (‘*Renton*’).

²¹⁹ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [7] (‘*Renton*’).

²²⁰ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [142] (‘*Renton*’).

²²¹ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [117] (‘*Renton*’).

²²² *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [117] (‘*Renton*’).

²²³ *Renton v Bendigo HealthCare Group* [2016] FWC 9089, [143] (‘*Renton*’).

²²⁴ On the acceptance of a misogynist workplace conduct as humour, see Plester (2015).

However, there does seem to be a line in Australia where tolerable larrikin social media conduct tips to dismissible misconduct. It seems to involve the sexualising of male bodies. In *Little*,²²⁵ the FWC found the dismissal lawful²²⁶ where a male employee made comments about sexual assault towards another male employee.²²⁷ The employee's arguments that the comments were humorous²²⁸ and were meant as a joke²²⁹ where not shared by the FWC that found the comments to be acutely offensive.²³⁰ The contrast with *Renton* seems stark - where images and text about a woman's body was not grounds for dismissal. In *Fussell*,²³¹ the FWC held that the forwarding by a male employee of an image of his erect penis to a female colleague was at the "extreme outer limit of offensiveness,"²³² and the reason for dismissal was valid.²³³ In the sample, the limit to tolerable larrikin conduct seemed to be the sexualised male body.²³⁴

It also seems to be the male body in danger. In *Naresh*,²³⁵ an employee was dismissed for posting a "cool as hell"²³⁶ image of himself standing on top of a mining machine, 1.6 metres above the ground with its engine running.²³⁷ The FWC upheld the dismissal partly as the image was evidence of unsafe work practices,²³⁸ but particularly as evidence of the brazen disregard for workplace health and safety and the serious risk to the employer's reputation and profitability if seen by its clients.²³⁹

The sample shows that while larrikin conduct through social media is tolerated to a degree in Australia; there are limits, seemingly around the representing of the male body. Indeed, in the Australian sample, in 4/42 decisions the employee had explained their social media conduct using the term 'joke.' In South Africa, 'joke' was only used by an employee as an explanation

in a single decision.²⁴⁰ While not all Australians who argued that their social media misconduct should be understood and excused as larrikin carrying-on were successful, 72% (5/7) cases were. This finding coalesces with the broader finding emerging from comparing the samples, that the balance in Australian workplaces and employment law is slightly more towards employees. However, this comes with a *caveat* that this only extends to employees manifesting Australian hegemonic masculine values of "taking the piss" and misogyny (Bellanta 2012, p. 180).

4.2. RACIALISED HATE SPEECH IN SOUTH AFRICA

As was suggested in the findings in the previous section, race is a fundamental factor in South Africa. Indeed, the sample strongly shows that regardless of the Constitutional imperatives of equality entrenched in the *Bill of Rights*,²⁴¹ the employment equity²⁴² and affirmative action measures²⁴³ instituted to eradicate and redress past inequalities and unfair discrimination within the labour force, South Africa remains a deeply divided society. It is a nation still contending with the divisive colonial and apartheid legacies (Potgieter and Moosa 2018) and deep-seated hurt, biases, and prejudices (Gibson 2015) and this was strongly evident in the sample of social media misconduct decisions.²⁴⁴

"Hate speech" can be defined as "the use of abusive, racist and disparaging comments, words or phrases directed against particular race, religion, ethnic background, gender or sexual preference" (Cassim 2015, p. 309; Van der Merwe et al 2008, p. 444) and is expressly excluded from the general right to freedom of expression under s 16 of the *Constitution of the Republic of*

²²⁵ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642 ('Little').

²²⁶ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [84] ('Little').

²²⁷ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [11] ('Little').

²²⁸ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [45] ('Little').

²²⁹ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [49] ('Little').

²³⁰ *Little v Credit Corp Group Limited T/A Credit Corp Group* [2013] FWC 9642, [77] ('Little').

²³¹ *Mr Rodney Fussell v Sydney Trains* [2019] FWC 1182 ('Fussell').

²³² *Mr Rodney Fussell v Sydney Trains* [2019] FWC 1182, [135] ('Fussell').

²³³ *Mr Rodney Fussell v Sydney Trains* [2019] FWC 1182, [110] ('Fussell').

²³⁴ On the relation between larrikinism and the male body as a site of sexual violence, see Arnold (2020).

²³⁵ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097 ('Connolly-Manga').

²³⁶ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097, [1] ('Connolly-Manga').

²³⁷ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097, [1] ('Connolly-Manga').

²³⁸ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097, [62] ('Connolly-Manga').

²³⁹ *Naresh Connolly-Manga v Global Mining Services Pty Ltd* [2019] FWC 1097, [37] ('Connolly-Manga').

²⁴⁰ *National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd* MIDB12660, [22] ('Zulu').

²⁴¹ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 9.

²⁴² *Employment Equity Act* 55 of 1998 ('Equity Act').

²⁴³ *Skills Development Act* 97 of 1998 ('Skills Act'); *Broad-Based Black Economic Empowerment Act* 53 of 2003 ('Empowerment Act').

²⁴⁴ See also Cassim (2015); Shaw (2011); Van der Merwe et al (2008).

South Africa,²⁴⁵ and is prohibited in terms of the *Promotion of Equality and the Prevention of Unfair Discrimination Act*.²⁴⁶ In the sample, decision-makers have been unambiguous in condemning racist hate speech in the workplace, irrespective of whether the conduct occurs on or off-duty, in person or online.²⁴⁷ The ‘k-word’ is the worst insult that can be brought to bear on Black persons “as it runs against the very essence of our constitutional ethos or quintessence.”²⁴⁸ Likewise, “boer” has been held, when spoken by a Black person towards a White individual to be as offensive as the “k-word.”²⁴⁹

In 59% (57/97) of the sample, social media hate speech was the primary reason for dismissal. Within these decisions, there were four categories of racialised disputes. Race is a legal and political concept in South Africa in employment equity²⁵⁰ and economic empowerment legislation²⁵¹ namely African,²⁵² Coloured²⁵³ and Indian²⁵⁴ which together constitute ‘Black people’ and Whites.²⁵⁵ Of the 57 decisions, 53% (30/57) where

African employees vilifying White individuals, followed by 9% (5/57) of vilification by White employees towards Black people, and 7% (4/57) Coloured employees using hate speech against White employers. The remaining cases included intra-racial hate speech,²⁵⁶ xenophobic vilification,²⁵⁷ and hate speech between Black people.²⁵⁸ In *Dagane*,²⁵⁹ social media posts by an African police officer that he hated Whites and threatened genocide upon them²⁶⁰ constituted “hate speech,”²⁶¹ and was deemed a fair reason for dismissal.²⁶² A similar treatment for racial slurs inciting Black individuals to kill White persons,²⁶³ to “drive whites back to the sea ...because Africa belongs to blacks,”²⁶⁴ and the promotion of genocide²⁶⁵ was held in *Ngcobo*²⁶⁶ and *Booi*.²⁶⁷ Black African employees were fairly dismissed for calling Whites people “wicked,”²⁶⁸ “shit pig skins,”²⁶⁹ “snakes and idiots,”²⁷⁰ and “inja”.²⁷¹ A similar level of intolerance by Coloured employees posting about their White employers was also evident in the sample. In *Du Preez*,²⁷² a Coloured employee

²⁴⁵ *Constitution of the Republic of South Africa* 1996 (South Africa) ch 2 s 16(2)(c).

²⁴⁶ *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000 s 10.

²⁴⁷ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* (2002) 23 ILJ 863 (LAC); *City of Cape Town v Freddie & Others* (2016) 37 ILJ 1364 (LAC); *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 ILJ 1766, [13]-[14] (LAC); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97, [4] (CC) (‘SARS’).

²⁴⁸ *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) (‘SARS’).

²⁴⁹ *Makhanya v St Gobain* [2019] 7 BALR 720 (NBCCI).

²⁵⁰ *Employment Equity Act* 55 of 1998 ch 1 s 1 (‘Equity Act’).

²⁵¹ *Broad-Based Black Economic Empowerment Act* 53 of 2003 s 1 (‘Empowerment Act’).

²⁵² Makes up 80.7% of the current population: <http://www.statssa.gov.za/publications/P0302/P03022019.pdf>

²⁵³ Makes up 8.8% of the current population: <http://www.statssa.gov.za/publications/P0302/P03022019.pdf>

²⁵⁴ Makes up 2.4% of the current population: <http://www.statssa.gov.za/publications/P0302/P03022019.pdf>

²⁵⁵ Makes up 7.9% of the current population: <http://www.statssa.gov.za/publications/P0302/P03022019.pdf>

²⁵⁶ See eg, *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC) (‘Dewoonarain’).

²⁵⁷ See, eg, *WOCOFO obo Siphokazi Pitseng v Royal Trading Pty Ltd* [2013] CCMA GATW11253-13.

²⁵⁸ See, eg, *Ahmad Mahri v Mather Dangor Financial Services* [2018] CCMA GAJB15475-18; *Desigan Muthaya v First National Bank (FNB)* [2018] CCMA GAJB15475-18; *Samuel Mokwoane Shayi v Quality Pallets CC* [2015] CCMA GAJB4751-15; *Lindiwe Sweetness Shoji v Standard Bank* [2017] CCMA KNDB6956-17.

²⁵⁹ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114 (‘Dagane’).

²⁶⁰ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [1] (‘Dagane’).

²⁶¹ *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [49] (‘Dagane’).

²⁶² *Dagane v SSSBC and others* JR 2219/14 [2018] ZALCJHB 114, [49] (‘Dagane’).

²⁶³ *Lindokuhle Ngcobo v EOH Avanti(Pty)Ltd t/a Highveld PFS* [2012] CCMA GAJB 20141-14, [12] (‘Ngcobo’).

²⁶⁴ *Booi v Wonderstone* [2013] CCMA NWKD963-13, [15] (‘Booi’).

²⁶⁵ *Lindokuhle Ngcobo v EOH Avanti(Pty)Ltd t/a Highveld PFS* [2012] CCMA GAJB 20141-14, [7] (‘Ngcobo’).

²⁶⁶ *Lindokuhle Ngcobo v EOH Avanti(Pty)Ltd t/a Highveld PFS* [2012] CCMA GAJB 20141-14, [7] (‘Ngcobo’).

²⁶⁷ *Booi v Wonderstone* [2013] CCMA NWKD963-13 (‘Booi’).

²⁶⁸ *Noluthando Gumede v Mutual and Federal* [2014] CCMA GAJB9817-14, [118] (‘Gumede’).

²⁶⁹ *Mandla Zamokwakhe Magubane v De Heus* [2017] CCMA KNPM2101-17, [5.4] (‘Magubane’).

²⁷⁰ *Jikela v Smit Amandla Marine WECT* [2012] CCMA 16547-12, [8] (‘Jikela’).

²⁷¹ *Thamsanqa David Ntshangase v MCFI International SA Pty Ltd* [2015] CCMA KNDB10251-15, [20] (‘Ntshangase’). This is a deeply offensive, disrespectful and hateful comment in the isiZulu culture meaning ‘dog.’ See also *SACCAWU obo Gustuv Cholofeco Mokhothu v Edcon (Pty) Ltd* [2014] CCMA FSWK824-14 (‘Mokhothu’); *FAWU obo Myeni, Ntokozo v Imperial Retail Solutions* [2016] CCMA KNDB2662-16, [5.13] (‘Myeni’); *FAWU obo Ngomane, Thabiso v Radisson BLU Hotel Sandton* [2018] CCMA GAJB20280-18, [8.18] (‘Ngomane’); *Mandla Zamokwakhe Magubane v De Heus* [2017] CCMA KNPM2101-17, [5.4] (‘Magubane’).

²⁷² *FAWU obo Martin Du Preez v Casidra (Pty) Ltd t/a Aanhalt Boerdery* [2013] CCMA WEGE 1417-13 (‘Du Preez’).

was fairly dismissed for the Facebook posts “kill the boer, kill the farmer.”²⁷³ In *Motloung*²⁷⁴ the constitutional right to free speech as a defence for social media hate speech was expressly rejected.²⁷⁵ This sentiment that freedom of speech does not protect hate speech by employees was also specifically noted in 14% (8/57) of the decisions.²⁷⁶

The extent of intolerance to racialised talk on social media can be seen in *Nqani*,²⁷⁷ where an African employee was fairly dismissed for posting that his White employer was xenophobic and racist on Facebook.²⁷⁸ However, there were three decisions (3/30) 10% where a Black employee was successful in arguing the dismissal for social media racial hate speech about White individuals was unfair. For example in *Maja*²⁷⁹ the dismissal was not fair as the racism on the employee’s “[Facebook] profile does not exhibit a connection with the employer.”²⁸⁰ Likewise, in *Ndhlovu*,²⁸¹ comments demanding “boers” to leave South Africa²⁸² was not sufficient to justify a fair dismissal.²⁸³ In *Nkala*,²⁸⁴ the employee was dismissed for posting the statement “until we learn to unlearn killing each other and learn how to kill these white rednecks or any of the racist pigs, then we will be

respected” on Facebook.²⁸⁵ The employees who felt aggrieved by the statement were largely White.²⁸⁶ The decision-maker found that the employer had acted inconsistently by not dismissing two White employees who had also made racial comments²⁸⁷ thereby indicating that the employer overlooked and tolerated racism in the workplace.²⁸⁸ Significantly, the decision-maker noted that the Black employee’s “[W]hite colleagues got away with very serious allegations of racist remarks,”²⁸⁹ and found the employee’s dismissal substantively unfair due to the inconsistent application of discipline and policies.²⁹⁰

In the 9% (5/57) of decisions where a White employee engaged in social media hate speech towards Black people, in 60% (3/5) it was held that the dismissal was fair. In *Haviga*,²⁹¹ comments posted by a White employee towards African women stating that “half the women [in South African townships] are overweight and the other half are HIV infected,”²⁹² warranted dismissal.²⁹³ In that decision, the employee’s Constitutional right of freedom of expression was reasonably limited by the need to protect others’ rights to dignity.²⁹⁴ Similarly, in *Bird*²⁹⁵ dismissal of a White employee for posting a picture of the old

²⁷³ *FAWU obo Martin Du Preez v Casidra (Pty) Ltd t/a Aanhalt Boerdery* [2013] CCMA WEGE 1417–13, [11] (‘Du Preez’). See also *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse / Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* [2013] CCMA WECT16781-13 (‘Arendse’); *MATUSA obo Paulse v JD Kirsten Boedery (Pty) Ltd* WECT17777-18 (‘Paulse’); *EAMWUSA obo Duncan van Wyk v Dart Stationers CC* WECT14283-11 (‘Van Wyk’).

²⁷⁴ *Motloung v The Market Theatre Foundation* [2011] CCMA GAJB 4458-11 (‘Motloung’).

²⁷⁵ *Motloung v The Market Theatre Foundation* [2011] CCMA GAJB 4458-11, [4.4] (‘Motloung’).

²⁷⁶ *Daniel Rayman Nqani v Else Cole Brioche* [2015] CCMA ECPE4540-15, [17] (‘Nqani’); *Lucienne- Anne Haviga v SAA (SOC) Ltd* [2014] CCMA GAEK7750-14, [32] (‘Haviga’); *Kenneth Marshall Alexander v Ebesa Architects (Pty) Ltd* [2015] CCMA WECT19446-15 (‘Alexander’); *NASUWU obo Ngxwana v M Red Alert Cleaning and Security* [2016] CCMA ECEL4931-16, [32.5] (‘Ngxwana’); *Broadcasting, Electronic, Media & Allied Workers Union obo Msimang v South African Broadcasting Corporation* KNDB14983-16, [49] (‘Msimang’); *SACAWU obo Gustav Cholofeco Mokhothu v Edcon (Pty) Ltd* [2014] CCMA FSWK824-14, [29] (‘Mokhothu’); *Johannes Makganthe Ngoepe v Quemic (Pty) Ltd* [2015] CCMA GAJB4016-15, [25] (‘Ngoepe’); *Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith* 2013 7 BALR 689 (MIBC) (‘Dewoonarain’).

²⁷⁷ *Daniel Rayman Nqani v Else Cole Brioche* [2015] CCMA ECPE4540-15, [17] (‘Nqani’).

²⁷⁸ *Daniel Rayman Nqani v Else Cole Brioche* [2015] CCMA ECPE4540-15, [18] [26] (‘Nqani’). See also *Happiness Harting v Container World (Pty) Ltd* [2015] CCMA GAEK9537-15, [31] (‘Harting’); *NUM obo Godloza, Sivuyile Yalela v Harmony Gold Mining Company Ltd* [2012] CCMA FS2022-12 (‘Godloza’); *NEHAWU obo Obakeng Victor Tilodi v Commissioner T Ndzombane, Department of Health and Public Health & Social Development Sectoral Bargaining Council* C30/15 (‘Tilodi’); *SATAWU obo of B. Sam and Two Others v Ikhethele Terminal Services (Pty) Limited* [2012] CCMA WECT12982-12 (‘Sam’).

²⁷⁹ *Pontsho Maja v Glencore Lion Smelter* [2016] CCMA LP3649-16 (‘Maja’).

²⁸⁰ *Pontsho Maja v Glencore Lion Smelter* [2016] CCMA LP3649-16, [64] (‘Maja’).

²⁸¹ *Mafabatho Ndhlovu v Adve Tech Copperleaf College* [2018] CCMA GATW 12969-18 (‘Ndhlovu’).

²⁸² *Mafabatho Ndhlovu v Adve Tech Copperleaf College* [2018] CCMA GATW 12969-18, [11] (‘Ndhlovu’).

²⁸³ *Mafabatho Ndhlovu v Adve Tech Copperleaf College* [2018] CCMA GATW 12969-18, [21] (‘Ndhlovu’).

²⁸⁴ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16 (‘Nkala’).

²⁸⁵ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [6] (‘Nkala’).

²⁸⁶ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [13] (‘Nkala’).

²⁸⁷ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [38] (‘Nkala’).

²⁸⁸ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [42] (‘Nkala’).

²⁸⁹ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [42] (‘Nkala’).

²⁹⁰ *SACWU obo Nkala Siphov v Sasol Synfuels* [2017] MPCHEM355-15/16, [43] (‘Nkala’).

²⁹¹ *Lucienne- Anne Haviga v SAA (SOC) Ltd* [2014] CCMA GAEK7750-14 (‘Haviga’).

²⁹² *Lucienne- Anne Haviga v SAA (SOC) Ltd* [2014] CCMA GAEK7750-14, [6] (‘Haviga’).

²⁹³ *Lucienne- Anne Haviga v SAA (SOC) Ltd* [2014] CCMA GAEK7750-14, [39] (‘Haviga’).

²⁹⁴ *Lucienne- Anne Haviga v SAA (SOC) Ltd* [2014] CCMA GAEK7750-14, [32] (‘Haviga’).

²⁹⁵ *Anthony Mark Bird v Rand Mutual Admin Services (Pty) Ltd* [2018] CCMA GAJB15348-17 (‘Bird’).

apartheid era South African flag with the words “Good South Africa”²⁹⁶ was held to be a “symbol of white supremacy over the black majority ... [t]hat were oppressed during the apartheid era under this flag,”²⁹⁷ and was deemed substantively fair.²⁹⁸ However, these decisions should be contrasted with *Leach*²⁹⁹ and first tier *Cantamessa*³⁰⁰ that were discussed in the previous section where at first instance the dismissal of White employees for racialised political comments was held to be unfair. In 40% (2/5) of the small number of decisions concerning a White employee and hate speech, the employee was successful through convincing the decision-maker that the comments were primarily political and not racist in motivation.

The sample shows South Africa is a society in which race and race conflict is at the forefront. At one level, the response of decision-makers could be commended. In *Roose*,³⁰¹ the decision-maker noted that “[r]acism is a cancer in the country...[i]ts wider impact on employees and consequent disharmony in the workplace renders it unacceptable”³⁰² and generally, the sample shows very little tolerance for employees engaging in racialised hate speech. However, the broader social and economic context of South Africa should be considered. Within the South African sample, in 86% (83/97) overall and 60% (34/57) of the hate speech decisions involved Black employees. In 5% (5/97) of the sample, the manager or employer was Black, and the dismissed employee was White.

South African has a long history of racialised discrimination and inequality, particularly in economic and employment relations (Potgieter and Moosa 2018). Prior to the apartheid regime, the majority of the African communities were divested of their land and resources and subjugated into a position of

subservience to a White minority (Magubane 1986). This stark division intensified during the apartheid regime where the racialised workplace of White employers and Black employees was characterised by “deeply-rooted adversarialism,” fuelled by “unjust, repressive” laws and policies (Du Toit 2006). Linked to this, the apartheid “Bantu” education that only prepared Black students for menial and low-skilled work effectively excluding, along with direct prohibitions, Black people from securing high-skilled status and remunerated employment.³⁰³ This resulted in a small, elite class of White skilled workers, and a largely unskilled Black population (Potgieter and Moosa 2018). Notwithstanding democratic elections in 1994, the formation of South Africa’s first Black-majority government and the passage of laws and policies to address employment equity, “white monopoly capital” persists, and employment relations still predominately involves White ownership and White top management with Black employees and a largely Black African skilled, semi-skilled and unskilled labour market.³⁰⁴

Indeed, the economic legacy of apartheid seemingly endures (Potgieter and Moosa 2018). In 2019, World Bank figures have 55.5% of all South Africans living below the upper-bound poverty level,³⁰⁵ with unemployment at 29%.³⁰⁶ This inequality renders South Africa a highly divided nation. Institute for Justice and Reconciliation 2017 figures indicated that 30.4% of South Africans distrust people from other races, and 27.4% distrust people with different religious affiliations. While 38% of the South Africans stated that they did not have any difficulty with other race groups, and 66.3% of White people indicating that they did not have any problems associating with any other race group, 26.9% of Black people noted that they found it most difficult to associate with White individuals.³⁰⁷

²⁹⁶ *Anthony Mark Bird v Rand Mutual Admin Services (Pty) Ltd* [2018] CCMA GAJB15348-17, [13] (*‘Bird’*).

²⁹⁷ *Anthony Mark Bird v Rand Mutual Admin Services (Pty) Ltd* [2018] CCMA GAJB15348-17, [53] (*‘Bird’*).

²⁹⁸ *Anthony Mark Bird v Rand Mutual Admin Services (Pty) Ltd* [2018] CCMA GAJB15348-17, [53] (*‘Bird’*). See especially *Jolanda Roose v Netcare 911* [2016] CCMA ECPE405-16, [18] wherein a racist, derogatory comment warranted dismissal even for a first transgression (*‘Roose’*).

²⁹⁹ *Arthur Leach v Suzuki JHB South* MINT 44570 D (*‘Leach’*).

³⁰⁰ *Cantamessa and Edcon Group* (2017) 38 ILJ 1909 (CCMA) (*‘Cantamessa’*).

³⁰¹ *Jolanda Roose v Netcare 911* [2016] CCMA ECPE405-16 (*‘Roos’*).

³⁰² *Jolanda Roose v Netcare 911* [2016] CCMA ECPE405-16, [70] (*‘Roos’*).

³⁰³ http://www.saha.org.za/youth/the_future_is_ours.htm

³⁰⁴ *Employment Equity Act* 55 of 1998 (*‘Equity Act’*); *Skills Development Act* 97 of 1998 (*‘Skills Act’*); *Broad-Based Black Economic Empowerment Act* 53 of 2003 (*‘Empowerment Act’*). See generally the *19th Commission of Employment Equity Annual Report 2018-2019* at <https://www.labourguide.co.za/workshop/1692-19th-cee-annual-report/file> which noted 65.5% of top management positions were still occupied by White people (p. 20). Black African employees constitute 63.3% of skilled employees (p. 34), 75.5% of semi-skilled employees (p. 38) and 83.7% of the unskilled workforce (p. 42). “White monopoly capital” refers to the White population’s pervasive control over the South African economy - see, eg, Anwar 2017 for a general discussion. According to the Broad-Based Black Economic Empowerment Commission’s annual report on *National Status and Trends Transformation* (2018), Black ownership of the JSE’s listed entities was 25.2% (p.51) at <https://www.bbbee.commission.co.za/wp-content/uploads/2019/06/National-Status-Trends-on-Black-Economic-Empowerment-Report-31-March-2019-Approved-FINAL.pdf>.

³⁰⁵ https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_ZAF.pdf See also <http://www.statssa.gov.za/publications/P03101/P031012019.pdf>

³⁰⁶ Roughly 6.7 million individuals: http://www.statssa.gov.za/?page_id=737&id=1

³⁰⁷ <http://www.ijr.org.za/home/wp-content/uploads/2018/03/IJR-Barometer-Report-2017-WEB-final.pdf>

Investigating interpersonal trust within the workplace, the Institute for Justice and Reconciliation found that White persons exhibit the highest level of trust towards colleagues, whilst Black African employees exhibit the lowest levels.³⁰⁸ Almost 21% of respondents indicated that they experienced racism in the workplace in their daily lives “always” or “often,” with 41.8% of employees agreeing that it is most difficult to confront racism by superiors at work.³⁰⁹

In an economy that is highly racially stratified, where the legacy of apartheid remains a lived reality especially for Black South Africans, it is unsurprising that racialised comments are shared on social media. It is also unsurprising that South African workplaces are a catalyst for these comments given the enduring fractured relations between Black and White people. In this context, White employers or White management dismissing Black employees for their social media conduct can be seen as less about upholding rights of freedom from racial vilification above freedom of speech, but more a strategy of control against a Black workforce. Indeed, the sample suggests that social media misconduct dismissal in South Africa is another forum for the continuance of White privilege.

5. CONCLUSION

This article has argued, through an analysis of a sample of 42 Australian and 97 South Africa social media misconduct dismissal decisions, that the enduring and uncontrolled audience of social media combined with national specific factors influence how decision-makers decide social media misconduct matters. Addressing a need for more comparative work that include consideration of digital diffusion and disruption in the Global South, predominately “street-level” decisions from Australia and South Africa were analysed to identify the cultural, economic and technological factors driving contested social media misconduct dismissals. Three commonalities were identified: social media content as evidence of “at work” misconduct; reluctance to allow employees to claim ignorance of the nature of social media; and the ineffectiveness of rights-based arguments. While this finding was unsurprising in Australia given the absence of a formal rights instrument. Two unique factors were also identified; in Australia there was a degree tolerance for larrikin behaviour, while in South Africa the racial divisions and racial impact of social media misconduct dismissals was highly significant and visible.

In Australia, the absence of entrenched political rights means that employee social media use is not subject to reasonable expectations of privacy. However, there is also tolerance for a

certain level of larrikin behaviour. In South Africa, the existence of enshrined rights manifests differently in the context of social media misconduct dismissal.

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³⁰⁸ <http://www.ijr.org.za/home/wp-content/uploads/2018/03/IJR-Barometer-Report-2017-WEB-final.pdf>

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- O'Keefe v Argus Printing and Publishing Company Limited* 1954 3 SA 244 (Constitutional Court) 247.
- Palesa Petronella Motol v Democratic Alliance (DA)* [2017] CCMA LP1723-17.
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- Phillip Madisha v Sandton Plant Hire (Pty) Ltd* [2018] CCMA GAJB 10432-18.
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- Portia Ndlovu-Nzama v Ithala Development Finance Corporation* [2011] CCMA KNDB11884-11.
- Princess Mlala v Bidvest Vericon and Avon* [2017] CCMA GAEK3588-17.
- Praxydis Lungile Dladla v E SAT (E.TV)* [2011] CCMA GAJB948-11.
- Robert Naysmith v Merchant SA (Pty) Ltd* [2015] CCMA GAJB8124-15.
- S v Mamabolo (E TV Intervening)* 2001 3 SA 409 (CC).
- SACCAWU obo Gustuv Cholofeco Mokhothu v Edcon (Pty) Ltd* [2014] CCMA FSWK824-14.
- SACWU obo Nkala Siphon v Sasol Synfuels* [2017] MPCHEM355-15/16.
- SACCAWU obo Prescilla Matshidiso Motshegoa v Mass Discounters (Pty) Ltd t/a Game Stores* [2013] CCMA GAJB11646-13.
- Samuel Mokwoane Shayi v Quality Pallets CC* [2015] CCMA GAJB4751-15.
- SASSAWU obo Ballim, Yasmin v North West Provincial Legislature* [2013] CCMA NWKD2792-13.
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- Sedick and Another v Krisray* [2011] 8 BALR 879 (CCMA).
- Simphiwe Given Mbhele v Shoprite* [2015] CCMA KNDB1959-15.
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Stephen Devasagium Andrew v Pick n Pay Supply Chain [2014] CCMA GAJB5317-14.

Suretha Nass v Little Green Beverages (Pty) Ltd [2017] CCMA ECEL2930-17.

Thamsanqa David Ntshangase v MCFI International SA Pty Ltd [2015] CCMA KNDB10251-15.

Thando Templeton Maku v Department of Social Development - Western Cape [2017] CCMA PSHS330-16/17.

Toni Muir v Neo Africa [2012] CCMA GAJB 7546-12.

UASA obo Siviwe Bokuva v Shoprite Checkers Ltd [2017] CCMA ECEL2040-17.

William Kerekere v Onelogix [2015] CCMA KNDB9649-15.

Willie B Botha v Bid Air Service [2015] CCMA ECPE3142-15.

WOCOFO obo Siphokazi Pitseng v Royal Trading Pty Ltd [2013] CCMA GATW11253-13

7. APPENDIX 1: AUSTRALIAN SAMPLE

<i>Anders v The Hutchins School</i> [2016] FWC 241
<i>Bowden v Ottrey Homes - Cobram & District Retirement Village Inc T/A Ottrey Lodge</i> [2012] FWA 6468
<i>Banerji and Comcare (Compensation)</i> [2018] AATA 892
<i>Banerji v Bowls</i> (2013) FCAA 1052
<i>Chief of the Defence Force v Gaynor</i> [2017] FCAFC 41
<i>Clint Rimmert v Broken Hill Operations Pty Ltd T/A Rasp Mine</i> [2016] FWC 6036
<i>Comcare v Banerji</i> [2019] HCA 23
<i>Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd</i> [2017] FWC 5380
<i>Daniel Starr v Department of Human Services</i> [2016] FWC 1460
<i>Dover Ray v Real Insurance Pty Ltd</i> [2010] FWA 8544
<i>Fitzgerald v Smith T/A Escape Hair Design</i> (2010) FWA 7358
<i>Gaynor v Chief of the Defence Force (no 3)</i> [2015] FCA 1370
<i>Gee v Tasmanian Ports Corporation Pty Ltd t/a Tasports</i> [2017] FWC 31 [36]
<i>Judith Wilkinson-Reed v Launtoy Pty Ltd T/A Launceston Toyota</i> [2014] FWC 644 [13]
<i>Jurecek v Director of Transport Safety Victoria</i> [2016] VSC 285
<i>Linfox Australia Pty Ltd v Stutsel</i> [2012] FWAFB 7097
<i>Little v Credit Corp Group Limited T/A Credit Corp Group</i> [2013] FWC 9642
<i>Lukazsewski v Capones Pizzeria</i> [2009] AIRC 280
<i>Luke Colwell v Sydney International Container Terminals Pty Ltd</i> [2018] FWC 174
<i>Marc Waters v Mt Arthur Coal Pty Limited T/A Mt Arthur Coal Pty Limited</i> [2018] FWC 3285
<i>Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend T/A Subway</i> [2011] FWA 3496
<i>McDiarmid v Commissioner of Police</i> [2012] NSWIRComm 100

<i>Mitchell v HWE Mining Pty Ltd</i> [2012] FWA 2721
<i>Mr Antony Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern</i> [2010] FWA 3389
<i>Mr Rodney Fussell v Sydney Trains</i> [2019] FWC 1182
<i>Mrs Robyn Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium</i> [2016] FWC 1168
<i>Ms Kim Fallens v Serco Australia Pty Ltd T/Z Serco Acacia Prison</i> [2015] FWC 8394
<i>Ms Nektaria Natoli v Anglian Community Services t/a Anglicare</i> [2018] FWC 2180
<i>Naresh Connolly-Manga v Global Mining Services Pty Ltd</i> [2019] FWC 1097
<i>O'Keefe v William Muir's Pty Ltd T/A Troy Williams The Good Guys</i> [2011] FWA 5311
<i>Pearson v Linfox Australia Pty Ltd</i> (2014) FWC 446
<i>Queensland Rail Transit Authority T/A Queensland Rail v Australian Rail, Tram and Bus Industry Union</i> [2018] FWC 6116
<i>Rani v Limitless Ventures Toscas Pty Ltd</i> [2015] FWC 6429
<i>Renton v Bendigo HealthCare Group</i> [2016] FWC 9089
<i>Rombola v Rail Commissioner</i> [2017] FWC 194
<i>Sharon Bowker & Others v DP World Melbourne Limited T/A DP World Maritime Union of Australia</i> [2014] FWC FB 9227
<i>Singh v Aerocare Flight Support Pty Ltd</i> [2016] FWC 6186
<i>Somogyi v LED Technologies</i> [2017] FWC 1966
<i>Stephen Campbell v Qube Ports Pty Ltd T/A Qube Ports & Bulk</i> [2017] FWC 1211
<i>Stutsel v Linfox Australia Pty Ltd</i> [2011] FWA 8444
<i>Tasmanian Ports Corporation Pty Ltd t/a Tasports v Mr Warwick Gee</i> [2017] FWC FB 1714
<i>United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board</i> [2017] FWC 3274

8. APPENDIX 2: SOUTH AFRICAN SAMPLE

<i>Ahmad Mahri v Mather Dangor Financial Services</i> [2018] CCMA GAJB15475-18
<i>Amakhosi Radebe v JD Group (Pty) Ltd</i> [2014] CCMA GAJB12297-14
<i>Anthony Mark Bird v Rand Mutual Admin Services (Pty) Ltd</i> [2017] CCMA GAJB15348-17
<i>Arthur Leach v Suzuki JHB South</i> [2015] MIBC MINT 44570 D
<i>Aubrey Mabaso v UTI South Africa (Pty) Ltd</i> GPRFBC 35409
<i>Beaurain v Martin NO and others (C16/2012)</i> [2014] ZALCCT 16
<i>Booi v Wonderstone</i> [2013] CCMA NWKD963-13
<i>Broadcasting, Electronic, Media & Allied Workers Union obo Msimang v South African Broadcasting Corporation</i> [2017] 11 BALR 1170 (CCMA).
<i>Cantamessa and Edcon Group</i> (2017) 38 ILJ 1909 (CCMA)
<i>CEPPWAWU obo Dietlof v Frans Loots Building Material Trust t/a Pennypinchers</i> [2016] CCMA ECPE7247-15
<i>Constance Hleza v Edcon (Pty) Ltd</i> [2014] CCMA GAEK1469-14
<i>Crisna Roux v SBF Services (Pty) Ltd</i> [2017] CCMA GATW8998-17
<i>Dagane v SSSBC and others JR 2219/14</i> [2018] ZALCJHB 114

<i>Daniel Rayman Nqani v Else Cole Brioche</i> [2015] CCMA ECPE4540-15
<i>Davina Shee v Greystone Trading CC t/a Absolute Pets</i> [2012] CCMA WECT 2852-12
<i>Desigan Muthaya v First National Bank (FNB)</i> [2018] CCMA GAJB15475-18
<i>Dewoonarain v Prestige Car Sales (Pty) Ltd t/a Hyundai Ladysmith</i> 2013 7 BALR 689 (MIBC).
<i>EAMWUSA obo Duncan van Wyk v Dart Stationers CC</i> [2011] CCMA WECT14283-11
<i>FAWU obo Martin Du Preez v Casidra (Pty) Ltd t/a Aanhalt Boerdery</i> [2013] CCMA WEGE 1417-13
<i>FAWU obo Matlaila, Sammy v Tiger Brands Field Sales (Pty) Ltd</i> [2014] CCMA GAJB634-14
<i>FAWU obo Myeni, Ntokozo v Imperial Retail Solutions</i> [2016] CCMA KNDB2662-16
<i>FAWU obo Ngomane, Thabiso v Radisson BLU Hotel Sandton</i> [2018] CCMA GAJB20280-18
<i>FOSAWU obo Koka, Daniel v Goldreef City Casino</i> [2011] CCMA GAJB15215-11
<i>Fredericks v Jo Borkett Fashions</i> [2012] 1 BALR 28 (CCMA)
<i>Galya Brickhill v Ellerines Furnishers</i> [2012] CCMA GAJB19322-12
<i>George Roderick Molale v Bosasa Security (Pty) Ltd</i> [2017] CCMA GAJB27050-17
<i>Hanniker v One and Only Cape Town</i> [2017] CCMA WECT4369-17
<i>Happiness Harting v Container World (Pty) Ltd</i> [2014] CCMA GAEK9537-15
<i>Iteseng Joseph Nkgwang v Eskom Holdings Ltd</i> MEMP351
<i>Jikela v Smit Amandla Marine WECT</i> [2012] CCMA 16547-12
<i>Johannes Makganthe Ngoepe v Quemie (Pty) Ltd</i> [2015] CCMA GAJB4016-15
<i>Jolanda Roose v Netcare 911</i> [2014] CCMA ECPE405-16
<i>Kenneth Marshal Alexander v Ebesa Architects (Pty) Ltd</i> [2015] CCMA WECT19446-15
<i>Khanya Zowia Nduma v Fowkes Brothers (Pty) Ltd</i> [2018] CCMA WECT 5340-18
<i>Lindiwe Sweetness Shoji v Standard Bank</i> [2017] CCMA KNDB6956-17
<i>Lindokuhle Ngcobo v EOH Avanti(Pty)Ltd t/a Highveld PFS</i> [2014] CCMA GAJB 20141-14
<i>Lucia Nhlapo v Delta EMD</i> [2013] CCMA MP5131-13
<i>Lucienne- Anne Haviga v SAA (SOC) Ltd</i> [2014] CCMA GAEK7750-14
<i>Luxolo Kobo v Sea Truworths (Pty) Ltd</i> [2018] CCMA WECT 13962-18
<i>Mafabatho Ndhlovu v Adve Tech Copperleaf College</i> [2018] CCMA GATW 12969-18
<i>Mahoro v Indube Staffing Solutions</i> [2012] 4 BALR 395 (CCMA)
<i>Mandla Zamokwakhe Magubane v De Heus</i> [2017] CCMA KNPM2101-17
<i>Masemola v Commission for Conciliation, Mediation and Arbitration and Others (JR1025/2013)</i> [2016] ZALCJHB 183
<i>MATUSA obo Paulse v JD Kirsten Boedery (Pty) Ltd</i> [2018] CCMA WECT17777-18
<i>Media Workers Association of SA obo Mvemve and Kathorus Community Radio</i> 2010 31 ILJ 2217 (CCMA).
<i>Melody Adendorff v The Leadership Development Institute</i> [2010] CCMA ECEL2327-10
<i>Melusi Nelson Mthabela v Arcelor Mittal SA Ltd</i> MEKN9239
<i>Mmakwena Martin Mokgehele v Imvula Quality Protection</i> [2017] CCMA GAJB24628-17
<i>Moreblessing Ndudzo v Studio 05 House of Fashion</i> [2011] CCMA GAJB28706-11

<i>Motloung v The Market Theatre Foundation</i> [2011] CCMA GAJB 4458-11
<i>M Paule v Department of Health-Western Cape</i> PSHS10-17/18.
<i>Mr J Ludick v Vodacom Group Ltd (operating as Vodacom)</i> [2018] CCMA WECT16371-18
<i>Mr T Mabele v SGRP Meridian (Pty) Ltd</i> WECT: 4669- 16
<i>Ms Muthoni Kimani v Cape Peninsula University of Technology</i> [2017] CCMA WECT 18824-17
<i>Nanthus Augustus v Mass Discounters (Pty) Ltd</i> [2015] CCMA ECPE79-15
<i>NASUWU obo Ngxwana v M Red Alert Cleaning and Security</i> [2016] CCMA ECEL4931-16
<i>Nathaniel Arelisky v Van Wyk Da Silva Trust t/a Ocean Basket Table View</i> [2014] CCMA WECT16930-10
<i>National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse / Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd</i> [2013] CCMA WECT16781-13
<i>National Union of Metalworkers of South Africa obo Zulu / GUD Holdings (Pty) Ltd</i> MIDB12660
<i>National Union of Metalworkers of South Africa obo Victor and Warikker v Aveng Trident Steel (Pty) Ltd</i> MEPE 1794
<i>NEHAWU obo Motseme, I and 1 other v Tsebo Holdings and Operations (Pty) Ltd t/a Fedics</i> [2017] CCMA NC26-17
<i>NEHAWU obo Obakeng Victor Tilodi v Commissioner T Ndzombane, Department of Health and Public Health & Social Development Sectoral Bargaining Council</i> C30/15
<i>NEHAWU obo Sifiso Cyril Dlamini v Dept of Social Development-Kwazulu Natal</i> [2019] PSHS901- 18/19
<i>Noluthando Gumede v Mutual and Federal</i> [2014] CCMA GAJB9817-14
<i>NTM obo Ms c Ganger v Bidair Services (Pty) Ltd</i> [2015] CCMA WECT 1273-15
<i>NUM obo Godloza, Sivuyile Yalela v Harmony Gold Mining Company Ltd</i> [2012] CCMA FS2022-12
<i>NUMSA obo Eugene Patterson v PFG Building Glass</i> CHEM516-16/17
<i>NUMSA obo Ishmael Mpe Jogom v G4S Correction Services (Bloemfontein) (Pty) Ltd</i> [2016] CCMA
<i>NUMSA obo Komane, Mike v Middelburg Ferrochrome</i> MEMP351
<i>Palesa Petronella Motolo v Democratic Alliance (DA)</i> [2017] CCMA LP1723-17
<i>Pamela Matiso v Nelson Mandela Tourism</i> [2012] CCMA ECPE2825-12
<i>Phillip Madisha v Sandton Plant Hire (Pty) Ltd</i> [2018] CCMA GAJB 10432-18
<i>Pontsho Maja v Glencore Lion Smelter</i> [2016] CCMA LP3649-16
<i>Portia Ndlovu-Nzama v Ithala Development Finance Corporation</i> [2011] CCMA KNDB11884-11
<i>Princess Mlala v Bidvest Vericon and Avon</i> [2017] CCMA GAEK3588-17
<i>Praxydis Lungile Dladla v E SAT (E.TV)</i> [2011] CCMA GAJB948-11
<i>Robert Naysmith v Merchant SA (Pty) Ltd</i> [2015] CCMA GAJB8124-15
<i>SACWU obo Nkala Sipho v Sasol Synfuels</i> [2017] MPCHEM355-15/16
<i>SACCAWU obo Gustuv Cholofeco Mokhothu v Edcon (Pty) Ltd</i> [2014] CCMA FSWK824-14
<i>SACCAWU obo Prescilla Matshidiso Motshegoa v Mass Discounters (Pty) Ltd t/a Game Stores</i> [2015] CCMA GAJB11646-13 [15]
<i>Samuel Mokwoane Shayi v Quality Pallets CC</i> [2015] CCMA GAJB4751-15
<i>SASSAWU obo Ballim, Yasmin v North West Provincial Legislature</i> [2013] CCMA NWKD2792-13
<i>SATAWU obo Sam and Two Others v Ikhethale Terminal Services (Pty) Ltd</i> [2012] CCMA WECT12982-12

<i>Sedick and Another v Krisray</i> [2011] 8 BALR 879 (CCMA)
<i>Simphiwe Given Mbhele v Shoprite</i> [2015] CCMA KNDB1959-15
<i>Sithembile Portia Zulu v SATAWU</i> [2015] CCMA MP8164-15
<i>Sithembiso Promise Mavundla v Merchants SA (Pty) Ltd a Dimension Data Company</i> [2019] CCMA GAJB7904-19
<i>Smit v Partners in Sexual Health (Non-profit)</i> (2011) 32 ILJ 1470 (CCMA)
<i>SOCRAWU obo Elroy Bibby v KSM Distributors</i> [2018] BC PERFBC 49968
<i>Stephen Devasagium Andrew v Pick n Pay Supply Chain</i> [2014] CCMA GAJB5317-14
<i>Suretha Nass v Little Green Beverages (Pty) Ltd</i> [2017] CCMA ECEL2930-17
<i>Thamsanqa David Ntshangase v MCFI International SA Pty Ltd</i> [2015] CCMA KNDB10251-15
<i>Thando Templeton Maku v Department of Social Development - Western Cape</i> PSHS330-16/17
<i>Toni Muir v Neo Africa</i> [2012] CCMA GAJB 7546-12
<i>UASA obo Siviwe Bokuva v Shoprite Checkers Ltd</i> [2017] CCMA ECEL2040-17
<i>William Kerekere v Onelogix</i> [2015] CCMA KNDB9649-15
<i>Willie B Botha v Bid Air Services</i> [2015] CCMA ECPE3132-15
<i>WOCOFO obo Siphokazi Pitseng v Royal Trading Pty Ltd</i> [2013] CCMA GATW11253-13