

LABOUR & EMPLOYMENT LAW

A Practitioner's Guide

Disciplinary Actions on Account of Employee's Social Media Comments and Conduct



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Bimbo Atilola
Lagos, Nigeria.

1. Introduction

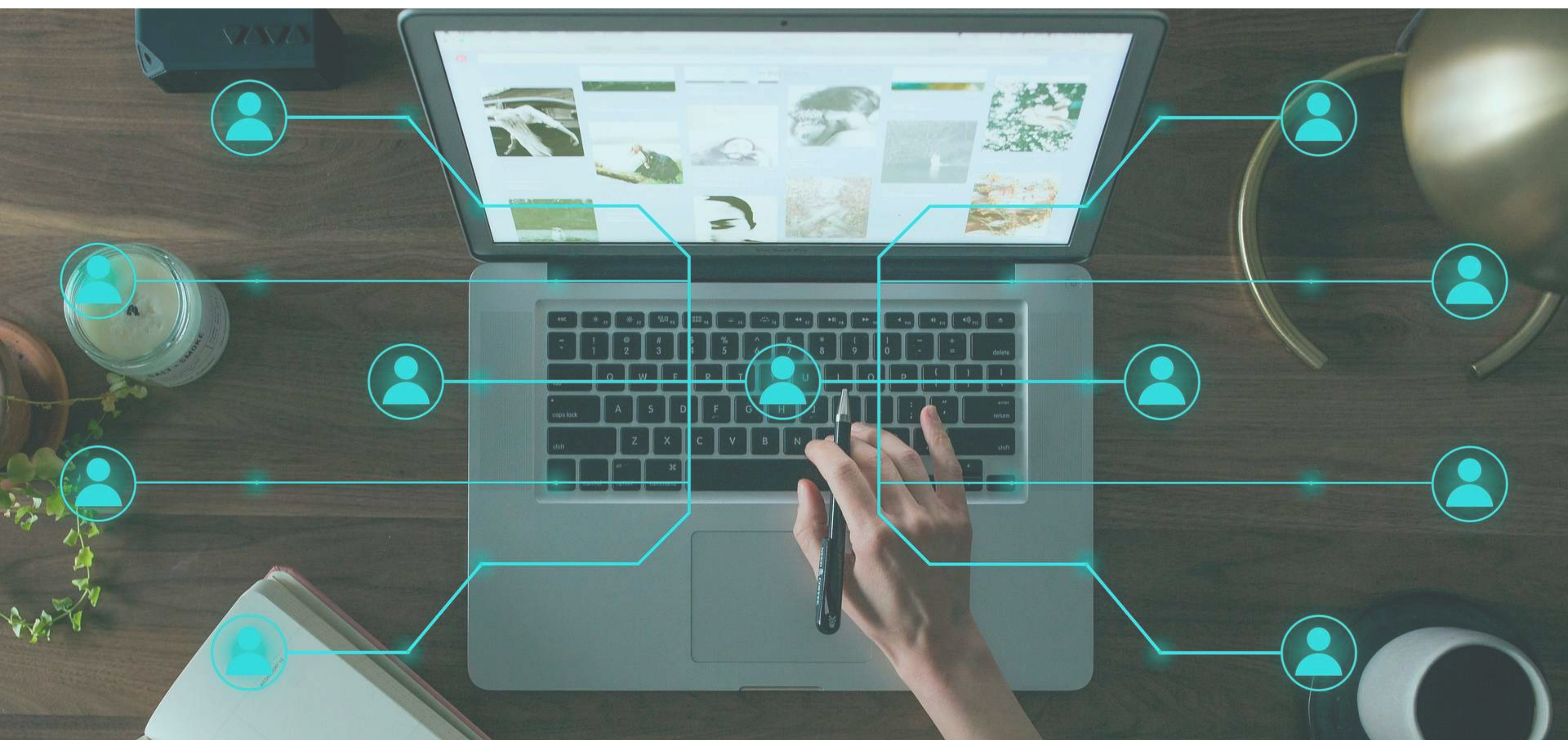
The explosion of social media around the world in the last decade has been phenomenal. The increasing subscription to various social media platforms such as Facebook, LinkedIn, Twitter, Instagram etc has thrown up some interesting issues in labour and employment law. Apart from the fact that most people, especially young men and women, now have personal accounts on the various social media platforms, it has also become fashionable for organisations and companies to have social media presence. The emergence and the increasing spread of social media communications and interactions are capable of both positive and adverse consequences for a corporate organisation. A key issue for the Human Resources Managers and legal advisors is the increasing legal and reputational risks for corporate organisations and employers of labour being linked with the inappropriate social media comments or conducts of their employees.

With the increasing use of social media platforms for both official and private communications, the question has arisen as to whether an employee may be sanctioned or disciplined on account of his or her social media behaviour. This paper discusses disciplinary actions on account of employees' social media conducts. I will analyse some of the Nigerian case laws touching on this subject including case laws from other jurisdictions especially Europe. This work alerts employers of labour to the potential legal and reputational risks that employees' social media comments and conducts may pose to corporate organisations including how best to manage the risks.



2. Disciplinary Actions on Account of Employees' Social Media Behaviour

Inherent in employment relationships is the disciplinary powers of an employer over his employee. Disciplinary measures and sanctions often invoked at the workplace include queries, warnings, suspension, interdiction, termination, and in extreme cases, summary dismissal. There are concerns whether or not an employee's social media comments or conduct on his or her own private social media account can be a basis for disciplinary actions. It is customary to have categories of misconducts defined in the company's Employees Handbook, Staff Manual, or a separate Disciplinary Policy. Workplace misconducts are often categorised into simple offences or misdemeanours, serious offences and gross misconducts. Most policies go further to list examples of misconducts which fall under each category of offences although the list is usually expressed not to be exhaustive. Social media misconducts may fall under any of these categories of misconducts depending on the gravity and surrounding circumstances. A social media misconduct of an employee may qualify as a gross misconduct justifying summary dismissal, for instance an inappropriate social media comment of an employee directed to disparage the products or services of his employer or that which generally works against the interest of the employer. Summary dismissal refers to the right of an employer to dismiss an employee without giving notice nor payment in lieu of notice in the event of a proven gross misconduct.





Gross misconduct has been defined as a misconduct of a grave and weighty character which undermines the trust and confidence expected in an employment relationship¹. Thus, an employee's inappropriate social media comments or conducts which disparage the employer's business or which wilfully discredits its brand, business or services may be a valid ground for summary dismissal.

3. Case laws from Nigeria

There are a few decided cases of the National Industrial Court of Nigeria which held that employees may be validly disciplined on account of their private social media activities which is detrimental to the deep interest of the employer. In **Monday Abraham v Famakas British School**², the claimant's employment was terminated for alleged misconducts including social media misconducts. The claimant had allegedly posted a negative and damaging write up against the defendant, his employer. The Court noted that working against the deep interest of an employer is a misconduct, however, the termination of the claimant's employment was held to be wrongful for want of proof of the alleged social media post, and lack of fair hearing. The alleged damaging text messages and social media posts were not tendered in court and there was no evidence that the claimant was accorded fair hearing over the said allegations. Thus, but for the want of proof of the alleged post and lack of fair hearing, the termination might have been upheld by the court.

Similarly, in the Nigerian case of **Efosa Okunkpolor v Arik Air**³, the claimant was demoted from her position as a senior cabin crew to a cabin crew member on account of her inappropriate social media post while on flight and which post embarrassed the defendant.

Apart from decided cases, there have also been reported cases of employees who are sanctioned for their inappropriate social media behaviour. For instance, in June this year, there was a reported case of a policeman who was demoted on his account of inappropriate social media conduct. A TikTok video had gone viral where the Nigerian policeman dressed in his uniform and with his service rifle was seen dancing to a music associated with a secret cult confraternity. He was made to face an Orderly Room Trial after which he was demoted from the rank of a Corporal to Constable having being found guilty of a discreditable conduct and violation of the Social Media Policy of the Nigeria Police Force.

¹ See *Union Bank v Ogboh* (1995) 2 NWLR Pt. 380 page 647, *Ajayi v Texaco Nig. Ltd* (1987) 3 NWLR Pt. 62. P.577.

² Suit No. NICN/ABJ/183/2019 judgement delivered on 7/10/2021.



Similarly, in April 2020 during the nationwide Covid-19 lockdown, the Nigerian Immigration Service (NIS) had queried three female officers after they appeared in a video that had gone viral. The trio had recorded a video in which they used “Bop Daddy”, a song by a Nigerian Artiste known as Falz, to change themselves from their official uniform to casual outfits which they probably felt better projected their beauty. The Nigerian Immigration Service had considered the post as unprofessional, embarrassing to the Service, and a conduct unbecoming of a public servant, and the trio were queried accordingly⁴. The said query reportedly read in part as follows:

“The attention of the Comptroller General has been drawn to a video clip trending in the social media in recent times which revealed a rather disturbing and embarrassing display of indecent flaunting of your bodies, desecration of Service uniform/beret and the use of inappropriate language thereby sabotaging the values upheld by the Service, the action has caused a lot of embarrassment to the NIS and in line with our standard as a paramilitary organisation is considered scandalous and an act unbecoming of a public officer and therefore a violation of PSR 030401 and 030402. This is a serious misconduct liable to dismissal from Service... in view of the foregoing, therefore you are requested to make a representation, if any, within 72 hours on receipt of this letter, why disciplinary action should not be taken against you...⁵

It was unclear whether the three officers were eventually sanctioned by the NIS for these alleged social media misconducts.

³ Suit No. NICN/LA/45/2017 judgement delivered on 4th June, 2021.

⁴ This news was reported online by many Nigerian Newspapers.

⁵ Available on <https://thenigerialawyer.com> (April 20, 2020)

⁶ 20 ET/1500258/2011.

⁷ 2010 B.C.L.R.B.D NO 190.



4. Caselaws from other Jurisdictions

There are also relevant case laws from other jurisdictions, especially Europe. In the popular United Kingdom case of **Crisp v Apple Retail (UK) Ltd**⁶, the Employment Tribunal held that an employee who made disparaging comments about his or her employer's products on a private Facebook account may be validly dismissed for gross misconduct. Similarly, in **Lougheed Imports Ltd (West Coast Mazda)**⁷, some employees "offensive, insulting and disrespectful comments" about their supervisors on their Facebook accounts. The British Columbia Labour Relations Board held that the employees were validly dismissed.

The dismissal of Justine Sacco drew global attention 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. The tweet reads "Going to Africa. Hope I don't get AIDS. Just kidding, I'm white"⁸. Similarly, in **Dagane v SSSBC & Ors**⁹, a social media post by an African police officer that he hated whites was held to be a good reason for dismissal. These two cases suggest that an employer may dismiss an employee not only for social media misconducts considered damaging to its brand, products or services, but also for generally irresponsible and offensive social media comments. In another Australian cases of **Dover Ray v Real Insurance Pty Ltd**¹⁰ and **O'kefee v Williams Muirs Pty Ltd**¹¹, employees were held to be validly dismissed for posting disparaging comments about their employers even though the employer was not specifically mentioned. In the Australian cases of **Judith Wilkinson - Reed V Launtoy Property Ltd**¹², and **Stutsel v Linfox Australia Pty Ltd**¹³, the Court appeared to have created an exemption in respect of inappropriate comments on a private social media account. In the Judith Wilkinson's case, the Court held that inappropriate private messages sent from a social media account but not made public on "the wall" was not a ground for invoking the company's disciplinary procedure, while in the Stutsel's case, the dismissal was held unreasonable as the derogatory Facebook remark about the employee's manager were in private.

⁸ Reported in Rene Cornish & Kieran Tranter, "The Cultural, Economic and Technical Milieu of Social Media Misconduct Dismissal in Australia and South Africa" available on https://doi.org/10.26826/law_in_context

⁹ JR2219/14(2018) ZALCJHB114

¹⁰ (2010) FWA 8544.



5. The need for Workplace Social Media Policy

The increasing growth of social media use by employees for private and official communications and the attendant risks to the employers' business underscore the need for every company and organisation to develop a policy on social media use and integrate same into their human resources policies and practices. Most employees may not be aware of the potential adverse effects their social media behaviour may have on their employers. Indeed, in **Mitchell v HWE Mining Pty Ltd**¹⁴, the employee was exonerated of allegation of social media misconduct largely because the employer had no social media policy. It is also not sufficient to develop a social media policy, sufficient training must also be provided by the human resources team on the importance of the policy and the consequences of any violation. While some organisations would require a comprehensive policy on social media use, for most companies, a relatively simple policy communicating the business objectives of the policy, providing guidance on how to avoid unintentional social media misconduct including the consequences of any infraction of the policy would suffice.

6. Conclusion

The intersection between the employees' social media activities and employment has been recognised in contemporary labour and employment law. Corporate organisations are also beginning to realise the potential reputational damage which employees' social media behaviours may cause them. Nigerian Courts have also recognised the fact that an employee may be validly sanctioned for inappropriate social media comments and conducts particularly those that work against the deep interest of an employer.

As social media continues to have implications for human resources management including corporate reputation, corporate organisations must respond to this by developing a Social Media Policy to guide their employees. By this policy, employees are reminded to take good judgement to ensure that their social media comments and activities do not adversely affect the company's corporate reputation and business interest generally.

¹¹ (2011) FWA 5311.

¹² (2014) FWC 644.

¹³ (2011) FWA 8444.

¹⁴ (2012) FWA 2721.