The disclosure of information on medical certificates and the impact on the right to privacy

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CHAPTER 1

Introduction

1. Background to the study

1.1. The Constitution of the Republic of South Africa, 1996

Chapter 2 of the Constitution contains the Bill of Rights, which 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'[1] By rights being afforded to the employee in the workplace, such rights need to be protected (legislation being implemented by legislature is subjugated by the Bill of Rights).[2] Labour legislation being implemented in order to protect the rights afforded to the employees, therefore creating fair labour practice in terms of section 23 of the Constitution. Such legislation needs to take in regards various rights of an employee, such as the right to privacy[3] of an employee. This resulted in creating domestic legislation in order to protect employees' rights to privacy. A detail discusses of how various domestic legislation were implemented to protect the right is discussed in Chapter 2.

In addition to the implementation of domestic legislation giving effect to the right to fair labour practices, the Constitution requires that international law be considered when interpreting the rights enshrined therein (South Africa has an obligation to protect each individual and a further international obligations with regards to international standards). Section 39(1)(b) provides that 'when interpreting the Bill of Rights, a court, tribunal or forum must consider international law'. This means that standards set by the International Labour Organisation and Conventions must be considered when interpreting the right to fair labour practice.[4] A detailed discussion is dealt with in Chapter 2.

1.2 Research question

The primary research question of this thesis is 'is an employee's right to privacy infringed by requiring a medical condition to be disclosed on a sick note for purposes of statutory sick leave?' In answering this question, a number of ancillary questions must be answered, including whether doctor and patient confidentiality is breached in disclosing such

[1] Section 7, Constitution of the Republic of South Africa, 1996.
[2] Section 8, Constitution of the Republic of South Africa, 1996.
[3] Section 14, Constitution of the Republic of South Africa, 1996.
[4] Section 1, Labour Relations Act 66 of 1995.

information on a sick note; to what extent medical information can be disclosed in the medical information; whether there is a potential for misuse of information disclosed on the medical certificate against the employee; whether such disclosure of information could lead to unfair labour practice where the employee can be unfairly discriminated against based on such disclosure and how is privacy is being protected and processed in terms of legislation domestically and foreign legislation.

In answering these questions, the need to disclose private information will be examined. This also entails whether examining the disclosure of this information is an acceptable in terms of section 36 of the Constitution of the Republic of South Africa.

1.3. Methodology

This thesis will be conducted by means of literature review. Numerous sources will be consulted in completion of this thesis. These include: domestic legislation; journal articles; foreign law and case law.

The primary focus of the thesis is: South African legislation and how it deals with right to privacy; the right to privacy with regards to disclosure and doctor and patient confidentiality. This will by necessity include a discussion of labour legislation relating to sick leave and sick notes. I will be discussing specific legislation that deals with this area of law. Examples of such legislation are: the Basic Conditions of Employment Act 75 of 1997 (which provides the requirements related to sick leave); Protection of Personal Information Act 4 of 2013; Protected Disclosure Act 2000 and the Compensation for Occupational Injuries and Diseases Act (COIDA). The purpose of COIDA is to compensate employees who are or became ill in the workplace or any injury or death that occurred in the workplace.[5] Other relevant legislation that will be considered is related to the handling of confidential patient information, namely the Health Professions Act 56 of 1976. Discussion of the policies of the Health Professions Council of South Africa (HPCSA) will be included, which provides guidelines for good practice in the health care professions. The HPCSA provides guidelines specifically related to confidentiality and protecting and providing information. I shall be further looking at guidelines provided by HPSCA on the keeping of patient records.

Another source which is of great importance is the decisions made by South African courts and how judges deal with the right to privacy. Decisions made by the courts will therefore be

[5] Compensation for Occupational Injuries and Diseases Act 130 of 1993

analysed and compared to determine whether such constitutional right is being infringed by the disclosure of sensitive information on sick notes and whether there is a fair limitation on such constitutional right. An example of how the court deals with whether the limitation is justifiable can be *Huey Extreme Club v McDonald t/a Sport Helicopters* case.[6] Other examples of cases dealing with the interpretation and limitation of constitutional rights are *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC), *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19, and *Hoffman v South African Airways* 2001(1) SA 1.

There are case law dealing with the disclosure of information in the workplace and how it has been detriment to the employee. Detriment to such an extent where employees will be unfairly dismissed and treated unfairly based on personal information being disclosed. This suggests how problematic it is with regards to disclosing information to an employer. Employees do not know how and to what extent such disclosure should be made to their employer/s.

Legislation from the United Kingdom will also be examined and compared with legislation from South Africa to establish the similarities and differences between them. Examples of such differences are: how to privacy is protected; how information of an employee is processed and protected; the use of 'fit notes'; self-certifications and Information Code of good practice; as utilised in the United Kingdom. Privacy in the United Kingdom is being regulated to create a balance between your need to collect personal information and an individual's right to maintain their privacy, therefore the United Kingdom has introduced eight data protection principles: personal data must be processed fairly and lawfully; information should only be obtained for specified and lawful purposes; the information must be accurate; what information you can hold and for how long; the right of the individual under various legislation; how data must be kept securely and guidelines for information sent outside the European economic area.[7] Privacy is protected in the United Kingdom to such an extent that their online companies are required to be open with any users about how their personal data will be used regardless of whether it is private or work related and a privacy

[6] *Huey Extreme Club v McDonald t/a Sport Helicopters,* 2005 (1) SA 485 (C).
[7] Privacy Act in UK- Data Protection Law & Policy at http://www.shopify.co.uk>guides (accessed on 30 November 2019).

policy is should available for users.[8] Failure to comply will result in fines being imposed or criminal proceedings may be conducted because of malpractice.[9]

Selected case law from the United Kingdom will also be analysed to determine how the courts interpret and apply the legislation relating to legal issues arising from absence due to sickness. An example of United Kingdom case law that deals with evidence (medical evidence) and information can be seen in the case of *East Lindsay District Council v Daubney*[10] and *Bliss v South East Thames* case.[11] United Kingdom legislation such as the Access to Medical Reports Act 1988, Data Protection Act 1998 and the Freedom of Information Act 2000 shall be analysed and compared to South African legislation. A further analysis of United Kingdom government websites will play a large part in the explanations of various legal principles that is to be found in articles posted on the government websites. Based on the aforementioned, these are the reasons why I chose United Kingdom as my comparative study because the way the right is being protected and conducted in the workplace.

1.4 Significance and aim of the research

The primary aim of this thesis is to determine to what extent and to whether the disclosure of personal information is necessary to be included in a medical certificate, where such information is protected in terms of the constitutional right to privacy.

The outcome of the research is promoting constitutional values in the workplace and the protection of personal information of employees as it relates to sick notes. Since the disclosure of certain illnesses may lead to the unfair treatment of employees, it is imperative that sick notes be dealt with a manner that removes such potential for unfair treatment of the employee. Therefore aiming to promote fair labour practice in the workplace, where constitutional values are protected. This will allow employees not to be unfairly treated or discriminated unfairly. A better understanding of an employee's right to privacy in accordance with the workplace is a key objective to prevent malice and discrimination based on employee's information that can influence an employer's perspective of such employee.

[8] Privacy policy for your website: what to consider- IONOS at http://ionos.co.uk>digital-law (accessed on the 30 November 2019).
[9] Privacy policy for your website: what to consider- IONOS at http://ionos.co.uk>digital-law (accessed on the 30 November 2019).
[10] *East Lindsay District Council v Duabney* [1977] IRLR 181.
[11] *Bliss v South East Thames RHA* [1985] IRLR 308.

This thesis will therefore attempt to provide guidelines and recommendations for the handing of sensitive information in sick notes required by law and the extent of such disclosure.

1.5. Chapter outline

Chapter one of the thesis will be an introduction to the study, including the research question and the background to the study. Further, the significance and aims of the thesis will be discussed in greater detail.

Chapter two will consist of the current legislative framework related to sick notes in South Africa. This includes the South Africa's international obligations as a member state and the current domestic and labour legislation that requires the provision of sick notes and information to be disclosed in certain circumstances. In addition, the disclosure of information in terms of the Constitution will be considered.

Chapter three is a comparative chapter, where foreign law will be discussed. In particular, the legislative and policy framework related to the disclosure of information in sick notes in the United Kingdom will be considered on how information is protected and processed. A comparison will be drawn between the two legal systems and discussed in detail.

Chapter four will be the conclusion of the thesis. Based on these conclusions, the research questions will be answered and recommendations made.

CHAPTER 2

An assessment of the adequacy and sufficiency of the legal regime that governs Sick leave and medical certificate laws in South Africa

21. Historical introduction

Currently, there is no legislative protection in the South African context that relates to the extent of the disclosure of information contained in sick notes and medical certificates by medical practitioner. Hence, there is no clarity whether the disclosure of such information amounts to a breach of the employee's right to privacy entrenched in the final Constitution of South Africa. This could be gravely problematic with regard to unfair dismissals in accordance with the South African Labour legislative regime. For instance, where employees tend to furnish employers with a medical certificate of their absence from workplace for more than two consecutive days would be seen as validation for their absence. However, failure to prove the reasons for their absence could result in unfair treatment and dismissals.

To gain said this injustice, the Constitution of the Republic of South Africa provides that 'everyone the right to privacy, which includes the right not to have: their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed'[12] and this could have an adverse impact in the workplace.[13] Even though breach of information (such as the extent of disclosure of private information) is not stipulated in terms of section 14 of the Constitution it is covered by the ambit of the right to privacy.[14] However, one could ask the following questions: Firstly, would this legislative mechanism afford sufficient and adequate protection to an employee in the South African context? Secondly, would it suffice for future generations to come as provided by section 24(b) of the constitution? Therefore, this chapter and the ensuing chapters will explore and investigate the current international and the South African labour legislative regimes to

[12] Section 14, Constitution of the Republic of South Africa, 1996.
[13] *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC) para 10.
[14] *Berstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 90.

examine if these regimes afford adequate and sufficient protection to the South African employee with regard to the disclosure of medical information.

2.2. International legal instruments and standards with regards to the right to privacy

2.2.1. International Labour Organisation (ILO)

The ILO further protects the right of an individual in order to promote social justice and recognition human and labour rights of an individual.[15] Labour Conferences are held and a number conventions and recommendations are implemented to provide standards for members (South Africa is a member state) of the ILO. Therefore, a code of practice was implemented by the ILO in accordance to protection of private information of an employee. The purpose of this code is to provide guidance on the protection of disclosure of an employee's private information. However, would this protection afforded by the ILO suffices to adequately and sufficiently protect an employee's right to privacy which would infringed by requiring a medical condition to be disclosed on a sick note for purposes of statutory sick leave? Moreover, these guidelines does not have binding force, it is a mere guideline. The following are examples of these guidelines: : how information should be kept safe; storage of such information; the use of personal information and the employee's right with regards to the information.[16] In this regard the ILO affords very little protection employee's right to privacy infringed by requiring a medical condition to be disclosed on a sick note for purposes of statutory sick leave.

2.2.2. Article 17 of the International Covenant on Civil and Political Rights

The privacy of an individual is protected in terms of the Covenant; which recognises the right of an individual and it gives the individual the right to enjoy such right protected by the Covenant. 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'[17] The Covenant gives wide protection with regards to an individual right to privacy. If South Africa ratifies a convention, such country has an obligation to meet the standards set by such a convention.

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[15] Mission and impact of the ILO available at http://www.ilo.org (accessed on 11 February 2020).
[16] Code of practice on protection of workers' personal data available at http://www.ilo.org (accessed on 11 February 2020).
[17] Article 17, International Covenant on Civil and Political Rights 1976.

2.2.3. Article 12 of the Universal Declaration of Human Rights

The declaration of human rights protects the right to privacy. It provides that no one shall be subjected to arbitrary interference with his privacy, family, home and no one is allowed attack his honour and reputation.[18] South Africa is a member state to the United Nations, where member states co-operate with one another in order to achieve the Declaration, where the human rights are promoted and protected.[19] This Declaration is a predecessor of the Bill of Rights[20], this stipulates how international conventions impact and influence domestic and national law.

2.2.4. The Constitution of the Republic of South Africa

The Constitution of the Republic of South requires that international law be considered when interpreting the rights enshrined therein. The Constitution, 1996 states that when interpreting the Bill of Rights the courts must consider international law.[21] Therefore this suggests that foreign decisions have to be taken into consideration when it is a constitutional matter or a matter of great importance, where constitutional values and Bill of Rights are at the core of the case. When the court is determining a judgement on a case where the Bill of Rights of an individual is infringed, the court must consider foreign law, more specific the decisions taken by these courts in order to conclude to a final judgement that promotes the values basic to an open and democratic community based on human dignity, equality and freedom.[22] In addition to the implementation of domestic legislation giving effect to the right to fair labour practices[23] and the right to privacy[24], whether Covenants are upheld, the Constitution requires that international law be considered when interpreting the rights enshrined therein.

With regard to the abovementioned international legal instruments, the national legislation does provide for the right to privacy for each citizen and resident of the country (example the right to fair labour practice and the right to privacy). The structure (the right to privacy is recognised) of providing a safe workplace for employees is being implemented both on an

[18] Article 12, Declaration of Human Rights 1948.
[19] Universal Declaration of Human Rights 1948 available at https://www.un.org/en/universal-declaration-human-rights/ (accessed on 11 February 2020).
[20] Human Rights- Parliament of South Africa available at https://www.parliament.gov.za (accessed on 11 February 2020).
[21] Section 39(1)(b), Constitution of the Republic of South Africa, 1996.
[22] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 74.
[23] Section 23, Constitution of the Republic of South Africa, 1996.
[24] Section 14, Constitution of the Republic of South Africa 1996.

international and national level, however there are ambiguity with regards to how employer/s can exploit the extent of disclosure with regards to personal information of their employee/s. For example, the Covenant gives wide protection, but it does not provide adequate protection when disclosing information (the extensiveness of the disclosure) with regards to sick leave (where there are statutory obligations).[25] This will lead to ambiguity with regards to what to exactly to disclose or what not to disclose to your employee in order to satisfy statutory obligations for years to follow. Ambiguity will therefore lead to unfair labour practices, which the standards of the ILO are not upheld and obligation of upholding its right to privacy as being a member of the United Nations will not be afforded to each and every individual.

2.3 South African context

2.3.1. Constitution

2.3.1.1. Constitution of the Republic of South Africa, 1996

South Africa's Constitution is the supreme law of the land, which indicates that any law and legislation that is inconsistent with it will be invalid.[26] This indicates that the principles of the Constitution has supremacy and binds all legislations, court rulings and statute governed by the state.[27] Therefore in terms of any decisions and judgments taken in courts, any inconsistency with the Constitution shall be ruled invalid based on its inconsistency with the Constitution.[28] In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995,* proves the statement above that any law inconsistent with the Constitution shall be invalid and not be implemented as a force of law in court precedents and proceedings.[29] The Constitution further provides that each citizen of the Republic of South Africa has equal entitlement with regards to their rights, privileges and benefits due to citizenship.[30]

Chapter 2 of the Constitution contains the Bill of Rights, which 'enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and

[25] Section 22 and 23, Basic Conditions of Employment Act 75 of 1997.
[26] Section 2, Constitution of the Republic of South Africa, 1996.
[27] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 8.
[28] Section 172, Constitution of the Republic of South Africa, 1996.
[29] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) *para* 62.
[30] Section 3, Constitution of the Republic of South Africa, 1996.

freedom.'[31] The Bill of Rights recognises certain personality rights such as the right to privacy.[32] 'This recognition and the direct application of the Bill of Rights enhance their protection, in particular also through the constitutional imperatives which oblige the state to respect, protect, promote and fulfil the rights in the Bill of Rights.'[33] The state must respect the right of each and every individual of the state insofar where such right is granted to them, however such right can be limited provided that the limitation is justifiable and reasonable.[34] The court must give effect to these rights granted to these individuals by applying and developing the common law to give effect to these rights where applicable in the law.[35]

The Constitution of the Republic of South Africa provides that 'everyone has the right to fair labour practices.'[36] This means that, where there is a working relationship between the parties involved (employer/s and the employee/s) where there has been an act or omission taken by the employer that does not infringes the rights of the employee/s in the workplace.[37] Example of unfair labour practices can be where an employer failed to act appropriately after an employee has been subject to unfair discrimination and unfair labour practice.[38] If there is an infringement of such right granted to the employee, the employee/s right is infringed and will be regarded as unfair labour practice. Another example of unfair labour practices can be where the employer makes circumstances intolerable and allowing an employee to experience unfair discrimination.[39]

The right to fair labour practices allows a citizen (or permanent resident)[40] of South Africa to bring a claim against their employer based on infringement of his constitutional right to fair labour practices, where no relief can be claimed under other statutory and common law remedies.[41] In other words, if the employee has been unfairly treated in the working

[31] Section 7, Constitution of the Republic of South Africa, 1996.
[32] Section 14, Constitution of the Republic of South Africa, 1996.
[33] Neethling J, Potgieter JM and Visser PJ 'Basis for protection of personality in South African law' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 75.
[34] *Huey Extreme Club v McDonald/ a Sport Helicopters,* 2005 (1) SA 485 (C) para 33.
[35]Section 39(2), Constitution of the Republic of South Africa, 1996.
[36] Section 23, the Constitution of the Republic of South Africa, 1996.
[37] Cooper C 'Unfair labour practices'in du Toit D (ed) *Labour Relations Law: A Comprehensive Guide* 5th ed (2006) 481.
[38] *Piliso v Old Mutual Life Assurance Co* (SA) Ltd 2007 para 1.
[39] Section 186, Labour Relations Act 66 of 1995.
[40] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) *para 21-22.* The courts need to take into account the rights of the individual and take holistic view of the Constitution, whereby social and historical context of the individual has to be taken into account where the Constitution states that everyone has such a right, which includes permanent residents.
[41] *Fose v Minister of Safety and Security* (CCT14/96) [1997] (7) ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (June 1997) para 78.

environment and his claim does not fall in the ambit of section 186 of the Labour Relations Act (LRA), an alternative claim can be raised in terms of the Constitution.[42] Furthermore if the LRA does not give adequate protection and in conflict to such a constitutional right, such right in the LRA should be amended to give adequate protection to the constitutional right granted to such employee.[43]

Domestic legislation must give effect to constitutional values, including the right to fair labour practices.[44] It was found that

> 'The entrenchment of labour rights in general terms has led to the development of constitutional jurisprudence by the civil courts and the Constitutional Court that may have a far-reaching effects on the way the contract of employment and the employment relationship are approached in the future.'[45]

To this end, the LRA was introduced to ensure that the rights of the employees and employers are recognised and protected[46] to ensure fair labour practices in place and where there is democracy in the workplace.[47]

In order for fair labour practice to be upheld in the workplace, constitutional rights of the individual itself should be protected and not infringed. Specifically the privacy right of an individual should be bear in mind when dealing with such an individual's personal and private information. The Constitution provides that 'everyone has the right to privacy, which includes the right not to have: their person or home searched; their property searched; their possessions seized; or the privacy of their communications infringed.'[48] and this right to privacy can be infringed in the workplace, such has having someone's HIV status being used as an inherent requirement[49] or inspectors going through private information of individuals at a surgery.[50] Even though breach of information (such as the extent of disclosure of private

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[42] Cooper C 'Unfair labour practices' in du Toit D (ed) *Labour Relations Law : A Comprehensive Guide* 5th ed (2006) 484.
[43] *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* (CCT 27/01) [2001] ZACC 6; 2002 bclr 113; 2002 (2) SA 693; [2002] 2 BLLR 119 (CC) (4 December 2001) *para 31- 45.*
[44] Grogan J *Workplace law* 11 ed (2014) 5.
[45] Grogan J *Workplace law* 11 ed (2014) 5. Can also see the case of *SA Maritime Authority v Mckenzie* (2010) 31 *ILJ* 529 (SCA) .
[46] Section 1 Labour Relations Act 66 of 1995.
[47] Grogan J *Workplace law* 11 ed (2014) 367.
[48] Section 14, Constitution of the Republic of South Africa, 1996.
[49] *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17; 2001(1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 200).
[50] *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC) para 10.

information) is not stipulated in terms of section 14 of the Constitution it is still covered by the ambit of the right to privacy.[51]

The right to privacy can by divided into four categories, which includes the legitimate expectation of the privacy; continuum of privacy interests; privacy and the value of human dignity and informational privacy. The expectation to the right to privacy can be elaborated to an extent that the scope of privacy of an individual can only be protected to an extent that is expected for such private information of an individual to be protected. Based on the aforementioned statement one can see that there are two components of legitimate expectation of privacy: firstly it is subjective expectation whether such private facts warrant protection according to the individual and secondly it is an objective expectation whether such private facts reasonable to warrant such protection in terms of the standard of reasonableness.[52] If an individual is of an opinion that such medical information of the individual is private to him and the nature of the individual's behaviour is reasonable expected to act in such circumstances, such information has to be expected to be kept private based on the two components, which therefore warrants protection under 14 of the Constitution. In terms of continuum of privacy interests, one must look at the individual itself and determine the manner and status of such an individual. To elaborate one must consider the concept of privacy in different aspects such as his relationships, home environment and information and then put it up against whether such right in the public sphere (where such person status in the community has to be taken into account) has to be considered.[53] For example if an employee is sick and he is required to issue to his employer a medical certificate to explain the reason for his absentee from work, taking into account the person's interest in what he considers to private and whether according to such person in terms of his status in the community, to what extent disclosure of information is relevant. The more confidential the information is, easier it is to infringe such a right and further away it is to the personal sphere of the individual, scope of infringement of such a right reduces.[54] This can only be judged and determined in accordance with the circumstances of each case, this is subject to the nature and effect of such invasion (competing interests of the parties involved, whether such disclosure is necessary in terms of public interests).[55]

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[51] *Berstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 90.
[52] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 298.
[53] *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) *para 27.*
[54] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 300.
[55] *Huey Extreme Club v McDonald t/a Sport Helicopters* 2005 (1) SA 485 (C) *para 27.*

Privacy and the value of human dignity can be explained to an extent that when determining whether such privacy of an individual warrants protection, protection cannot be given to an individual where such protection is not justifiable where it violates the public's sphere (not in the best interest of the public and it is reasonable justifiable). An example of this can be the case of *S v Jordan*[56], where prostitution is a sexual act and it falls under privacy, however such an act is not in the personal realm of an individual (based on the way it is conducted), even though it is private it does not merit protection and to a degree it is unlawful according to law and the public. 'In circumstances where the limitation of a right is not severe, where Parliament has identified important purposes to be achieved by that limitation, and where people may reasonably disagree as to the most effective means for the achievement of those purposes, it is our view that it would be inappropriate for this Court to hold the limitation unjustifiable.'[57] Looking at the nature of the privacy as a whole is important whether it merits protection not to the individual only, but in terms of the interest of the public.

Informational privacy is a concept where it is determining whether it is reasonable in protecting the interest of the individual via protecting the use and disclosure of information of the individual.[58] The protection to the right to privacy is given to an individual and respected in accordance of law, where such individual considers such information is deemed worthy of protection.[59] Informational privacy consists of information of the individual in question. 'Personal information is information that reveals something about the person who is the subject of the information; or, to use a term of art employed in this area the data subject of the information.'[60]

The violation of the right to privacy in terms of informational privacy according to the court considers certain factors that needs to be considered to determine the informational aspect of the right to privacy, these factors are: whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicant's personal life; whether it involved data provided by the applicant for one purpose and then used for another; or

[56] *S v Jordan* 2002 (6) SA 642 (CC).
[57] *S v Jordan* 2002 (6) SA 642 (CC) *para* 94.
[58] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 303.
[59] *Investigating Directorate: Serious Economic Offences v Hyudai Motor Distributors (Pty) Ltd: In re Hyudai Motor Distributors (Pty) Ltd v Smit NO* 2001 (SA) 545 (CC) *para*16.
[60]Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 303.

whether it was disseminated to the press or the general public or persons from whom the applicant could reasonably expect such private information would be withheld.[61]

This category of privacy (informational privacy) in terms of South Africa resulted in the Protection of Personal Information Bill 9 of 2009, where it is aimed to regulate how personal information of an individual should be processed (set of regulations and principles of fair lawful processing) and preventing the nondisclosure of information of an individual where no consent was given.[62] The Protection of Personal Information Bill 9 of 2009 became an Act, where it recognises that the right to privacy includes a right to be protected against unlawful collection and use of personal information. This recognition aims to promote and fulfil the rights in the Bill of Rights.[63] Section 4, 9 and 11 of this Act regulates the lawful processing of personal information.[64] In the Protection of Personal Information Act, it specifies how special information (such as medical information of an individual) should be dealt with and the prohibition of such disclosure.[65] In terms of this Act, it regards medical information as confidential information and disclosure of such information should be done according to the Act (where it gives prerequisites on disclosure of information).[66]

2.3.1.2. Scope and content of the right to privacy

The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.[67] Since the right to privacy is at the core of South African democratic values, there is a need for South African legislation to protect this constitutional right.[68]

The disclosure of private information (such as disclosure of illness in medical certificate and the extent of the disclosure of illness) is not expressly mentioned in section 14 of the Constitution, it would be covered by the ambit of the right to privacy, where it is specifically provided in the Constitution, that it grants privacy to everyone and that right protects an individual's personal and private possession (example of such possession can be medical

[61] *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) *para* 51.
[62] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 304.
[63] Protection of Personal Information Act 4 of 2013.
[64] Section 4, Protection of Personal Information Act 4 of 2013.
[65] Section 26 and 27 Protection of Personal Information Act 4 of 2013.
[66] Section 32 Protection of Personal Information Act 4 of 2013.
[67] South African law Reform Commission: Privacy and Data Protection (2005) iv available at http://www.justice.gov.za>dpapaers.dp109 (accessed on 20 October 2017).
[68] Chapter 2: Right to Privacy Recognition of the right to privacy 1 available at http://www.old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf (accessed on 20 October 2017).

documentation). This has been discussed in the *Bernstein v Bester case*, where it provides in terms of the law in South Africa, 'the right not to be subjected to seizure of private possessions forms part of every person's right to personal privacy.'[69] Furthermore it provides that if someone wants to invade and acquire disclosure of personal information of that person, such invasion or seizure of personal possession of the person as in the case of *Bernstein v Bester* in must be interpreted in the light of the right to privacy.[70] In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit No*, the court establishes that one of the elements of the general right to privacy is 'informational privacy'.[71]

In the case of *Huey Extreme Club v McDonald,* a further acknowledgment of privacy in terms of disclosing of information where the court states, 'wherever a person had the ability to decide what he wished to disclose to the public and the expectation that such decision will be respected is reasonable, the right to privacy would come into play.'[72] Therefore in determining whether it is unlawful, one must look whether such infringement was an unlawful intrusion of the personal privacy of another (the information was taken from the individual against his will) and whether it is unreasonable for such publication of such private facts.[73]

In the *O'Keeffe v Argus Printing Co Ltd*, it was held that the right to privacy is recognised as an independent right in terms of personality rights (where such right is acknowledged as a right on its own that is worthy of protection).[74] It was further held that there are many legal personality rights afforded to an individual, where privacy is one of those personality rights that is recognised by common law as an independent right of personality,[75] in which is worthy of protection in terms of the Constitution and the common law.[76] This statement is supported by other case law such as *Bernstein v Bester*, where it is provided that privacy extends to non-revelation of irrelevant and embarrassing facts and the protection from

[69] *Berstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 90.
[70] *Berstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC) para 90.
[71] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit No* (CCT1/00)[2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (25 August 2000).
[72] *Huey Extreme Club v McDonald t/ a Sport Helicopters* [2004] 3 All SA 702 (C) para 28.
[73] *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A) *para* 29.
[74] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).
[75] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).
[76] South African Law Reform Commission: Privacy and Data Protection (2005) iv available at http://www.justice.gov.za>dpapaers>dp109 (accessed on 20 October 2017).

disclosure of information given or received by the individual confidentially.'[77] The aforementioned statement further explains Watermeyer AJ in the case *O'Keeffe v Argus Printing and publishing Co Ltd* that there are many legal personality rights afforded to an individual, where privacy is one of those personality rights that is recognised by common law as an independent right of personality,[78] in which is worthy of protection in terms of the Constitution and the common law.[79] 'In terms of the common law every person has personality rights such as the rights to physical integrity, freedom, reputation, dignity, and privacy.'[80]

In terms of disclosing of information, there are three types of disclosure that infringes the right to privacy: the disclosure of private facts acquired by a wrongful act of intrusion; the disclosure of private facts contrary to a confidential relationship and the disclosure of private facts through mass publication of those facts.[81] For purposes of this thesis, the disclosure of private facts is most relevant and is discussed below.

Since the right to privacy is not an absolute right[82] there can be a breach of privacy on justifiable grounds. These conditions need to have a legal foundation; must be reasonable; there needs to be a specific purpose for the disclosure of such information.[83] When it comes to medical certificates employees are mostly ignorant about the law (do not know their rights and they disclose their illness, which can be used against them).Instances of misinterpretation by the employers can occur, when the employer interprets what is stipulated on the medical certificate and come to a conclusion that can be prejudice to the employee. Another example can be to what extent of the personal medical information should be disclosed. By privacy waiver (right waived in terms of contractual obligations) can disregard your claim that such information is confidential.[84] Further the extension of when public interest prevails over the right to privacy of such a person needs to be considered. A further consideration should be considered in whether amending legislation by disregarding the description of the disease and just allowing medical practitioners to provide that these employees are fit or unfit for work or

[77] *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) para73.
[78] *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).
[79] South African Law Reform Commission; Privacy and Data Protection (2005) iv available at http://www.justice.gov.za>dpapaers>dp109 (accessed on 20 October 2017).
[80] Chapter 2: Right to Privacy Recognition of the right to privacy 7 available at http://www.old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf (accessed on 20 October 2017).
[81] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 226.
[82] van der Bank C.M. 'The Right to Privacy- South African and Comparative Perspectives (2012) 79.
[83] van der Bank C.M. 'The Right to Privacy- South African and Comparative Perspectives (2012) 80.
[84] van der Bank C.M. 'The Right to Privacy- South African and Comparative Perspectives (2012) 81.

allowing a minimal disclosure that will not infringe the patient's right to privacy. An example can be when employers need not to disclose relevant information if it is legally privileged, where such disclosure would result in a breach of the law; court order and where such information is private information about the employee and he did not consent.[85] By looking at the medical certificate, we must consider that is there a legal foundation? Is there a purpose and is the disclosure of the information of the employee's illness necessary and in the best interest of employees in the workplace? The interests of all employees should be promoted in the workplace.[86]

2.3.1.3. Limitation of the right to privacy

Section 36 of the Constitution of the Republic of South Africa provides for the limitation of rights if certain prerequisites are met.[87] This section provides that the rights in the Bill of Rights can be limited if that the limitation is reasonable[88] and justifiable[89] in an open and democratic society based on human dignity, equality and freedom.[90] The state cannot violate the right of an individual, where such state has a coexisting duty to protect such right of an individual.[91] Before such limitation of such right is permitted, factors such as: the nature of the right; the importance of the purpose of the limitation; the nature and the extent of the limitation; the relation between the limitation and its purpose; and the existence of less restrictive means to achieve the purpose need to be taken into account.[92] Furthermore if one wants to limit a specific right, he must determine the scope and content of the right in question. Thus one must determine what privacy entails.

The determination of which information is private

One has to determine which facts and information are regarded private to a person. Essentially, this decision is left up to the person whose information is at stake.

[85] Grogan J *Workplace law* 11 ed (2014) 381.
[86] Section 79 Labour Relations Act 66 of 1995.
[87] Section 36, Constitution of the Republic of South Africa, 1996.
[88] *Huey Extreme Club v McDonald t/ a Sport Helicopters* [2004] 3 All SA 702 (C) para 30.
[89] *S v Gumede and Others* 1998 (5) BCLR 530 (D) para 20.
[90] Section 36, Constitution of the Republic of South Africa, 1996.
[91] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 8.
[92] Section 36(1)(a)-(e), Constitution of the Republic of South Africa, 1996.

'A useful yardstick in this regard is that it is up to each person (whether a natural person or a juristic person) to determine or decide for himself that certain facts relate to his seclusion (privacy) and should thus be excluded from the knowledge of others.'[93]

By considering the aforementioned quote, it appears as though it is possible for each individual to have a different concept of privacy or what is privacy to them, and this concept may differ between individuals. It is therefore the responsibility of each person to create an impression to others that certain facts are private to them.[94] Only the individual has the authority to determine which facts are private to them and which outsiders can have access to such private facts.

If he grants consent to others to have access to such information, then that information is no longer regarded as private to the individual who has been granted access to such information.[95] This reaffirms that each individual can decide what is private to him. As per Neethling et al, 'since only the person concerned can determine the scope of his interest in privacy, this power of *self-determination* is seen as the essence of an individual's interest in privacy.'[96]

The right to informational privacy can only be infringed when outsiders gain unauthorised knowledge of the private facts or information or where a person that already has access to the information discloses those private facts to a third party. An example of such third party is when an employer who wants to gain knowledge of his employee.[97] The question then arises whether an employer, who is not authorised by an employee, can gain access to private information through the application of section 36 of the Constitution. However limitation can take place but only according to section 36 of the Constitution of the Republic of South Africa where the requirements are met and it is reasonable and justifiable. If these requirements are not met, no law may limit any right entrenched in the Bill of Rights.[98]

[93] Neethling J, Potgieter JM and Visser PJ 'Doctrine of law of personality' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 30.
[94]McQuoid-Mason D J *The Law of Privacy in South Africa* (1978) 1-2.
[95]McQuoid-Mason DJ *The Law of Privacy in South Africa* (1978) 231-232.
[96] Neethling J, Potgieter JM and Visser PJ 'Doctrine of law of personality' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 31.
[97]Neethling J, Potgieter JM and Visser PJ 'Doctrine of law of personality' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 33.
[98] Section 36(2), Constitution of the Republic of South Africa, 1996.

Applying section 36 of the Constitution of the Republic of South Africa

At present there is no case law on the impact of the right to privacy on medical certificates (what to exactly disclose and the extent of such disclosure). The purpose of the limitation is that it must be reasonable and justifiable, taking into account the nature and purpose of the society to infringe such right and the value of the right itself.[99] In the following paragraphs, an application of the limitation clause to a scenario involving informational privacy will be conducted. An employee, who submitted a medical certificate to his employer, where the medical certificate gave the description and diagnosis of the illness of the employee, is often considered private to the employee and the right to privacy therefore applies to the information therein.

The purpose in this case of the limitation is because the employer wants to know through the medical certificate, the reasons why the employee has been absent for so many days (as prerequisite in terms of section 23 of the BCEA)[100] and the disclosure of the information will allow the employer to gain knowledge whether it is a justifiable reason for the absence. The nature and extent of the limitation is determined by a case by case basis, such it is a policy or regulated that a medical certificate be produced when someone is absent for 2 or more consecutive days the expectation of privacy with respect to this, the scope of privacy will be reduced and therefore shrink in the workplace.[101] This can be the reason of a contract conducted by the employee and employer stating that disclosure of information of the illness should be disclosed in full. Aforementioned is an example of the extent of the limitation. If the contract does not provide anything and the doctor discloses that the patient is ill with no disclosure of information of the illness, the patient has the right not to disclose such information as mentioned above in terms of legislation and it can be regarded to him that such information is private to him. The relation between the limitation and its purpose is to allow the employer to gain knowledge on information of his employee.

The less restrictive means can be used by the doctor by stating that the employee is unfit for work, which the doctor and client confidentiality will be intact, the legal duty the doctor has towards his patient, it is not in the best interest or in public interest that such disclosure should be disclosed to the employer and the status and credentials of the doctor should be

[99] *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
[100] Section 23, Basic Conditions of the Employment Act 75 of 1997.
[101] *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC) para 20.

trusted. If there are less restrictive means that can achieve the same purpose and does not infringes the right, then such method should be used.[102]

Knowledge of the illness is not in the public interest to a certain extent only. It is therefore important to take into account the circumstances of the case to determine whether the employee's right to privacy is being infringed by requiring a medical condition to be disclosed on a sick note. Therefore if such disclosure is private in nature to the employee, it can lead to an infringement of privacy of such employee. This suggests that one must look at the concept of the nature of privacy as a whole and determine, whether such private information is private in nature. Further inquiring can be made in terms if whether such information is an intimate aspect of the employee's life, how the information was obtained and whether such information can be disclosed to others (not a party to a doctor and patient confidentiality). If the employee does disclose his illness and the employer wants to know more about the illness (therefore further disclosure of confidential facts), is not in the public interest of knowing more where disclosure is already given. There is no case law stating the extensive nature of disclosing information in the medical certificate. However it is not in the public interest that a constitutional right granted to an employee be infringed in such a manner that gaining knowledge of the information is a merely for disclosure purposes for the employer (constitutional right outweighs a mere disclosure and gaining knowledge for the employer). Further knowledge will infringe the patient's privacy rights and under certain circumstances the information that would be obtained could be used against such an employee, where the employer is of the opinion (in certain situation may not understand the exact nature of the illness) that the employee is harmful to other employees in the workplace. When the employer does not understand the exact nature of the illness and does not trust the opinion of the doctor when the information is disclosed, could result in dismissal of such an employee as shown above by case law. The employer must also take into account: the degree of incapacity in determining fairness of whether dismissal is appropriate; the cause of incapacity and the employee should be allowed to state his case.[103] By stating unfit to work, would be in the best interests of the employee and the employer, a furthermore prevention of the right to privacy. This will prevent employees being unfairly[104] dismissed in terms of the LRA and misuse of application by the employer with regards to fair[105] dismissal in terms of

[102] Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) 170.
[103] Schedule 8 Item 10 Labour Relations Act 66 of 1995.

[104] Section 187 Labour Relations Act 66 of 1995.
[105] Section 188 Labour Relations Act 66 of 1995.

the LRA. Furthermore by stating unfit for work, is a less restrictive means where it can achieve the same purpose and the right to privacy of an individual is still being protected.

2.3.2 The current SA legislative framework

2.3.2.1 Basic Conditions of Employment Act 75 of 1997

The law relating to the provision of medical certificates in the event of an employee taking sick leave is governed by the Basic Conditions of Employment Act.[106] An employee is entitled to day's paid sick leave for every 26 days worked during the first four months of employment.[107] Thereafter, sick leave is calculated by establishing the number of days of an employee works in six weeks during each 36 months' employment cycle. .[108] The employee who is employed by the same employer is entitled to the amount of paid sick leave equal to the number of days the employee would normally work during that period of six weeks.[109] However subject to the aforementioned (section 22(2) of the BCEA) the employee who is employed by the same employer is entitled to one day's paid sick leave for every 26 days, during the first six months, furthermore the employer is entitled in terms of the first sick leave cycle of such employee who is employed by such employer, to reduce the employee's entitlement of such sick leave in terms of section 22(2) and section 22(3) of the BCEA.[110] 'Pay during sick leave may be reduced by agreement below the normal rate received by the employee if the number of days' paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay, provided that the rate is not reduced to below three-quarters of the normal wage and the number of days granted is at least the equivalent of those the employee normally works in six weeks.'[111]

The amount the employer should pay the employee for the paid sick leave cycle is stipulated in terms of the BCEA (must remember these are minimal requirements or standards).An employer, subject to section 23 (proof of incapacity) of the BCEA, must pay an employee who is employed by him the wage that such employee would receive for work on that day and on the employee's usual pay day, when the employee has taken sick leave, furthermore

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[106] Section 22 Basic Conditions of Employment Act 75 of 1997.
[107] Grogan J *Workplace law* 11 ed (2014) 69.
[108] Section 22(1) Basic Conditions of Employment Act 75 of 1997.
[109] Section 22(2) Basic Conditions of Employment Act 75 of 1997.
[110] Section 22(3)-(4) Basic Conditions of Employment Act 75 of 1997.
[111] Grogan J *Workplace law* 11 ed (2014) 69.

the employee is entitled to at least 75 percent of the wage payable to such employee who is employed by the same employer for the work the employee would have done on such a day.[112] However the employer is allowed not to pay the employee, where such employee has been absent from employment for more than two consecutive days or more than two occasions or incidence during an eight week period and then he fails to produce a medical certificate stating that the employee was unable to work for that duration of employment, due to the fact of an illness or injury that occurred to such employee, when the employer has requested from the employee a medical certificate.[113]

According to the BCEA, there needs to be a proof of incapacity, when an employee does not come to work or there is a collective absenteeism from such employee from work.[114] This is because the right to sick leave only accrues on such an employee who works for the same employer if such sickness or illness (incapacity to work) prevents him to work.[115] The employer is not required to pay such an employee (who stays away from work for more than two consecutive days or on more than two occasions during an eight-week period) if such employee is unable to produce to the employer a medical certificate.[116] The BCEA provides 'The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnosed and treat patients and who is registered with a professional council established by an Act of Parliament'.[117]

A sick note contains personal information related to the medical condition of the employee in question. According to the BCEA the employer should take reasonable measures that medical assessment are done before dismissal on the grounds of incapacity is determined, failure for taking reasonable steps would constitute an unfair dismissal and the BCEA provides basic conditions and steps to be taken when ill health by an employee occurs.[118] Employers tend to rely on medical professionals' input on the employee's medical conditions.[119]

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[112] Section 22 (5)-(6)(b) Basic Conditions of Employment Act 75 of 1997.
[113] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* [2012] 11 BLLR 1099 (LAC) para 25.
[114] Section 23 Basic Conditions of Employment Act 75 of 1997.
[115] Grogan J *Workplace law* 11 ed (2014) 70.
[116] Section 23(1) Basic Conditions of Employment Act 75 of 1997.
[117] Section 23(2) Basic Conditions of Employment Act 75 of 1997
[118] How does sick leave work in South Africa 2019? By Albert Simiyu https://briefly.co.za//25831-how-sick-leave-work-south-africa-2019.html (Accessed on 25 October 2019)
[119] Incapacity dismissals: Not "here" doesn't mean "gone" by Peter McDermott http://www.hrpulse.co.za/employment-termination/dismissal/230943-incapacity-dismissals-not-here-doesn't-mean-gone (Accessed on 25 October 2019).

There are steps that can be taken from the employer to inquire into the conditions of their employee/s. These inquiries are: the nature and extent of their incapacity; the nature of the employee's job; the period of the absence and the possibility of a temporary replacement for their employee.[120] Further inquiry can be made where the employer must determine whether the employee is capable of performing the work; if not capable, to what extent can the employee be able to perform his work; can there be accommodations made to assist him and whether there is suitable alternative work.[121]

There needs to be a substantive fairness for a dismissal to take place, the employer needs to establish the nature of the incapacity; the cause of the incapacity; the period of absence and the employee's work record and length of service.[122] The employer needs to establish procedural fairness to, this entails: the employer taking the necessary investigations; holding disciplinary hearings; giving warnings; providing alternatives for the employee and looking at alternative options to dismissal.[123] There is no case law on the extensiveness of the disclosure on medical information for employees where they have to disclose based on legislation for sick leave. There are case law on how employees are dismissed based on incapacity, legislation just gives employers steps to take as mentioned above but not how specifically the extent of disclosure on medical certificates or sick notes. This could result in misuse of information, such as in the case of *Wylie v Standard Executors & Trustees*, the employee disclosed to the employer her medical information, however he provided for her alternative positions and then later was dismissed based on incapacity.[124] The court held it was unfair and the employer did not treat the employee as a person with disability but as a poor performer. Employee was dismissed unfairly due to disclosure of information being disclosed to the employer, where the employer did not take reasonable measures to provide alternative positions for the employee and the court found that the employee was unfairly dismissed.[125] The employers as seen above rely on the medical certificates furnished to them by the employees; however it can be misused or interpreted in a manner that is detriment to the employee. It is not wrong for the employer to rely on the information being furnished to them by the employee, however it is wrong for the employer to dismiss the employee based on the misuse of the information, where such information was interpreted to an extent that

[120] The employers guide to: ill health incapacity http://seesa.co.za/the-employers-guide-to-ill-health-incapacity/ (Accessed on 25 October 2019).
[121] http//:www.labourguide.co.za (Accessed on 25 October 2019).
[122] Hendricks v Mercantile & General Reinsurance Co of Sa Ltd Tebbutt J (1994) 15 ILJ 304 (LAC) para 82
[123] Hendricks v Mercantile & General Reinsurance Co of Sa Ltd Tebbutt J (1994) 15 ILJ 304 (LAC) para 85-93.
[124] Wylie v Standard Executors & Trustees 2006 ILJ 2210 (CCMA).
[125] Tshaka v Vodacom (Pty) ltd 2005 ILJ (CCMA).

they do not meet the employment standards of the workplace and arising to their own solution based on information of the medical certificate.[126]

2.3.2.2. Protection of Personal Information Act 4 of 2013

The Protection of Personal Information Act (POPIA) recognises and protects the constitutional right to privacy to an extent where it protects the usage of personal information in line with international standards when information being disclosed.[127] Since this research question is dealing with infringement of privacy in accordance with disclosure of on a sick note, one must determine what personal information of an individual would likely be infringed. According to POPIA, the meaning of personal information means 'information relating to an identifiable living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but limited to – (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well being, disability, religion, conscience, belief, culture, language and birth of the person.'[128]

The POPIA deals with the lawful conditions on how to process of personal information of an individual. The conditions are: accountability, processing limitation, purpose specification; furthering processing limitation; information quality; openness; security safeguards and data subject participation.[129]

The employer must ensure that at the time of reason and purpose of disclosing the personal information, that the conditions on how to process information are dealt in a manner that justifies its purpose of processing such information[130], where it is lawful to an extent it does not infringes the right to privacy of the employee, adequate reason given in disclosing such personal information and that consent is given in order to process such personal information from the employee.[131] If it is not what society needs to know about the employee or something he absolutely needs to disclose to an extensive degree which is private to the individual, such invasion of the employee's privacy needs to be appropriate and needs to be

[126] National Union of Mineworkers v Libanon Gold Mining Co ltd 1994 15 ILJ 585 (LAC)
[127] Section 2 Protection of Personal Information Act 4 of 2013.
[128] Section 1 Protection of Personal Information Act 4 of 2013.
[129] Section 4 Protection of Personal Information Act 4 of 2013.
[130] State of Privacy South Africa http://privacyinternational.org/state-privacy/1010/state-privacy-south-africa (access on 24 October 2019).
[131] Section 9 and 10 Protection of Personal Information Act 4 of 2013.

made to the benefit of public interest.[132] 'Indeed there must be a pressing social need for that expectation to be violated and the person's right to privacy interfered with.'[133] For such disclosure of personal information of individual, in this case medical information and with regards to the *NM and Another v Minister of Safety and Security* case, there needs to be a compelling public interest for such disclosure to invade the privacy of an individual.[134]

However the employee at anytime can object such consent if it is justifiable and reasonable.[135] The employer needs the consent of the employee where such personal information is going to be brought into the public domain and in terms of a doctor and patient confidentiality; they are not entitled to disclose it outside of their professional circumstances without consent.[136] This is supported by the LRA, where the employer is not required to disclose information that is private to an employee, unless such employer was given consent from the employee.[137] There needs to be an overwhelming public interest when there is no consent given.[138] If such consent is justifiable, the employer can no longer process or want disclosure of such personal information. The employer must have a specific reason which defines the purpose for collecting such personal information. Without the consent of the employee, the employer may only retain records of personal information for the purpose of its collection. Further inquiry on the information of the employee must be compatible with the purpose on collecting such information, which must be accurate.[139] The employee must be aware exactly of the information being collected, be aware of his rights in terms of the law, in disclosing of such personal information and the employer must take reasonable measures for information to be collected in a lawful manner with no chance of others gaining access to it.[140] Supported by the LRA, where there is a dispute with regards to what information should be disclosed, it can be referred to the Commissioner and he can decide if such information is relevant.[141] The employee has the right to know what personal information their employer has in their possession, he can further gain access to such information being obtained and further check whether it is accurate (can make alteration

[132] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* (CCT 20/95; CCT 21/95) [1996] ZACC 7 para 91.
[133] *NM and Others v Smith and Others* (CCT 69/06) [2007] ZACC 6 para 45.
[134] *NM and Others v Smith and Others* (CCT 69/06) [2007] ZACC 6 para 47.
[135] Section 11 Protection of Personal Information Act 3 of 2013.
[136] *NM and Others v Smith and Others* (CCT 69/06) [2007] ZACC 6 para 137..
[137] Section 16(5)(d) Labour Relations Act 66 of 1995.
[138] *NM and Others v Smith and Others* (CCT 69/06) [2007] ZACC 6 para 209.
[139]Section 15 and 16 Protection of Personal Information Act 4 of 2013
[140] Section 18 and 19 Protection of Personal Information Act 4 of 2013.
[141] Section 16(6) and 16 (10) Labour Relations Act 66 of 1995.

where such information is inaccurate). However the employer can deny such disclosure on reasonable grounds established in the Promotion of Access to information Act.

Any person guilty of breach of confidentiality in terms of POPIA he is guilty of an offence and a penalty up to 10 years of imprisonment or a fine or both can be imposed.[142]

2.3.2.3. Health Professions Council of South Africa (HPSCA)

The rule 16 of the HPCSA (Ethical and Professional Rules of the Health Professions Council of South Africa, booklet 2) must be abided by the medical practitioner. Rule 16 of the HPCSA provides guidelines in terms of what should be contained in a certificate of illness. To be more specific, the medical certificate should contain a description of the illness with the informed consent of the patient.[143] If the patient does not give consent the practitioner merely states that the patient according to the medical practitioner is unfit to work.[144] If the employer wants to know exactly what is wrong with his employee, determining and allowing the employer to know or disclosing the information to the employer can be an infringement of the employee's right to privacy. Determining the extension of disclosure of information, surrounding circumstances should be taken into account (for example the employee is staying absent far too many times and the employer wants to know what is exactly is wrong). If the employee does disclose illness, one must determine whether in depth analysis of such illness being disclose in the medical certificate will not be an infringement of the patient's right to privacy.

The Constitution of the Republic of South Africa provides that everyone has the right of access to any information held by the state or any information held by an individual that is required for the exercise or protection of any right.[145] However one should bear in mind that the state must respect, protect, promote and fulfil all the rights in the Bill of Rights which is the cornerstone of democracy, such right to access to information may be limited to an extent, where such discloser is reasonable and justifiable. Refusal to grant access to such records will be accepted if such disclosure would involve the unreasonable disclosure of personal information about a third party.[146]

[142] Section 107 Protection of Personal Information Act 4 of 2013.
[143] Rule 16(1)(f) health professions council of South Africa.
[144] Rule 16(1)(f) health professions council of South Africa.
[145] Section 32, Constitution of the Republic of South Africa, 1996.
[146] Section 34 and section 63, Promotion of Access of Information Act 2 of 2000.

When dealing with reasonable and justifiable, it is dealt with the limitation clause which is provided for by the Constitution of the Republic of South Africa.[147] It is stipulated in the National Health Act that the objectives of such an Act is to regulate the national health and to promote uniformity in respect of health services by protecting, respecting, promoting and fulfilling the rights of: individuals of South Africa of their constitutional right of access to health care services; providing an environment where their health will not be harmed; children to basic health services and to further fulfil the rights of vulnerable groups such as women, children, older persons and persons with disabilities.[148]

The National Health Act allows a health worker, who has access to the health records of an individual to disclose it to another person (can be an employer) for a legitimate purpose within their duties, where such access or disclosure is in the interest of the individual.[149] However refusal of a request for access to records can be allowed if such disclosure would constitute an action for breach of a duty of confidence owed to another in terms of an agreement.[150] Personal information (the health records of an individual) in terms of legislation means information about an identifiable individual, which includes information relating to an individual's medical history and information.[151] One has to have authorisation in order to have access to the health records of an individual. The person in possession of an individual's health records must prevent unauthorised access to those records and failure by an individual who is in charge of protecting those records, is liable of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year or to both a fine and imprisonment.[152]

According to the HPCSA there are ethical rules that need to be abided by and that failure by a practitioner to comply with any conduct determined in these rules shall constitute an act or omission in respect of which the board may take disciplinary steps.[153] Legislation provides for patients have their right to privacy protected (that their confidential information are

[147] Section 36, Constitution of Republic of South Africa 1996.
[148] Section 2, National Health Act 61 of 2003.
[149] Section 15, National Health Act 61 of 2003.
[150] Section 65, Promotion of Access to Information Act 2 of 2000.
[151] Section 1, Promotion of Access to Information Act 2 of 2000.
[152] Section 17, National Health Act 61 of 2003.
[153] Health Professions Council of South Africa- ethical and professional rules of the health professions council of south Africa as promulgated in government gazette r717/2006 booklet 2 available at http://www.hpcsa.co.za/downloads/conduct_ethics/rules/generic_ethic_rules/booklet_2_generic_ethical_rules_with_anexures.pdf (accessed on 23 October 2017).

protected in terms of the right to privacy).[154] If there is reasonable believe that the disclosure was made in good faith and is substantially true (in this regards taking into accord the doctors integrity and his duty towards the Health Council) and not made for personal gain, such protection is protected disclosure.[155] The employee must disclose information that there is reasonable believe that the information is true and must be complied with section 6 and 9 of the Protected Disclosure Act (PDA).[156] The PDA protects the employee where he makes the disclosure to the employer in good faith and complied with the prescribed procedure.[157] Example can be a sick note provided by the employee to the employer giving reasons for his absence of working. It can be that he fulfilled his prescribed procedure but the information disclosed should be protected in a way it will not be prejudice to the employee where such information were true and made in good faith. However further information can be disclosed if there is consent in writing to disclose; a court order to disclose and public interest.[158]

Since these medical practitioners are obligated to follow the rules and conduct bestowed upon them, their trust should be taken into account, the need for the medical practitioner to disclose doctor and client confidentiality to the employer should be disregarded. An example is when there is a student wants to apply for a sick test, he needs to provide a medical certificate (where such certificate describes the illness) in order to determine whether he qualifies for a sick test. Qualification for such sick test, the board looks at the illness of such student. This shows how the privacy of such student is breached. The more serious the illness the more likely would the student will qualify for the sick test. In this situation the medical practitioner should just provide that the student is unfit to write the specific test, it is not in the public interest that the board should know that the student is suffering from a specific illness. The same can be said to employees who stay absent for consecutive days. The medical practitioner is under oath from the HPCSA to be ethical and professional in doing his profession. The mere fact that a medical practitioner stating the description of such illness does not constitute that it is in the public interest for such disclosure of information to be disclosed for a mere sick note for his employer. It is only in the public interest when such employee makes it a habit to stay away and there is a collective absenteeism from the employee.

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[154] Section 14 National Health Act 61 of 2003.
[155] Section 9 of the Protected Disclosure Act 26 of 2000.
[156] *John v Afrox Oxygen Ltd* [2018] 5 BLLR 476 (LAC) para 14-21.
[157] Section 6 Protected Disclosure Act 26 of 2000.
[158] Section 14(2) National Health Act 61 of 2003.

An example of this can be the case of *NUM v Free State Consolidated Gold Mines,* where such instances it is in the public interest to know what is wrong with the employee in order to determine whether the employee breached the disciplinary action. This shows how and when it is in the public interest to know the exact illness of such a person. Therefore the difficulty lies in determining when the information is relevant.[159] 'Both relevance and adequacy must be measured against the purpose(s) the information is meant to serve.'[160] Further consideration should be taken to account in the main responsibilities of a practitioner. According to the HPCSA booklet 2 on ethical rules provide that a practitioner shall at all time: act in the best interests of his patients; respect patient confidentiality, privacy, choices and dignity.[161] The medical practitioner can also be a traditional healer, where a person who under religious believes goes to such healers when they are sick.[162] The Constitution recognises these rights and practices, where this recognition of diversity in our society is being accommodated for.[163]

2.3.2.4. Compensation for Occupation Injuries and Diseases Act 130 of 1993 (COIDA)

In terms of section 96 of COIDA, the disclosure of information must be disclosed when it is necessary for the administration of this Act, for the purpose of the administration of justice or the request of the Minister or any person entitled thereto.[164] The purpose of the COIDA is to provide compensation for employees for disablement caused by occupational diseases contracted in the course of their employment. In terms of this Act, if an employee wants to claim for compensation he may give a written notice of the said disease if he wants to claim under this specific Act.[165] However the disease has to be described to the commissioner in order to claim.[166] In terms of COIDA, this does not fall under right to sick leave[167], however an employee's privacy is still disclosed in terms of this Act. Furthermore if you stay away from work like aforementioned, there needs to be a proof of incapacity.[168]

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[159] Grogan J *Workplace law* 11 ed (2014) 332.
[160] Grogan J *Workplace law* 11 ed (2014) 332.
[161] Health Professions Council of South Africa- ethical and professional rules of the health professions council of south Africa as promulgated in government gazette r717/2006 booklet 2 section27A available at http://www.hpcsa.co.za/downloads/conduct_ethics/rules/generic_ethic_rules/booklet_2_generic_ethical_rules_with_anexures.pdf (accessed on 23 October 2017).
[162] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* [2012] 11 BLLR 1099 (LAC) para 26.
[163] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* [2012] 11 BLLR 1099 (LAC) para 26.
[164] Section 96, Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[165] Section 68 (1), Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[166] Section 68(2), Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[167] Grogan J *Workplace law* 11 ed (2014) 70.
[168] Section 23 Basic Conditions of Employment Act 75 of 1997.

2.4. Other literature relevant to the topic/ problem

2.4.1. A confidential relationship involving personal information

According to Neethling et al 'there are a number of statutory measures placing a duty on confidentiality upon public servants in respect of inter alia personal information that they come into contact with on account of their office.'[169]

In an attorney and client relationship, the attorney contains private information of the client. The attorney has a legal duty of confidentiality that such right of privacy of the client should be protected and any disclosure of such private information will be considered an infringement and a non-compliance with the legal duty of confidentiality; however such information can be disclosed based on justifiability and reasonableness of such disclosure.[170] Therefore the attorney and client confidentiality can only be breached where there is a justifiable and reasonable reason for gaining access of such private information of the employee.

When dealing with a recognised confidential relationship any unauthorised disclosure of information to a third party will result in infringement of the person's right to privacy.[171] Mass publication of private information of an individual is also unlawful and is an infringement of such an individual's right to privacy (where no consent has been given by such person).[172]

Further a person also deserves protection against the principle of fixation. 'By fixation is meant the embodiment of private facts, for example by photography, photocopying and tape recording, contrary to the determination and will of the plaintiff.'[173] Furthermore there are two types of fixation: the embodiment of private facts by outsiders (refers to when a person who does not have the authority to do so and gains access to those private facts) and the fixation of private facts by insiders (refers to when a person who has authority and authorisation to have access to those private facts).[174] Fixation by outsiders is a threat to the

[169] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 231.
[170] Section 36, Constitution of the Republic of South Africa, 1996.
[171] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 228.
[172] *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W) 61 para 74.
[173] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 236.
[174] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 237.

right of privacy of the individuals whose private facts that person wants to have access to, since no consent or reasonable and justification was granted. The publication or disclosure of such facts needs consent by the person to whom the private information relates.[175] One must take into account the surrounding circumstances of the case such as taking into the account the right to privacy nature and the personality of the person.[176]

Fixation by an insider can be a breach or infringement of the privacy of the person whose private facts are being accessed to, but if there is a reasonable and justifiable reason for such access then the embodiment of such private facts is not unlawful.

This suggests that one must determine whether such private facts should be embodied, taking into the account the right to privacy and disclosure of such private facts by further applying the limitation clause provided by the Constitution of the Republic of South Africa.[177] 'Finally, protection against a threatening infringement of privacy through fixation of private facts is also supported by the constitutional entrenchment of the right to privacy, which enhances its protection and gives it a higher status in that, *inter alia*, any conduct of persons that threatens or infringes the right to privacy may only be lawful if it is reasonable and justifiable in terms of the limitation clause of the Constitution.'[178] By looking at the aforementioned embodiment of private facts through fixation, the right to privacy is protected through legislation, however based on certain circumstances such fixation will not be unlawful where it is justifiable and reasonable.

2.4.2. The employment relationship

In South Africa, the employment relationship is established by way of contract. The employment relationship is governed by contract but it must further comply with the LRA and BCEA. An employment relationship in terms of *SA Broadcasting Corporation v Mckenzie* is established when the employee renders his services to the employer, where the employer compensates the employee for the services rendered.[179] Aforementioned statement is validated by the LRA, where it is provided that a person is regarded as an employee where

[175] *Mhlongo v Bailey and Another* 1958 (1) SA 370 (W).
[176] *Mhlongo v Bailey and Another* 1958 (1) SA 370 (W).
[177] *National Director of Public Prosecutions v Mahomed* [2007] SCA 138 (RSA) para 19.
[178] Neethling J, Potgieter JM and Visser PJ 'Right to privacy' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005) 238.
[179] *SA Broadcasting Corporation v McKenzie* [1999] 1 BLLR 1 (LAC) *para* 13.

one or more of the prerequisites of the LRA are met.[180] To determine whether there is an employment relationship, one must prove in terms of section 200A of LRA that these prerequisites are met and then the other party will try to rebut such presumption.[181]

2.4.3. The law of contract in South Africa

The employment contract can contain waiver terms, where such terms allow a party in terms of the contract to waive his rights in a specific way.[182] An example can be a waiver term included in the contract, where the term provides that the medical certificate can disclose personal information that can be a breach of privacy of such employee. The waiver term allows the employer to exercise his right to gain knowledge about the illness of his employee and whether such illness is worthy of sick leave. Such a waiver in the agreement may be included to prevent the employee from consistently staying absent.[183] However if the waiver is not included in the agreement of the contract, the right to privacy is protected and this does not allow the employer to gain extensive knowledge of the illness of the employee, where such disclosure of the illness may be prejudice and used against the employee.

There can also be a confidentiality agreement between the parties. The confidentiality undertaking that can be agreed upon is: the restrictions on disclosure and the use of information; security precautions to be taken by the recipient of the information; the extent of the disclosure of the information to employees; the right to have information and the exceptions to the confidentiality terms.[184] These terms can allow the extension of information that is allowed for the employee to know about his medical information. Furthermore provide how such information is disclosed (for example of disclosing on the medical certificate can be that the employee is 'unfit for work'). The contract between the employee and the employer further helps to whether disclosing medical information in terms of medical certificate impacts on the right to privacy. If such right is waivered, then there is no infringement, however if it is protected in a particular way then disclosing information in

[180] Section 200A, Labour Relations Act 66 of 1995.
[181] Woolfrey D 'Interpretation and application of the labour statutes' in du Toit D (ed) *Labour Relations Law: A Comprehensive Guide* 5th ed (2006) 79.
[182] Hutchison D and Pretorius and et al 'Drafting of contract' in Hutchison D (ed) *Law of Contract in South Africa* 2 ed (2012) 410.
[183] Hutchison D and Pretorius and et al 'Drafting of contract' in Hutchison D (ed) *Law of Contract in South Africa* 2 ed (2012) 410.
[184] Hutchison D and Pretorius and et al 'Drafting of contract' in Hutchison D (ed) *Law of Contract in South Africa* 2 ed (2012) 415.

terms of a medical certificate of the illness of an employee can lead to an infringement of the right to privacy of the employee.

2.5. Conclusion

The law of privacy is bestowed upon all individuals, in which is protected by legislation and it is a right granted by us by the Declaration of Human rights. The right to privacy is not an absolute right granted to an individual; however such limitation or infringement of someone's right to privacy must be done in accordance with section 36 of the Constitution, where such limitation must be justifiable and reasonable. Each and every requirement or prerequisite must be met in order for such right to be limited. For example if there is a lesser means or method available to prevent such a right to be infringed, then such method must be taken. What is private to an individual is different to all individuals; therefore it should be dealt by a case by case basis, where the individual is taken into account (intimate expect of the individual), what information is being disclosed and whether it should be withheld or disclosed to the public. Since legislation provides protection and steps in order to gain access to information of an individual, it does not provide to what extent such information should be disclosed, this can have a ripple effect where the employer gains information that could be misused and misinterpreted, which results in discriminating the employee. Legislation must promote the values enshrined in the Constitution and must protect the rights given to each and every individual. By avoiding infringement of an individual's right, will promote fair labour practice in the workplace, further upholding international standards such as the Declaration of Human Rights. Consideration to foreign law should be examined in order to achieve an answer to the question of disclosure of information on medical certificates and the impact to the right privacy. Such comparative study will be consistent with the constitutional values stipulated in section 39(1) (b) and (c) of the Constitution.

In the next chapter, a comparative study will be discussed. To be more specific a comparison with other countries such as the United Kingdom, where comparison will be made with their legislation and how the United Kingdom deals with the right to privacy in terms of disclosure of information in medical certificates and whether there are means in which or how the United Kingdom protects infringements of privacy.

CHAPTER 3

A Comparative study of the legal systems of United Kingdom (UK) and South Africa (SA) on the laws relating to private/personal information relating to medical certificates

3.1. Introduction

Medical information/certificates of an individual employee are protected in terms of laws such as the right to privacy and dignity.[185] However, without such protection patients in a doctor and patient relationship would be reluctant to seek help from such a doctor, especially where their personal information is being disclosed without their consent. The doctor has a legal obligation not to [voluntary] disclose information he has obtained in his professional capacity, without consent.'[186] However, is this really so? As Chapter 2 at 2.1 evidence that there is no legislative protection in the South African context that relates to the disclosure of medical/ private information relating to medical certificates.

Therefore, this chapter will denote a comparative study of both the United Kingdom and South African`s legal systems with regard to the right to privacy. In addition, the chapter will include the examination and investigation of this right to privacy entrenched in both legal systems to answer the following questions. Does this right to privacy afford sufficient and adequate protection to an employee? But, of paramount importance, on how this right to privacy is applied to the legal procedures of the disclosure of private information relating to medical certificates.

The ensuing paragraphs will illustrate the following: Firstly, a discussion on how adequate and sufficient this right to privacy is protected in the workplace. Secondly, how information of an employee is processed and protected and lastly, the usage of a fit note and the rights given to such employee with regards to his/her personal/private information, internationally (United Kingdom) and nationally (South Africa).

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[185] *Campell v Mirror Group Newspapers* [2004] 2 AC 457, [2004] UKL 22 *para* 50.
[186] *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414.

3.2. International Level (United Kingdom)

3.2.1. How privacy is protected in the workplace?

3.2.1.1. United Kingdom legislation

Medical information of an individual is protected in terms of law (such as privacy, dignity of a person).[187] This is supported by the case of *Z v Finland* in the European Court of Human Rights, where it is stated that privacy of the individual is important where that specific individual can rely on the protection of the law and the medical field in its entirety.[188]Therefore it is required by the doctor to gain consent from the employee to disclose such personal information to the employer, however only relevant and factual information should be disclosed.[189]

3.2.1.1. 2. Access to Medical Reports Act 1998 Chapter 28

The United Kingdom has an Act, called Access to Medical Reports Act 1998 Chapter 28, where it provides the conditions in order to be granted access to medical reports of an individual. According to the Act, a person who wants access to medical reports shall not apply to the medical practitioner for such reports of an employee to be granted to him for purposes such as employment purposes, unless the person has notified the employee that he is going to make such as application and the employee must grant consent to such an application.[190] The application made will not be granted by the medical practitioner if the employee notified the medical practitioner that he does not consent to it being supplied.[191] The employee is entitled to make a request to the medical practitioner to amend any part of the medical report, in which the employee who consents to the medical report considers to be incorrect or misleading.[192] If the employee wants to amend such medical report, the medical practitioner can amend it[193] and if the medical practitioner does not want to amend it, the employee can attach to the medical report a statement of his views on any part of the report,

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[187] *Campell v Mirror Group Newspapers* [2004] 2 AC 457, [2004] UKL 22 *para* 50.
[188] *S v Finland*, 9/1996/627/811, Council of Europe: European Court of Human Rights, 25 February 1997 *para* 95.
[189] All healthcare staff have a duty of confidentiality by Dr Maria Dyban http://www. https://www.guidelinesinpractice.co.uk/your-practice/all-healthcare-staff-have-a-duty-of-confidentiality/352639.article (Accessed on 30 October 2019).
[190] Section 3, Access to Medical Reports Act 199, c. 28.
[191] Section 5(1), Access to Medical Reports Act 1998, c. 28.
[192] Section 5(2), Access to Medical Reports Act 1998, c. 28.
[193] Section 5(2)(a), Access to Medical Reports Act 1998, c. 28.

in which in writing he states his views on the declining of amendments to the medical report.[194]

When the medical practitioner receives an application without any notification, but later on before supplying such medical report, receives a notification from the person who wants access to it, the medical practitioner shall only supply the medical report if section 5 of the Access to Medical Reports Act 1998 Chapter 28 is met and the 21 days beginning with the date of that notification has elapsed without his having received any communication from the individual concerning arrangements for the individual to have access to it.[195]

A medical practitioner is not authorised and obliged to disclose or give an individual access to such medical reports, where such disclosure would cause harm via physically or mentally health of the individual (the medical reports of the individual) or others.[196] Furthermore is that a medical practitioner is not obligated to give access to medical reports to an individual, where such disclosure will reveal information about another person or employee, unless the disclosure has been consented by the person or employee; or that person is a health professional who has been involved in the care of the person and the information that been provided by the professional in that capacity.[197]

One can see that disclosure of information and private information of an individual is also protected in terms of United Kingdom legislation. One can further see how privacy is protected in the workplace. An example can be made when the employer asks for medical reports that can be detriment to the employee, to an extent that it disclosing the physical health of the employee (HIV status is positive or the physical health is not in the employee's opinion a good enough reason for sick leave) can be used against him or be unfairly dismissed by the employer because he is of the opinion that the health of the employee will affect the workplace or the employee is lazy to work.

[194] Section 5(2)(b), Access to Medical Reports Act 1998, c. 28.
[195] Section 4(3), Access to Medical Reports Act 1998, c. 28.
[196] Section 7(1) Access to Medical Reports Act 1998, c. 28.
[197] Section 7(2) Access to Medical Reports Act 1998, c. 28.

3.2.1.1.3. Data Protection Act 1998 Chapter 12 (DPA)

What information is being protected

Section 7 of the DPA, provides a data controller to deal with the right to have access to the personal data of an individual.[198] It is under the employer's obligation to make sure that (as the employee) personal data or information is being processed in a just, fair and lawful manner.[199] Personal data is any information that is or can be identified as personal information of you, in which it can affect your privacy as an individual (either your personal life or affect your working life, where such information can be used against you or be prejudice).[200] An example of personal data can be medical information of the individual, such as your details of your sickness records.[201] Such an individual whose personal data is being used or processed must be informed of such action.[202] Therefore you as an employee has the right to ask the employer in terms of the DPA to ask about the personal information the employer has in his possession of you and the employer must have a right which is agreed upon by the employee to obtain medical information about the employee[203], the employee can further ask the employer how he obtained such personal information (the employer may obtained the information in an illegal manner) and the reason for having accessed to such personal information.[204]

The purpose why such personal information is being disclosed under the DPA

Information must be given to the individual such as the purpose in which the data is being processed and to whom the personal data is being disclosed to. The employer is obliged to inform the employee that such personal information is being recorded, why such personal information is being recorded and as stated above to whom it is being disclosed to.[205] The data controller is not obliged to give any personal information of the individual, unless it is in writing and excepted in certain prescribed cases, a fee as may be required.[206] Where the data in which is being disclosed contains information of another person, that person needs to consent first to the disclosure of the information being disclosed to the person making the

[198] Section 7, Data Protection Act 1998, c. 12.
[199] Privacy at work 3 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[200] Privacy at work 3 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[201] Privacy at work 3 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[202] Section 7(1)(a) Data Protection Act 1998, c. 12.
[203] *Bliss v South East Thames RHA* [1985] IRLR 308 para 7.
[204] Privacy at work 5 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[205] Privacy at work 4 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[206] Section 7(2) Data Protection Act 1998, c. 12.

request to access the information or under reasonable circumstances such consent is not needed when request is made.[207]

The person disclosing such personal information of the individual to the person who wants to be informed of such personal information must have a legitimate reason for gaining or being granted access to such personal information of the individual (there must be reasonable grounds to such disclosure).[208] The data will then comply with the request and if the data controller does not comply and failed to do so, a court order may order such data controller to comply with the request that is being made.[209] The obtaining or disclosure of personal information or personal data cannot be disclosed without the consent of the data controller.[210] Further consent is needed from the data controller when personal information or personal data is being obtained of another person.[211]

The DPA has protection principles that need to be upheld in order for the process of personal data or information to be lawfully processed. The principles are that data must always be: fairly and lawfully processed; the process must be processed for limited purposes; the information or personal data being processed must be adequate and relevant, which indicates that information or personal data that is being processed must not be unnecessary and irrelevant; the information or personal data that is being processed must be accurate and up to date with its accuracy on the latest information or personal data that is being processed; the withholding of such information or personal data cannot be held unnecessary; the information or personal data that is being processed must not violate any rights of the individual or employee and other legislation and such information or personal data may not be transferred to another country outside the European Economic Area without adequate protection bestowed upon the individual or employee's information or personal data being processed.[212]

Furthermore the Information Code sets out good practice recommendation on the protection of personal data. The good practice provides that the employer must: eliminate personal information or personal data that is irrelevant to the employment relationship; make employees aware about recklessly disclosing personal information or personal data outside

[207] Section 7(4)(a)-(b), Data Protection Act 1998, c. 12.
[208] *Bliss v South East Thames RHA* [1985] IRLR 308 para 6.
[209] Section 9 Data Protection Act 1998, c. 12.
[210] Section 55(1)(a) Data Protection Act 1998, c. 12.
[211] Section 55(1)(b) Data Protection Act 1998, c. 12..
[212] McCuskey L Privacy at work 5-6 available at http://www.unitetheunion.org (accessed on 4 December 2017).

their employer's policies and procedure and conduct meetings to discuss with the employee and with the trade union if it is represented by such trade union about the development and implementation of employment practice, employment policies and the procedure of the process of the employees personal information or personal data about such employee being processed.[213] By following these recommendation of the good practice provided by the Information Code will allow the right to privacy not to be breached by the employee and allow disclosure of information to be disclosed to the employer in a lawful manner.

There are exceptions to the aforementioned statements. Consent from the data controller is not needed when disclosing is for the purpose of preventing a crime; consent is not needed by reason of rule of law or by a court order; the person reasonably believed he has authority according to law to obtain such disclosure; he reasonably believed that he would of obtained the consent from the data controller if he informed the data controller and if it is justified in terms of public interest that disclosure of such personal information or personal data needed to be disclosed.[214] If the aforementioned is not met and personal information has been obtained in an unlawful manner, such person will be guilty of an offence.[215] Such exception are allowed and in terms of court proceedings the minimum standards for a medical certificate should set out the date in which the medical practitioner examined the defendant and disclosure of medical information of the defendant.[216] One can see this is an exception of an example of criminal proceedings. Any person who sells such personal information or personal data to another is also guilty of an offence in terms of legislation.[217] No rule of law will prohibit the person in the disclosure of information from furnishing to the Commissioner information that is required by him in terms of his duty and functions in terms of this Act.[218]

In terms of the DPA, disclosure of the information can only be lawful if the consent was obtained by the individual to disclose and the personal information was provided for the purpose of being made available to the public; the disclosure was made under a specific Act and European Union obligation; disclosure is need for the purpose of civil or criminal proceedings and disclosure was made in the public interest.[219] As mentioned above if such disclosure of information requirements are not met, contravention is also guilty of an

[213] McCuskey L privacy at work 19 available at http://www.unitetheunion.org (accessed on 4 December 2017).
[214] Section 55(2)(a)-(d) Data Protection Act 1998, c. 12.
[215] Section 55 (3) Data Protection Act 1998, c. 12.
[216] *R. v Ealing Magistrates Court Ex p. Burgess* (2001) 165 J.P. 82. Para 2.
[217] Section 55 (5) Data Protection Act 1998, c. 12.
[218] Section 58 Data Protection Act 1998, c. 12.
[219] Section 58(2)(a)-(e) Data Protection Act 1998, c. 12.

offence.[220] Furthermore the employer is under obligations in accordance with the data protection law to protect his employee's personal information, which consists of mental or physical health of such an individual or employee.[221] If the employee has granted the employer permission to hold personal information[222] (mental or physical health) of the employee, you as an employee have the right and are able to withdraw your permission to hold such personal information of you as an employee at any time.

3.2.1.1.4. Data Protection Act 2018 Chapter 12

The implementation of the new DPA implemented to give rise to more protection to the individual and provides for principles that need to be adhered to. The purpose of this Act is to protect information in the best interest of the individual where the information was disclosed/ processed in a lawful and fair manner with the consent of the individual.[223]

In terms of Part 3 Chapter 2 of the DPA set out principles to consider when in processing such information of the individual. The information that is being processed must be: lawful and fair; must be for a legitimate purpose for such information to be processed; must be applicable to the purpose for such processing where avoiding irrelevant or unnecessary information; therefore it has to be accurate; such information needs to be protected for a period that is specified (cannot be kept for longer than its purpose) and security is given for such processing of information.[224]

3.2.1.1.5. Freedom of Information Act 2000 Chapter 36

The Freedom of Information Act 2000 Chapter 36 is another United Kingdom legislation that deals with information and the disclosure of such information in the United Kingdom. Exempt information is any information that is reasonably accessible to the applicant except the information under section 1 (access to information held by public authorities).[225] The disclosure of information is exempted if the disclosure by the public authority holding such disclosure is prohibited by or under enactment; is incompatible with any community obligation or would constitute or by punishable as a contempt of court.[226] However information is exempt information if that information was obtained by the pubic authority

[220] Section 58 (3) Data Protection Act 1998, c. 12.
[221] Privacy at work 4 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[222] Privacy at work 4 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[223] Part 1 2(1) Data Protection Act 2018 Chapter 12.
[224] Part 3 Chapter 2(35-39) Data Protection Act Chapter 12.
[225] Section 21 Freedom of Information Act 2000, c. 36.
[226] Section 40(1)(a)-(c) Freedom of Information Act 2000, c. 36.

from any other person or another public authority and if the disclosure of such information disclosed to the public by the public authority holding it would therefore constitute a breach of confidence.[227]

3.2.1.1.6. United Kingdom Civil Procedure Rules 1998

According to the United Kingdom Civil Procedure Rule 31, provides that the meaning of disclosure is when a party discloses a document by stating that this specific document exists or has existed.[228] In terms of United Kingdom court cases the standard of disclosure is a standard that requires a party to disclose: only the documents on which he relies; the documents that adversely affects his and another party's case; supports another party's case and the documents in which the party requires to disclose by a relevant practice direction.[229] However the party only has the duty to disclose documents in which he has physical possession of such document; has or had the right to possess it or has or had the right to inspect or take copies of it.[230]

One can see how there must be a right to possession of such a document and it must be only relevant documents/information. An example can be medical information containing personal information of an employee, he must have the right to possess such information of the employee in such a way where he consents to it or waiver his right in terms of an employment contract to allow the employer to possess and have the right to such information. A court can make a specific order for disclosure, where the party must either disclose the documents or classes of documents in a specified order; either carry out a search to an extent specified in the order; either disclose any document resulted in such a search specified in the order and either allow a party to state in his disclosure that the disclose statement that he will not permit inspection of a document on the grounds that will be inappropriate to do.[231] A party can make an application for a claim to withhold the disclosure of a document. The party must prove that it would damage or not in the public interest for such disclosure, such prove must be in writing that he has a right to do so and the grounds on which he claims such a

[227] Section 41 Freedom of Information Act 2000, c. 36.
[228] Rule 31.2 Civil Procedure Rules 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).
[229] Rule 31.6 Civil Procedure Rule 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).
[230] Rule 31.8 Civil Procedure Rule 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).
[231] Rule 31.12 Civil Procedure Rule 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).

right.[232] One can compare that there are similarities when making disclosures of documents, to be more specific is when disclosing documents such disclosure cannot be against public interest and if the court makes an order for documents to be disclosed, he must make such disclosure. Therefore there must be a determination of reasonableness in terms of the circumstances of the case.[233]

3.2.1.1.7. Human Rights Act 1998 Chapter 42

The Human Rights Act 1998 Chapter 42 gives effect to the European Convention on Human Rights to uphold certain obligatory to the European Convention. The European Convention gives effect to certain human rights that must be upheld by the member states, such as the right to privacy.[234] The article further elaborates by stating that everyone has the right to have respect for his private and family life, his home and his correspondence.[235] No one shall interfere with such a right unless it is in the accordance with law, public interest, public safety or the economic well- being of the country, health precautions, prevention of crime and the protection of the right and freedoms of others.[236] This is also in terms of legislation stipulated in the Health and Social Care Act, giving the power of authority to override patient consent only in circumstances that it is necessary to do so.[237] The Human Rights Act must therefore uphold the privacy right (article 8 been incorporated into the Human Rights Act) granted by the European Convention on Human Rights.[238] Legislation such as the DPA has to take into account the Human Rights Act, in which gives effect to the European Convention on Human Rights, therefore stating that the DPA is obliged to uphold privacy rights and be in accordance with legislation and convention rights.[239] Employees can take their employers to court if they are in breach of the convention rights as statutory or common law rights must be interpreted in such a way that it must give effect to be aligned with the European Convention on Human Rights.[240] There is another way in which privacy is protected in the workplace is the agreement between the employer and the employee on privacy. The employer and employee can agree on code of practice with regards to privacy in the workplace, so that the

[232] Rule 31.19 Civil Procedure Rule 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).
[233] *Leonard v Fergus & Haynes Civil Engineering Ltd* [1979] IRLR 235, CS para 1.
[234] Article 8 European Convention on Human Rights 1953
[235] Article 8 European Convention on Human Rights 1953
[236] Article 8 European Convention on Human Rights 1953
[237] Section 60 Health and Social Care Act 2001, c. 15.
[238] Section 3 Human Rights Act 1998, c. 42.
[239] Privacy at work 14 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[240] McCuskey L privacy at work 5 available at http://www.unitetheunion.org (accessed on 4 December 2017).

employee can have knowledge about his right with regards to privacy in the working environment.[241] 'It will also commit the employers to certain basic principles protecting the privacy of employees and set out the precise form in which any monitoring is to be carried out.'[242]

3.2.2. How the information of an employee is processed and protected

3.2.2.1. Disclosure of information in the workplace

An employee needs to be made aware and informed about how information is being disclosed in the workplace, where personal information of such an employee can be disclosed. The rights of the employee are very important and legislation is implemented to protect the privacy of the employee in the workplace. 'Your employer does not have the right to access or see a copy of any of your medical records unless you have willingly given them permission to do so.'[243] Therefore it is very important that consent of the employee is being given to the employer in order for such employer to be granted access to such personal information of such employee. However if the employee has given his consent to his employer, the employee possesses the right to be given the medical report before being given to the employer in order to assess such medical report in order to see what information is being disclosed, a further withdrawal of his permission as mentioned in terms of legislation stated above.[244] If the employee gives his consent to the disclosure of his medical reports, then it is justifiable and reasonable for such disclosure by the doctor to a third party like the employer.[245] However consent of such employee can only be valid if the patient who is the employee has the legal capacity to give consent to disclose such medical information and further understands the nature of the disclosure.[246] Employee has further rights over his medical information in terms of how he can object to his employer in holding or using information about his (the employee) information if such medical information can cause harm to the employee.[247]

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[241] McCuskey L privacy at work 8 available at http://www.unitetheunion.org (accessed on 4 December 2017).
[242] McCuskey L privacy at work 8 available at http://www.unitetheunion.org (accessed on 4 December 2017).
[243] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[244] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[245] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007)259.
[246] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007) 259.
[247] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).

One can see that there are limitations in withdrawing and holding medical information, where an example can be public interest or court order as mentioned above in terms of legislation. A very important issue that needs to be address is how the sickness and absence records should be dealt and how it should be kept separately. In terms of absenteeism, the employee must merely state the reason for the absence; however he does not have to refer to a specific medical condition or information of such employee, where privacy is being protected.[248] In terms of sickness records, details of the illness are needed for statutory purposes such as sick pay granted to the employee, in which provides that the both relevance and adequacy must be measured against the purpose the information is meant to serve.[249] The Employer needs to know the differences in order for personal medical information of the employee is being kept securely and privacy of such personal medical information is only disclosed to people where such disclosure is necessary (statutory purposes).[250]

Defining confidential information is important because not all information is confidential. One must therefore look at information such as whether such information is already in the public domain; is such information worthy of being confidential and useful and is it in the public interest for the disclosure of such information to be disclosed; therefore one can see it is important to determine the nature of the information in terms of the surrounding circumstances such information is being disclosed.[251] The doctor has a duty on behalf of his patient to protect personal medical information (doctor and patient confidentiality); however such sensitive information can only be protected to an extent and can only be disclosed to an extent where it is in the public interest and where the privacy of such a patient is being protected to an extent.[252] If such protection is not upheld, the patient has remedied for the breach of confidentiality that took place. The remedies are: that the employee can claim (injunction) to prevent the publication for such confidential information to be disclosed; the employee can claim for the damages he had suffered due to the disclosure, in which the employee can be compensated for it and if the doctor gains from the disclosure, the employee can be compensated by the earned profits.[253]

[248] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[249] Grogan J *Workplace law* 11 ed (2014) 332.
[250] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[251] Nicholas N 'Confidentiality, disclosure and access to medical records'(2007) 258.
[252] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007) 262.
[253] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007)261.

3.2.3. The use of a fit note

3.2.3. The fit note for work

In terms of the United Kingdom legislation, there is no requirement by the doctor to write anything apart from stating on the note that the employee is not fit to work.[254] Therefore this states that the consent of the employee is needed first in order to write more in the note. In the United Kingdom, the sick notes are being replaced by the fit note. 'Sick notes (or Medical Statements are the forms issued by doctors to people when they are ill or injured.'[255] The sick note provided by the doctor, only advises the employer that the employee is not able to work, however the fit note provides much more than what the sick note provides, such as it provides the opportunity to assist the employer to an extent to help employees achieve an earlier return to work.[256] 'The idea that a person is either too ill to work at all, or well enough to fulfil their full duties does not reflect the real experience of those who are recovering from a long-term illness who would often like the opportunity of returning in a phased or supported way.'[257]

The doctor will state whether the employee is either 'unfit for work' or 'may be fit for work'. The fit note provides options for doctors to give advice to the employers for their employees on how these employees can return to work with the support and help of them (the employers) and it gives more lenience for doctors to provide information to employers about the employees that will not contravene or infringe their privacy (help employees by elaborating that the work this specific employee is doing will affect him in such a way).[258] The fit note should not contain irrelevant medical information and consent is needed for such information to be disclosed by the doctor to be disclosed in the fit note, it can be a simple diagnosis consented by the employee.[259]

This new system of the fit note will not change any requirements under the payments of Statutory Sick Pay and the employers' obligations under the Disability Discrimination Act

[254] How to use the new "Sick Note" (2012) 2 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).
[255] The Statement of Fitness for Work- from sick note to fit note 1 available at https://www2.le.ac.uk>docs>policies (accessed on 23 December 2017).
[256] The Statement of Fitness for Work- from sick note to fit note 1 available at https://www2.le.ac.uk>docs>policies (accessed on 23 December 2017).
[257] How to use the new "Sick note" (2012) 2 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).
[258] The Statement of Fitness for Work- from sick note to fit note2 available at https://www2.le.ac.uk>docs>policies (accessed on 23 December 2017).
[259] How to use the new "Sick Note" (2012) 6 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).

1995 Chapter 50. One can see that there is no legislation amendment that needs to be amended or done; it is simply a system that is enforced to provide not only a reason why they are not working, but guidance in order for these employees to be properly monitored and assisted in the working environment. These fit notes are beneficial for both the employee and employer to prevent any discriminatory injustice and avoid any infringement of rights that is bestowed upon both parties involved.

The fit note consists of various boxes in which are filled by the doctor in which he provides the employee, who in return gives it to the employer in order for the employer to have some form of evidence that could be used for statutory purposes. The boxes consist of the: name of the employee; the date the doctor assessed the employee; the condition that affected the employee's fitness to work; the doctors assessment on how the condition of the employee prevented the employee from working; another box is available for stating that the employee will not be able to perform or do his work to their full capacity; a box stating ways and guidelines that will aid the employee to return to work; another box based on the statement period (stating whether he must work or how long is that fit note is valid for) and a box stating whether the doctor needs to see the employee again after the stated period provided in the other box. The doctor can also make amended duties for the employee so that the employer can have a guideline to what extent the employee can work and perform his duties.[260] In the fit note not all boxes will be ticked, for example certain boxes will state that he may be fit for work and another box will state that the employee is not fit work.

When the employer receives the fit note provided by the employee given to him by their doctor, the employer should: firstly discuss the advice given by the doctor on the fit note about the employee with the employee; secondly the employer should consider the advice given by the doctor and if unsure about the advice given by the fit note, he can contact Human Resources; thirdly the employer should discuss options with the employee and whether he is fit to return to work; lastly agree on a date to work and if amendments, agree on those amendments.[261] In terms of case law, a recent fit note was furnished by the employee for establishing reasons for her long- term sickness, the employer dismissed the employer based on the reason that all of a sudden a fit note is furnished when the employer asked for information and the decision to for dismissal already been established by the

[260] How to use the new "Sick note" (2012) 4 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).
[261] The Statement of Fitness for Work- from sick note to fit note 4 available at https://www2.le.ac.uk>docs>policies (accessed on 23 December 2017).

employer (the employer disregarded the fit note being furnished by the employee).[262] The tribunal held that employers must review all evidence being furnished by the employee, which includes recent evidence that been suddenly being produced by a medical doctor, it is an unfair dismissal without reviewing the fit note and gathering further information in light the new evidence. [263] The fit note protects the right of the employee and further guides the employer in assessing the situation, therefore arriving to outcome that is both suitable for employer and employee.

There must be an agreement by both parties on how the employee will conduct himself in the workplace when the employee returns from work. If there is a disagreement by the employee on the circumstances and proposal in which he was given by the employer, he can pursue such disagreement and a grievance with their union, furthermore no one can force such employee to return to work when he feels not fit to work or perform to his full capacity or employer fails to make accommodations (example can be when the employer does not understand fully the guidelines made by the doctor).[264] If the employer makes alterations and adaptations for the employee who is returning to work, the employer must make a further revised risk assessment on the employee's duties to ensure that the employee does not find difficulty in the workplace and no new risks are being created for the employee when he is returning or have returned to work.[265] In the *East Lindsay District Council v Daubney* case gives an example how the employer should conduct himself in terms of the abovementioned statement, such as discussions and consultations with the employee and other parties involved.[266]

3.3 Lessons to be learned from the United Kingdom

By looking at the comparative study of foreign law, one can see a comparison or similarities on when disclosure of information can take place. Examples of the aforementioned limitations are: disclosure for public interests; where he consents to disclosure; court order (in terms of the National Health Act provided by South African legislation and/or prevention of a

[262] *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145 *para* 27-31.
[263] *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145 *para* 57.
[264] How to use the new "Sick Note" (2012) 6 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).
[265] How to use the new "Sick note" (2012) 5 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).
[266] *East Lindsay District Council v Daubney* [1977] IRLR 181 para 20.

crime (in terms of the DPA provided by United Kingdom legislation). In terms of United Kingdom legislation, disclosure of personal medical information can be disclosed provided that requirements are met. Therefore it is necessary that the employer takes precautions and makes sure it is legally necessary to hold such personal medical information. The precautions taken by the employer can be stated or be answered by the employer making sure that: processing such personal medical information is necessary in terms of legal obligations; the processing of such personal medical information is necessary in terms of legal proceedings and it is necessary in terms of the provision of care or treatment by an occupational health doctor.[267] This is similar to South African legislation, specifically POPIA, where certain requirements need to met with regards to access to such personal information of the individual and the BCEA and COIDA provides the statutory purpose (employer's right) for such disclosure of personal information. Consent is important in order to gain access to an individual's personal information, which is adopted by both the United Kingdom legislation (Access to Medical Reports Act 1998 Chapter 12) and South African Legislation (POPIA). In certain instances consent is not needed and reasonable grounds for access to such information to be disclosed. In both countries, there needs to be a reasonable and justifiable purpose for such disclosure, which is required by the Constitution of the Republic of South Africa and legislation such as POPIA. In terms of United Kingdom legislation such reasonable and justifiable purpose are also required in terms of DPA.

Furthermore the employers of the employees who hold personal medical information of his employees cannot disclose such personal medical information or sickness records of each employee to the other employees unnecessary unless they are under legal obligations to fulfil their duties[268] and further obligations provided by the DPA. When all precautions have been met and disclosure for such medical information is requested by a third party like the employer, the doctor must therefore write a report of the medical information of the employee. The patient must be aware about this and further must be aware of: the purpose of the disclosure and the extent of information that will be disclosed to the third party; must be aware that such information cannot be withheld; the patient who is the employee must give written consent to such disclosure; only relevant information should be disclosed on request and only factual information that can be sustained and presented in an unbiased manner can

[267] Privacy at work 12 available at http://www.worksmart.org.uk (accessed on 2 December 2017).
[268] McCuskey L Privacy at work 20 available at http://www.unitetheunion.org (accessed on 4 December 2017).

be included.[269] This shows the extent in which disclosure of information of the patient who is the employee can be disclosed and how privacy is protected. Only relevant information needs to be disclosed and information that is personal and private in nature to the patient does not have to be disclosed based on the consent on the patient who the employee is.[270] Similar approach is taken by the HPCSA and the National Health Act, how disclosure is taken place.

There should be more legislation and protection for privacy based on the extent of such disclosure with regards to medical information of the employee. In both countries there is a lack of assistance as to how extensive can the disclosure of information of the employee be, which tends to results in unfair dismissal because of misuse of the sick note and medical certificate by the employer[271] and unfair labour practice[272], however the fit note and Information Code of good practice (examples creating awareness of preventing unnecessary disclosure by the employee and creating awareness for the employee with regards to employment policies) as stated above provided by the United Kingdom (not provided by South African legislation), provides assistance to a degree where employee's rights are protected more sufficiently. As mentioned above there is difference between absenteeism and sick records in the United Kingdom. In terms of absenteeism, the individual merely needs to state the reason why he is absent (no detailed description and disclosure of the personal information of the individual) and in terms of sick records, there needs to be a detailed description of the illness for statutory purposes. By knowing the difference and the application of it, will prevent unnecessary infringement of the rights of the individual.

[269] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007)259.
[270] Nicholas N 'Confidentiality, disclosure and access to medical records' (2007)259.
[271] *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145.
[272] *Piliso v Old Mutual Life Assurance Co* (SA) Ltd 2007.

CHAPTER 4

4. Conclusions and Recommendations

The modern day era of a workplace, grants rights to both the employee and the employer. Since rights bestowed and protected by the Constitution, the right such as the right to fair labour practice must be upheld. In order for the right to fair labour practice to be upheld, no infringements to the right of an individual such as a employee's right to privacy. However employers have rights too in the workplace. This explains the reasons for the limitation clause that is included into the Constitution. Under the limitations and statutory requirements, it is justifiable and reasonable in order for such disclosure; however it does not speak of the extent of such disclosure of medical information of the individual. One should determine to what extent it is reasonable and justifiable for an employer to know the personal and private information of the employee. Privacy as a right is hard to measure because as abovementioned is measured differently for every individual (privacy for everyone is different, one person might see it as a privacy and another person might see it as not a privacy factor). Even though the statutory/ legislation allows infringement of constitutional rights, but there is no extent to what all to disclose. The limitation on the right does not provide measures to what extent the privacy right can be disclosed and infringed.

A recommendation can be made with regards to the contractual relationship between the employer and employee. A clause in the contract can be included, where both the employee and employer agree to the extent of disclosure of any disclosure of information by the parties to the contract, which includes the extent of disclosure of medical information. This clause will prevent any injustice in the workplace, where the rights of the employee and the statutory obligations of the employer are upheld.

As above mentioned, it states that a disclosure of the medical information needs to be a simple diagnosis of the patient or employee. A simple diagnosis of the employee is reasonable, but a broad outline and in detail disclosure of the medical information is unjustifiable and unreasonable for statutory purposes. An detailed disclosure of medical information is not specified in terms of statutory legislation, it just states as above mentioned that medical information must be disclosed for example in terms of a court order and in the public interest. This suggests that one must determine what is a simple diagnosis and to what

extent can disclosure can be made in order to protect the rights of the employee and further allow the employer to uphold their statutory obligations in terms of statutory sick pay.

Another factor that needs to be address is the doctor and patient confidentiality and relationship. In certain circumstances it may be seemed that implied consent is given, however the doctor must explain the rights afforded to the patient, in order for him to understand that certain information is confidential (which is explained above what is confidential information) and might contravene their doctor and patient confidentiality. The doctor should further explain the patient's right in terms of the right not to disclose any medical information in the medical certificate, where such disclosure of information can lead to an infringement of their constitutional right to privacy. The doctor and patient confidentiality and relationship plays an important role to an extent as mentioned above in terms of the psychology of the patient because he trusts the doctor to look in his best interests where the patient has disclosed and allowed the doctor to gain knowledge of the patient's personal medical conditions.

Same can be said for a lawyer and his client's information. The client has a right in terms of client confidentiality. However in certain circumstances it is allowed but these relationships must be governed and there should be statutory prerequisites in terms of the extent of the disclosure of the personal medical information. It is therefore also concern and of great importance that the HPCSA to address this problem in the extent of the disclosure and the ethics of doctor in addressing their patients about the law in terms of disclosure of information. The doctor has a confidential duty to inform patients about their rights, where most of these patients has a lack of knowledge of their rights. Where failure of providing these patients of their rights can be used against them in the workplace where the patients are employees and such disclosure of medical information can either lead in a dismissal or not getting employed based on such information. This is shown in above, where it is misused and misinterpreted by employers where they do not treat the employee as an employee with a disability but as one with a poor work performance and think it is a justifiable reason for a fair dismissal.

One can adopt the United Kingdom's fit note, where it has different boxes in order to be an assistance to return to work quicker and provide a workplace where it will provide a healthy environment for the employee and employer. The fit to work note is informative and way in promoting fair labour practice. Reason being that is a essential mechanism in which it helps

inform and guide employers in a way where no rights can be infringed by the employee (being exploited and forced to work) and the employer (infringing his statutory duties). As abovementioned the doctor's credentials and profession can be trusted, where his opinion is worthy to provide as a guideline for the employer to get the best out of the employee, so that he can work at full capacity to do his work. South Africa can adopt the fit to work note as a way to promote fair labour practice in the workplace. It will promote positivity and work efficiency as abovementioned. By adopting this approach in the workplace it will protect both the doctor and patient relationship and the employment relationship of the employee. Consent is still needed for the disclosure of the conditions of the health of the person. By stating on the fit to work note a simple diagnosis and providing guidelines can provide the employer with an indication about the seriousness of the medical condition of the employee. It will work in the best interest of the employee that a simple diagnosis will be disclosed. It will work in the best interest of the employer that the fit to work note will provide a guideline for the employer in terms of the nature of the medical conditions and how to provide or make accommodations for the employee in the working environment. The fit to note should be efficient for statutory sick pay obligations that should be upheld by the employer of the employee. It provides information in an indirect way about the nature of the medical conditions instead of intruding the privacy of the employee by disclosing the personal medical conditions of the employee that essentially lead to infringing fair labour practice and the constitutional right of privacy of the employee.

It is essential that all these issues abovementioned should be addressed and implemented in order for constitutional values to be promoted in the workplace. Therefore all surrounding circumstances must be considered in order not to intrude someone's right to privacy and further consider that privacy is different for every single individual. It is therefore a case by case basis approach, which can only be aided by assistance not only by amending legislation, but also the HPCSA, specifically speaking the doctors, in informing these patients about the confidentiality of disclosing medical information.

The Information Code of good practice is also a great initiative to provide protection for both the employer and employee. The Information Code of good practice by the United Kingdom could be adopted by South Africa to provide more assistance in the workplace. One should take into account also that privacy of one person is different to another person. Based on the aforementioned, when one is determining such disclosure, surrounding circumstances should be taken into account.

Legislatures need to provide guidelines on the extent of disclosure on the sick notes and medical certificate for purposes of statutory obligations that is required by the employer in the workplace. Assistance should be provided on how extensive can the disclosure be without implementing a limitation and infringing the right of the employee in the workplace. By providing such guidelines on statutory obligations, the rights of employees will not be infringed, which will create a fair labour practice for all.

Bibliography

Books

- Currie I &De Waal J *The Bill of Rights Handbook* 6th ed (2013) Cape Town: Juta.

- Du Toit, D *Labour Relations Law: A Comprehensive Guide* (2012) Cape Town: LexisNexis.

- Du Toit D, Bosch D, Woolfrey D et al *Labour Relations Law: A Comprehensive Guide* (2006) Cape Town: LexisNexis.

- Grogan, J *Workplace Law* (2014) Cape Town: Juta.

- Hutchison D and Pretorius and et al 'The nature and basis of contract' in Hutchison D (ed) *Law of Contract in South Africa* 2 ed (2012) Oxford University Press Southern Africa (Pty) Ltd.

- Neethling J, Potgieter JM and Visser PJ 'Basis for protection of personality in South African law' in Neethling J (ed) *Neethling's Law of Personality* 2nd ed (2005).

Case Law

- *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC).

- *Bliss v South East Thames RHA* [1985] IRLR 308.

- *Campell v Mirror Group Newspapers* [2004] 2 AC 457, [2004] UKL 22

-*Coulson v Felixstowe Dock and Rly Co* [1975] IRLR 11].

- *D v K* 1997 (2) BCLR 209 (N).

- *East Lindsay District Council v Daubney* [1977] IRLR 181.

- *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

- *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A).

- *Fose v Minister of Safety and Security* (CCT14/96) [1997] (7) ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (June 1997).

- *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* (CCT 27/01) [2001] ZACC 6; 2002 bclr 113; 2002 (2) SA 693; [2002] 2 BLLR 119 (CC) (4 December 2001).

- *Gaertner and others v Minister of finance and others* 2013 (6) BCLR 672 (WCC).

- *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

-*Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17; 2001(1) SA 1; 2000 (11) BCLR 1211; [2000] 12 BLLR 1365 (CC) (28 September 200).

- *Howman & Son v Blyth* [1983] ICR 416.

- *Huey Extreme Club v McDonald t/a Sport Helicopters* [2004] 3 All SA 702 (C).

- *Huey Extreme Club v McDonald/ a Sport Helicopters,* 2005 (1) SA 485 (C).

- *Hunter v Mann* [1974] QB 767, [1974] 2 All ER 414.

-*International Sports Co. Ltd.v Thomson* [1980] IRLR 340.

- *Investigating Directorate: Serious Economic Offences v Hyudai Motor Distributors (Pty) Ltd: In re Hyudai Motor Distributors (Pty) Ltd v Smit NO* 2001 (SA) 545 (CC).

- *Jones v Tsige* 108 O.R (3d) 241 2012 ONCA 32.

- *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* [2012] 11 BLLR 1099 (LAC).

- *Leonard v Fergues and Haynes Civil Engineering Ltd* [1979] IRLR 235.

- *Lynock v Cereal Packaging Ltd* [1988] IRLR 510.

- *Mears v Safecar Security Ltd* [1983] QB 54.

- *Mhlongo v Bailey and Another* 1958 (1) SA 370 (W).

- *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1997 (7) BCLR 933 (D).

- *Mistry v Interim National Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

- *Mistry v Interim National Medical and Dental Council of South Africa and Others 1998* (7) BCLR 880 (CC).

- *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W).

- *National Director of Public Prosecutions v Mahomed* [2007] SCA 138 (RSA).

- *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).

- *Ontario Nurses' Association v St. Joseph's Health Centre* (St. Joseph's) 76 OR (3rd) 22 (DIV Ct).

- *Podlas v Cohen NO and Others* 1994 (3) BCLR 137 (T).

- *Piliso v Old Mutual Life Assurance Co* (SA) Ltd 2007.

- *R. v Ealing Magistrates Court Ex p. Burgess* (2001) 165 J.P. 82.

- *S v Finland*, 9/1996/627/811, Council of Europe: European Court of Human Rights, 25 February 1997

- *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

- *S v Gumede and Others* 1998 (5) BCLR 530 (D).

- *S v Jordan* 2002 (6) SA 642 (CC).

- *SA Broadcasting Corporation v McKenzie* [1999] 1 BLLR 1 (LAC).

- *South African Railways & Harbours v National Bank of SA Ltd* 1924 AD 704.

- *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373, [1977] ICR 301.

- *Steyn v LSA Motors* 1994 (1) SA 49(A).

- *Taylorplan Catering (Scotland) v McInally* [1980] IRLR 53.

- *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) 395.

Journal Articles

- Burchell J 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid' (2009) *EJCL.*

- Health S, Cheves S 'Legal issues arising from sickness absence' (2014).

- Hughes K. A and Dixon E 'Ignored and misunderstood: Privacy Rights and Medical Information in the Canadian Workplace (2013).
- Loewenstein G, Sunstein C.R and Golman R 'Disclosure: Psychology Changes Everything (2014).
- McGill L, Tarasevich M 'Confidential Personnel Information in the Workplace (2012).
- McQuoid-Mason DJ '*The Law of Privacy in South Africa'* (1978).

- Nicholas N 'Confidentiality, disclosure and access to medical records' (2007).
- Sangor C 'Social Psychology Principles' (2012).
- Tudor M 'Protecting Privacy of Medical Records of Employees and Job Applicants in the Digital Era Under the Americans with Disabilities Act Vol. 40:3 (2013).
-Schwartz 'The Social Psychology of Privacy' (1968).
- Shiels C, Hillage J, Pollard E and Mark G 'an evaluation of the Statement of Fitness for Work (fit note): quantitative survey of fit notes' (2013).
- van der Bank C.M. 'The Right to Privacy- South African and Comparative Perspectives (2012).

Statute and international instruments

- Access to Medical Reports Act 1988 Chapter 28.

- Basic Conditions of Employment Act 75 of 1997.

- Compensation for Occupational Injuries and Diseases Act 130 of 1993.

- Compensation for Occupational Injuries and Diseases Amendment Act 61 of 1997.

- Constitution of the Republic of South Africa, 1996.

- Data Protection Act 1998 Chapter 12.

- Data Protection Act 2018 Chapter 12.

- Employment Equity Act 55 of 1998.

- European Convention on Human Rights 1953

- Freedom of Information Act 2000 Chapter 36.

- Health and Social Care Act 2001 Chapter 15.

- Health Information Privacy Code 1994.

- Health Professions Act 56 of 1976.

- Human Rights Act 1998 Chapter 42.

- International Covenant on Civil and Political Rights, 1976.

- International Labour Organisation.

- Labour Relations Act 66 of 1995.

- Medicines and Related Substances Control Act 101 of 1965.

- National Health Act 61 of 2003.

- Promotion of Access to Information Act 2 of 2000.

- Protection of Personal Information Act 4 of 2013

- Protected Disclosure Act 26 of 2000.

- Protection of Personal Information Act 4 of 2013.

- Occupational Health and Safety Act 1993.

- Occupational Diseases in Mines and Works Act 1973.

- Universal Declarations of Human Rights.

- United Kingdom Civil Procedure Rules 1998.

Websites

- Duffy J '10 human rights cases that defined 2015:

https://ukhumanrightsblog.com/2015/12/23/10-human-rights-cases-that-defined-2015/.

- Chapter 2: Right to Privacy Recognition of the right to privacy 7 available at http://www.old.ispa.org.za/regcom/privacyfiles/chapter-2-righttoprivacy.pdf (accessed on 20 October 2017).

- Health Professions Council of South Africa- ethical and professional rules of the health professions council of south Africa as promulgated in government gazette r717/2006 booklet 2 available at http://www.hpcsa.co.za/downloads/conduct_ethics/rules/generic_ethic_rules/booklet_2_generic_ethical_rules_with_anexures.pdf (accessed on 23 October 2017).

- How to use the new "Sick Note" (2012) 2 available at https://www.tuc.org.uk>extras>fitnote (accessed on the 23 December 2017).

- McCuskey L Privacy at work 5-6 available at http://www.unitetheunion.org

- Privacy at work 3 available at http://www.worksmart.org.uk

- Robert, A 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2012) 60 is available at http://journals.cambridge.org (accessed on 1 December 2017).

- Rule 31.2 Civil Procedure Rules 1998 available at https://www.justice.gov.uk>civil>rules (accessed on the 7 December 2017).

- Government of the United Kingdom:

https://www.gov.uk

- South African Law Reform Commission; Privacy and Data Protection (2005) iv available at http://www.justice.gov.za>dpapaers>dp109 (accessed on 20 October 2017).

- The Statement of Fitness for Work- from sick note to fit note 1 available at https://www2.le.ac.uk>docs>policies