Chapter 5

Academic Freedom and Academics' Right to Criticise their Employer

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Abstract

Academic freedom is an essential aspect of a democratic society and is recognised as such in international law. In South Africa, academics are generally regarded as employees, and, as such, their freedom of expression may be limited by labour law. The common law imposes a duty of utmost good faith on employees to act in the best interests of their employer, which can restrict an employee's freedom of expression. Therefore, it is crucial to understand the limitations on an employee's freedom of expression and how they restrict an employee's ability to criticise their employer. This chapter considers the existing legal framework regarding an employee's right to criticise their employer, specifically in the context of academic freedom. The Committee on Economic, Social and Cultural Rights (CESCR) recognises that academic freedom is not absolute and may need to be limited in certain circumstances, including limitations brought about by an academic's countervailing duties to respect the academic freedom of others, ensure fair discussion of contrary views, and treat all without discrimination on any prohibited grounds. Therefore, academic freedom does not permit an academic to propagate hate speech or discriminatory speech. Nevertheless, it affords an academic broad rights to freely express their opinion on academic matters, including criticism of the institutions they work in (i.e. their

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employer). While the *Motsoeneng* case in South Africa appears to provide some protection for academics to criticise their employer, this chapter argues that it is more restrictive than legitimate restrictions on academic freedom recognised in international law. This chapter critically analyses the protection of academic freedom in international law and argues for an interpretation of the common law in a manner that aligns with this international law position. To this end, this chapter argues that, in the context of academic freedom, criticism of the employer must be in the public interest, and must be interpreted within the unique context of a higher education institution (HEI) where criticism ought to be presumed to be in the public interest unless the academic in question acted in bad faith.

1. Introduction

Academics have a dual role as both an academic and an employee that may sometimes impose seemingly conflicting obligations on them. In their capacity as employees, academics owe their institution a duty of good faith.[2] This duty of good faith has been interpreted relatively broadly as an obligation to always protect the employer's interest and has also increasingly been applied to utterances made by employees on social media.[3] It has generally been regarded as a legitimate limitation on employees' right to freedom of expression. South African labour law accordingly restricts an employee's ability to criticise their employer where such criticism is likely to harm the employer's reputation.[4]

Yet, academics may occasionally have legitimate cause to criticise certain actions by their employer during their research. The Committee on Economic Social and Cultural Rights (CESCR) recognises academic freedom as an important element of the right to education.[5] It notes that, even though the right to academic

2 Coetzee "A legal perspective on social media use and employment: Lessons for South African educators" 2019 *PELJ* 1-8.
3 Phungula "The clash between the employee's right to privacy and freedom of expression and social media misconduct: What justifies employee's dismissal to be a fair dismissal?" 2020 *Obiter* 504-518.
4 Phungula (n 2) 518.
5 Commission on Economic, Social and Cultural Rights (CESCR) "General Comment No. 13: The Right to Education" (Art. 13) 1999

freedom is not explicitly recognised within the right to education, the realisation of the right to education depends on the effective recognition of academic freedom. The CESCR defines the concept of academic freedom broadly and notes that:

> academic freedom includes the liberty of individuals to *express freely opinions about the institution or system in which they work*, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.[6] [emphasis added]

The CESCR accordingly recognises the freedom to criticise one's own institution (employer) as an important component of academic freedom. Unlike conventional employees who are not academics, the freedom to criticise the employer affects not only the right to freedom of expression but also the right to education. While academic freedom does not confer an unfettered right to criticise the institution, it is clearly broader than the restrictions imposed on other employees not to make statements that could be harmful to the employers' reputation.

This chapter aims to consider the extent to which labour law permits an academic employee to criticise their employer in the scope of the right to academic freedom. It considers existing case law and arbitral awards on employees' right to criticise their employer to draw on best practices in balancing the rights of academic employees with the duty of good faith owed to the employer in terms of labour law.

2. Academic freedom and the right to criticise one's institution

The CESCR's recognition of the freedom to criticise one's own institution as an important component of academic freedom

E/C.12/1999/10 (hereafter "CESCR General Comment No 13") par 38.

6 par 38 of General Comment 13 of 1999.

has not always enjoyed universal recognition. There are varying interpretations of what the concept of academic freedom entails and what the limits of academic freedom are. For example, in the United Kingdom, the concept of academic freedom is defined as the freedom:

> ...within the law to question and test received wisdom, and to put forward new ideas and controversial and unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.[7]

On the face of it, this definition does not necessarily conflict with the understanding of the concept of academic freedom as defined by the CESCR. Nevertheless, it has been argued that the requirement of "within the law" means that academic freedom is subject to any other legal restrictions. This, it is argued, has the effect of the common law duty of good faith to an employer prevailing over the right to academic freedom. Therefore, in the context of the United Kingdom, there is an argument to be made that academic freedom does not extend to the right to criticise one's employer. In a South African context, there has been more limited attention paid to this aspect of academic freedom, with the literature largely focused on the debate surrounding the extent to which academic freedom extends to institutional autonomy.[8] While this debate may be highly relevant in a broader South African context, it ultimately falls outside the scope of this chapter.

Nevertheless, the European Court of Human Rights (ECtHR) has endorsed a broader understanding of the concept of academic freedom which offers a valuable point of departure for the purposes of this chapter. In the case of *Sorguç v Turkey*,[9] the

7 s 202 of the Education Reform Act, 1988.

8 See *inter alia* Kruger "The Genesis and Scope of Academic Freedom in the South African Constitution" in *Kagisano No 8: Academic Freedom* (2013); Malherbe "State involvement and the issues of academic freedom, autonomy and accountability" paper presented at the Council on Higher Education. Regional Forum on Government Involvement in Higher Education, Institutional Autonomy and Academic Freedom (23 March 2006, Pretoria).

9 *Sorguç v Turkey* Appl. no. 17089/03 (23 June 2009).

ECtHR was confronted with a case where a university professor (the applicant) had criticised the appointment and promotion process within universities and in particular the examination process for assistant professors.[10] After the publication of this paper, an assistant professor who had been appointed in terms of this process, and to whom the applicant had referred in his article (albeit not by name), instituted a claim for damages against the applicant.[11] This claim for defamation was ultimately successful and the applicant was ordered to pay one million liras in compensation as well as legal costs and interest.[12]

The applicant approached the ECtHR arguing that the decision infringed upon his right to freedom of expression and academic freedom.[13] The court stressed the importance of academic freedom in a democratic society and noted that academic freedom consists of "the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction".[14] The court noted that the applicant had clearly made the remarks in the course of exercising his academic freedom as they concerned his assessment of the appointment and promotion system in universities.[15] Therefore, the state would need to demonstrate that there was a pressing social need for restricting the applicant's ability to freely express his view on these matters.[16]

In *Yazici v Turkey*,[17] the ECtHR further expanded on the protection of academic freedom and academics' right to criticise the institutions within which they work. In the *Yazici* case, the applicant had published an academic article in which he raised concerns around plagiarism committed by certain academics and pointed out a specific instance where a colleague's book appeared to have been substantially plagiarised.[18] The article resurfaced

10 the *Sorguç* case par 6.
11 the *Sorguç* case par 7.
12 the *Sorguç* case par 16.
13 the *Sorguç* case par 22.
14 the *Sorguç* case par 35.
15 the *Sorguç* case par 32.
16 the *Sorguç* case par 35.
17 *Yazici v Turkey* Appl. No. 40877/07 (15 April 2014).
18 the *Yazici* case par 7.

after this first publication when the Higher Education Council indicated that it would be establishing a committee to examine ethical issues in the academy. This saw a summary of the initial article being published online, along with new remarks by the applicant in which he said that the first to be investigated ought to be the colleague whose book had purportedly been plagiarised and who was also the founder of the Higher Education Council.[19] This colleague subsequently instituted and ultimately succeeded in a defamation claim against the applicant.[20]

The applicant then approached the ECtHR, alleging that the restriction on his academic freedom violates his right to freedom of expression. The court emphasises that academics and academic institutions perform an essential public function which may require them to show greater tolerance of public scrutiny and criticism.[21] In this case, the allegations of plagiarism were also made in the context of a broader debate on the establishment of an ethics committee and were made by the applicant within his capacity as an academic.[22] Therefore, the court observes that the matters are presumed to have been raised in the public interest and that there is little scope for restricting academic expressions made in good faith in the course of an academic debate in the public interest.[23]

The ECtHR's approach to academic freedom accordingly aligns with that of the CESCR. However, unlike the CESCR, the ECtHR reads the right to academic freedom into the more generally accepted right to freedom of expression, instead of the right to education. The ECtHR has also emphasised that academic freedom is not restricted to academics' ability to conduct and disseminate their research.[24] It also extends protection to the expression of "their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise

19 the *Yazici* case par 10.
20 the *Yazici* case par 13-16.
21 the *Yazici* case par 56.
22 the *Yazici* case par 55.
23 the *Yazici* case par 57.
24 *Erdoğan v Turkey* Appl. No. 346/04 and 39779/04 (27 May 2014) par 40.

and competence".[25] Therefore, the medium of publication of academic views is not restricted to academic journals, provided that the matters in respect of which an opinion is expressed are related to their function as an academic.[26]

This more comprehensive understanding of the concept of academic freedom has also been endorsed by the United Nations Educational, Scientific and Cultural Organization (UNESCO), who defines academic freedom as scholars'

> right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.[27]

Therefore, while individual countries might sometimes define academic freedom more restrictively, international law generally regards academic freedom as inclusive of the freedom to criticise the institution in which they work. In the context of South Africa, where there is no legislative definition of academic freedom, greater weight should also be attached to the definition accepted in international law than to a more restrictive comparative definition from another domestic law system.

The Constitution clearly requires South African courts to consider international law when interpreting the rights in the Bill of Rights.[28] This consideration of international law is not confined to instruments which South Africa has ratified, and extends to a range of international law instruments as well as decisions of human rights bodies and courts interpreting those

25 the *Erdoğan* case par 40.
26 the *Erdoğan* case par 41.
27 UNESCO "Recommendation Concerning the Status of Higher Education Teaching Personnel" (RSHETP) 1997 par 27.
28 s 39(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

instruments (such as the ECtHR).[29] Therefore, when interpreting the right to freedom of expression and the right to education in the context of an alleged infringement of academic freedom, the courts must consider these decisions and, where possible, prefer an interpretation that is consistent with these decisions.

3. Employees' right to freedom of expression

While international law may recognise an academic's right to criticise their institution as a fundamental component of academic freedom, academics are generally employees in terms of South African labour law and subject to the restrictions associated therewith. As previously mentioned, the common law imposes a duty of good faith on employees which has been interpreted as an obligation to always act in the best interests of their employer.[30] Nevertheless, the courts have also made it clear that an employee does not lose their constitutional rights, such as the right to freedom of expression, merely because they are in the workplace.[31] Therefore, it is important to understand the contemporary limitations on an employee's freedom of expression and the extent to which these limitations restrict an employee's ability to criticise their employer. Phungula argues that, while an employee enjoys the right to freedom of expression, this right may be

29 See *S v Makwanyane* 1995 6 BCLR 665 (CC) at par 35, where decisions of the ECtHR are specifically included among the sources of international law which courts are obliged to consider. The court noted that "[i]n the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three".

30 Coetzee (n 1) 8.

31 *Independent Risk Distributors SA (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration* [2022] ZALCJHB 282 (11 October 2022) par 35.

justifiably limited if the expression has the potential to damage the name of the employer or otherwise harm their reputation.[32] Coetzee expresses a similar view and notes that the:

> [c]ommon law compels employees to act in the best interests of the employer and to behave honestly. Employees who criticise or make derogatory remarks about their employer, institution or profession on social media open themselves up to disciplinary proceedings.[33]

Phungula adds that an employee who publishes comments about their employer, which are later proven to have the potential to damage the reputation of the employer, may be fairly dismissed.[34] In advancing this argument, Phungula relies on a series of arbitral awards from the Commission for Conciliation, Mediation and Arbitration (CCMA), including the case of *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (the "*Media Workers Association* case").[35]

The *Media Workers Association* case concerned an applicant, a radio presenter, who had been dismissed following criticism of his employer on his Facebook account.[36] In these posts, the employee had criticised the station's board and suggested that the board had protected the station manager, who was a criminal.[37] The applicant was then charged with misconduct in bringing the employer's name into disrepute and, upon a finding of guilt, the chairperson of the hearing recommended his dismissal.[38] However, the board decided not to dismiss the applicant, subject to him retracting the statements and issuing an apology.[39]

The applicant subsequently failed to comply with this condition and was dismissed, after which he referred an unfair dismissal dispute to the CCMA. The CCMA found that his

32 Phungula (n 2) 512.
33 Coetzee (n 1) 8.
34 Phungula (n 2) 512.
35 *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA)
36 the *Media Workers Association* case par 5.1.
37 *Ibid*.
38 *Ibid*.
39 the *Media Workers Association* case par 5.2.

dismissal had been fair, as the remarks damaged the employer's reputation.[40] The commissioner considered the applicant's refusal to apologise as an indication of a lack of remorse.[41] At no point did the commissioner engage in any balancing between the employee's right to freedom of expression and the employer's interest. In so doing, the commissioner seemingly suggests that a dismissal would be fair as soon as the employer establishes that the remarks made by the employee had the potential to harm the employer's reputation.

While these cases are largely supportive of the suggestion by Phungula that any expression which has the likelihood of harming the employer's reputation can be reasonably limited, the issue is not so clear cut. There are also CCMA awards which have recognised that an employee's public criticism of their employer may, in some instances, be protected speech for which dismissal would not be fair. The most well-known case in this respect is the case *Motsoeneng v the South African Broadcasting Corporation SOC Ltd* (the *Motsoeneng* case).[42]

The *Motsoeneng* case concerned a suspended senior employee who had called a press conference in which he raised grievances in respect of his employer, its board, and the judge of the Labour Court who was adjudicating his dispute with the employer.[43] He was subsequently dismissed over these remarks which had brought the employer's name into disrepute and violated the employee's duty to act in the employer's interest.[44] Motsoeneng then referred the dispute to the CCMA, alleging that his dismissal was unfair and that a press conference prohibition violates his freedom of expression.[45]

The commissioner in the *Motsoeneng* case considers the right to freedom of expression in much more detail than other similar CCMA awards, and recognises that an employee is entitled

40 the *Media Workers Association* case par 5.7.
41 *Ibid*.
42 *Motsoeneng v the South African Broadcasting Corporation SOC Ltd* (2018) 39 ILJ 2809 (CCMA).
43 the *Motsoeneng* case par 18.
44 *Ibid*.
45 the *Motsoeneng* case par 25.

to freedom of expression in relation to their employer.[46] The commissioner reiterates that an employee has an important duty "to use his utmost endeavours to protect and promote the business and interests of the [employer] and to preserve its reputation and goodwill".[47] However, the award recognises that there are certain instances in which it may be permissible for an employee to criticise their employer. According to the *Motsoeneng* case, an employee's criticism of their employer may attract judicial protection if:

> (a) the disclosure is made in the public interest (and typically does not involve a matter of only private concern);
>
> (b) the employee does not – either dishonestly or negligently –— indulge in misleading statements, and has no reason to doubt their veracity; and
>
> (c) the employee acts in good faith (*ie* with no ulterior motive, revenge or malice: without personalising the complaint and having exhausted internal remedies).[48]

Based on these requirements, it can be argued that there is no conflict between the award in the *Media Workers Association* case and the *Motsoeneng* case. Ultimately, the arbitrator in the *Media Workers Association* case made much of the fact that the employee had not exhausted internal remedies.[49] Similarly, in terms of the *Motsoeneng* case, public criticism of an employer by an employee would not attract judicial protection if there was a failure to exhaust internal remedies.[50] Nevertheless, it is also clear that dismissal would not be permitted in every instance where an employee publicly criticises their employer, even if such criticism poses reputational harm to the employer. Therefore, Phungula's argument that an employee's freedom of expression may be justifiably limited wherever the remarks pose the potential to harm the employer's reputation would not be entirely correct.

46 the *Motsoeneng* case par 51.
47 the *Motsoeneng* case par 52.
48 the *Motsoeneng* case par 51.
49 the *Media Workers Association* case par 5.7.
50 the *Motsoeneng* case par 51.3.

Nevertheless, much uncertainty exists in this area of the law, as the *Motsoeneng* case also used conservative language in formulating its recognition that public criticism of an employer "may potentially" enjoy judicial protection. Furthermore, in assessing whether the comments made by Motsoeneng were in the public interest, the arbitrator focused almost exclusively on the employee's duty to act in the best interest of his employer.[51] It can accordingly be said that South African labour law currently places substantial restrictions on employees' ability to publicly criticise their employer, albeit that these restrictions may be somewhat less severe than some academics have suggested.

4. Balancing the duty of the academic as an employee and academic freedom

If the approach suggested by Phungula and the line of cases he referred to are correct, academics would not be permitted to publicly criticise their employer where such criticism poses the risk of reputational harm. If, instead, the approach in the *Motsoeneng* case is followed, it would appear to provide some protection for academics to criticise their employer. Nevertheless, even this more permissive approach appears to be more restrictive than the legitimate restrictions on academic freedom recognised in terms of international law. In the following section, the existing law on employees' right to criticise their employer will be considered in the specific context of academic freedom and the restrictions on academic freedom recognised in terms of international law.

The CESCR recognises that academic freedom is not absolute and may need to be limited in certain circumstances, just as other forms of expression may need to be limited. In the CESCR's view, these limitations are brought about by academics' countervailing duties, which include the duties to "respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds".[52] Therefore, academic freedom

51 the *Motsoeneng* case par 52.
52 par 38 of General Comment 13 of 1999.

would not permit an academic to propagate hate speech or discriminatory speech against any person on one of the prohibited grounds.[53] These are important limitations to academic freedom.

The *Motsoeneng* case does not explicitly mention that the speech in question must not amount to hate speech to enjoy protection. However, this requirement does exist as the *Motsoeneng* case envisages an additional limitation to the right to freedom of expression brought about by the employment relationship. Hate speech does not enjoy protection in terms of the right to freedom of expression,[54] which would have made the specific listing of a hate speech exclusion in the *Motsoeneng* case otiose. The CESCR does not explicitly recognise any other limitations on the right to academic freedom and academics' ability to criticise their employer.

Nevertheless, certain other limitations are recognised by other human rights bodies, such as the ECtHR. The ECtHR has recognised that the permissible bounds of protected speech may be exceeded where there is no factual basis for the expression.[55] However, this does not mean that a statement must be true to enjoy protection in terms of the right to freedom of expression. In the context of academic freedom, the ECtHR has held that what is required is merely a reasonable factual basis for the statement, particularly where the statement is made during an academic debate in the public interest.[56] This limitation is broadly in line with the recognition by the *Motsoeneng* case that an employee should not deliberately or negligently make misleading statements.

53 The prohibited grounds are set out in art 2(2) of the International Covenant on Economic, Social and Cultural Rights and are the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

54 s 16(2) of the Constitution. See also *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at par 78 where the Constitutional Court explains that "[h]ate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy".

55 *Jerusalem v Austria* Application no. 26958/95 (27 February 2001) par 47.

56 the *Sorguç* case par 32.

The limitation in the *Motsoeneng* case requiring the disclosure to be in the public interest also appears justifiable. However, the approach by the ECtHR in relation to academic freedom differs fundamentally concerning when a disclosure would be in the public interest. The *Motsoeneng* case seems to suggest that a disclosure which risks harming the reputation of the employer would only be in the public interest in exceptional circumstances.[57] In contrast, the ECtHR presumes that an academic who expresses an opinion in relation to "areas of their research, professional expertise and competence" is acting in the public interest.[58] It further presumes that open and frank debates about the functioning and operation of HEIs is in the public interest.[59]

The public nature of an HEI may accordingly require an adaptation of the principles of the *Motsoeneng* case in an academic context. This would be better aligned with the *Yazici* case discussed earlier, where the ECtHR recognised the need for a greater tolerance to criticism by academics and academic institutions.[60] While the public may have a less pressing interest in an ordinary private employer's operations, its interest in an HEI's operations is much greater. Therefore, in the context of academic freedom, the public interest requirement – while relevant – must be interpreted within the unique context of an HEI, where criticism would be presumed to be in the public interest unless the academic in question acted in bad faith.

Therefore, the requirement in the *Motsoeneng* case that the employee must have acted in good faith is also generally reasonable. However, requiring the raising of the concerns internally should not always be a strict prerequisite for the speech in question to enjoy protection. While there is certainly value in having the concerns raised internally, criticism may also arise in respect of matters that are generally known within an institution even if there had not been a formal grievance process followed. The mere fact that concerns had not been raised internally

57 the *Motsoeneng* case par 52.
58 the *Erdoğan* case par 41.
59 the *Sorguç* case par 32.
60 the *Yazici* case par 56.

should not be sufficient to deprive the speech of its protected nature. This approach also accords better with that of the ECtHR, considering that the applicant in the *Sorguç* case had not raised any internal dispute. Yet, this did not affect the protected nature of the speech or result in the speech falling outside the bounds of academic freedom.

5. Conclusion

It has become increasingly clear that academics need to balance their obligations as an employee with their obligations as an academic. As demonstrated in this chapter, an academic is restricted in the extent to which they may publicly criticise their employer as a matter of labour law. These restrictions exist notwithstanding the fact that international law generally recognises that academic freedom includes an academic's right to criticise their own institution or employer.

The extent of the limitation on an employee's ability to criticise their employer is also uncertain. Some academics and a series of CCMA awards suggest that an employee's right to freedom of expression may be justifiably limited as soon as the employee's speech poses a reputational risk to the employer. This is particularly problematic in the context of academic freedom and the freedom to criticise one's employer, as most forms of criticism almost invariably present some risk of reputational harm to the institution. An interpretation that is too quick to recognise a limitation on an academic employee's right to freedom of expression as justifiable would not accordingly align with the protection granted to academic freedom in terms of international law. Nevertheless, the *Motsoeneng* case represents a welcome recognition that an employee may publicly criticise their employer in certain instances. Despite the value of this recognition, the *Motsoeneng* case and its requirements for an employee's criticism of their employer is still more restrictive than the permissible limitations imposed on academic freedom by international law. Therefore, the principles in the *Motsoeneng* case should be used in a modified form when considering the balancing exercise between a university as an employer's rights and that of its employee as an academic.

Criticism of the operations of an HEI which had been made by an academic in good faith should generally be presumed to be in the public interest. The public nature of an HEI and its important role in society diminishes the employer's right to demand that its employees prevent criticism of it that could harm its reputation. Nevertheless, it is axiomatic that such criticism should have a reasonable foundation in fact and not be driven by "ulterior motive, revenge or malice".[61]

The courts are empowered to develop the common law in order to promote the spirit, purport, and object of the Bill of Rights.[62] In recognising the important value of academic freedom, the courts ought to develop an academic employee's common law duty of good faith to recognise these instances where an academic may legitimately criticise their employer without attracting disciplinary action.[63] This development of the common law would ensure a better alignment between labour law and the protection of academic freedom as a fundamental component of academic employees' right to freedom of expression and the right to education.

61 the *Yazici* case par 57.

62 s 39(2) of the Constitution.

63 The Council of Europe has, for example, recognised that academic freedom would be of little practical value if the exercise thereof is frequently visited with the sanction of dismissal. Therefore, the council has noted that academic freedom must be capable of being exercised "without the fear of disciplinary action, dismissal or any other form of retribution". See in this respect Council of Europe (CoE) CM/Rec(2012)7 "Committee of Ministers (COM) on the responsibility of public authorities for academic freedom and institutional autonomy" 2012.