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# A Platform for Discipline: Social Media Speech and the Workplace

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### **A Platform for Discipline: Social Media Speech and the Workplace**

David Mangan

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## **A Platform for Discipline: Social Media Speech and the Workplace**

David Mangan

### **Abstract:**

The common law engages with social media in a manner that overlaps with defamation: seeking to balance the competing interests of free speech and protection of reputation. Employment law prompts a question as to how the law on this topic is developing. Adjudication of the concept of business reputation is the comparative focal point. Canadian employment law is developing a balance between protecting business reputation and workers' free speech (though there are issues arising therein). In the UK, however, the term has been more of a blunt tool. As a result, a juxtaposition has arisen: speech in traditional media is better protected than that of workers using virtual social platforms. Using the contrasting case law as an example, the argument pursued here is that law must develop in a manner that establishes scope for remarks by workers on user-generated content platforms while protecting business reputation. To permit discipline for any form of social media remark would be inconsistent with the spirit of twenty-first century defamation law that has expanded protection for speech.

### **Keywords:**

Labour, Employment, Tort, Defamation, Social Media, United Kingdom, Canada

### **Author(s):**

David Mangan

Osgoode Hall Law School

York University, Toronto

E: [dmangan@osgoode.yorku.ca](mailto:dmangan@osgoode.yorku.ca)

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## **I. Introduction**

Two intersecting points of departure ground the present study. First, employment law provides an enhanced setting from which to observe the balancing of competing interests arising in the law’s interaction with social media.<sup>1</sup> Second, social media challenges the legal understanding of free speech. By its boundless form, social media naturally brings about comparisons amongst different locales. The jurisdictions under study here are English and Canadian labour/employment litigation where social media use has been the basis for discipline up to and including dismissal.<sup>2</sup> These two jurisdictions have been selected for the reason that they offer contrasting adjudication of the same issue (worker discipline for social media use) set against the background of harm to business reputation. There is also an instructive gap in treatment of this issue between these two countries precipitated by the development of online user-generated content: the extent to which speech is associated with the workplace. Discipline for speech on social media hints at a categorization of work where certain positions (such as academic) inherently provide a wider scope for protection of free speech while other jobs (noted in the employment decisions below) perceive of a restricted space for free expression. The focus in this paper remains on challenging the latter grouping.

The concept of business reputation is at the core of this examination; a phrase used to justify discipline based on expression via social media.<sup>3</sup> A divergence of opinion arises within the parameters of this term based on jurisdiction. Canada protects business reputation with space for workers’ free speech. In comparison, the UK has not developed much nuance and an

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<sup>1</sup> Professor Oliphant illustrated the influence of the workplace in legal developments, namely tort law, in K. Oliphant, “Tort Law, Risk, and Technological Innovation in England” (2014), 59 *McGill Law Journal* 819-845.

<sup>2</sup> The public law considerations will not be discussed here. There are relevant statutes in this area such as in the UK s.127(1)(a) of the *Communications Act 2003* which makes it an offence to send a message using a public electronic communications network if that message is “grossly offensive or of an indecent, obscene or menacing character”. On this provision see, D. McGoldrick, “The Limits of Freedom of Expression on *Facebook* and Social Networking Sites: A UK Perspective” (2013) 13 *Human Rights Law Review* 125-151. On public order considerations see J. Rowbottom, “To Rant, Vent and Converse: Protecting Low Level Digital Speech” (2012) 71 *Cambridge Law Journal* 355-383; J. Rowbottom, “In the shadow of the big media: freedom of expression, participation and the production of knowledge online” (2014) *Public Law* 491-511 [Rowbottom (2014)].

<sup>3</sup> The Ontario Court of Appeal’s decision in *Barrick Gold Corp v Lopehandia* (2004), 71 O.R. (3d) 416, [44], speaks to the landmark change in defamation where the internet is the vehicle: the “distinctive capacity of the Internet to cause instantaneous and irreparable damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications”.

unsavoury juxtaposition has resulted: speech in the mainstream media is better protected than that of workers on social media. Using the UK as an example of a more restrictive legal treatment, the situation is cause for pointed consideration, especially given the underlying ethos of defamation law reforms (in the jurisdiction) to expand protection for a wider range of speech.<sup>4</sup> A worker who raises an issue regarding her workplace or the products made (services provided) by her employer should be afforded some opportunity to comment<sup>5</sup> and not automatically be subjected to discipline, let alone termination. There is scope for more engaged discussion. Just as in defamation law, there are limitations, but there also should be a *prima facie* right to render critical opinions on social media subject to those limitations, even in the workplace setting. Workers' speech on social media is subject to the legitimate and yet seemingly expanding interpretation of business interests. A basic right to free expression should be adapted to social media in the employment setting and this basic right should not be restricted by jurisdiction.

This analysis begins by exploring the distinction between libel and slander, concluding that social media (as a written form of conversation) converts slander into libel. The intersection between employment law and social media is then unpacked. An examination of relevant English cases reveals a strictly construed concept of business reputation resulting in a low threshold for the discipline (if not dismissal) of workers expressing their opinions on social media platforms. Contributing to this situation are expansive contract clauses granting employers a far-reaching power to discipline or dismiss workers as result of online comments. The chilling effect on speech is evident; contrasting unfavourably with the tenor of the Defamation Act 2013 and the associated effort to protect a wider spectrum of speech. In comparison, Canadian employment decisions demonstrate greater nuance in adjudicating this same matter; thereby underlining scope for a more balanced approach. While Canadian cases are more nuanced, there remain developing issues within this body of law which will be canvassed. Overall, the aim in the present work is to outline how law may accommodate speech *and* business interests in the employment setting.

## **II. From slander to libel: the conversion of speech in social media**

Defamation has long made the distinction between spoken and written speech. Once the common law courts took jurisdiction over defamation law (from the Star Chamber), the view emerged that the written form was of a more severe nature. In *King v Lake*<sup>6</sup> Hale C.B. ruled that the written form “contains more malice than if they had been once spoken”.<sup>7</sup> The decision of Chief Justice Mansfield in *Thorley v Lord Kerry*<sup>8</sup> marked a useful point of change in the courts' attitude towards written and spoken forms of defamation.<sup>9</sup> Identifying the precedent “established by some of the greatest names known to the law, Lord Hardwicke,

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<sup>4</sup> As set out in the *Defamation Act 2013* and the common law developments leading up to its passage.

<sup>5</sup> The remark of Sedley LJ equally applies to both the workplace and the public space, “Freedom only to speak inoffensively is not worth having”: *Redmond-Bates v DPP* (1999) 163 JP 789.

<sup>6</sup> (1668) Hardr. 470. Kaye has criticized taking this meaning from *King*: J.M. Kaye “Libel and Slander – Two Torts or One?” (1975) 91 *Law Quarterly Review* 524-539, 531. Others have not adopted this line of argument. See for example L. McNamara, *Reputation and Defamation* (Oxford: OUP, 2007) who does not make reference to Kaye.

<sup>7</sup> The decision in *Austin v Culpepper* (1683) 2 Show. K.B. 313 has been included in some literature as asserting a similar point. There, the defendant had forged an order of the Chancery Court stating that Sir John Austin should “stand committed”. Culpepper's conduct however should distinguish this decision.

<sup>8</sup> (1812) 4 Taunt. 355 [*Thorley*].

<sup>9</sup> J.M. Kaye “Libel and Slander – Two Torts or One?” (1975) 91 *Law Quarterly Review* 524-539; L. McNamara, *Reputation and Defamation* (Oxford: OUP, 2007), 91 ff.

Hale, ... Holt C.J.”, though contrary to his personal view,<sup>10</sup> Mansfield C.J. concluded “an action for a libel may be brought on words written, when the words, if spoken would not sustain it.”<sup>11</sup> The distinction owes to arguments such as “written scandal is more generally diffused than words spoken”.<sup>12</sup> Although the permanence of form allowed comments to be read by a wider audience, Mansfield C.J. went on to suggest that making a remark in a public place (such as the Royal Exchange in London) “may be much more extensively diffused than a few printed papers dispersed”.<sup>13</sup> These decisions suggest concern with media that may reach the most widespread audience. Today, the spoken word, however, reaches a smaller audience (even if shouted in the Royal Exchange) than social media (which itself transcends boundaries of many forms). And so, there are two foundations taken from the history of the law of defamation for application today. First, libel is more serious than slander because it may be disseminated to a larger audience. Second, the medium that reaches a more vast audience is of greater concern to the courts. Following these points draws attention to a significant (as well as historically important) conclusion: social media converts slander to libel insofar as the medium is considered to be the equivalent of having a conversation. Put more generally, social media makes speech actionable owing to the historical distinction between slander and libel.<sup>14</sup>

Prior to social media, workers would voice their objections at a social gathering, perhaps the end of the workday or at a break. Remarks, which at one time may have been made in person, are now additionally “posted” to a worker’s social media page and have formed grounds for termination (for example by “making disrespectful, damaging and derogatory comments”).<sup>15</sup> The belief that social media is “only” another medium for oral discussion remains ubiquitous. In *Pridgen v University of Calgary*<sup>16</sup> one of the plaintiffs offered the following understanding of *Facebook*: “it’s a social networking site, things that are said on here are not designed to be held up to intense scrutiny, it is merely the equivalent of having an online conversation. It is as public as ... standing in the middle of the University ... hallway and saying the exact same thing.”<sup>17</sup> Focusing solely on the argument that social media is the equivalent of standing in a hallway and making a statement,<sup>18</sup> this understanding of the medium does not fit with long-held distinctions in the law regarding liberties attached to speech.<sup>19</sup> The appeal of social media platforms such as *Facebook* has also pushed its way into workplace adjudication:

it mimics traditional social interactions. The ability to include or exclude those who can share in the conversation is important. Many subscribers, in particular younger persons, regard *Facebook*

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<sup>10</sup> “If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken”: *Thorley*, 366.

<sup>11</sup> *Ibid*, 365.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*.

<sup>14</sup> An associated idea is found in the law of evidence and the developments around hearsay. Historically there was an aversion, but more recently the scope for the acceptance of such evidence has expanded. A full elaboration of this point is beyond the scope of the present work. There has been a movement to assess hearsay as a matter of weight instead of excluding it *prima facie*. On this matter see the examples: in the UK the *Civil Evidence Act 1995*, c.38 and in Canada the common law developments outlined in S.N. Lederman, A.W. Bryant & M.K. Fuerst, *Sopinka, Lederman & Bryant The Law of Evidence* 4<sup>th</sup> ed. (Markham: Lexis Nexis, 2014).

<sup>15</sup> *Lougheed Imports Ltd v UFCW, Local 1518* (2010) CLRBR (2d) 186, [56].

<sup>16</sup> 2012 ABCA 139 [*Pridgen*].

<sup>17</sup> *Ibid*, [32].

<sup>18</sup> The plaintiff also expressed his view of how social media is used: “I hesitate to believe that future employers will go to Facebook sites looking for statements made by first year students and take them with any degree of seriousness”: *Pridgen*, [32].

<sup>19</sup> The argument that Twitter comments are akin to a private conversation was expressly rejected in *Professional Firefighters Association, Local 3888 v Grievance (Edwards)*, 2014 CanLII 62879, [178].

as conduct engaged in on personal time, unconnected to the workplace, analogous to sharing a beer with colleagues and friends or getting together with friends to confide details about their jobs.<sup>20</sup>

So novel is the perception of the medium that terminated workers have contended: “How could I have assumed that a release on a Facebook page would be grounds for dismissal?”<sup>21</sup> Disconnect<sup>22</sup> between users’ perceptions of the place of the medium and legal distinctions<sup>23</sup> adds to this complicated topic and also confirms the impact of the distinction between slander and libel<sup>24</sup> where, for the most part, the latter has been actionable *per se*.<sup>25</sup> A published remark carries the significant potential of lowering the plaintiff amongst right-thinking members of society<sup>26</sup> because it is indeterminately accessible: the opinion of anyone who sees the remarks may be influenced. What may be a trivial difference to the layperson is in fact a significant distinction within the law.

The permanent form of social media comments arguably places the individual at home in a similar position to a publisher defendant in the common defamation cases; for this form of communication must be viewed as something beyond what was previously contemplated with regards to this tort.<sup>27</sup> As noted by the European Court of Human Rights, the internet, particularly social media as a form of communication via the internet, “has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”<sup>28</sup> The decision in *Lougheed Imports Ltd (cob West Coast Mazda) v United Food and Commercial Workers International Union*<sup>29</sup> illustrates. Two union activists who had been part of a union certification campaign at Lougheed were terminated after a successful certification vote. The union argued that this was anti-union animus. Lougheed contended that there was just cause<sup>30</sup> for these dismissals

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<sup>20</sup> *Groves v Cargojet Holdings Ltd.* [2011] C.L.A.D. 257 [*Cargojet*], [77]. Similarly, the grievor in *Toronto Professional Firefighters Association, Local 3888 v Grievance (Edwards)*, 2014 CanLII 62879, [67], was quoted as contending that Twitter was a locale for random thoughts to be expressed and that these expressions were not taken seriously.

<sup>21</sup> *Cargojet*, [77].

<sup>22</sup> Voorhoof and Humblet have called this a “virtual conflict zone”: D. Voorhoof & P. Humblet, in “The Right to Freedom of Expression in the Workplace under Article 10 ECHR” in F. Dorssemont, K. Lorcher & I. Schomann, *The European Convention on Human Right and the Employment Relationship* (Oxford: Hart, 2013), 237-286, 238.

<sup>23</sup> The employer’s successful argument in *Canada Post Corp v CUPW*, (2012), 216 LAC (4<sup>th</sup>) 207 [83], is of note in this instance: “The Employer suggested that there is a fundamental difference between ‘bar talk’ and social media: social media is accessible for months or years; it has a huge potential audience; the contents are discoverable through key word searches, and the contents are easily copied and forwarded to others.”

<sup>24</sup> Under the *Defamation Act 1952*, s.16(1) words shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning”; the *Cable and Broadcasting Act 1984*, s.28 extends a statement in s.16(1) of the *Defamation Act 1952* to cable programme services; the *Theatres Act 1968*, s.4(1) states: “the publication of words in the course of a performance of a play shall . . . be treated as publication in permanent form.”

<sup>25</sup> In Canada and the UK, libel has been actionable *per se* but it is contended that with s.1 of the UK *Defamation Act 2013* (a claim must meet a threshold of seriousness) this is no longer the case. And so, what is characterized as converting libel into slander is to say that social media, as an online conversation, is a transcript of a conversation and as such places the ‘speakers’ in a more actionable position.

<sup>26</sup> *Sim v Stretch* [1936] 2 All E.R. 1237 (H.L.). *Sim* is a decision which remains of contemporary importance: *Thornton v Telegraph Media Group Ltd.* [2010] EWHC 1414 (Q.B.).

<sup>27</sup> The Australian High Court in *Dow Jones v Gutnick* (2002) 210 CLR 575, [64] described the internet as “not simply an extension of past communications technology”.

<sup>28</sup> *Yildirim v Turkey* [2012] ECHR 2074, [56].

<sup>29</sup> (2010) 186 CLRBR (2d) 82 [*Lougheed*].

<sup>30</sup> In Canada the test for just cause is found in *William Scott & Company Ltd v Canadian Food and Allied Workers Union, Local P-162* [1977] 1 Can LRBR 1: (1) the seriousness of the employee’s offence; (2) whether

based on the *Facebook* posts of the workers.<sup>31</sup> The Labour Board found that the dismissal was just because the aim of the comments was to denigrate supervisors and managers.<sup>32</sup> Of particular importance was the rejection of the union's claim that *Facebook* comments were akin to inappropriate verbal statements one would hear on a shop floor regularly and should therefore not be treated as anything more than "shop floor" banter.<sup>33</sup> An important factor for the Board, the remarks gained greater force because of the medium (which together reached almost 500 individuals). The platform here took the situation past "'moaning' or 'gripping'" to a more serious level where harm to the employers' business interests was found.<sup>34</sup>

A similar tension to that found in defamation maps onto social media in employment law; that is, (commercial) reputation interests versus freedom of expression.<sup>35</sup> The following example sets up the more detailed discussion below. The Canadian province of Alberta's *Public Sector Services Continuation Act 2013*<sup>36</sup> defined the novel term "strike threat". The preamble stated the statute's purpose: to deal with public services "of the utmost importance" to the people and functioning of the jurisdiction where "any withdrawal or threatened withdrawal of those services would be contrary to the public interest and could compromise health or safety of, or otherwise cause hardship" to the province. "Strike threat" included "an act or threat to act that could reasonably be perceived as preparation for an employees' strike". If an employer believed a strike threat was occurring, the Act permitted an application to the provincial labour board for a declaration that a strike threat was occurring.<sup>37</sup> If a strike threat was found to be occurring, the Board would issue a directive requiring the workers, trade union and its executive to cease the impugned conduct.<sup>38</sup> Moreover, where a strike threat declaration has been made,<sup>39</sup> the directive may also bar "any future strike threat made for substantially the same reasons in respect of the employees in the bargaining unit".<sup>40</sup> The available penalties to the union are remarkably thorough: the employer may suspend deduction and remittance of union dues;<sup>41</sup> this suspension "must continue for a period of 3 months for the first day or partial day on which the strike threat ... occurs plus one additional month for each additional day or partial day on which the strike threat ... continues";<sup>42</sup> the Board may make an "abatement order" amounting to "\$1 000 000 for each day or partial day on which a strike threat ... occurs or continues";<sup>43</sup> the employer may recover "eligible losses" in addition to these penalties<sup>44</sup> as well as other remedies of

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the employee's conduct was premeditated, repetitive or provoked; (3) the length of the employee's record of service; (4) whether the employer engaged in progressive forms of discipline prior to dismissal; and (5) whether the employee's dismissal is in line with the employer's policies and past record.

<sup>31</sup> The impugned comments were - "my Boss ... [is] A COMPLETE JACK-ASS not just Half-a Tard" and "[the employer] is a f[...] joke...don't spend your money there as they are f[...] crooks and are out to hose you":

*Lougheed*, [35], [37].

<sup>32</sup> *Ibid*, [98].

<sup>33</sup> *Ibid*, [97]-[98].

<sup>34</sup> *Ibid*, [97].

<sup>35</sup> Freedom of expression rights have been found in both the public and private sector employment settings: *Heinisch v Germany* [2011] IRLR 923 (ECtHR), [46]; *Fuentes Bobo v Spain* (2001) 31 EHRR 50 (ECtHR), [38].

<sup>36</sup> c.P-41.5 [PSSCA], s.1(k). Assent December 11, 2013.

<sup>37</sup> Section 5.

<sup>38</sup> Section 5(4).

<sup>39</sup> Within twenty-four hours of the application pursuant to s.5(3)(b).

<sup>40</sup> Section 6(b).

<sup>41</sup> Section 6(1)(a),(b).

<sup>42</sup> Section 6(2).

<sup>43</sup> Section 9(9). The amount is due within seven days if the strike threat ends before the abatement order is made or if it continues, it is payable the day after the order is made.

<sup>44</sup> Section 11.



“monetary compensation for losses resulting from a strike threat ..., not later than 2 years after the day on which the strike threat ... ends”.<sup>45</sup> There was no potential for the union and employer to enter into an agreement for compensation relating to any of these penalties as it was expressly barred by the *PSSCA*.<sup>46</sup>

The Alberta Government may not have intended to include social media within the ambit of this legislation. Nevertheless, the likelihood of capture remains strong. If a trade union was found to be communicating with members, potential members or even making a statement to the public via social media (as one viable medium) to put forward a case for possible industrial action, the conduct is likely to fall under the spectrum of a “strike threat” and therefore would be subject to the aforementioned repercussions. This would include a discussion for the “setting of a vote or other poll of employees to determine whether they wish to strike”.<sup>47</sup> The completeness of this legislation makes it the definition of chilling insofar as the effect it would have on discussion amongst the union, its members and the public via social media. As such it is a useful illustration of the argument advanced here: there is a perceptible disconnect between freedom of expression under civil law as compared with the workplace setting.

### **III. The intersection between social media and employment**

Social media offers peril and opportunity for employing entities. Different groupings of social media considerations for online comments posted by a worker may be discerned:<sup>48</sup> use of an electronic communication device provided by the employer; use of the employer’s network (including for personal reasons); remarks made about work-related materials where an employee uses his/her own electronic device (or that of a non-co-worker);<sup>49</sup> finally comments by a worker on his/her own electronic device or that of a non-co-worker where the subject matter may be considered offensive in some manner (even if unconnected to the workplace). Some employers may hesitate in adopting an off-duty and on-duty applicable policy.<sup>50</sup> The dominant view of employers regarding social media is likely that of its business utility for public outreach. Many companies now have *Facebook* pages where they “want people (including employees) visiting the company’s *Facebook* page and expressing positive sentiments about working for us and about our products.”<sup>51</sup> The business utility of social media is not explored here but it remains an important mitigating factor in this discussion: some instances illustrate the desire is to use social media for the enterprise’s own purposes while punishing for “social” use which does not conform. As will be seen below, contract

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<sup>45</sup> Section 12(1), (2).

<sup>46</sup> Section 8.

<sup>47</sup> Section 1(k)

<sup>48</sup> The growth of mobile internet access (as noted in K. Perset, “The Economic and Social Role of Internet Intermediaries”, OECD Digital Economy Papers, No. 171, OECD Publishing) suggests the continuation of nebulous issues surrounding user-generated content and the workplace.

<sup>49</sup> Of note for multinational employers, in creating a policy, the US *National Labor Relations Act* 29 USC § 151 (1935) [*NLRA*] may be a factor as it protects speech about working conditions; a matter discussed further below.

<sup>50</sup> For example, “In light of our policy direction being that employees should not be using social media tools to communicate for business purposes, it felt wrong to provide guidance on how one should optimize their use for business purposes”: M. Crestohl, “Developing a Social Media Policy: TD Bank Group’s Experience” in *The Law Society of Upper Canada Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age* (Toronto: Irwin Law, 2013), 195-202, 198.

<sup>51</sup> J. O’Reilly, “Reflections on the Development of a Social Media Policy: Loblaws” in *The Law Society of Upper Canada Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age* (Toronto: Irwin Law, 2013), 203-205, 204.

clauses remain exceptionally useful tools for protecting businesses from their workers' social media usage.<sup>52</sup>

Social media has been adjudicated using tests which pre-date the medium. Although this is an unsurprising point, given the common law system, it does highlight a gap in consideration of the challenges arising from the innovation of the virtual social platform. Within this gap sits troubles, one of which is explored here. Treatment of social media speech by workers<sup>53</sup> stands at a distance behind the more robust engagement that reforms in defamation law (common law and statute) have encouraged. This characterisation applies most particularly to the UK.

In this section, engagement of the topic is as follows. First, an example of the common law applying to social media will be used to demonstrate how "old law" may be adapted to a new setting. Second, UK employment cases where termination of a worker based on social media comments is the issue will be discussed. These decisions will be contrasted with those in Canada in each subsection. The theme introduced below and explored in each of the ensuing subsections is that the worker's impugned comments on social media are generically assessed based on the presumption of a negative impact on the business reputation of the employing entity.

#### **(i) Adapting the common law to social media**

While the subject matter is new, common law principles can still be applied. One example is the decision in *Byrne v. Deane*<sup>54</sup> where illegal machines were removed from a club following a tip to police. On the wall where the games had formerly been, someone had written: "But he who gave the game away may he byrnn in hell and rue the day." Byrne, taking this to be a reference to himself, sued in defamation. The court rejected the claim, finding that being called a good subject of the King does not ground a claim in defamation. An analogy has been drawn from this decision. The club owned the wall on which the message had been written by another individual which, allegedly, defamed the plaintiff. The structure is similar to issues that arise in social media where there is an author of a comment on a virtual wall for an unlimited audience to see. In *Byrne*, the owner of the wall was sued because he had control over that space (he had let the writing remain on the wall, despite protestation to the contrary). The actual writers were not known and were not sued. Today, a similar scenario has arisen where anonymous comments or posts by those employing pseudonyms are the subject matter of a defamation claim.<sup>55</sup> In lieu, those who have control over that space are sued instead. It is an important reminder that despite the law being said to lag behind

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<sup>52</sup> The view asserted here is that the potential for an employer to dismiss (coupled with case law vindicating this power) has a deterrent effect on other workers in their social media habits regarding work.

<sup>53</sup> Vickers has identified different forms of speech in the workplace: whistleblowing, political speech, principled dissent and general comment. She has argued at length that "some form of employment protection is required for employees who suffer work based sanctions for the exercise of their freedom of speech. Protection may be needed at work, regardless of whether the speech itself took place at work": L. Vickers, *Freedom of Speech and Employment* (Oxford: OUP, 2002), 237, 15.

<sup>54</sup> [1937] 1 KB 818 [*Byrne*]. This decision has given rise to further discussion – on which see *Oriental Press Group Ltd v Fevaworks Solutions Ltd*. [2013] HKFCA 47 (where the court criticized *Byrne*) as well as A. Mullis & R. Parkes QC (eds) *Gatley on Libel and Slander* 12<sup>th</sup> edn (London: Sweet & Maxwell, 2013), 6.26.

<sup>55</sup> To some extent the matter is addressed in the UK's *Defamation Act 2013*, s.5 as well as the European Union's *Electronic Commerce Directive* Dir. 2000/31/EC brought into force in the UK in *Electronic Commerce (EC Directive) Regulations 2002* SI 2002/2013. This topic is explored further in A. Vamialis, "Online defamation: confronting anonymity" (2013) 21 *International Journal of Law and Information Technology* 31-65.

technological advances, the common law system is not without its own multipurpose tools. *Byrne* is an example of the flexibility the common law system possesses.

What is flexibility in one instance can be rigidity in another. English law has long held a corrective view of worker conduct insofar as it may taint an employer's business. A precedent is the Court of Appeal's decision in *Pearce v Foster*<sup>56</sup> where the court upheld Pearce's dismissal. Pearce was hired under a ten-year contract of employment (containing no dismissal provisions) as principal clerk to conduct foreign correspondence for the defendant merchant firm. He was also consulted as to which securities to purchase but was not involved in financial aspects of the firm's business. It was later established that he had speculated on the stock exchange with vast sums of money (though not the firms' or clients' money). The dismissal was upheld because the conduct was "wholly incompatible with the due and faithful performance of his duties".<sup>57</sup> Elaborating on the rationale for upholding the dismissal, Lindley LJ wrote: "the plaintiff having habitually conducted himself in such a manner as would injure the business of his employers if his conduct were known, they might dismiss him upon discovery of such conduct. It is not necessary for them to prove that they have in fact suffered by reason of his conduct."<sup>58</sup> The potential for harm was sufficient. The defendants were not required to adduce evidence of actual harm. For this reason, *Pearce* is authority for the proposition that a worker cannot put her interests ahead of her employer's. The scope for protecting business interests is wide and the need to prove harm has rarely been sought out by triers of fact.

Social media issues in employment law compel consideration of the law in its complex yet engaging interconnectedness. Employers have well-founded concerns about reputational harm arising from negative comments by employees about the workplace. And yet, should employees not be free to speak their minds and enjoy the protection of the defences in the tort of defamation (particularly the renovated law in England)? The punishment of dismissal is an extreme response<sup>59</sup> to such a nuanced challenge. The juxtaposition of commercial and free speech is the focus of the ensuing discussion amongst the aforementioned jurisdictions.

## **(ii) Workers, social media and the UK**

There is not an extensive body of reported decisions on the topic of social media and employment in the UK. Even fewer move beyond the employment tribunal stage. One of the more noted rulings is *Smith v Trafford Housing Trust*.<sup>60</sup> The court expressed "real disquiet" at the disciplinary action against the plaintiff for expressing his opposition to same sex civil marriage on his *Facebook* page. The court found that the defendant had breached the employment contract by demoting Smith as a result of his *Facebook* posting. However, Smith was only awarded a small amount being the difference between his contractual salary and the twelve weeks following the assumption of his new role. Smith's *European Convention of Human Rights* claims (arts. 9 and 10) were dismissed because his employer was a private entity and therefore the Human Rights Act 1998 was inapplicable.<sup>61</sup>

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<sup>56</sup> (1886)17 QBD 536 (CA) [*Pearce*]. This case continues to be relied upon in Canada as well. On this point see J. Maier, "Cause for Termination in the Age of Social Media" in *The Law Society of Upper Canada Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age* (Toronto: Irwin Law, 2013), 281-304.

<sup>57</sup> *Ibid*, 540 per Lord Esher.

<sup>58</sup> *Ibid*, 542.

<sup>59</sup> *Fuentes Bobo v Spain*, App. No. 39293/98, 29 February 2000 (ECtHR).

<sup>60</sup> [2012] EWHC 3221 (Ch.).

<sup>61</sup> The tribunal in *Gosden v Lifeline Project Ltd*. Case No: 2802731/09 [*Gosden*] also arrived at this conclusion.

This distinction, however, may suggest a false hope in the public sector.<sup>62</sup> It is not clear a public authority would have infringed upon a worker's expression rights under the *ECHR* given the *Smith* facts. The decisions culminating in the European Court of Human Rights' finding in *Eweida and others v UK*<sup>63</sup> demonstrate. There were four complainants in this case. One of them, Ms. Ladele, worked for a public authority as a registrar for births, deaths and marriages. Her case is of instruction here. Under the local authority's "Dignity for All" equality and diversity policy, she was compelled to officiate civil partnerships for same sex couples. As a Christian she objected.<sup>64</sup> Eventually she was dismissed. In total, three employees objected to conducting civil partnerships as part of their work. Ladele was the only one to bring a claim. In dismissing her case, the English Court of Appeal drew attention to the policy of the public authority and how Ladele's stand obstructed that legitimate aim:

it appears to me that the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served".<sup>65</sup>

The ECtHR was not overly elaborate in its decision.<sup>66</sup> It accepted the Court of Appeal's reasoning as falling within the margin of appreciation:<sup>67</sup> the public authority's aim was legitimate and undertaken in a reasonable manner.<sup>68</sup> With regards to the *Smith* facts, the case may be concluded in a similar manner.<sup>69</sup> It is worth noting that some decisions, such as *Smith*, have considered Lord Justice Mummery's often-discussed comments regarding the application of the *Human Rights Act, 1998* to a private sector employer in *X v Y*.<sup>70</sup> This reasoning has still not been successfully applied. Social media, free speech and the workplace may provide a situation within which to consider the matter anew.

UK employment law generally accepts potential harm to business reputation as grounds justifying discipline or termination of workers for work-related social media commentary. Enhancing protection for employers, a well-crafted policy<sup>71</sup> or contract clause about social media usage can permit an employer to take a wide variety of action. More generally, the

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<sup>62</sup> When the Human Rights Act 1998 was passed there were skeptical comments as to whether or not the rights would translate into the workplace. See for example, K. Ewing, "The Human Rights Act and Labour Law" (1998) 27 *Industrial Law Journal* 275; G. Morris, "The Human Rights Act and the Public/Private Divide in Employment Law" (1998) 27 *Industrial Law Journal* 293.

<sup>63</sup> *Eweida and Others v UK* [2013] IRLR 231 (ECtHR) [*Eweida*].

<sup>64</sup> At first, she made arrangements with other registrars but eventually the changes caused difficulties to the rota. As well, two gay registrars complained that they felt victimized by Ladele.

<sup>65</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [52]. The Court also went a bit further by indicating that there was a discrepancy between Ladele's basis for the claim (religion) and her own beliefs as compared to her religion: "Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished."

<sup>66</sup> A point also noted in R. McCrea, "Religion in the Workplace: *Eweida and Others v United Kingdom*" (2014) 77 *Modern Law Review* 277-307.

<sup>67</sup> *Eweida*, [106].

<sup>68</sup> *Ibid*, [105].

<sup>69</sup> This may leave open the possibility to distinguish the *Smith* facts on the grounds that the claimant made the statement outside of work and he expressed an opinion which he has a right to do.

<sup>70</sup> [2004] IRLR 625 (CA). See *Gosden; Irwin*, [77]; *Teggart v TeleTech UK Ltd.* [2012] NIIT 00704\_11IT, [12].

<sup>71</sup> Acas has noted the importance of a workplace policy: Acas "Social Media, Discipline and Grievances" <http://www.acas.org.uk/index.aspx?articleid=3378> (last accessed: 29 January 2015).

scope of workplace policies has been extensive regarding the medium. Social media policies will often include a broad provision defining unacceptable use of social media that causes offence or brings the company into disrepute.<sup>72</sup>

Part of the difficulty with this issue, employment law is challenged when faced with scenarios of dual identity. In *Game Retail Ltd v Laws*,<sup>73</sup> Laws held the position of risk and loss prevention investigator for Game Retail since 1997. Events leading to his termination seem to have begun when he used his personal Twitter account to monitor Game Retail stores' Twitter accounts (as part of his position). For a period of about a year, he posted (what the employer called) offensive, threatening and obscene tweets<sup>74</sup> which would have been received by those who followed him (a mixture of individuals and store staff under his work purview). Agreeing with the employer's characterization,<sup>75</sup> the Employment Appeals Tribunal overturned the lower tribunal's finding for Laws, ruling that his dismissal was within the reasonable band of responses. It should be noted, though, that the Employment Tribunal's conclusion included a reduction of 40% due to Laws' own role in the matter.<sup>76</sup> In finding against Laws, the EAT made the critical observation that Laws had not set any restrictions on his Twitter account and, more importantly it would seem, failed to create a separate work account. Though easy to admonish Laws for mixing work with personal remarks on Twitter, *Game Retail* hinted at the outcome if Laws had maintained two separate accounts and yet made the same impugned remarks.<sup>77</sup> Unfortunately, the EAT did not take up the invitation to provide clarity in this area.<sup>78</sup> It is suggested that if these same remarks were drawn to the attention of Game Retail, the retailer would have taken the same action and the likelihood (reinforced by the discussion of case law below) would be the affirmation of his dismissal by any subsequent tribunal.

Another case of mixing work and personal identities in social media, in *Crisp v Apple Retail (UK) Ltd*.<sup>79</sup> the employment tribunal ruled that Apple was justified in terminating Crisp's employment for posting comments critical of the Apple workplace and its products.<sup>80</sup> The issue was one of misconduct and the test in English law is rather elastic. The tribunal found that there was a genuine belief in the misconduct; there were reasonable grounds for this belief; and that a reasonable investigation of the allegation had been conducted.<sup>81</sup> Emphasis was placed on the "great importance of image to the company".<sup>82</sup> Even though Crisp did not identify himself as an Apple employee on his *Facebook* page, the tribunal was satisfied that the friends to which these comments were accessible (Crisp had restricted the visibility of his

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<sup>72</sup> A. Broughton, T. Higgins, B. Hicks and A. Cox, "Workplaces and Social Networking: The Implications for Employment Relations" (Brighton: ACAS/Institute of Employment Rights, 2009) [ACAS/IER], 19.

<sup>73</sup> UKEAT/0188/14/DA (3 November 2014) [*Game Retail*].

<sup>74</sup> *Ibid*, [9].

<sup>75</sup> *Ibid*, [50].

<sup>76</sup> *Ibid*, [16].

<sup>77</sup> Consider the EAT's equivocal remarks at [46]: "Generally speaking, employees must have the right to express themselves, providing it does not infringe on their employment and/or is outside the work context. That said, we recognise that those questions might themselves depend on the particular employment or work in question."

<sup>78</sup> *Ibid*, [52].

<sup>79</sup> ET/1500258/11 [*Crisp*].

<sup>80</sup> *Ibid*, [14].

<sup>81</sup> A test set out in *British Home Stores v Burchell* [1980] ICR 303 and modified by *Sainsbury's Supermarkets v Hitt* [2003] ICR 111 where it was held that the reasonableness of the investigation will be assessed based on the reasonable responses test. Section 98(4) of the Employment Rights Act 1996 also requires fairness in procedures which involves looking at the Acas Code on Disciplinary Procedures and the general requirements of a fair procedure. The tribunal's findings begin at *Crisp*, [34].

<sup>82</sup> *Crisp*, [39].

comments to only his friends) knew that Apple employed him. Despite the privacy settings, Crisp did not have control over what his friends did with the comments. In this case a co-worker passed on his comments to Apple.<sup>83</sup> The claimant's freedom of expression argument was dismissed on the basis his comments, first, were deemed unimportant as compared to political opinions and, second, their damaging potential to Apple's reputation.<sup>84</sup>

*Crisp* stands out as a particularly useful decision for the present discussion. Criticism of the ruling here refutes the first basis above and elaborates on the second. The tribunal was remarkably certain Crisp's comments were of low quality and as such not worthy of protection. However, the mention of "political opinion" as an example of higher quality speech is disconcerting: remarks made on social media pertaining to the workplace seem unworthy of protection. Some of the claimant's comments related to the functionality of Apple products and so the question (often posed in defamation cases) of a public interest would at the least be arguable, given the prominent sales of these items. Recalling defamation law, protection from reputational harm is not an absolute right for the law permits challenges to reputation. In this instance, the challenge by Crisp was that Apple products do not function properly. Furthermore, protected speech should not be limited to remarks about government. There is a public interest in discussing matters pertaining to private entities, for example, because of the products they sell to the public as consumers. In short, the tribunal's remarks on speech do nothing for the contemporary. The ranking of Crisp's speech is a difficult distinction to maintain and one that has not been witnessed in recent successful defamation actions. *Crisp* betrays a troubling negative perspective of social media speech.

Dismissals are upheld where the employment contract contains a clause (broad as it may be) governing social media use as it relates to the workplace. *Preece v JD Wetherspoon plc*<sup>85</sup> illustrates. It is another decision where a worker was terminated (for gross misconduct) based on her use of *Facebook* as a "vent for her upset and anger [one] evening"<sup>86</sup> following a series of encounters with customers. Wetherspoon had a broad policy on this subject in its employee handbook: "The respondent reserved the right to take disciplinary action should the contents of any blog, including pages on sites such as MySpace or Facebook 'be found to lower the reputation of the organization, staff or customers and/or contravene the company's equal opportunity policy.'"<sup>87</sup> Two customers had subjected Preece to physical and verbal threats during a shift. She asked them to leave. Later that evening an individual (allegedly the customers' daughter) made a series of abusive phone calls to her at the workplace. At this point, Preece began to comment negatively about the customers on her *Facebook* page. Other workers joined in. The customers' daughter saw these postings and made a complaint to the respondent. The tribunal found that: there was a genuine belief in the misconduct; there were reasonable grounds for this belief; and that a reasonable investigation of the allegation had been conducted.<sup>88</sup> Dismissal was within the range of reasonable responses.<sup>89</sup> Absent social media, Preece would likely have made the same comments orally but may have escaped termination (if not discipline) if that were the case. The platform provided a record of the violation of the employer's policy.<sup>90</sup> *Preece* exemplified how social media turns slander into

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<sup>83</sup> *Ibid*, [44]-[45].

<sup>84</sup> *Ibid*, [46].

<sup>85</sup> ET/2104806/10 [*Preece*].

<sup>86</sup> *Ibid*, [42].

<sup>87</sup> *Ibid*, [12].

<sup>88</sup> *Ibid*, [36]-[39].

<sup>89</sup> *Ibid*, [40].

<sup>90</sup> Provocation seemed irrelevant to the decision.

libel, regardless of the impressions social media users may have as to the function of the platform.

It is highly likely that potential (as opposed to actual) harm to the employer's business reputation will continue to ground a consistent line of authority; though this standard is questioned below. The decision of the European Court of Human Rights in *Pay v UK*<sup>91</sup> illustrates.<sup>92</sup> Lawrence Pay was a probation officer working predominantly with sex offenders. He was dismissed after his employer discovered that he was involved in activities including the merchandising of products connected with bondage, domination and sado-masochism as well as his performing in hedonist and fetish clubs (photographs of him involved in acts of bondage, domination and sado-masochism were available on the internet). The employer took the view that these activities were incompatible with his role and responsibilities as a probation officer working with sex offenders. Mr. Pay complained that his dismissal was unfair because it infringed his Convention rights under Article 8; specifically the conduct was an important part of his sexual expression and sexual orientation. Furthermore, his performances on stage (during which he wore a mask) were conducted in a private club and those who attended would have shared this form of sexual expression. The Court ruled against Pay. It relied upon the fact that he "refused to accept that these activities might be incompatible with his role as a probation officer" as well as the fact that it was not until quite late in the process that he indicated a willingness to remove links to the photos of him."<sup>93</sup> The ruling offered the following guidance:

An interference with the rights protected by that Article can be considered justified only if the conditions of its second paragraph are satisfied. Accordingly, the interference must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued. It is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left to contracting states in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions. . . . The nature of the activities in this context includes the extent to which they impinge upon the public domain.<sup>94</sup>

While phrased as an inconsistency between Pay's conduct and his employment, a legitimate aim was the protection of the employer's reputation. There is no criticism of that point in itself here. Rather, what constitutes harm to that reputation is not an area where there has been penetrating analysis. The difficulty with *Pay* is that it is a borderline decision. By finding his off-duty activities to be inconsistent with the nature of his work with sex offenders, the insinuation was that his out of work activities were themselves deviant. The facts in this case may not have been ideal for a precedent-setting decision on the observation of Article 8 rights. Still, his extra-curricular activities should not be so easily viewed as out of step with his workplace duties.<sup>95</sup> His status as a worker subsumed his identity as an individual to the extent that his off-duty activities were found to impact his role in the workplace. *Pay* confirms that the employer significantly contributes to fixing the boundary for expression protected under the ECHR.

Based on the above decisions, business reputation is likely to be interpreted in a manner that is so robust as to quell comments about, within and related to the workplace. Important

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<sup>91</sup> [2009] IRLR 139 (ECtHR) [*Pay*].

<sup>92</sup> The connection between *Pay* and social media has also been made in "Acas Advises on the "Do's and Don'ts" of Social Media – Part 1" LNB News 21/09/2011 104.

<sup>93</sup> *Pay*, [41].

<sup>94</sup> *Ibid*, [44].

<sup>95</sup> Pay's behaviour "violat[ed] the norms of the majority": McCrea, 280.

considerations include: comments which were posted over a period of time; the existence of (and weight placed on) a policy related to the company's image; the impugned comments being read by others (in *Preece* this included the customers who were the subject of some of the comments); how the worker uses the social media platform(s) (though *Smith* and *Game Retail* suggest that this may be a contested point). Violation of a social media policy usually leads to dismissal.<sup>96</sup> Though early decisions and other factors will likely arise, an important consideration in the adjudication of these issues is motive. Motive for a worker's remarks on a social media platform stands out as the more accurate basis for dismissal in *Crisp*.<sup>97</sup> Distinguishing his remarks from those of a whistleblower,<sup>98</sup> Crisp seemed motivated by embarrassing his employer. The duty of loyalty in employment, then, is part of the measurement in weighing the worker's right to freedom of expression against the interests of the employer.<sup>99</sup>

Distilling the above employment decisions, the picture we have of business reputation is that of a fragile entity that any negative comment may damage, if not break. In comparison, criticism of government remains a praiseworthy aim because of the positive implications: government is held to account. Could criticism of employers (as providers of services or as manufacturers) not have a similar impact? A strict view of business reputation is not the only interpretation available. These decisions contrast poorly with the strong movement witnessed in UK defamation law where there has been a concerted effort to expand protection of free speech. Speech in the workplace appears to be a realm in which freedom is not as expansively secured in the UK.<sup>100</sup> In the next two sections, different means of balancing competing interests are discussed.

### **(iii) Canada's treatment of social media in employment law**

There is evidence of a more nuanced treatment in Canadian employment law. Distinctions are being made in Canadian labour arbitration decisions, for example with regards to different social media platforms. In *Chatham-Kent (Municipality) v CAW-Canada Local 127*,<sup>101</sup> a personal care worker created a website (using MSN Spaces) that was accessible to the public (though she claimed to have believed the site to be private) containing "resident information and pictures without resident consent and ... inappropriate comments ... about residents entrusted to her care."<sup>102</sup> The arbitrator relied upon a number of factors (such as "her

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<sup>96</sup> There is a rare opportunity for a worker to mitigate any damage and for this to render the dismissal unfair. In *Bates v Cumbria County Council and another* ET/2510893/09 (unreported) the claimant teacher had accessed a dating website while he was teaching. The dismissal was ruled unfair, but his compensation was lowered by 15%. Onus has been also placed on the employer to properly inform workers of relevant social media policies and their implications. The failure to warn the complainant of the implications of a breach of the social media policy rendered dismissal unfair: *Lerwin v Aston Villa Football Club Ltd* (unreported ET/1304758/10).

<sup>97</sup> Motive is a consideration at the European Court of Human Rights in adjudicating freedom of expression issues in the workplace. See for example, *Heinisch v Germany* [2011] IRLR 923, [69]; *Guja v Moldova* (2011) 53 EHRR 16, [77].

<sup>98</sup> Whereas in the case of a whistleblower, the worker would have first communicated concerns to her employer as in *Heinisch*, [69]. In that decision, the European Court of Human Rights looked to establish "the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it, and that no other, more discreet means of remedying the wrongdoing was available to him or her."

<sup>99</sup> This is a consideration found in the European Court of Human Rights decisions on the topic. See *Heinisch*, [64]; *Marchenko v Ukraine* (2010) 51 EHRR 36, [45].

<sup>100</sup> Still, there has been optimism for freedom of expression as a viable line of argument as noted in T. Novitz, "Information and Communication Technology and Voice" in A. Bogg & T. Novitz (eds) *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014), 436-545.

<sup>101</sup> (2007), 159 L.A.C. (4<sup>th</sup>) 321 [*Chatham-Kent*].

<sup>102</sup> *Ibid.*, [2].



comments, their hostility, and the language used to express them”<sup>103</sup> including the widespread accessibility to the public of this site to uphold the grievor’s termination. In decisions where *Facebook* is the platform in question, arbitrators are considering grievors’ privacy settings when rendering their decisions. In *Cargojet*,<sup>104</sup> the arbitrator distinguished between *Facebook* and blogs<sup>105</sup> because the former permitted subscribers to limit the audience to which comments were made.<sup>106</sup> *Facebook* posts cannot be automatically viewed as comments made to the world because each person has editing privileges on the account. Still, *Facebook* settings will not excuse all comments. The following passage illustrates:

To summarize, there are numerous factors that render Mr. W’s misconduct very serious. His Facebook postings were frequent. They were derogatory to both [the employer and W’s manager]. They were prolonged, over more than a 16 month period. They were premeditated and deliberate, not a momentary aberration. He twice failed to stop making them when it was brought to his attention, on two occasions, that they were inappropriate. He failed to acknowledge any wrongdoing or show any remorse when [his employer] met with him on September 30 and October 5, 2010. For the reasons discussed above, I put little weight upon his apology letters or the issue of whether [W’s manager’s] conduct amounted to provocation. There is no provocation regarding his derogatory postings that pertain to [his employer]. He was not a long service employee. Rather, he was a temporary part-time employee with less than 18 months of service. Accordingly, long service is not a mitigating factor. Taking all of this into consideration, I find that [the employer] had just cause to terminate his employment and I dismiss his grievance regarding this discharge.”<sup>107</sup>

*Bell* offers an extreme example insofar as the grievor failed on all considerations; but the decision remains useful for its listing of different factors which informed the arbitrator’s final decision. In Canada, harm to an employer’s reputation is not so readily assumed where social media is the medium.<sup>108</sup>

In *Cargojet*, the grievor was terminated for comments made on her *Facebook* page. The arbitrator found this unjust; though the relationship was broken to the extent that reinstatement was not recommended. The issue was whether the grievor had violated the employer’s workplace violence policy when she wrote of striking a male co-worker in the groin with her steel-toed boots. Finding that the grievor’s comments had “only minimally impaired the company’s reputation for service”,<sup>109</sup> the arbitrator found that the remarks were more in the nature of “derogatory commentary on the relationships among staff at the workplace, and a personal threat against her supervisor.”<sup>110</sup> A threat of violence by one worker against a co-worker is not speech which would be desirable to protect in the workplace. And yet, the harm to the employer’s reputation was not the basis for upholding

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<sup>103</sup> *Ibid*, [31].

<sup>104</sup> *Groves v Cargojet Holdings Ltd.* [2011] C.L.A.D. 257 [*Cargojet*].

<sup>105</sup> *Ibid*, [75], [84].

<sup>106</sup> *Ibid*, [78].

<sup>107</sup> *Bell Technical Solutions and CEP (Facebook Postings)* (2012), 224 L.A.C. (4<sup>th</sup>) 287 [*Bell*], [153]. Compare these remarks with the facts in the UK decision in *Preece*.

<sup>108</sup> Decisions carry on from labour law history: *Millhaven Fibres Ltd v Oil, Chemical, & Atomic Workers International Union, Local 9-670 (Mattis Grievance)* [1967] O.L.A.A. No. 4. remains a precedent for this discussion where the issue is one of off-duty conduct. If the matter is just cause for dismissal the *William Scott* test is employed. The five-part test from that decision was:

- (1) The conduct of the grievor harms the Company’s reputation or product;
- (2) The grievor’s behaviour renders the employee unable to perform his duties satisfactorily;
- (3) The grievor’s behaviour leads to refusal, reluctance or inability of other employees to work with him;
- (4) The grievor has been guilty of a serious breach of the Criminal Code and, thus rendering his conduct injurious to the general reputation of the Company and its employees;
- (5) Places difficulty in the way of the Company properly carrying out its function of efficiently managing its works and efficiently directing its workforce.

<sup>109</sup> *Cargojet*, [95].

<sup>110</sup> *Ibid*.

the decision not to return her to the workplace.<sup>111</sup> While it could have been disposed of as a speech case, *Cargojet* illustrated that harm to an employer's business reputation is not only a wide spectrum, but also a troubling one if we desire some level of consistency in applying such a measure.<sup>112</sup>

Where social media speech is squarely the issue, adjudication of dismissal (or discipline) for social media speech demands attention to the circumstances and context in which the comments were made. To this point, duration of time between remarks has been considered. In *Canada Post Corp v CUPW*,<sup>113</sup> the grievor posted messages to her *Facebook* page, reaching more than fifty of her *Facebook* friends, amongst them were co-workers, for over a month. These postings "contained a number of derogatory, mocking statements about her supervisors and the Corporation."<sup>114</sup> The sustained barrage of remarks distinguished this situation from that of one-off venting of frustration. Comments which may have been ignored if they were spoken, once written online, were recognized as "mean, nasty, and highly personal. They go well beyond general criticism of management and essentially target one person with a degree of venom that is unmatched in other social media cases."<sup>115</sup> This was no "momentary lapse" or "short-lived fit of rage".<sup>116</sup> A worker's written attacks aimed at a supervisor (whose identity was alluded to but was not named) using her *Facebook* page can also lead to irreparable damage to the employment relationship. In *Campeau v Yellow Quill First Nation*,<sup>117</sup> the grievor's remarks were described as follows: "she accused him of lying, of being 'unprofessional', questioned his personal hygiene, said that he could not do his job, that he was unqualified and that she was a 'threat to his lies'."<sup>118</sup> The arbitrator upheld her termination because these attacks destroyed any possible work relationship she could have had with the supervisor. These characterizations suggest that venting at a moment in time may be permissible, even through social media, but a sustained series of comments over (for example) a month will not be tolerated. Remarks over a short period, depending on their content, can be conclusive. For example, comments over a two-hour period involving aggressive, sexual remarks about a co-worker have been sufficient to warrant dismissal.<sup>119</sup>

Two decisions assist in determining what should be a clear consideration in the assessment of speech on social media by workers. In *EV Logistics v Retail Wholesale Union, Local 580 (Discharge Grievance)*,<sup>120</sup> the then twenty-two year old grievor posted discriminatory remarks regarding "those good for nothing people from South Asia aka INDIA".<sup>121</sup> When confronted with these postings by his employer, the employee admitted to suffering from depression and indicated that he had been encouraged to post the material. He offered to apologize to the employer and anyone who viewed the blog. Ultimately EV Logistics

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<sup>111</sup> Of interest to an English audience is the underlying influence of the decision in *Malik v BCCI* [1997] 3 All ER 1 (HL) The decision not to return the grievor to her job reverberates with a breakdown in mutual trust and confidence where the collapse was attributable to the employee's conduct.

<sup>112</sup> Recalling the decision above in *Lougheed*, the ruling there was based on just cause for dismissal whereas in *Cargojet* it was premised on off-duty misconduct. The difference in the tests was attributable to the workplace violence policy held by the latter employer and the absence of any policy for the former.

<sup>113</sup> (2012), 216 LAC (4<sup>th</sup>) 207 [*Canada Post*].

<sup>114</sup> *Ibid.*, [1].

<sup>115</sup> *Ibid.*, [104].

<sup>116</sup> *Ibid.*

<sup>117</sup> [2014] C.L.A.D. No. 217.

<sup>118</sup> *Ibid.*, [167].

<sup>119</sup> *United Steel Workers, Local 9548 v Tenaris Algoma Tubes (D Grievance)* (2014), 244 L.A.C. (4th) 63 [*Tenaris*].

<sup>120</sup> [2008] B.C.C.A.A.A. No.22 [*EV Logistics*].

<sup>121</sup> *Ibid.*, [9]. He also blogged about his "love" of Adolf Hitler.

terminated his employment because there was a “direct and prejudicial relationship between [the] expressed values and EV Logistics’ interests”.<sup>122</sup> The arbitrator found termination too extreme for “the reckless ranting of an emotionally impulsive young person”.<sup>123</sup> The arbitrator believed the grievor was immature (instead of the conduct being related to any medical condition). The ruling constitutes cause for concern. Discriminatory comments by an employee made to the public at large must be the epitome of reputational harm for an employer. In Canada, the value of equal treatment is enshrined at different levels of law (i.e. the *Charter*, provincial human rights codes). In contrast (and by way of illustration of the divergence of opinion at this fledgling stage of the development of a body of jurisprudence in the area), the decision in *Wasaya Airways LP v Air Line Pilots Assn, International (Wyndels Grievance)*<sup>124</sup> offers a preferable perspective. The grievor posted a note on his *Facebook* page which was derogatory towards First Nations peoples. Another employee added his own derogatory comments to this posting. Their employer’s client base was composed largely of individuals of this denomination. A third employee made the employer aware of these posts as she found them offensive. The company terminated the grievor’s employment and suspended the other employee who added his own comment. Upholding the termination, the arbitrator found there was significant risk the comments would harm the employer’s business reputation.<sup>125</sup>

A point requiring further consideration in *Wasaya* was that the arbitrator equated *Facebook* posts with any form of internet posting: “where the internet is used to display commentary or opinion the individual doing so must be assumed to have known there is potential for virtually world-wide access to those statements.”<sup>126</sup> There was no evidence provided regarding the grievor’s *Facebook* privacy settings or how many “friends” he had on that medium. Though an aside, the absence of such evidence coupled with the arbitrator’s comment regarding *Facebook* potentially leading to world-wide access are troubling. The remark ignores the level of control a worker may exert over who views his social media comments. The settings of any social media platform must be a consideration where use of the medium forms the basis of discipline at work. The topic relates to the notion that circulation for news agencies is the same as audience online.<sup>127</sup> And yet, social media challenges reliance on this factor as definitive. Remarks in social media have been deemed serious enough to justify summary dismissal from employment where the potential audience may be limited. The suggestion is that fixating on the number of readers is not determinative. Rather significance rests in the nature of the statements made.

Complainants’ own role in escalating the situation may be more evident with social media, but as yet, this has not been identified as a mitigating factor. In a case involving sexual harassment as one of the issues, the arbitration panel found that the complainant’s “communications [on *Facebook*] might have mitigated, though not excused, the Grievor’s blame for his part in the exchange. We are struck by the thought that the Complainant’s messages, posted early in the conversation on a public part of the *Facebook* site, may have been nicely calculated to cut the Grievor where he would bleed, so to speak.”<sup>128</sup> As noted

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<sup>122</sup> *Ibid*, [27].

<sup>123</sup> *Ibid*, [56].

<sup>124</sup> (2010), 195 L.A.C. (4<sup>th</sup>) 1 [*Wasaya*].

<sup>125</sup> This is an assessment based not on direct evidence of reputational damage but on the potential for significant detrimental impact on the employer’s business reputation: *Wasaya*, [93].

<sup>126</sup> *Ibid*, [98].

<sup>127</sup> D. Rowland, “Griping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet” (2006) 110 *Penn State Law Review* 519-538, 523.

<sup>128</sup> *AUPE v Alberta Health Services* 2012 CarswellAlta 353 [*AUPE*], [46].

earlier with regards to the English employment tribunal decision in *Preece*, provocation may be a consideration in social media cases.<sup>129</sup> The contention is an intriguing one since it may be suggested that the comments were prompted in response to certain other remarks or actions by the employer, thereby constituting an opinion of events. To assess this argument, the arbitrator in *AUPE* summarized the law (taking into consideration both the civil and criminal law): “1) was there some act or series of acts that reasonably could be seen as provocative; and 2) was there a response against the perpetrator of the act(s) that was proportional and proximate to the provocative action.”<sup>130</sup>

Returning to charting out a space for discipline based on social media postings, in *City of Toronto v TPFPA, Local 3888 (Bowman)*,<sup>131</sup> the grievor of 2.5 years work experience was terminated for off-duty use of his Twitter account, specifically, over a period roughly equivalent to his time with the Fire Services, “a series of comments on his Twitter account, many of which were sexist, misogynist and racist. Some were offensive in their discussion of people with disabilities. Others were offensive in their references to homeless people. One invaded the privacy of others. Many were jokes, juvenile in nature, with sexual themes.”<sup>132</sup> These tweets were also published in a report by a national Canadian newspaper alleging an unwelcoming culture within the Toronto fire force. While the conduct was considered a breach of City and Fire Services policies, the remarkably public manner in which the story arose damaged the reputation of the Service and must be viewed as a key factor in Bowman’s termination.<sup>133</sup> The labour arbitration case law confirms both the importance of the employer’s reputation as well as its right to protect its reputation with a view to those for whom it provides its service where a worker’s off-duty conduct is the topic.<sup>134</sup> The fact of public sector employment adds to the consideration, as there is concern for a balance of rights.<sup>135</sup> A serious breach of a discrimination policy or the provincial Human Rights Code may harm this reputation and justify the employer’s subsequent response.<sup>136</sup> In comparison to the English approach which has permitted discipline for the guilty act alone (without other factors being considered), in *Bowman* the arbitrator relied upon the absence of sincerity in the grievor’s apology established by post-incident behaviour (such as statements to a counsellor) to uphold the termination. This conduct demonstrated that Bowman remained oblivious to the wrongs committed as he tried to “excuse, minimize and rationalize his conduct.”<sup>137</sup> The

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<sup>129</sup> Academic commentary on whether or not this is an excuse or justification may be engaged anew in this instance. See J. Goudkamp, *Tort Law Defences* (Oxford: Hart, 2013), 82ff.

<sup>130</sup> *AUPE*, [119]. There was clearly little doubt in the mind of the arbitrator that provocation was not a factor in *AUPE*. Extended comments are found at [127].

<sup>131</sup> Unreported (12 November 2014) [*Bowman*].

<sup>132</sup> *Ibid*, 1.

<sup>133</sup> The employer need only establish the conduct is of such a magnitude that there is potential for detrimental harm to the business reputation or to operate the business effectively: *Toronto District School Board v. CUPE Local 4400 (Van Word)*(2009), 181 L.A.C. (4th) 49, [65].

<sup>134</sup> *Bowman*, 9 citing *Ottawa-Carleton District School Board and O.S.S.T.F., District 25, (Cobb)*, (2006), 154 L.A.C. (4th) 387 [*Cobb*].

<sup>135</sup> *Cobb*, 394: “Employees of school boards, like other employees, do not surrender their personal autonomy when they commence the employment relationship. In order for an employee’s off-duty conduct to provide grounds for discipline or discharge, it must have a real and material connection to the workplace ... And, where the interest asserted by the employer, as it is here, is in its public reputation and in its ability to be able to successfully carry out its works, the concern must be both substantial and warranted. The test, so far as possible, is an objective one: what would a reasonable and fair minded member of the public (in this case, the school community) think if apprised of all of the relevant facts.”

<sup>136</sup> *Bowman*, 10.

<sup>137</sup> *Ibid*, 11.

arbitrator found the evidence to constitute very serious misconduct as she upheld Bowman's termination.

If *Bowman* was a clear case, the companion decision (though from a different arbitrator) of *City of Toronto v. TPFPA, Local 3888 (Edwards)*<sup>138</sup> was not. Both these decisions arose from overlapping facts insofar as Edwards (a "Black Jamaican Canadian male")<sup>139</sup> called out Bowman for a racial slur in one of his tweets, though he did so in a non-confrontational manner. This response and some others of Edwards' tweets were also part of the national newspaper coverage forming the departure point for *Bowman*. Edwards was terminated for breaching City and Fire Services policies as well as the harm his conduct caused to the Fire Services' recruitment efforts. The basis for this action were tweets in Edwards' Twitter account (in which he identified himself as a Toronto firefighter): suggesting giving a woman a "swat in the back of the head" to "reset the brain"; another tweet in which Edwards wrote "go get it sweetie" to a potential female applicant to the Fire Services; and finally the aforementioned tweet in which Edwards used a derogatory ethnic and racial term. The Fire Services emphasised the importance of reputation, noting the Standard Operating Guideline ("SOG") regarding Public Relations which stated at section 2.02: "It is imperative that while in the public eye the Firefighters are portrayed in an image that is fitting with the public perception."<sup>140</sup> Though the arbitrator substituted termination with a three-day suspension,<sup>141</sup> *Edwards* suggests that it is still worth employers disciplining (even terminating) for social media usage because the benchmark for harm (anything that could reflect poorly on the employer) remains robust.

Both of these Toronto Fire Services cases suggest a more profound potential to social media. If social media is the equivalent of a conversation, the platforms are then a mirror to society. By publishing offensive comments, the authors expose themselves (as demonstrated in *Edwards*) to a potential corrective response. Adjudicators of workplace discipline involving social media must be aware of this powerful positive potential. Certainly social media blur the lines between work and off-duty conduct, but part of that obfuscation is the powerful possibility for social media to effect positive social change.

On the matter of the potential for social change, *United Steel Workers, Local 9548 v Tenaris Algoma Tubes (D Grievance)*<sup>142</sup> offered pointed commentary. The male grievor posted remarks about a female co-worker's (though unnamed, he did allude to her identity) ability and suggested that a violent and humiliating sexual act be performed on her.<sup>143</sup> The remark was visible to all who looked at the grievor's *Facebook* page. Within the context of social change and employment, the notion of the poisoned workplace comes to the forefront.<sup>144</sup> In

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<sup>138</sup> 2014 CanLII 62879 [*Edwards*].

<sup>139</sup> *Ibid*, [9]. It should be noted that Edwards was described as one of very few 'racialized' firefighters in the Service according to figures gathered for the Toronto Fire Services *Pathways to Diversity* report which aimed to recruit more female and denominational recruits: *Ibid*, [12].

<sup>140</sup> There were also guidelines pertaining to social media usage, but the effect of these appear to have been diminished by the fact that the Division Chief in charge of community outreach and public relations seemed unaware of the policy's content: *Ibid*, [113].

<sup>141</sup> *Ibid*, [216].

<sup>142</sup> (2014), 244 L.A.C. (4th) 63 [*Tenaris*].

<sup>143</sup> Factual details (such as the precise nature of the male worker's comments as well as the female victim's name) were not disclosed by the arbitrator "to avoid publicizing the comments made about her": *Ibid*, [1].

<sup>144</sup> Social media is not the genesis of the toxic work environment as witnessed from cases pre-dating the various platforms, see for example *Re Tenaquip Ltd and Teamsters Canada, Local 419* (2002), 112 L.A.C. (4<sup>th</sup>) 60. Still, social media can tangibly add to discussion of the topic.

*Tenaris*, the collective agreement was applicable: “Article 10 No Harassment or Discrimination states: ‘The Company and the Union are committed to providing a work environment where all employees are treated with respect and dignity. Each individual has the right to an atmosphere which promotes respectful interactions and is free from discrimination and harassment.’”<sup>145</sup> In the province of Ontario, the *Occupational Health and Safety Act*<sup>146</sup> directly addresses this matter. This legislation was referred to in *Tenaris*. The amended statute has been described as having “real potential to protect the emotional health of workers who are the victims of violence”. The legislation, as it applies to words, has been interpreted as follows: “The workplace violence is the utterance of the words. There need not be evidence of an immediate ability to do physical harm. There need not be evidence of intent to do harm. No employee is required, as the receiver of the words, to live or work in fear of attack. No employee is required to look over their shoulder because they fear that which might follow.”<sup>147</sup> As words constituting threats of violence (even though not of immediate harm) falling under the purview of the *Occupational Health and Safety Act* remarks on social media platforms carry enhanced potential for discipline (up to and including dismissal). Imbuing social issues (such as sexist and misogynistic remarks) with legal implications by way of social media speech may be one of the most engaging, controversial and important matters to be taken up by the intersection of user-generated content platforms and employment law.

This potential depends upon courts giving effect to legislation. In the UK, the *Protection from Harassment Act 1997* may be applicable, but doubt has been cast on the range of scenarios applicable to the Act. In *Veakins v Kier Islington Ltd.*,<sup>148</sup> Maurice Kay LJ, for the court, wrote with regards to a claim for stress made through the Act: “It seems that [the challenge in making a claim for stress based in negligence] may be causing more employees to seek redress by reference to harassment and the statutory tort, although it is doubtful whether the legislature had the workplace in mind when passing an Act that was principally directed at ‘stalking’ and similar cases. It should not be thought from this unusually one-sided case that stress at work will often give rise to liability for harassment.”<sup>149</sup>

#### **(iv) Concerted activity versus public disclosure**

By way of rounding out discussion, a widely publicized case from the US helps shape assessment.

In *American Medical Response of Connecticut, Inc v. International Brotherhood of Teamsters, Local 443*<sup>150</sup> a client of the plaintiff (AMR) complained about the social media posting of its employee Dawnmarie Souza. The employer asked her for a response but she was refused (by her supervisor) the opportunity to have assistance from the union. To voice her displeasure, Souza made several vulgar entries on her *Facebook* page in order to ridicule her supervisor – for example she identified him as a psychiatric patient. The posting elicited supportive comments for Souza and further negative commentary about the supervisor. AMR terminated Souza for violating its policy prohibiting any depiction of the company on social

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<sup>145</sup> *Ibid*, [8].

<sup>146</sup> R.S.O. 1990, C.O.1, as amended by *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 S.O. 2009, C.23 [*Occupational Health and Safety Act*] (specifically ss. 1(1) (“workplace harassment” & “workplace violence”), 25(2)(h), 27(2)(c), 28(1)(d) & Part III.0.1).

<sup>147</sup> *City of Kingston v Canadian Union of Public Workers, Local 109* 2011 CanLII 50313, 53, 54.

<sup>148</sup> [2009] EWCA Civ1288 [*Veakins*].

<sup>149</sup> *Ibid*, [17].

<sup>150</sup> Case No 34-CA-12576 (27 October 2010) [*Souza*].

media. The NLRB supported Souza's case as it took the view that criticisms on social networking sites about an employer constituted protected activity under s.7 of the US National Labor Relations Act. The case was later settled out of court.<sup>151</sup> *Souza* is a remarkable case itself and the social media aspect only enhances its pertinence.<sup>152</sup> The National Labour Relations Board established the following criteria for determining when a *Facebook* posting loses "protected concerted activity status": "a four point test applies: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."<sup>153</sup>

The difference in levels of protection afforded by the *NLRA*<sup>154</sup> as compared to the law of England is illustrated with reference to the amendments contained in the *Enterprise and Regulatory Reform Act 2013*<sup>155</sup> regarding the public interest factor in assessing protection for whistleblowing in the UK. (This comparison is not noted to suggest that social media will necessarily be the vehicle for whistleblowing; though its potential is evident.) The first resort for the whistleblower is to confidentially relay the information to someone in a management position and only when the confidential route does not yield a response to then release information to the general public.<sup>156</sup> The comparison between the US and the UK is apt because the reforms to whistleblowing in the UK suggest a more profound chilling effect in an area of identified importance.<sup>157</sup> Protected disclosures (whistleblowing) as defined by the UK's *Employment Rights Act 1996* are limited. The *ERRA* curbs this category by inserting a public interest test.<sup>158</sup> A comparison with the interpretation of s.7 of the US *National Labor Relations Act* demonstrates how strict the amended *ERA 1996* is. Where in the US a worker may be able to demonstrate that she has participated in a concerted activity under the *NLRA*, she will be protected from retaliatory actions such as dismissal. However, under the *ERRA*, a worker must first demonstrate that the matter was of public interest; that is, something which is of interest to those outside of the workplace.<sup>159</sup> And so there are two stages of assessment for disclosure: first, whether the disclosure qualifies under s.43B of the *ERA 1996*; and second, whether the disclosure is in the public (wider) interest. If the disclosure is found not to have been made in good faith (a term which is not defined but which has been restricted to "one of the wrongs listed in section 43B of the ERA 1996"),<sup>160</sup> the *ERRA* now permits an employment tribunal to reduce any award for unfair dismissal pursuant to a protected

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<sup>151</sup> "Facebook firing test case settled out of court"

[http://money.cnn.com/2011/02/08/technology/facebook\\_firing\\_settlement/index.htm](http://money.cnn.com/2011/02/08/technology/facebook_firing_settlement/index.htm) (last accessed: 29 January, 2015).

<sup>152</sup> Further useful information has come since this paper was delivered. For example, Memorandum OM 12-59 (May 30, 2012) from the Office of the General Counsel of the NLRB provides some insight into what are lawful and unlawful social media policies. It was developed at the request of employers.

<sup>153</sup> This was posted on the NLRB's *Facebook* page: [www.facebook.com/NLRBpage/posts/141052949280338](http://www.facebook.com/NLRBpage/posts/141052949280338) (last accessed: 29 January, 2015).

<sup>154</sup> US employers may still dismiss workers for remarks made on social media platforms (save where a State may have specific protection for workers in this regard): M. Finkin, "Information Technology and Workers' Privacy: The United States Law" (2002) 23 *Comparative Labor Law & Policy Journal* 471-504, 486.

<sup>155</sup> C.24 (Royal Assent 15 April 2013) [*ERRA*].

<sup>156</sup> The sequence is the one outlined by the whistleblowing charity Public Concern at Work in its *Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK* (November 2013) [*Whistleblowing Report*], 16.

<sup>157</sup> To this point see the quotations on the vital role of whistleblowing in the *Whistleblowing Report*, 5-6.

<sup>158</sup> This phrase is also used in the Explanatory Notes for the Act.

<sup>159</sup> The Explanatory Notes are revealing. A protected disclosure is not the failure to receive the correct amount of holiday pay because this is a "matter of personal rather than wider interest": Explanatory Notes, [108]. The *Whistleblowing Report* noted its concern with this requirement: *Whistleblowing Report*, 17.

<sup>160</sup> Explanatory Notes, [110].

disclosure which was not made in good faith by 25%.<sup>161</sup> Concerted activity in the US is given some breadth of coverage. However, even the behaviour of those who are whistleblowers is strictly construed in England. Workplace speech garners the potential for better protection in the US; whereas the UK appears to be suspicious of remarks which possibly negatively affect commercial activities and so adopts a strict approach to such comments.

#### **IV. Scope within the law**

Underlying the above discussion has been the scope for liability. A claim is not automatically successful because it meets the conditions of tort liability. The courts have found that people must endure certain annoyances as a result of the exigencies of life. This idea prompts two considerations. First, at any workplace there is likely to be complaining and even emotional venting. Second, reputations may be challenged; that is, a pristine reputation is not a right. Consequently, the staunch position taken with regards to social media in the workplace appears stubbornly resistant.

There has been scope within the law, requiring acceptance of a certain amount of discomfort encapsulated in the Latin phrase *de minimis*. We know from the common law of tort that not all contact between two individuals constitutes battery. Battery does not arise from “the least touching of another in anger”, as Chief Justice Holt wrote in the 1704 decision of *Cole v Turner*.<sup>162</sup> Putting the debate surrounding a hostility requirement aside, Lord Goff commented on this nebulous territory of contact. His rationale for an exception of contact in the ordinary conduct of everyday life was as follows:

... a broader exception has been created to allow for the exigencies of everyday life. Generally speaking consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact.<sup>163</sup>

This approach was followed in *Wainwright v Home Office*<sup>164</sup> where Lord Hoffmann applied Lord Goff’s remarks in *Collins* and defined battery as “a touching of the person with what is sometimes called hostile intent but which [Lord Goff] redefined as meaning any intentional physical contact which was not ‘generally acceptable in the ordinary conduct of human life.’” The UK’s *Protection from Harassment Act 1997* (as a contemporary example of lawmaking) also bears out this scope. The *Act* requires there to be a series of incidents (more than two) in order to ground a claim. Here the words of Jacob LJ in *Ferguson v British Gas Trading Ltd*<sup>165</sup> sketch out some of the landscape:

I accept that the course of conduct must be grave before the offence or tort of harassment is proved ... It has never been suggested generally that the scope of the civil wrong is restricted because it is also a crime. What makes the wrong of harassment different and special is because ... in life one has to put up with a certain amount of annoyance: things have got to be fairly severe before the law, civil or criminal, will intervene.

These instances of scope anticipate the more detailed discussion below.

##### **(i) Towards a balance of interests**

With social media, tort and employment law have converged in a thought-provoking manner. Defamation law has influenced the adjudication of speech in the employment setting where social media usage is at issue. The defamation model permits conduct that qualifies as a tort

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<sup>161</sup> Section 18 of the *ERRA* adding s.123(6A) of the *ERA 1996*.

<sup>162</sup> (1865-66) L.R. 1 C.P. 373 (Exch.).

<sup>163</sup> *Collins v Wilcock* [1984] 1 W.L.R. 1172 (CA), 1177 [*Collins*].

<sup>164</sup> [2004] 2 AC 406, [9].

<sup>165</sup> [2009] EWCA Civ 46, [17]-[19].



but has established (and continues to develop) defences to fit the circumstances.<sup>166</sup> Using the defamation model would not be a matter of simply transplanting the tort into the employment setting. Rather, there would be a call for nuance. Consider the decision in *Crisp* noted above. An employer should still be able to dismiss a worker who undertakes actions as did Crisp. There must be scope for employers to protect their business reputations from such workers. Another parameter mentioned above is when an employee uses a social media platform to express discriminatory remarks (a discussion undertaken in Canadian labour arbitration decisions). Still, there is an expanse of expression before one gets to these signposts.<sup>167</sup> Here is where the focus of this paper has been: the common law is a remarkable tool in many ways and there is scope within it to allow for the principles of free expression defended in one of its disciplines (tort) to be repeated in another (employment). UK law provides a good basis for this discussion.

In the United Kingdom, there is a rule prohibiting government from making a claim in defamation.<sup>168</sup> The basis for this rule is a concern that permitting government to sue in tort would have a chilling effect: it may diminish if not eliminate discussion of government and undercut the notion of keeping government accountable to the people. There is a question as to why in the private sector speech should be limited in a different manner.<sup>169</sup> Postings by workers who criticize their employers can also be a productive form of speech (depending on the motivation). The right is fettered as employers should be able to protect their interests. The current state of the law, however, is unsatisfactory. There is room at present for a better balancing of interests: postings on social media should not be treated *prima facie* as damaging to a company's reputation. Recall that the above decisions from the UK have primarily imposed the "heaviest sanction possible under labour law"<sup>170</sup> for the exercise of a right enshrined under the *ECHR*. Social media provides a forum in which discussion may take place. The lessons from developments in defamation law are instructive. This tort operates in a unique manner insofar as the defenses to a claim are of great importance to the action: speech may be found to be defamatory and still not be the subject of legal sanction because robust defenses signify that speech should (generally) be protected. In employment law, tension exists between the duty of loyalty and the Convention right. And yet, to suggest that the duty of loyalty automatically trumps the right is remarkable for it belittles one of the more celebrated of rights.<sup>171</sup> Distinctions must be made. For example, there may be protection for comments made to a limited audience of colleagues and/or friends versus remarks about a company made to the world at large via the Internet.<sup>172</sup> The concern identified here is why the use of social media by workers should be treated in a less nuanced manner than remarks subject to defamation law.

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<sup>166</sup> The definition of defense proffered by Goudkamp illustrates: where a defendant is "confessing" that the facts narrated by the claimant in his pleadings amounted to a tort and alleging further facts that, if true would enable the usual legal effect of the facts pleaded by the claimant to be "avoided": J. Goudkamp, *Tort Law Defences* (Oxford: Hart, 2013), 2-3.

<sup>167</sup> If *Smith* is any indication, the expression of opinions would be a challenging topic. And yet, the debate is one which should be good for the law (so long as it is not a cloak for discriminatory opinions).

<sup>168</sup> *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534 (H.L.)

<sup>169</sup> The impact of the *Human Rights Act 1998* on private sector employers in the UK remains a point of discussion.

<sup>170</sup> As the European Court of Human Rights called termination of employment in *Heinisch*, [91].

<sup>171</sup> See for example, A. Sen, *Development as Freedom* (Oxford: OUP, 1999) who argues that a free press is pivotal for economic prosperity.

<sup>172</sup> This would not preclude speech which could be considered whistleblowing.

The employment decisions demonstrate how the law deals poorly with multiple identities: an individual making comments on a social media platform to friends is viewed differently when he is identified as a worker employed by a particular enterprise.<sup>173</sup> Social media issues in the employment setting suggest the need for innovation in legal treatment. There should also be greater room for free speech by workers: a right to free expression which should not be automatically curbed as a result of business reputation; but where the individual's intention was to impugn or discredit the employer (with care taken to consider whistleblowing circumstances) the speech may lose protected status and be the subject of legal recourse. And so some threshold should be met in regards to discipline (up to and including termination) of workers for remarks made on social media within the expansive employment setting. An example can be found in the seriousness threshold found in s.1 of the UK *Defamation Act 2013* should be adapted to the employment setting.

Regarding the threshold of seriousness, a discussion has already been underway in employment case law where the respondent has been required to establish evidence of harm. The decision in *Whitham v Club 24 Ltd t/a Ventura*<sup>174</sup> illustrated. The tribunal ruled that the employer's decision to dismiss for gross misconduct was beyond the range of reasonable responses.<sup>175</sup> Whitham had posted comments to her *Facebook* page which outlined a certain level of frustration with one of her employer's clients.<sup>176</sup> The workplace policy on e-mail and internet use stated: "You should also remember that your obligation of confidentiality extends outside the workplace and that posting information about your job on the internet (for example, on social networking sites such as Facebook and MySpace) may lead to disciplinary proceedings and/or dismissal itself".<sup>177</sup> One of the factors leading the tribunal to its decision was the absence of "evidence that the client [Volkswagen] suffered any embarrassment or that there was any likelihood of actual harm to the relationship between the two companies."<sup>178</sup> *Whitham* stands out because it suggested that tribunals need not simply accept the potential without some evidence.<sup>179</sup>

Following on from *Whitham*, another decision of the Northern Ireland Industrial Tribunal in *Irwin v Charles Hurst Ltd*.<sup>180</sup> also challenged acceptance of potential harm. Irwin was dismissed for posting uncharitable remarks on the *Facebook* page called "Justice for Cody" set up in memory of a dog who died as a result of injuries sustained from being set on fire. A customer of the respondent made a complaint and encouraged others to complain to Hurst as well. Irwin was summarily dismissed for failing to "ensure that his conduct whilst off duty did not impact on the company."<sup>181</sup> Here too the tribunal found that freedom of expression was not interfered with, but not because it was inapplicable. Rather, the tribunal wrote that dismissal "may be a justifiable interference with the right to freedom of expression, which is qualified by the responsibility to exercise that right in such a way that the reputation and rights of others is protected."<sup>182</sup> Furthermore, on the point of off-duty conduct leading to

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<sup>173</sup> The decision in *Smith v Trafford* illustrates.

<sup>174</sup> ET/1810462/10 [*Whitham*].

<sup>175</sup> *Ibid.*, [41].

<sup>176</sup> *Ibid.*, [5].

<sup>177</sup> *Ibid.*, [16].

<sup>178</sup> *Ibid.*, [40].

<sup>179</sup> Similarly, in the unreported decision of *Stephens v Halfords plc* ET/1700796/10, the actions of the claimant after being notified his posting violated the employer's social media policy took immediate action by removing the posting and being apologetic. These steps rendered his dismissal unfair.

<sup>180</sup> [2012] NIIT 2254\_12IT [*Irwin*].

<sup>181</sup> *Ibid.*, [37].

<sup>182</sup> *Ibid.*, [82].

termination, the tribunal offered: “it may be reasonable for an employer to treat an employee’s actions as gross misconduct where the employee has made comments, even though they may not be work related.”<sup>183</sup> Still, it highlighted the absence of evidence establishing actual damage: “The tribunal does not consider that a finding of actual damage to the respondent’s business interests/reputation was one that the respondent was entitled to make on the basis of the evidence which was before the disciplinary and appeal hearings and in this regard fell outside the band of reasonable responses thus rendering the dismissal unfair.”<sup>184</sup> A key fact was the respondent’s failure to even inquire into the fact of any financial loss.<sup>185</sup> Declining the opportunity to make an order for reinstatement,<sup>186</sup> the tribunal instead made a compensatory award, reduced by 80% for Irwin’s responsibility in bringing about his dismissal. *Irwin* falls short of an enthusiastic endorsement of freedom of expression because the employment relationship had been broken so as to render reinstatement impractical. Though these decisions are insufficient to establish a line of cases, the suggestion here is that in order to pass the threshold of seriousness the comments must (in the words of s.1(2) of the *Defamation Act 2013*) have caused or be likely to cause the employer serious financial loss. Reinforcing the threshold, though prior to the *Act*’s coming into force, the Court of Appeal in *Cammish v. Hughes*<sup>187</sup> wrote: “The law does not provide remedies for inconsequential statements, that is, of trivial content or import. It is necessary that there should be some threshold test of seriousness to avoid normal social banter or discourtesy ending up in litigation and to avoid interfering with the right to freedom of expression conferred by article 10 of the *European Convention on Human Rights*.”

One of the difficulties in the interaction between law and social media is users’ attitudes towards the different platforms. Consistently in the cases noted above, users have expressed the belief that the medium provides another platform for conversation and not (as the law views it) as a publication of comments in a permanent form. The emphasis for users is on the social and therefore is understood as beyond legal scrutiny. The law, however, does not share this view. A simple caution may be proposed: remarks of a dubious nature should be spoken and not written.<sup>188</sup> Here there is room for debate centred on the notion of audience. It is contended that nuance is needed in the understanding of this term. Using the analogy of conversation, we do not converse with all friends or acquaintances simultaneously at one time but particular individuals. Topics for discussion are sometimes had with particular audiences of friends. Identifying an audience, however, places more responsibility in the hands of the commentator. The Canadian decisions show greater awareness of privacy settings and how employing stricter settings demonstrates an intention to control to whom the remarks are made. Conversely, failure to amend settings imputes an intention that the remark was made to an unlimited audience. To this we may ask: what is the awareness of the user to the expanse of online conversations; that is, the potential that the remark may be exponentially shared (such as in *Crisp*)? An underlying assumption is that privacy settings form a panacea when in fact they do not because *Facebook* (as one example) does not grant users the capacity to limit an audience’s use of information received. User attitudes will change over time and a greater awareness of the risk in making online remarks will grow (for example, children will grow up

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<sup>183</sup> *Ibid*, [82].

<sup>184</sup> *Ibid*, [85].

<sup>185</sup> *Ibid*.

<sup>186</sup> Pursuant to Art.150 of the Employment Rights Northern Ireland Order 1996.

<sup>187</sup> [2012] EWCA Civ 1655 [*Cammish*], [38].

<sup>188</sup> Though even here, the potential for repetition of oral remarks renders the advice susceptible to undermining. See the decisions of *McManus v. Beckham* [2002] 1 WLR 2982 (CA) and *Ecclestone v Telegraph Media Group Ltd.* [2009] EWHC 2779 (QB) where the defendant and claimant (respectively) made verbal remarks which were then reported in newspapers.

being taught of the adverse potential and will hopefully develop habits around this knowledge). So too must users' capacity to limit how far their remarks may travel through social media platforms and beyond. And so, returning to the prominent analogy, social media is not truly akin to an online conversation. This is how users may understand the way in which they employ these media. However, in a usual verbal conversation there is no other party that is monitoring the remarks. On social media there is: algorithms are created so as to build upon discussions had over online media. This issue extends beyond the employment setting and moves into the contentious area of data retrieval on social media.<sup>189</sup> Still, the point is that there must be more widespread recognition of what happens on social media before change arises in other areas. In the employment setting, unfortunately, the rate of change (expanding protection for remarks made about, at or related in some way to the workplace) will be slow. For this reason, the seriousness threshold is an important factor, but one complicated by the difficulties experienced in the law with multiple identities. The benchmark for legal sanction in the employment setting should be moved, but not in a manner which robs employers of protection for business interests.

Part of the challenge here is the perceived lower value of social media comments. Though a full engagement of the topic requires a separate discussion, a brief comment is warranted. The perception of social media speech openly contradicts the ideal of neutrality; a fiction maintained in defamation law where formal ranking of publications has not been undertaken. Courts have only written of different readerships in considering whether a comment is defamatory.<sup>190</sup> And yet, the public may unofficially rank publications in some manner (for example by perceived quality). This behaviour would be consistent with the marketplace of ideas concept that leaves to the individual reader such a choice.<sup>191</sup> Rowbottom has provided the language of high and low level speech.<sup>192</sup> This categorization has brought the discussion further along (notably as it combines the medium of speech with a notion of its value).<sup>193</sup>

With regards to speech by workers on social media, one factor to assist in establishing a space for comments is to examine the author's motive through assessment of the language employed. *Crisp* offers a good scenario for consideration. There, the sounder basis for upholding the dismissal can be broadly placed under the notion of fidelity or loyalty.<sup>194</sup> The claimant was at liberty to express opinions as he had but he must also have accepted the employer's response to those comments by dismissing him.<sup>195</sup> The strict communications

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<sup>189</sup> Writing of *Facebook*, J. Van Djick (*The Culture of Connectivity: A Critical History of Social Media* (Oxford: OUP, 2013), 65) argues: "In less than eight years, the meaning of "sharing," once understood as user-to-user information exchange, has subtly been replaced by a meaning that naturalizes the sharing of personal data with anyone on the planet."

<sup>190</sup> See for example *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414.

<sup>191</sup> D. Mangan, "An Argument for the Common Law Defence of Honest Comment" (2011) 16 *Communications Law* 140-147, 144.

<sup>192</sup> Rowbottom (2012), 357: "The term "high level" is adopted here to refer to expression that is professionally produced, aimed at a wide audience, is well resourced and researched in advance. By contrast, the "low level" refers to amateur content that is spontaneous, inexpensive to produce, and is often akin to everyday conversation. With "low level" communications, lower standards of responsibility will normally be expected of the speaker than of a professional mass media entity." He has also provided a diagram outlining his classification: Rowbottom (2014), 494.

<sup>193</sup> The language continues the view of speech by an individual on a user-generated platform as being of a low level without noting the blurred lines created by news media using the popular spontaneous platforms available to all with online access.

<sup>194</sup> The rule having been long-established in cases such as *Lacy v Osbaldiston* (1837) 8 C & P 80.

<sup>195</sup> The case hints at whistleblowing considerations, but *Crisp*'s comments clearly did not fall under this category.

strategy as borne out in the worker's employment contract emphasized the importance of reputation. Even though Crisp did not hold a managerial level position,<sup>196</sup> the tone of his postings (especially if one considers that his first mention of the matter was on his *Facebook* page) went beyond the measure of mere remarks as they undercut the company's image (as a reputable producer of electronics products). The motive was to impugn his employer and, recalling the threshold of seriousness, it is suggested that such a motive be sufficient to pass that standard. There is support for this as a demarcation point. The Leuven Labour Tribunal took a similar path to that identified here.<sup>197</sup> The critical statements of a business development manager on his *Facebook* account constituted serious misconduct warranting dismissal because of the company's communications policy; his work as a manager; and finally as a result of the timing of the comments which came about when the CEO had been reassuring markets about the company's strength. The European Court of Human Rights has also found that where the intention of the worker was to damage the employer's reputation, the speech did not contribute to social debate.<sup>198</sup>

## V. Conclusion

In contrast to Canada, speech of workers on social media platforms garners noticeably less protection in the UK. The matter is made more stark by the disconnect between these decisions and recent legislative and common law movement regarding UK defamation law. The distance in protection of speech for workers versus media must be critically engaged. It is a troubling distinction where the law protects a range of media from the tort of defamation for writing about a range of matters viewed under the expansive rubric of a marketplace of ideas when workers' remarks may also fit under the same heading. There should be more robust scope for a worker to offer a critique of her employer. As it stands, there appear to be limitations not in concert with defamation law. Force may be detected in both instances where the benefit for the public may be positive. The underlying difficulty is the categorization of social media as a lower form of speech, thereby intimating that mainstream media is at a higher level which is worthy of protection. This is a subject for another analysis. For the present, social media inherently has the potential to challenge such a presumption. There should be a better engagement of workers' free speech on social media that balances the right with the business interests of employing entities.

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<sup>196</sup> Holding such a position has been understood at common law as holding a special position where the employer can trust the individual's exercise of judgement and discretion: *British Telecommunications plc v Ticehurst* [1992] IRLR 219 (CA).

<sup>197</sup> 17 November 2011, (2012) 46 *Revue du Droit des Technologies de l'Information* 79.

<sup>198</sup> *R Predota v Austria*, App. No. 14621/06, decision of 18 January 2000.