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‘Social Media in the Workplace’ in D. Mangan & L.E. Gillies (eds), [\*The Legal Challenges of Social Media\*](#) (Cheltenham: Edward Elgar, 2017), Chapter 10.

## **Social Media in the Workplace**

**David Mangan**

### **1. Introduction**

Two intersecting points ground the present study. First, employment law provides an enhanced setting from which to observe the balancing of interests arising from the law’s interaction with social media. The balancing of interests remains a particularly demanding objective now. However, there has been a notable lethargy with regards to developments in the employment setting.<sup>1</sup> Second, social media forms yet another technological innovation to which the law must respond.<sup>2</sup> UK employment decisions, where social media use has been the basis for discipline up to and including dismissal,<sup>3</sup> chart a troubling trajectory.<sup>4</sup> The core of these rulings is the concept of business reputation; a phrase used to justify discipline based on expression via social media. The UK has not developed much nuance in this regard. The situation prompts pointed consideration for three reasons: the underlying ethos of defamation

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<sup>1</sup> The focus here is on employment law but this is not to overlook the impact on collective labour law. The Department for Business, Innovation and Skills (The Department for Business, Energy and Industrial Strategy as of July 2016) in *Tackling intimidation of non-striking workers* (BIS/15/621) committed to updating ‘the Code of Practice on Picketing in order to set out clear advice on the rights and responsibilities of all parties involved in industrial dispute, particularly the use of social media’.

<sup>2</sup> Professor Oliphant illustrated the influence of the workplace in tort law in Ken Oliphant, ‘Tort Law, Risk, and Technological Innovation in England’ (2014) 59 McGill LJ 819.

<sup>3</sup> The focus is on social media platforms and so cases where workplace email has been used to communicate are not included. The summary dismissal in *Williams v Leeds United* [2015] EWHC 376 (QB) illustrates insofar as the use of a workplace email address to forward pornographic images connected the workplace with the impugned activity. In social media, there is a question as to that connection, notably as some cases below, where the claimant’s connection to the employer is not evident.

<sup>4</sup> The public law considerations are further discussed by Daithí Mac Síthigh and Jacob Rowbottom in this volume. Other discussions include: Dominic McGoldrick, ‘The Limits of Freedom of Expression on *Facebook* and Social Networking Sites: A UK Perspective’ (2013) 13 HRL Rev 125; Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71 CLJ 355; Jacob Rowbottom, ‘In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online’ (2014) PL 491.

law reforms has been to expand protection for a wider range of speech; the capacity for individual expression has proliferated as a result of developments in information technology; and the free speech implications of these employment decisions adds to the existing challenges for workers including the significant legislative reforms to employment law which affect workplace protections and access to redress within the jurisdiction.<sup>5</sup> The present circumstances can be characterised in rather unsettling terms by comparison to defamation: a worker may be disciplined (up to and including dismissal) for any remarks made on social media which the employer deems embarrassing or harmful to its interests. The punishment of dismissal stands out as an extreme response<sup>6</sup> to such a nuanced issue. And so, there is scope for more discerning deliberation. Just as in defamation law, there are limitations, but there also should be a *prima facie* right to express on social media subject to those limitations, even related to the workplace setting. Employers have well-founded concerns about reputational harm arising from certain (though not all) comments by employees. The potential for an employer to dismiss (coupled with case law vindicating this power) affects other workers' social media habits in a way that recalls the deterrent effect argument put forward in favour of defamation law reforms to expand protection for free speech.

This analysis begins by exploring the distinction between libel and slander. The importance of this distinction lies in social media users' perception of the medium as compared to how the law treats this platform of user-generated content. Focusing on employers' justification of harm to business reputation, case law reveals a strictly construed concept of business reputation resulting in a low threshold for the dismissal of workers for remarks made on

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<sup>5</sup> For an overview of this topic, see Nicole Busby and Morag McDermont, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings' (2012) 41 ILJ 166; Keith Ewing and John Hendy QC, 'Unfair Dismissal Law Changes – Unfair?' (2012) 41 ILJ 115; David Mangan, 'No Longer. Not Yet. The Promise of Labour Law' (2015) 26 KLJ 129.

<sup>6</sup> *Fuentes Bobo v Spain* App no 39293/98 [2000] ECHR 96 (ECtHR).

social media platforms. Contributing to this situation are expansive contract clauses granting employers far-reaching powers, with wider implications for speech. The chapter culminates in consideration of how employment law may accommodate speech *and* business interests.

## **2. 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 (from the Star Chamber), the view emerged that the written form was of a greater concern. In *King v Lake*<sup>7</sup> Hale CB ruled that the written form ‘contains more malice than if [the words] had been once spoken’.<sup>8</sup> The finding contrasted with what would have occurred if the matter had been slander: ‘although such words spoken once, without writing or published them, would not be actionable’. Kaye has criticised taking this meaning from *King* and instead analysed the matter as one of malice.<sup>9</sup> Professor Mitchell placed Kaye’s argument in doubt by suggesting the reading was inconsistent with Hale CB’s reasoning.<sup>10</sup> For some time, the matter remained unsettled,<sup>11</sup> though there was a hint of a continuing line with *Villers v Monsley*.<sup>12</sup>

The emphasis on the written form by which we abide today was entrenched in 1812. The decision of Chief Justice Mansfield in *Thorley v Lord Kerry*<sup>13</sup> marked a point of change in the courts’ attitude towards written and spoken forms of defamation. Identifying the

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<sup>7</sup> (1668) Hardr 470.

<sup>8</sup> *ibid* 471. In *Austin v Culpepper* (1683) 2 Show KB 313, 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>9</sup> JM Kaye, ‘Libel and Slander – Two Torts or One?’ (1975) 91 LQR 524, 531. Note, there is no reference to Kaye in Lawrence McNamara, *Reputation and Defamation* (OUP 2007).

<sup>10</sup> Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 5. The *King* court rejected the argument that there was no action where words were too vague and uncertain to cause loss because the words were written: Mitchell, 6.

<sup>11</sup> *ibid* 8.

<sup>12</sup> (1769) 2 Wils KB 403.

<sup>13</sup> (1812) 4 Taunt 355.

precedent ‘established by some of the greatest names known to the law, Lord Hardwicke, Hale, ... Holt ...’, though contrary to his personal view,<sup>14</sup> Mansfield concluded: ‘an action for a libel may be brought on words written, when the words, if spoken, would not sustain it’.<sup>15</sup> The distinction owed much to arguments such as ‘written scandal is more generally diffused than words spoken’.<sup>16</sup> Although the permanence of form allowed comments to be read by a wider audience, Mansfield went on to suggest that making a remark in a public place ‘may be much more extensively diffused than a few printed papers dispersed’.<sup>17</sup> Harm has been a foundation as passed from the history of the law of defamation for application today. The permanent form of libel carries greater possibility for harm to reputation. The concern has been potential for injury and opinions differed as to which medium (spoken or written word) reached the larger audience.

Following these points draws attention to a matter of significance for a lay audience: social media may render speech actionable owing to the historical distinction between slander and libel. Prior to social media, workers voiced their objections in person. Remarks are now additionally ‘posted’ to a worker’s social media page. 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 ... regard Facebook as conduct engaged in on personal time, unconnected to the workplace,

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<sup>14</sup> *ibid* 366: ‘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’.

<sup>15</sup> *ibid* 365.

<sup>16</sup> *ibid*. The point was made in Thomas Starkie, *Law of Slander, Libel, Scandalum Magnatum, and False Rumours* (1812) 126-44.

<sup>17</sup> *Thorley* (n 13).

analogous to sharing a beer with colleagues and friends, or getting together with friends to confide details about their jobs.<sup>18</sup>

The belief that social media is ‘only’ another medium for oral discussion remains ubiquitous amongst a non-legal audience. In *Pridgen v University of Calgary*<sup>19</sup> one of the claimants 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>20</sup> Focusing solely on the latter statement, this understanding of the medium does not fit with long-held distinctions in the law regarding liberties attached to speech.<sup>21</sup> So distinct is the perception of the medium<sup>22</sup> that terminated workers have contended: ‘How could I have assumed that a release on a Facebook page would be grounds for dismissal?’.<sup>23</sup> Disconnect between users’ perceptions of the role of the medium and legal distinctions<sup>24</sup> adds to this complicated topic and also confirms the impact of the distinction between slander and libel<sup>25</sup> where, for the most part, the latter has been actionable *per se*.<sup>26</sup> The intrigue between the legal and lay understanding of the actionability of written statements is that it recalls Professor Mitchell’s passing note that the court in

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<sup>18</sup> *Groves v Cargojet Holdings Ltd* [2011] CLAD No 257 [76].

<sup>19</sup> 2012 ABCA 139. Though not an employment case, it offers a user perspective of social media.

<sup>20</sup> *ibid* [32].

<sup>21</sup> For example, the argument that Twitter comments are akin to a private conversation was expressly rejected by a Canadian labour tribunal in *Toronto Professional Firefighters Association, Local 3888 v Grievance of Edwards, F13-142-07*, 2014 CanLII 62879 [178].

<sup>22</sup> Voorhoof and Humblet have called this a ‘virtual conflict zone’: Dick Voorhoof and Patrick Humblet, ‘The Right to Freedom of Expression in the Workplace under Article 10 ECHR’ in Filip Dorssemont, Klaus Lörcher and Isabelle Schömann (eds), *The European Convention on Human Right and the Employment Relation* (Hart 2013) 238.

<sup>23</sup> *Cargojet* (n 18) [76].

<sup>24</sup> The employer’s successful argument in *Canada Post Corp v Canadian Union of Postal Workers* [2012] CLAD No 85 [82] is of note: ‘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>25</sup> Note legislative exceptions in the UK: 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’ and its extension under the Cable and Broadcasting Act 1984, s 28; as well as the Theatres Act 1968, s 4(1).

<sup>26</sup> With s 1 of the UK Defamation Act 2013 (a claim must meet a threshold of serious harm), this statement has become equivocal.

*Thorley* may have ‘felt free to take a more critical, principled line’ had it been aware of the weak foundation of the law at that time.<sup>27</sup> This is intriguing because the widespread use of social media may provide an opportunity to rethink accepted distinctions.<sup>28</sup> In comparison to social media, the spoken word now reaches a smaller audience than social media (which itself transcends boundaries of many forms). The reach of the social media platforms makes it difficult to separate damage from the vastness of the audience; for this must be considered an aspect of the harm. Still, section 1 of the Defamation Act 2013 seems to allude to the foundational point of harm taken from the aforementioned historical discussion. For now, the legal and lay understandings remain separated.

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. While social media must be viewed as a communication form beyond what was previously contemplated with regards to this tort, it is nonetheless a vehicle for expression. 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>29</sup>

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<sup>27</sup> Mitchell (n 10) 9.

<sup>28</sup> Defamation law appears to be one area in which some concepts were decided long ago, despite more recent criticisms. The single publication rule was set out in the 19th century and by *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, 71 was ‘too well established to require citation of authority’. And yet, consider the arguments against the rule in Andrew Scott, ‘Ceci n'est pas une pipe: the autopoietic inanity of the single meaning rule’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2016).

<sup>29</sup> *Yildirim v Turkey* App no 3111/10 ECHR 2012-VI [54].

### 3. The intersection between social media and employment

Though a similar tension between interests to that found in defamation maps onto social media in employment law – (business) reputation interests versus freedom of expression<sup>30</sup> – there is a perceptible disconnect between freedom of expression under tort law as compared with the workplace setting.

Different groupings of social media comments posted by a worker<sup>31</sup> may be discerned: <sup>32</sup> use of an electronic communication device provided by the employer;<sup>33</sup> use of the employer's network (including for personal reasons); remarks made about work-related matters where an employee uses his/her own electronic device (or that of a non-co-worker); 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 or embarrassing to the undertaking's interests in some manner (even if unconnected to the workplace); finally, postings (by either the worker or others) on social media that depict the worker in an unsavoury manner. Some employers have hesitated in adopting an off-duty and on-duty applicable policy.<sup>34</sup> The dominant view of employers regarding social media, however, is likely that of its business utility for public outreach.

Many companies now have Facebook pages where they 'want people (including employees)

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<sup>30</sup> Freedom of expression may be found in both the public and private sector employment settings: *Heinisch v Germany* App no 28274/08 [2011] ECHR 1175 [44]-[46] (ECtHR); *Fuentes Bobo* (n 6) [38] (ECtHR).

<sup>31</sup> Professor Vickers identified different forms of speech in the workplace: whistleblowing, political speech, principled dissent and general comment. She 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': Lucy Vickers, *Freedom of Speech and Employment* (OUP 2002) 15.

<sup>32</sup> The growth of mobile internet access (as noted in Karine Perset, 'The Economic and Social Role of Internet Intermediaries', OECD Report (April 2010) suggests the continuation of nebulous issues surrounding user-generated content and the workplace.

<sup>33</sup> This would be distinct from 'excessive' use of the internet during working hours as was the basis for upholding the claimant's dismissal in *Birchall v Royal Birkdale Golf Club* ET/2104308/09.

<sup>34</sup> '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': Mark 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* (Irwin Law 2013) 198.



visiting the company's Facebook page and expressing positive sentiments about working for us and about our products'.<sup>35</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 to utilise social media for the enterprise's own purposes whilst not being fully aware of negative repercussions.<sup>36</sup> As will be seen below, contract clauses have been exceptionally useful in protecting businesses from their workers' social media usage.

The law has adjudicated the employment issues surrounding social media using tests pre-dating 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 virtual social platforms. Treatment of workers' social media speech stands at a distance behind the more robust engagement that defamation law reforms (common law and statute) have encouraged. In this section, the topic is investigated as follows. 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. Another illustration will foreshadow the protective approach adopted by courts regarding workers' potential to affect employers' business reputations. Then, in the first subsection below, this protective approach will be explored in UK employment cases, where workers were terminated for social media comments.

One example of the common law being adapted to the new platforms has been the decision in *Byrne v Deane*<sup>37</sup> where illegal machines were removed from a club following a tip to police.

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<sup>35</sup> John 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* (Irwin Law 2013) 204.

<sup>36</sup> In *Amalgamated Transit Union, Local 113 v Toronto Transit Commission (Use of Social Media Grievance)* [2016] OLAA No 267, the labour arbitrator found a business' social media presence that was interactive with the public would need to also be a safe space for workers; that is, free of 'language that is vulgar, offensive, abusive, racist, homophobic, sexist, and/or threatening'.

<sup>37</sup> [1937] 1 KB 818. This decision has given rise to further discussion. See *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKFCA 47 (where the court criticised *Byrne*); Richard Parkes, Alastair Mullis,

On the wall where the games had formerly been, an anonymous individual had written: ‘... But he who gave the game away [m]ay he byrnn in hell and rue the day’. Byrne, taking this to be a personal reference, sued in defamation. The court rejected the claim, finding that being called a good subject of the Crown nullified the claim. An analogy has been drawn from this decision.<sup>38</sup> The club owned the wall on which the message had been left for some time. The structure is similar to that found with social media where anonymous comments or posts by those employing pseudonyms are the subject matter of a defamation claim.<sup>39</sup> Those who have control over that space are sued (since tracking down the unknown author can exceed available resources). It is an important reminder that, despite the law lagging behind information technology advances, the common law system is not without its own tools.

In contrast to *Byrne*, English law has long held a strict, corrective view of worker conduct that may taint an employer’s business reputation. The Court of Appeal, upholding the claimant’s dismissal, in *Pearce v Foster*<sup>40</sup> illustrated. 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 defendants were not required to adduce evidence of actual harm. The dismissal was upheld because the conduct was ‘wholly

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Godwin Busuttil, Adam Speker and Andrew Scott (eds), *Gatley on Libel and Slander* (1st supp, 12th edn, Sweet & Maxwell 2013) [6.26].

<sup>38</sup> See *Tamiz v Google Inc* [2013] EWCA Civ 68.

<sup>39</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, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1, brought into force in the UK in Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013. See further Anna Vamialis, ‘Online Defamation: Confronting Anonymity’ (2013) 21 IJLIT 31.

<sup>40</sup> (1886)17 QBD 536 (CA).

incompatible with the due and faithful performance of his duties'.<sup>41</sup> Lord Justice Lindley scolded the claimant for 'having habitually conducted himself in such a manner as would injure the business of his employers if his conduct were known'.<sup>42</sup> The scope for protecting business reputation continues to be wide enough that adjudicators have rarely sought evidence of (potential) harm.

### **3.1 Workers, social media and the UK**

Despite there being a paucity of reported decisions on the topic of social media and employment in the UK, a trajectory may be discerned. Two (intermingled) hurdles are highlighted in the ensuing treatment of the UK decisions. First, discussion of workers' speech rights is absent; mostly attributable to the private sector setting of many decisions. Second, the reasonable responses test (Employment Rights Act 1996, section 98) insulates employers from penetrating analysis by employment tribunals. Part of the reason for the scepticism is the case law outlining the parameters for consideration. The tribunal must assess whether the employer genuinely believed the worker's alleged conduct constituted misconduct and this entails consideration of the reasonableness of the employer's investigation as well as the grounds for the employer's belief.<sup>43</sup> The tribunal may only consider whether the employer acted as a reasonable employer would have.<sup>44</sup> This latter point has been the subject of some concern, specifically over the 'substitution mindset': that an employment tribunal becomes sympathetic to the claimant's cause and is 'carried ... away from the real question – whether

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<sup>41</sup> *ibid* 540 (Lord Esher).

<sup>42</sup> *ibid* 542.

<sup>43</sup> *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT) (approved by the Court of Appeal in *Weddel & Co Ltd v Tepper* [1980] ICR 286) and modified by *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588 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.

<sup>44</sup> *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 (EAT).

the employer acted fairly and reasonably in all the circumstances at the time of the dismissal'.<sup>45</sup>

An example of the reasonable responses test in action, the former employee in *Game Retail Ltd v Laws*<sup>46</sup> held the position of risk and loss prevention investigator for Game Retail since 1997. Events leading to his termination began 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>47</sup> received by those who followed him (a mixture of non-work individuals and employer personnel). The Employment Appeals Tribunal (EAT) ruled his dismissal fell within the reasonable band of responses. In finding against Laws, the EAT observed that he had not set any restrictions on his Twitter account and, more importantly, failed to create a separate work account. Though easy to admonish Laws for mixing work with personal remarks on a social media platform, *Game Retail* hinted at the same outcome even if Laws had maintained two separate accounts and made the same impugned remarks.<sup>48</sup>

Adding to the mechanisms in place for employers is the utility of a well-crafted policy<sup>49</sup> or contract clause about social media use. Social media policies have included a broad provision defining unacceptable use of social media that causes offence or brings the company into disrepute.<sup>50</sup> Dismissals have been upheld where the employment contract contains a notably broad clause governing social media use. In *British Waterways Board (t/a Scottish Canals) v*

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<sup>45</sup> *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220 [43].

<sup>46</sup> UKEAT/0188/14/DA (3 November 2014).

<sup>47</sup> *ibid* [9].

<sup>48</sup> Consider the EAT's equivocal remarks, *ibid* [46]: '... employees must have the right to express themselves, providing it does not infringe on their employment and/or is outside the work context'.

<sup>49</sup> Acas has noted the importance of a workplace policy: Acas 'Social Media, Discipline and Grievances' <[www.acas.org.uk/index.aspx?articleid=3378](http://www.acas.org.uk/index.aspx?articleid=3378)>. All websites last accessed 16 August 2016.

<sup>50</sup> Andrea Broughton, Tom Higgins, Ben Hicks and Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (Ref: 11/11) (ACAS/Institute for Employment Studies 2009) 19.

*Smith*,<sup>51</sup> the EAT found Smith's dismissal, based on his Facebook entries about drinking whilst on standby as well as his offensive views of colleagues, was within the reasonable range of responses as applied to the employer's policy: 'The following activities may expose BW and its employees, agents and contractors to unwarranted risks and are therefore disallowed: Any action on the internet which might embarrass or discredit BW (including defamation of third parties for example, by posting comments on bulletin boards or chat rooms) ...'.<sup>52</sup> The EAT endorsed British Waterways at each procedural stage: on the facts it found that the entries were made; that a reasonable investigation had been followed; that the employer had lost confidence in Smith; and that a fair procedure had been followed. Unfortunately, there was a troubling timeline with regards to the basis for the dismissal because the impugned comments had been made a few years prior and no discipline had arisen. In fact, termination only came about after Smith had raised another matter. Perhaps most importantly as a contribution to the developing understanding of the law in this area, the employer's argument centred on trust. When coupled with the potential for harm to reputation, the argument an employer has lost trust in the worker would seem to be advantageous.<sup>53</sup> In *Preece v JD Wetherspoon plc*<sup>54</sup> a worker was terminated (for gross misconduct) based on her use of Facebook as a 'vent for her upset and anger [one] evening ...'<sup>55</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 organisation, staff or customers and/or

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<sup>51</sup> UKEATS/0004/15/SM.

<sup>52</sup> *ibid* [14].

<sup>53</sup> One may wonder how Mummery LJ's instruction from *Leach v Office of Communications* [2012] EWCA Civ 959 [3] will be applied in these cases: "'Breakdown of trust" is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal'.

<sup>54</sup> ET/2104806/10.

<sup>55</sup> *ibid* [42].

contravene the company's equal opportunity policy".<sup>56</sup> Two customers had subjected Preece to 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 the dismissal was within the range of reasonable responses. Posting to the platform provided a record of her violation of the employer's policy.<sup>57</sup>

There has also been a suggestion of remarks on social media not meriting protection at all. In *Crisp v Apple Retail (UK) Ltd.*<sup>58</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>59</sup> 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. Emphasis was placed on the 'great importance of image to the company'.<sup>60</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 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>61</sup> The claimant's freedom of expression argument was dismissed on the basis, first, his comments were deemed unimportant as compared to political opinions; and, second, their damaging potential

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<sup>56</sup> *ibid* [12].

<sup>57</sup> Provocation as a mitigating factor was not discussed in the decision.

<sup>58</sup> ET/1500258/11.

<sup>59</sup> *ibid* [14].

<sup>60</sup> *ibid* [39].

<sup>61</sup> *Crisp* (n 58) [44]-[45].

to Apple's reputation.<sup>62</sup> *Crisp* stands out as a particularly useful decision for the present discussion. 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 worthy speech was disconcerting: remarks made on social media pertaining to the workplace seemed 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 could have been arguable, given the prominent sales of these items. Again, recalling defamation law, protection from reputational harm is not an absolute right for the law permits challenges to reputation. In short, *Crisp* betrays a troubling negative perspective of social media speech.

One of the more noted rulings is *Smith v Trafford Housing Trust*<sup>63</sup> where the court expressed 'real disquiet' at the disciplinary action taken against the plaintiff for expressing his opposition to same sex civil marriage on his Facebook page. Smith had used the page for his own off-duty interests and had not identified himself as an employee of the defendant. The Trust demoted Smith as his posts had contravened the Trust's code of conduct and equal opportunities policy. The court found that the defendant had breached the employment contract by demoting Smith when it had as a result of his Facebook posting.<sup>64</sup> 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. His European Convention of Human Rights claims (Articles 9 and 10, freedom of speech and religion respectively) were dismissed

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<sup>62</sup> *ibid* [46].

<sup>63</sup> [2012] EWHC 3221 (Ch).

<sup>64</sup> *ibid* [5]: Demotion was in lieu of dismissal for gross misconduct as a result of his many years of 'loyal service'. The result was a demotion to a non-managerial position with a 40% reduction in pay phased in over five months.

because his employer was a private entity and therefore the Human Rights Act 1998 was inapplicable.<sup>65</sup>

*Smith* remains an instructive decision, warranting further discussion: in an instance of competing interests, speech lost out to reputation. In essence, Smith was punished at work for expressing, outside of the workplace, his opposition to same sex marriage based upon his religious beliefs. And yet, Trafford Housing disciplined Smith because of what he expressed. While we may not all share Smith's beliefs, the outcome here suggested a punishing of Smith's view based on Trafford's desire to protect its public identity – as noted in one part of the Trust's Code of Conduct: 'We expect all employees to be committed to the aims of the Trust and, given the fact that much of our work is dependent on a positive public profile, we further expect employees to promote a positive image of the Trust and of Trafford'.<sup>66</sup> There is a certain level of selectivity here insofar as Smith would have the right to express his position publicly, but this freedom is trumped by his status as an employee of Trafford Housing Trust. Moreover, disciplining Smith remains an ambivalent act – not necessarily a noble act by the employer (ie an endorsement of same sex rights). This outcome will likely be deemed acceptable in the majority of cases because it arose in the employment context. Still, *Smith* demonstrated how John Stuart Mill's proposition, that we are free to say what we like as long as it does not generate harm, has been repurposed insofar as harm includes potential detriment to a business reputation; ignoring Mill's contention regarding the benefits of a range of perspectives being voiced in public.<sup>67</sup>

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<sup>65</sup> The tribunal in *Gosden v Lifeline Project Ltd* ET/2802731/09 also arrived at this conclusion.

<sup>66</sup> *Smith* (n 63) [21]. Further outlining this part of the code of conduct is the following description of employees' interaction with anyone coming into contact with the Trust in [22]: 'Employees are required to act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues. The Trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views. Employees are expected to respect the customs and culture of any customers, their friends and family and colleagues.'

<sup>67</sup> '... it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied': John Stuart Mill, *On Liberty* (1859).



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 considerations include: comments which were posted over a period of time; the existence of (and weight placed on) a policy or contract clause related to the company's image; the impugned comments being read by others; how the worker used the social media platform(s) (though *Smith* and *Game Retail* suggest that this may be a contested point). Ultimately, violation of a social media policy usually leads to dismissal.<sup>68</sup> Similar to the absence of discourse within the remedies in defamation law,<sup>69</sup> apologies do not appear to have played a significant role in decisions.<sup>70</sup> And yet recall the gap between treatments in the tort of defamation versus employment law. The modest contention is that in tort law there is a threshold to be met for launching a claim and even after that liability may be avoided by the application of defences. In employment law, however, there are no such guideposts: speech that falls foul of broad employment contract clauses (or policies) has been the subject of some form of discipline, but mostly dismissal.

#### **4. Scope within the law**

Underlying the above discussion has been scope. A tort claim is not automatically successful because it meets the conditions of tort liability. The courts have found that people must endure certain annoyances. The law has required acceptance of a certain amount of discomfort encapsulated in the Latin phrase *de minimis*. We know from the common law of

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<sup>68</sup> The failure to warn the complainant of the implications of a breach of the social media policy rendered dismissal unfair in *Lerwill v Aston Villa Football Club Ltd* ET/1304758/10.

<sup>69</sup> Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 MLR 87. The criticism may be applied to other jurisdictions: see for example David S Ardia, 'Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law' (2010) 45 Harv CR-CL L Rev 261.

<sup>70</sup> There is rare occasion when a worker mitigates any damage which renders the dismissal unfair. See *Bates v Cumbria County Council and another* ET/2510893/09 where the claimant's actions mitigated damage, thereby rendering dismissal unfair. See also Paul Wragg, 'Free Speech Rights at Work: Resolving Differences between Practice and Liberal Principle' (2015) 44 ILJ 1.

tort that not all contact between two individuals constitutes a cause of action. Battery does not necessarily arise from ‘the least touching of another in anger’, as Chief Justice Holt wrote in the 1704 decision of *Coles v Turner*.<sup>71</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 that ‘a broader exception has been created to allow for the exigencies of everyday life’.<sup>72</sup> In *Wainwright v Home Office*<sup>73</sup> 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 Protection from Harassment Act 1997 forms another example regarding scope. The Act requires a series of incidents (more than two) in order to ground a claim. Jacob LJ in *Ferguson v British Gas Trading Ltd*<sup>74</sup> sketched out some of the landscape: ‘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 elaborations anticipate the more detailed discussion below.

#### **4.1 Towards a balance of interests**

With social media, tort and employment law may be considered in a thought-provoking manner. Defamation law has influenced the adjudication of speech in the employment setting where social media usage is at issue. One element is absent. The defences<sup>75</sup> are of great

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<sup>71</sup> (1865-66) LR 1 CP 373 (Exch).

<sup>72</sup> *Collins v Wilcock* [1984] 1 WLR 1172 (CA) 1177.

<sup>73</sup> [2003] UKHL 53 [9].

<sup>74</sup> [2009] EWCA Civ 46 [17]-[19].

<sup>75</sup> 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”: James Goudkamp, *Tort Law Defences* (Hart 2013) 2-3.

importance to the action: speech may be found to be defamatory and still not be the subject of legal sanction because robust defences have been put in place so that speech is protected. There is an expanse of expression before the criteria for tortious conduct are met. There is scope within the common law to allow for the principles of free expression defended in one of its disciplines (tort) to be reinforced in another (employment). Part of establishing this range of speech entails recognising the salient point emerging from defamation law: individuals are not protected from being offended.

The basis for the rule prohibiting government from making a claim in defamation<sup>76</sup> 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>77</sup> 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'<sup>78</sup> for the exercise of a freedom.

To suggest that the duty of loyalty on its own automatically trumps the right is remarkable for it belittles one of the more celebrated of freedoms.<sup>79</sup> Distinctions can 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>80</sup> The

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<sup>76</sup> *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 (HL).

<sup>77</sup> The impact of the Human Rights Act 1998 on private sector employers in the UK remains a point of discussion. See *X v Y* [2004] EWCA Civ 662. Lord Justice Elias relied upon Mummery LJ's opinion in *X v Y* with regards to Article 8 (of the ECHR) considerations in *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470 [52].

<sup>78</sup> As the ECtHR called termination of employment in *Heinisch* (n 30) [91].

<sup>79</sup> For example, Amartya Sen, *Development as Freedom* (OUP 1999) who argues that a free press is pivotal for economic prosperity.

<sup>80</sup> This would not preclude whistleblowing.

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. An individual commenting on a social media platform to friends is viewed differently when she is identified as a worker employed by a particular enterprise. A right to free expression should not be automatically curbed as a result of employment status (and therefore concerns over business reputation). A line may be drawn, however, where the individual's intention was to impugn or discredit the employer (with care taken to consider whistleblowing circumstances). 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 employment setting. A means of effecting this end may be found in a threshold having to be met; a matter brought into law by section 1 of the Defamation Act 2013 that has 'raised the bar for bringing a claim so that only cases involving serious harm to the claimant's reputation can be brought'.<sup>81</sup>

Regarding the threshold of potential harm, limited discussion has taken place in employment case law where the respondent has been required to establish evidence of harm. In *Whitham v Club 24 Ltd t/a Ventura*<sup>82</sup> the tribunal ruled that the employer's decision to dismiss for gross misconduct was beyond the range of reasonable responses.<sup>83</sup> Whitham had posted comments to her Facebook page; outlining a certain level of frustration with one of her employer's clients.<sup>84</sup> The workplace policy on e-mail and internet use stated: 'You should also remember that your obligation of confidentiality extends outside of the workplace and that posting information about your job on the internet (for example, on social networking sites such as

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<sup>81</sup> Explanatory Notes to the Defamation Act 2013 [11]. Although the effectiveness of this section in discouraging trivial claims may be doubted (as Mullis and Scott contend (n 69)), the cases noted above suggest consideration of a threshold may lead to a discussion of more perceptible balance.

<sup>82</sup> ET/1810462/10.

<sup>83</sup> *ibid* [41].

<sup>84</sup> *ibid* [5].

Facebook and MySpace) may lead to disciplinary proceedings and/or dismissal'.<sup>85</sup> One of the factors leading the tribunal to its decision was the absence of evidence of harm to the defendant's business reputation.<sup>86</sup> Following on from *Whitham*, the Northern Ireland Industrial Tribunal, in *Irwin v Charles Hurst Ltd*,<sup>87</sup> also challenged acceptance of 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>88</sup> Here too the tribunal found that freedom of expression was not interfered with, but not because it was inapplicable. A key fact was the respondent's failure to even inquire into the fact of any financial loss.<sup>89</sup> The tribunal ruled 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>90</sup> Furthermore, on the point of off-duty conduct leading to 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>91</sup> It should be noted, though, that in *Irwin* the employment relationship was broken to an extent that rendered reinstatement impractical.<sup>92</sup> The tribunal instead made a compensatory award, reduced by 80% for Irwin's responsibility in bringing about his dismissal.

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<sup>85</sup> *ibid* [15].

<sup>86</sup> *ibid* [40]. 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 (he took immediate action by removing the posting and was apologetic) rendered his dismissal unfair.

<sup>87</sup> [2012] NIIT 2254\_12IT.

<sup>88</sup> *ibid* [37].

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* [82].

<sup>91</sup> *ibid*.

<sup>92</sup> Pursuant to Art 150 of the Employment Rights Northern Ireland Order 1996.

Another important consideration in the adjudication of these issues is motive as a basis for dismissal.<sup>93</sup> It also permits a distinction to be made between whistleblowing<sup>94</sup> from efforts to bring ridicule on an employer. On the latter point, the duty of loyalty and fidelity in employment<sup>95</sup> forms part of the measurement in weighing the worker's right to freedom of expression against the interests of the employer.<sup>96</sup> As an illustration, the Leuven Labour Tribunal<sup>97</sup> upheld a dismissal where the critical statements of a business development manager<sup>98</sup> 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>99</sup> There are considerations to be weighed and these are not currently being sufficiently appreciated. The cases outlined above casually allude to a strict liability approach where the unilateral assessment of an act is all that may be required.

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<sup>93</sup> See the ECtHR, *Heinisch* (n 30) [69]; *Guja v Moldova* [GC] App no 14277/04 ECHR 2008-II [77]. Consider also *Freeth v Burr* (1874) LR 9 CP 208: 'the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract'.

<sup>94</sup> Whereas in the case of a whistleblower, the worker would have first communicated concerns to her employer as in *Heinisch* (n 30) [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'. Here too, however, legislative change (Enterprise and Regulatory Reform Act 2013) has curbed the parameters for whistleblowing.

<sup>95</sup> The rule having been long-established in cases such as *Lacy v Osbaldiston* (1837) 8 C&P 80.

<sup>96</sup> See the ECtHR, *Heinisch* (n 30) [64], and *Marchenko v Ukraine* App no 4063/04 [2009] ECHR 299 [45].

<sup>97</sup> 17 November 2011, (2012) 46 *Revue du Droit des Technologies de l'Information* 79.

<sup>98</sup> The position held (such as at a managerial level) may contribute to a finding against the worker: *British Telecommunications plc v Ticehurst* [1992] IRLR 219 (CA).

<sup>99</sup> *Predota v Austria* (dec) App no 28962/95 (ECtHR, 18 January 2000). While many ECtHR decisions have been more nuanced, there remain cases that still pose difficulties such as *Bărbulescu v Romania* App no 61496/08 [2016] ECHR 61.

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 made. The language of high and low level speech has been utilised to describe the situation.<sup>100</sup> This categorisation has raised an important consideration (notably as it combines the medium of speech with a notion of its value)<sup>101</sup> as social media platforms have provided the individual with enhanced means for expression. The negative perception of speech on social media recalls that in defamation relating to mainstream news media publications courts have focused on different readerships<sup>102</sup> in considering whether a published comment is defamatory and not on the perceived value of the publication.

## 5. Conclusion

Speech of workers on social media platforms garners little protection in the UK. The matter is made more stark by 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 when the law protects free speech in the tort of defamation for writing about a range of matters; while workers' remarks may also fit under the same heading but are not considered in a similar manner. An underlying difficulty is the categorisation of social media as a lower form of speech, thereby intimating that mainstream media is worthy of protection. This is a subject for another analysis. For the present, social media has the potential to challenge such a

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<sup>100</sup> Rowbottom, 'To Rant, Vent and Converse' (n 4) 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.' Rowbottom has also provided a diagram outlining his classification: Rowbottom, 'In the Shadow of the Big Media' (n 4) 494.

<sup>101</sup> Note the blurred lines created by news media using the popular spontaneous platforms available to all with online access.

<sup>102</sup> See *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB).

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.