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SOCIAL MEDIA AND THE WORKPLACE: PRIVATE REGULATION OF SPEECH

David Mangan*

A developing line of case law suggests there is little space for workers' remarks on social media platforms even before discussion of employers' proportionate responses. Workers are being disciplined (up to and including termination) for online remarks because employment contract clauses have vested employers with a unilateral authority to assess workers' online speech based on the expansive threshold of what may be embarrassing to or what may lower business reputation. While a legitimate concern itself, the singular focus on business reputation fosters a chilling effect at a time of unprecedented facilities for individual free speech. A comparison of United Kingdom and Canadian cases on social media in the workplace offers an instructive contrast where, in Canada, there is greater scope for expression than in the UK. While the Canadian decisions lead to fertile discussion of pressing social issues, they are not idealized. Rulings in both countries remain susceptible to further difficulties, such as the capacity for information technology to expose workers and employers alike to legal risk beyond the 'work day'.

Keywords: information technology, workplace, business reputation, United Kingdom, Canada

I. INTRODUCTION

Information technology offers an unprecedented capacity for individual expression. It also provides for widespread monitoring of these remarks by employers, co-workers and the public. The freedom to express online is notably constrained by the contract of employment for anyone falling under the heading of 'worker'. The breadth and strength of contract clauses (and, if incorporated, workplace policies or handbooks) regarding social media use can be seen in how these provisions vest employers with wide discretion to determine whether remarks reflect negatively on the undertaking's business reputation. This situation warrants further consideration. Free speech remains a championed value in many countries; a touchstone of modern democracy and protected in law.[1] Still, the perceived value of free speech does not appear to permeate the personal work relationship. There is an imperative to which this study is directed. As this is a formative period for information technology and the workplace, the present is an occasion to carefully consider the intersection. Once parameters are firmly set, they are more difficult to amend.

The jurisdictions under study here are United Kingdom and Canadian employment/labor litigation when remarks on social media have been the basis for worker discipline up to and including dismissal. While comparative analysis enhances the study of law and information technology,[2] the workplace additionally offers a valuable setting from which to observe the differing perspectives on the balancing of interests. These two jurisdictions have some important similarities:[3] they are both democratic, common law,[4]

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[1] Largely secular and West-centered: W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009), 6.

[2] A. R. Lodder, "Ten Commandments of Internet Law Revisited: Basic Rules for Internet Lawyers" (2013) 22 I.C.T.L. 264, 268.

[3] The comparison also continues that employed by UK academic labor law commentators; for example, D. Brodie, "Voice and the Employment Contract" in A. Bogg and T. Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014), 337.

highly-developed jurisdictions where economic interests and free speech are stated values. The paradigmatic quality of economic stimulation through employment regulation forms an important context for this discussion. There is also a noteworthy contrast in labor adjudication between these two countries where Canada has, since the turn of the 21st century, been more willing to recognize labor rights as compared to the more restrained UK approach.[5] A similar assessment can be made of the respective approaches to social media and the workplace. Business reputation is the concept at the center of the difference between the jurisdictions.

Decisions in this area offer a further point of interest: how do employers find out about these remarks? In some instances, employers are notified of online remarks by other workers or even members of the public. In others, employers have come across the remarks; seemingly through internet searches but it is not clear if this is by way of a decision to monitor workers or incidental to general internet searches. The reasons for the information coming to employers' attention casually bypass the question of whether or not there has been an intrusion into workers' privacy rights. Consequently, the topic has not been engaged as extensively as freedom of expression. Instead, the underlying notion is that if comments are made on social media then any privacy right has been automatically abandoned. This is a debatable premise regarding the privacy interests of workers.[6] The supposition relies on the assertion that all comments made online are public;[7] ignoring the possibility of privacy settings (for example) or more directed communication to a select audience.

Decisions have focused on expression by workers on social media platforms and as a result there has been a conflation of reputation and insubordination. Employers discipline workers for these online postings because of the potential negative effect on their business reputation. Adjudication of the issue is influenced by defamation through inferentially adopting the distinction made in the tort that published words pose greater potential for harm, in this case, to business reputation. The impugned conduct in these cases can be classified as insubordination which is most often set out in the failure of the workers to abide by a contractual clause (or workplace policy) relating to conduct in the online environment. However, not all of these remarks should fall under this classification because some are tantamount to the venting of frustrations co-workers may have (and certainly had) when meeting in the same physical location to verbally talk amongst themselves. Posting a remark about a frustration at work can be viewed as violating a contract clause and yet the remark is one that the same worker may say to colleagues at an after work gathering without a similar result. The difference lies in the form (a posting which is a publication) and the consequential potential impact on business reputation. One may wander by a table of disgruntled workers of

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[4] Canadian common law is largely derived from the UK and continues to borrow from it. This is not to say all Canadian law is strictly adherent. Canadian law diverged from UK tort law with the retention of Lord Wilberforce's duty of care analysis in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 by the Supreme Court of Canada in *Kamloops (City) v. Nielsen* (1984), 10 D.L.R. (4th) 641. The House of Lords in *Murphy v. Brentwood District Council*, [1991] 1 A.C. 338 overruled *Anns*. The Supreme Court of Canada's decision in *Cooper v. Hobart* [2001] 3 S.C.R. 537 recalls the cautious approach to the duty of care analysis by the House of Lords in *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605.

[5] Comparing for example the Supreme Court of Canada decisions of *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27 and *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 with the English Court of Appeal decision in *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829.

[6] See for example, M. Finkin, *Privacy in Employment Law*, 4th ed (BNA Books 2016); F. Hendrickx and A. Van Bever, "Article 8 ECHR: Judicial patters of employment privacy protection" in F. Dorssemont, K. Lörcher and I. Schömann (eds) *The European Convention on Human Rights and the Employment Relation* (Hart 2013), 183-208; P. Secunda, "Privatizing Workplace Privacy" (2012) 88 N.D.L.R. 277.

[7] L. Edwards and L. Urqhart, "Privacy in public spaces: what expectations of privacy do we have in social media intelligence?" (2016), 24 I.J.L.I.T. 279-310.

one employer, hear similar comments to those posted, and complain about them. Employment litigation is not as immersed in these types of cases as it is with instances of remarks on social media platforms.

Overlapping with defamation prompts additional discussion of disconnect between citizens' and workers' free speech. This requires further reflection because statutory and common law developments pertaining to defamation, in the jurisdictions under study, have expanded protection of free speech. Drawing from these changes, this investigation reflects on the permeability of free speech as a celebrated right in democracy against the stricter view held in employment decisions. In effect, employers are akin to gatekeepers with regards to expression of their workers on social media platforms. The *prima facie* freedom of speech, before there is discussion of a proportionate response,[8] remains an area for further important examination; that is, questioning whether there should be discipline for all social media remarks by workers. There has been an accepted spectrum for remarks where political speech has a prominent place.[9] However, the scope should be more broadly construed in light of developments in information technology, thereby compelling reconsideration of what may be viewed as 'unimportant speech' when it leads to discipline of workers for social media remarks. The larger question is why there continues to be a penchant for removing the humanity from the one of the most human of legal disciplines, labor/employment. Social media in the workplace recalls that, even in this contemporary context, the tools of contract and tort reinforce the roots of industrial law.[10]

Protection of business interests remain a legitimate aim[11] and social media issues connected to the workplace pose practical concerns to business reputation stemming from the "distinctive capacity of the [i]nternet to cause instantaneous and irreparable damage"[12]. And yet, there are different means of protecting business reputation. The interpretation of the negative potential effect on business reputation of social media remarks distinguishes adjudication within the (largely) private setting of employment[13] between the countries under study. The capture area for perceived negative remarks by workers extends well beyond comments made at the workplace on social media and includes statements unrelated to work and posted in off duty hours that the employer may find to be embarrassing to its interests. While the case law is at an early stage, there is a developing trajectory. In Canada, parameters are being developed which point to balancing concerns over business reputation with space for workers' free speech; while UK case law (especially in England) has been more one-sided, in favor of stricter protection of business reputation, based upon broad contract clauses. The more expansive approach to speech in the former jurisdiction establishes that the stricter view of important speech in the latter is not the singular means to balance competing interests. While the Canadian decisions lead to fertile discussion of pressing social issues, they are not idealized. Rulings in both countries remain susceptible to further difficulties, such as the capacity for information technology to expose workers and employers alike to legal risk beyond the 'work day'.

The ensuing pages explore the argument there is a chilling effect on free speech stemming from broad contract clauses which ostensibly justify discipline up to and including dismissal of workers for a range of remarks made on social media platforms. While

[8] P. Wragg, "Free Speech Rights at Work: Resolving Differences between Practice and Liberal Principle" (2015) 44 I.L.J. 1.
[9] *Redfearn v UK* (2013) 57 EHRR 2.
[10] The root of industrial law being contract and tort was outlined in Sir Mansfield Cooper, *Outlines of Industrial Law* (Butterworth 1947).
[11] *Sanchez v Spain* (2012) 54 EHRR 24, [57].
[12] *Barrick Gold Corp v Lopehandia* (2004) 71 O.R. (3d) 416 (CA), [44].
[13] The reported cases are largely situated within the private setting.

protecting commercial interests from negative potential justifiably endures as an important objective, there remains room for greater nuance in the application of this rationalization to additionally protect a scope for free speech.

II. SOCIAL MEDIA REMARKS INTERSECTING WITH EMPLOYMENT LAW

Prior to social media, workers would voice their complaints about the workplace in a social setting. Remarks, which at one time may have been made in person, are now additionally 'posted' to a social media page and have formed grounds for termination (for example by "making disrespectful, damaging and derogatory comments").[14] Employment adjudication has acknowledged the appeal of social media platforms:

> it mimics traditional social interactions. The ability to include or exclude those who can share in the conversation is important. Many subscribers, younger persons, regard *Facebook* 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.[15]

Outside of law, the belief that social media is 'only' another medium for private discussion remains ubiquitous. What may be a trivial difference to the layperson[16] is in fact a significant distinction within the law. The gap between the lay understanding and legal analysis of social media postings by workers may be attributed to the long-held distinction in defamation law between libel and slander where the written form has been understood as containing greater potential for harm.[17] The chilling effect on workers' speech originates in the wide capture area of contract clauses (and, if incorporated, workplace policies or handbooks).[18]

Social media reveals an overlap between tort and employment law. What has been taken from defamation are the measurement of harm (to employers' interests) and, adjunct to this measurement, the significance placed on the written form (libel). It is not contended that workers are being 'sued' in defamation by their employers. Instead, defamation influences understanding: workers' online remarks are treated as constituting harm to business reputation. Once the reputational harm has been alleged, the matter becomes subsumed by the insubordination rubric: the worker has violated workplace rules. The move is too easily made considering the importance placed on free speech in a democratic society. This is all the more striking with technological innovations which permit the individual with access to a computer and the internet to speak to an audience of her choosing. The present criticism should not be viewed as a line of argument requiring employers to accept all online remarks that jeopardize business reputation. There are instances when discipline may be at least within a spectrum of acceptable responses.[19] The analysis here considers the disconnect on free speech. There has been a selectivity in the defamation principles that are influential; notably when one considers the changes in both jurisdictions under study in this tort to permit a broader range of expression. The implication is that speech considerations end at the workplace door; a separation that is entirely untenable given the persistence of online remarks versus the finite nature of a work day. The "infrastructure" of free speech[20] in social media has been situated in private hands; vesting remarkable authority in employers regarding the assessments of comments made on social media.

This is not the sole dimension to the topic. Social media platforms also use the law to

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[14] *Lougheed Imports Ltd v UFCW, Local 1518* (2010) C.L.R.B.R. (2d) 186, [56].
[15] *Groves v Cargojet Holdings Ltd.* [2011] C.L.A.D. 257, [77].
[16] For example, the argument that Twitter comments are akin to a private conversation was rejected in *Toronto Professional Firefighters Association, Local 3888 v Grievance (Edwards)*, 2014 CanLII 62879, [178].
[17] A history traced in P. Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005).
[18] *Department for Transport v Sparks* [2016] EWCA Civ 360.
[19] For example, harassment of a worker by a colleague by way of social media was considered in *Faires v Foreign and Commonwealth Office* Case No: 2200486/2016.
[20] J. Balkin, "Old-School/New-School Speech Regulation" (2014) 127 H.L.R. 2296.

retain what can amount to editorial control over the speech of users. The power vested in the platforms permits them to remove offending comments or even block users. The concept of the chilling effect has a lengthy history in defamation law which may be extended here. Adding to the considerations, social media platforms constitute a curious contradiction. They may be said to chill free speech. They may also be accused of facilitating illegal speech with no effective recourse to redress. Additional attention should be drawn to the fact these entities are private and as such act within their own defined parameters. Although space does not permit further discussion here, this is another aspect of the profound influence of information technology.

There have been movements in both the UK and Canada regarding protecting a wider range of free speech in defamation law. Those in Canada,[21] though, are not as numerous as found in its legal ancestor (where most provinces derived their laws from those of the UK, save for Quebec which adopted the French civil code). The recent emphasis in the UK on defamation law protecting a wider range of speech exposes one of the underlying elements in the analysis of social media in the workplace.[22] The ascendant view is that speech in its multifarious forms must be protected, but some level of guardianship over reputation should be noted. Criticisms of the tort as a "blot on the lawscape"[23] stemmed from protection of reputation with protection of liberty, a "surely more important value".[24] Around the turn of the 21st century, the tort was under significant change. As the end of the 20th century was in view, the House of Lords in *AG v Guardian Newspapers Ltd (No.2)*[25] established that interference with freedom of expression should only be undertaken where there was a pressing social need. This decision was one of the first representing a "rebalancing of the law".[26] Lord Nicholls' words in *Reynolds* further the point*:* "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved".[27]

Defamation as an action that fits with other torts by compensating for harm has become more difficult to reconcile. We recompense when "some other person can be said to be responsible for that harm in one of the senses of 'responsible' recognized by tort law in its heads of liability."[28] Libel, though, has become less about assigning responsibility and more about tending a gate through which speech is meant to pass; its movement interfered with in particular circumstances. Arguments regarding safeguarding plurality and democratic values

[21] In 2015, the Province of Ontario passed the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23 which, among other parts, amended the *Courts of Justice Act* to add s.137.1. The purpose of the provision (called anti-slapp) includes: **"**(a) to encourage individuals to express themselves on matters of public interest; (b) to promote broad participation in debates on matters of public interest; (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action."

[22] It should be borne in mind that much of the movement in this area has been promulgated by the coming into force of the *Human Rights Act 1998* which brought the European Convention of Human Rights into domestic law.

[23] T. Weir, *An Introduction to the Law of Tort* 2nd edn (OUP 2006), 190.

[24] Ibid 176. Plural in original.

[25] [1990] 1 A.C. 109 (HL).

[26] A. Mullis & A. Scott, "The swing of the pendulum: reputation, expression and the re-centring English libel law" (2012) 63 N.I.L.Q. 27, 29.

[27] *Reynolds v Times Newspapers Ltd.* [1999] 3 W.L.R. 1010, 1022.

[28] P. Cane, "Retribution, Proportionality, and Moral Luck in Tort Law" in P. Cane and J. Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford 1998), 141.

are readily recognizable.[29] In *Chase v Newsgroup Newspapers Ltd.*, the Court of Appeal, synthesizing decisions from the European Court of Human Rights,[30] itemized why free speech remains pivotal.[31] The distinct treatment is also evident in the discussion relating to the prohibition of government (though not individual politicians) to sue in defamation.[32] The basis for this rule is a concern that permitting government to launch this tort action would have a chilling effect: it may diminish, if not eliminate, discussion and undercut the notion of keeping government accountable to the people. This rationale focuses on what may be called the public law aspect as it deals with the interaction between the individual and the state. There is a question, then, as to why speech in the private sector speech should be limited in a different manner.[33]

Though free speech is valued in the UK, free press has been the more dominant focus of endorsement. This may not quite be understood as the same as free speech insofar as the latter term alludes to the individual right and the former a more particular form of the right. This distinction seems crucial for the law's application to the broad forms of communication. Social media invigorates the idea of free speech insofar as the individual possesses a platform for expression. However, if free speech is viewed as a free press, then the role and influence of social media may be significantly truncated. To focus exclusively on free press,[34] though, overlooks the importance placed on free speech to individuals' self-fulfillment.[35]

This is all before we even consider the effect of the defenses. Outside of the US, defenses have been expanding in the tort of defamation; premised on the importance of speech in democracy. The defenses[36] are of great importance to the action:[37] speech may be found to be defamatory and still not be the subject of legal sanction because robust defenses have been put in place so that speech is protected. The democratic foundations remain pivotal even for the private individual; for there is a public interest in the individualized opportunity for free speech afforded by social media platforms. The democratic rules outlined in *Chase* require linkage with a democratic culture; that is, the voicing of opinions cannot be kept only to the press. The point becomes apparent when considered within the workplace context.

Once situated within employment law, there is a hardening of when speech rights may be recognized. Often the public/private law divide is utilized; those areas in which the state is involved and those free from state involvement. Within the UK, the firmness of this separation may be challenged, as demonstrated by a host of changes to employment

[29] The European Court of Human Rights in *Steel and Morris v UK* (2005) 41 E.H.R.R. 22, [87] wrote of free speech as "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment".

[30] *Jersild v Denmark* (1994) 19 E.H.R.R. 26, [31]; *Stemsaas v Norway* (1999) 29 E.H.R.R. 125, [58]-[59].

[31] [2002] EWCA 1772, [60].

[32] *Derbyshire County Council v Times Newspapers Ltd* [1993] A.C. 534 (HL)

[33] There has been a little-used path for the courts to be involved in enforcing public rights (as enshrined in the *Human Rights Act*, sections 3 and 6) in the private setting: Lord Justice Mummery in *X* v *Y* [2004] I.C.R. 1634 (CA), [64]. See also K.D. Ewing, "The Human Rights Act and Labour Law" (1998) 27 I.L.J. 275

[34] Paul Wragg has contemplated the distinction between journalists and non-journalists regarding free speech arguments: P. Wragg, "'Free Speech is not Valued if only Valued Speech is Free': Connolly, Consistency and some Article 10 Concerns" (2009) 15 Eur. Pub. L. 111.

[35] *Lingens v Austria* (1986) 8 E.H.R.R. 407, [41]; *Nilsen and Johnsen v Norway* (2000) 30 E.H.R.R. 878, [43]; *Tammer v Estonia* (2003) 37 E.H.R.R. 43, [59].

[36] 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* (Hart 2013), 2-3.

[37] Eric Descheemaeker has aptly characterized defamation defenses as "reclaiming much – if not most – of the "territory" that the first part of the enquiry [satisfying the tripartite criteria] had handed to the pursuing party": E. Descheemaeker "Mapping Defamation Defences" (2015) 78 M.L.R. 641.

regulation aimed at stimulating the economy (in particular increasing private sector hiring)[38] where the state has injected itself into private matters of employment. With the emphasis on regulation for competitiveness,[39] employment law has blurred the public/private divide in law.[40] The example of social media in the workplace demonstrates not only the artificiality of the divide, but also imports a singular, law-focused perspective.[41] One element of the challenge for social media in the workplace is that the law has difficulty with the dual identities of people: an individual has the right of free expression; however, that right is limited quite noticeably when one considers that same person as a worker of an employing entity.

A question emerging from the cases discussed below is the legitimacy of employers acting as arbiters of speech, though indirectly doing so. The legitimacy of the state (state-made laws and its courts system to adjudicate) to determine legal issues pertaining to cyberspace has been discussed.[42] In the workplace, however, there has been an absence of action. Employers have filled this gap with contract clauses; tools that legitimate subsequent disciplinary action (up to and including dismissal). National laws in the common law jurisdictions under study (as two examples) have given effect to this means of governing relationships. The acceptability of this response is challenged here on the basis that speech stands out as an important element of democracy and should not be casually put aside based upon a contract clause. As illustrated below, the more flexible approach applied in Canada is closer to a balancing of the competing interests. This approach is preferred to an attempt to "produce rules which describe as precisely as possible the conduct required from regulates".[43]

The following non-exhaustive categories of sources for online comments posted by workers may be discerned: use of an electronic communication device provided by the employer; use of the employer's network (including for personal reasons) regardless of the provenance of the accessing device; remarks made about work-related materials 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 publicly embarrassing 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 unsavory manner (perhaps a photograph or video of the individual). The dominant view of employers regarding social media is likely that of its business utility for public outreach. Many companies have social media pages where they want customers

[38] Department for Business, Innovation and Skills, *Resolving workplace disputes: A consultation* (January 2011); K. Ewing & J. Hendy "Unfair Dismissal Law Changes – Unfair?" (2012) 41 I.L.J. 115; Department for Business, Innovation and Skills, *Ending the Employment Relationship: Government Response to Consultation* (January 2013); Department for Business, Innovation and Skills, *Employment Law 2013: Progress on Reform* (March 2013); D. Mangan "No Longer. Not Yet. The Promise of Labour Law" (2015) 26 K.L.J. 129.

[39] As outlined in H. Collins, "Regulating the Employment Relation for Competitiveness" (2001) 30 I.L.J. 17-47.

[40] For discussion on the challenges in the area see: G.S. Morris, "The Human Rights Act and the Public/Private Divide in Employment Law" (1998) 27 I.L.J. 293 as well as "Fundamental Rights: Exclusion by Agreement?" (2001) 30 I.L.J. 49. This is in contrast to the laissez-faire model outlined by Otto Kahn-Freund which characterized the time from the 1970s and earlier: P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, 3rd edn (Stevens 1983).

[41] W. Lucy and A. Williams, "Public and private: neither deep nor meaningful?" in K. Barker and D. Jensen (eds), *Private Law: Key Encounters with Public Law* (CUP 2013).

[42] C. Reed, *Making Laws for Cyberspace* (OUP 2012).

[43] Professor Reed has asserted a need for judges to consider the legitimacy of the law's claim to regulate and judges to adjudicate in relation to cyberspace: C. Reed, "Why Judges Need Jurisprudence in Cyberspace" Queen Mary University of London, School of Law Legal Studies Research Paper No. 244/2016, 4, 10.

and workers alike expressing positive views of their products[44] and workplaces to establish an appealing social media presence.

The issue arising in these cases focuses on the prevalence of internet-based social media platforms. This would exclude platforms that operate like a separate text messaging system, such as WhatsApp. It is a curious distinction. WhatsApp has been implicated in employment litigation, such as in *Dixon v T.M. Telford Dairy Ltd.*[45] where at work tensions intensified through off-duty social media exchanges on the application. However, the more usual platforms are Twitter or Facebook (which also owns WhatsApp). Despite the similar messaging capacities amongst media (directed messaging between two parties or setting up a group chat), WhatsApp has not been susceptible to the same scrutiny. It may be viewed as distinct insofar as texts may not be so easily visible to the world. And yet, these messages may be shared just as Facebook or Twitter messages which have been shared with a more restricted audience. One difference is that Twitter and Facebook provide a page-based form of communication in which the authors of these pages may place individualized comments. WhatsApp exists as a text-based application. While it has not been at issue in employment litigation, the query remains why WhatsApp may be viewed as distinct from these other forms when the adjudication surrounds publishing remarks which employers deem embarrassing or harmful to their business reputations.

There remains the question of whether, in the workplace setting, an employer's endorsement of social media use for business purposes could affect discipline or dismissal. The UK cases discussed suggest it may not be the case, but the matter has yet to be adjudicated. In Canada, there has been an indication that operating social media accounts could place employers in an actionable position where consumers are permitted to make discriminatory remarks about personnel or the employer engages in correspondence with consumers on matters that are disciplinary in nature and therefore not for public consumption pursuant to the collective agreement.[46] This matter will be returned to later.

III. A STRICT APPROACH TO PROTECTION OF BUSINESS REPUTATION

UK decisions regarding discipline for remarks on social media contrast with free speech as one of the more celebrated rights in western democracies (having garnered special attention within the law). Decisions have related to the content of communications (as opposed to monitoring of traffic). When looking at electronic communications, cases have arisen as a result of disclosure by either a fellow worker or another individual to the employer. The paucity of cases of employer monitoring does not suggest that UK employers do not monitor their workers' communications. There are other possibilities for this, including: it may be that workers generally do not challenge dismissals where there is monitoring; there is a gradual process in workplaces where workers are warned instead of being summarily dismissed. The UK decisions are premised on a (typical) bilateral relationship between worker and employer. They reveal unilateral assessments of speech vested in employers by employment contract clauses.

[44] 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* (Irwin Law 2013), 203-205.
[45] Case Number: 1303325/2016.
[46] *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)* [2016] O.L.A.A. No 267. See also "Employers now responsible for protecting their workers on social media" (30 July 2016) http://www.cbc.ca/news/canada/employers-social-media-harassment-1.3700334

Recalling the tort law influence on the adjudication of the issue, the UK situation remains noteworthy considering there have been lengthy campaigns[47] leading to government pronouncements regarding the good of free speech and subsequent legislative reform, such as the *Defamation Act 2013*. The underlying ethos of these recent reforms has been to expand protection for a wider range of speech.[48] With the remarkable capacities of information technology individuals may now easily post comments on any range of matters, not merely the political. The various social media platforms (for example) can advance democratic goals as well the unsavory agendas. The emphasis here is on better establishing a *prima facie* space for speech. Moreover, the UK cases reveal a strictly construed concept of business reputation resulting in a low threshold for discipline (if not dismissal) of workers expressing their opinions on social media platforms. The threshold set by the decisions in this area is that of speech by workers (though not necessarily related to the workplace) which causes embarrassment or a perceived lowering of reputation as determined by employers. UK law has demonstrated itself to be capable of greater nuance, and to establish room for (at least) the consideration of the co-existence of speech and reputation interests in this setting. It may be wondered why in the UK private law tort of defamation law there is some prima facie right to free speech, subject to limitations, but the principle does not seem to pierce the walls of workplaces, leading to a rhetorical question of why there continues to be a penchant for removing the humanity from the one of the most human of legal disciplines, labor/employment.

One must wonder at the permeability of a celebrated right such as free speech when considering these employment decisions. In each of the UK cases, a unilateral assessment of the impugned speech was made by the employing entity and the final decision carried permanent results.[49] In *Smith v Trafford Housing Trust,*[50] the Trust demoted (in lieu of termination owing to his many years of service) Smith for expressing his opposition to same sex civil marriage on his Facebook page because these postings had contravened the Trust's code of conduct and equal opportunities policy. Smith's successful wrongful dismissal claim was the classic pyric victory; awarded for the twelve weeks before the assumption of his new demoted role. His human rights claims were dismissed because his employer was a private entity.[51] Disagreement with Smith's beliefs aside, the outcome here suggested a punishing of Smith's view based on Trafford's desire to protect its public identity.[52] There is a certain level of selectivity here insofar as Smith would have the right to express his position publicly, but this freedom was trumped by his status as an employee of Trafford Housing Trust. *Smith*

[47] Andrew Scott described the *Defamation Act 2013* as "the culmination of a phenomenally successful political campaign": A. Scott, "Ceci n'est pas une pipe: the autopoietic inanity of the single meaning rule" in A. T. Kenyon (ed) *Comparative Defamation and Privacy Law* (CUP 2016), 40.

[48] At second reading and in introducing the Defamation Bill, the then-Lord Chancellor stated: "I am confident that everybody in this Chamber agrees that freedom of expression is the cornerstone of our democracy. In an open society, people should be at liberty to debate a subject without fear or favour, whether the matter be political, scientific, academic or anything else. That is how power is held to account, abuses of authority are uncovered and truth is advanced. … I share the mounting concern of recent years that our defamation laws are … at risk of damaging freedom of speech without affording proper protection": HC Deb 12 Jun 2012: Col 177 (Kenneth Clarke).

[49] Paul Wragg has also drawn critical attention to the standard to be used: "Free Speech Rights at Work: Resolving Differences between Practice and Liberal Principle" (2015) 44 I.L.J. 1.

[50] [2012] EWHC 3221 (Ch.).

[51] See also *Gosden v Lifeline Project Ltd.* Case No: 2802731/09.

[52] *Smith* [21]-[22]. If Smith was not disciplined because the employer viewed the matter as a free speech issue, the next steps for the employer would be to monitor Smith's work so as to ensure that he did not offend the code of conduct when he dealt with homosexual individuals. The odd result is that by voicing his opinion, Smith would have drawn greater scrutiny to himself.

is not an isolated instance. In *Game Retail Ltd v Laws,*[53] Laws 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[54], 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,[55] the Employment Appeals Tribunal observed that Laws failed to create a separate personal account. Though easy to admonish Laws for mixing work with personal remarks on Twitter, *Game Retail* left open the possibility of a similar outcome even if Laws had maintained two separate accounts and yet made the same impugned remarks.[56]

The present argument is not one forcing employers to deal with all wayward conduct that jeopardizes business reputation. In *Crisp v Apple Retail (UK) Ltd.,*[57] for example, the claimant was dismissed for posting comments critical of the Apple workplace and its products; a matter which Apple had sought to foreclose by the employment contract that emphasized the "great importance of image to the company".[58] Unfortunately, the employment tribunal's casual passing over any speech issues dramatized the kind of low level treatment that social media speech can receive in adjudication.[59] The outcome may be a matter of enforcing the relevant contract clause to protect commercial interests (and not a matter of whistleblowing). The tribunal's assertion that only political speech would be protected, however, asserts a narrow concept. A similar level of skepticism for online remarks was evident in *Plant v API Microelectronics Ltd.*:[60] "[The Facebook account] was linked to family and friends and there was nothing to stop those family and friends forwarding those comments open to a wider audience." *Plant* imposed a curious responsibility upon workers for the passing on of remarks made on social media. Even if limited to a specific audience, the 'speaker' cedes control of the remark. The concept of indefinite liability speaks to the present difficulty. It would be inconsistent for the courts to impose what amounts to a form of indefinite liability for remarks on social media in the employment setting, especially where these may be the product of autonomous, independent action of a recipient to broadcast the comment.

Combining speech and privacy interests is the surveillance of social media sites on which workers in an industry may virtually gather to post comments. A part of the richness in this setting is how it offers a contemporary version of workers gathering to talk about their workplace or industry, where the distinction between slander and libel becomes influential. The brief decision of the employment tribunal in *Greenwood v William Hill Organisations Ltd*.[61] illustrated. William Hill (a prominent betting agency) employed Greenwood for about eleven years (his latest position being Betting Shop Manager). He repeatedly posted comments on a Facebook page that was set up for those working in the betting industry (apparently called "I no longer fear hell"). His impugned comments (resulting in the termination of his employment) included: "Ok – I have been walking a tightrope here – media policy – we have had the odd mention of strikes joining unions etc – I suggest smash

[53] UKEAT/0188/14/DA (3 November 2014) [*Game Retail*].
[54] Ibid [9] and itemized [13].
[55] Ibid [50].
[56] 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."
[57] ET/1500258/11 [*Crisp*].
[58] Ibid [39].
[59] An application of Jacob Rowbottom's high and low level speech: "To Rant, Vent and Converse: Protecting Low Level Digital Speech" (2012) 71 C.L.J. 355.
[60] Case Number: 3401454/2016.
[61] Case No. 2404408/2016.

an FOBT (Fixed Odds Betting Terminal) – most of us have four, why not smash two of them all – a large size hammer should do the trick – touch screen is probably the best to damage – Luddites unite!!!"[62] The comments stemmed from the uncertainty created by company restructuring. William Hill's social media policy warned that serious breaches of the policy could result in dismissal for gross misconduct (summary dismissal) and, in particular, noted a concern with reputational harm: "We will not tolerate wilful misuse of social media and will continue to take a tough stance on this. We must guard against the risk of reputational damage or malicious behaviour driven by misuse of social media channels."[63] In response to his dismissal for gross misconduct, he contended that the punishment was too severe for someone with an otherwise unblemished work record. This was the essence of the case: "The real battleground … was whether the sanction was too draconian and that … there is a balance to be made between an employee's right to free speech and the respondent's right not to have the reputation of the company impugned."[64]

Greenwood also revealed a procedural difficulty in English employment adjudication: "However, I cannot substitute my views for the views of the dismissing officer. Mr Taylor [the dismissing officer] had a situation where the claimant knew the policy had been breached, knew that that could be very serious for him if such posts came to … his employers notice and that it was a sensitive time commercially for the respondents. The band of reasonable responses is very wide."[65] The band of reasonable responses test[66] insulates employers from penetrating analysis by employment tribunals. Part of the reason for characterizing this as a procedural difficulty is the case law outlining the parameters for consideration. As noted by the *Greenwood* Employment Tribunal judge, employment tribunals have been cautioned not to substitute their own view for that of the employer.[67] Instead, tribunals appear to be more like moderators: 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.[68] The tribunal may only consider whether the employer acted as a reasonable employer would have.[69] 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 the employer acted fairly and reasonably in all the circumstances at the time of the dismissal".[70]

Looking to the private setting of employment and its interaction with social media, however, it is curious that in the UK there is little room for free speech within the most human of collectives, the workforce. The decisions disclose a form of permissible social regulation. A coercive authority has been vested in private entities, which carries significant potential to narrow the range of speech in general. It also follows an unsophisticated methodology of punishing for harm done to the employer where such a claim remains

[62] Ibid [6].
[63] Ibid [10].
[64] Ibid [38].
[65] Ibid [39].
[66] *Employment Rights Act 1996*, s. 98.
[67] *Foley v Post Office* [2001] 1 All E.R. 550 (C.A.).
[68] *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.
[69] *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 (EAT).
[70] *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220 [43].

unparticularized. There is a timeliness to this issue insofar as if this situation is not addressed now, then the next generation of workers may accede to this standard parameter of work.[71] As it stands now, the matter need not be simply accepted.

A. Employers as Gatekeepers

An outcome of the above cases has been the role of employers as gatekeepers of online speech. Without specific legislative prohibition, workers are understood to have consented to the broad constraint placed on their social media activity. While this study examines litigated circumstances, the fact that the workforce *en masse* may be subject to this intervention is too easily overlooked. The cases that reinforce the potency of contract clauses only compounds the already grim situation.

To illustrate, consider *British Waterways Board (t/a Scottish Canals) v Smith*[72] where British Waterways applied the following policy in dismissing the claimant: "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)…". The EAT affirmed British Waterways' decision.[73] Perhaps most importantly as a contribution to the developing understanding of the law in this area, this case centered on trust; suggesting that if the employer contends it has lost trust in the worker, dismissal will be found to be a reasonable response. *Preece v JD Wetherspoon plc*[74] 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"[75] resulting from encounters with two customers. Wetherspoon had a broad policy on this subject in its employee handbook: "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'".[76] Two customers had subjected Preece to physical threats and verbal abuse 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. Preece had mistakenly thought her privacy settings permitted no more than 60 of her friends on Facebook to see these posts. The customers' daughter saw these postings and made a complaint to the respondent. The tribunal upheld the termination. There can be differences of opinion regarding these decisions. While these cases may be classified as insubordination in some form, it must not be overlooked that these workers were dismissed for remarks were 'published' on an information technology platform as opposed to being stated to co-workers. The publication is the platform for the outcome.

The potency of employer discipline (up to and including termination) of workers arises through indirect effect. Employers act as internet information gatekeepers. This indirect effect has been situated within the context of a free and democratic society:

> … the democracy offered online … is the broader notion of facilitation and participation in democratic culture, which brings within its ambit cultural participations such as non-political expression, popular

[71] In relation to privacy, Matthew Finkin previously raised this point: "Privacy: Its Constitution and Vicissitudes – A Half Century On" (2014-2015), 18 C.L.E.L.J. 349, 369.
[72] Appeal No. UKEATS/0004/15/SM.
[73] There are some further considerations arising from *British Waterways*. 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 grieved another matter.
[74] ET/2104806/10.
[75] Ibid [42].
[76] Ibid [12].

> culture and individual participation. Therefore, in assessing the impact on democracy, it is not just political discussions that are heralded and protected, but any communication which is part of meaning-making in democratic culture.[77]

Employers do not fit easily within the tripartite classification of micro-, authority and macro-gatekeepers of information. Instead, they possess some of the characteristics of micro- and macro-gatekeepers. Like micro-gatekeepers, employers could only affect their workers' conduct. And yet, for those individuals, employers are similar to macro-gatekeepers because workers (like users) "must inevitably pass through them to use the internet".[78] The difficulty for society emerges in the aggregate: when a plurality of employers act in the same way, the scope for speech narrows.

Viewing employers as gatekeepers challenges the traditional parameters of free speech. Aside from the notion of inciting harm, we readily accept that there are limitations as to what individuals may write and there seems to be an even more conservative approach to speech that may touch on the workplace. Recalling the cases, there is a more permissive attitude towards employers disciplining workers for remarks on social media. The possibility of losing a job may be one of the most potent of chilling effects. Although there has been no pronounced effort by employers to curb workers' online remarks, speech may be curtailed remarkably through the expansive wording of employment contract clauses that confer unilateral authority on employers to determine 'offending' speech. In effect, this situation is indicative of a contemporary version of the historical concept in labor law of the master/servant relationship.[79]

The European Court of Human Rights' decision in *Bărbulescu v Romania*[80] further illustrates the employer as gatekeeper.[81] While the pleadings in *Bărbulescu* asserted a violation of privacy rights, the majority's remarks on this topic compel further consideration of speech within the workplace. There are two further points from the decision that situate the case and ground the ensuing critique. Mr. Bărbulescu was terminated for the personal use of a Yahoo Messenger account he had set up for the purpose of clients' inquiries. During a period of a work week, his employer had monitored his account and found that he had exchanged messages with his fiancée and brother. The employer had also monitored a personal Yahoo Messenger account in which there were exchanges between Bărbulescu and his fiancée. The basis of his termination was breach of the company's internal regulations prohibiting such activity, namely the following provision: "It is strictly forbidden to disturb order and discipline within the company's premises and especially … to use computers, photocopiers, telephones, telex and fax machines for personal purposes".[82] The employer's termination was upheld at all levels of court, up to and including the Fourth Section of the ECtHR.

The Grand Chamber overturned the Fourth Section decision. Even with the new result at the Grand Chamber, *Bărbulescu* suggests that at work monitoring may be permissible in order to ensure that workers are performing contractual duties. Even in the workplace, there is scope for protection of privacy; with an employer being precluded from entirely

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[77] E. Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (CUP 2015), 49.

[78] Ibid 53.

[79] A matter noted by T. Novitz, "Regulating Workplace Technologies: Extending the Agenda" in R. Brownsword, E. Scotford, K. Yeung (eds) *The Oxford Handbook of Law, Regulation and Technology* (OUP 2016), 479 and discussed more deeply in S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005), 62-74.

[80] Application 61496/08.

[81] *Bărbulescu* also underlines a developing issue of the overlap of expression and privacy rights regarding social media and the workplace. Further illustrations of employers as gatekeepers can be seen in A. Topo and O. Razzolini, in this volume.

[82] *Bărbulescu* (Fourth Section of the European Court of Human Rights) [8].

eliminating private social life from the workplace.[83] Any conduct of an employer as a data controller must be proportionate. As such, the ruling anticipates the consent provisions of the GDPR in Article 7.[84] These points underscore a more procedural guarantee against arbitrariness[85] than a more substantive right which, at first glance, the General Data Protection Regulation (GDPR) may appear to provide. It may also be that where an employer has placed a social media policy within the employment contract, then it would form part of the performance of the contract. If this is to be the case, it may be wondered whether or not the rights outlined within the GDPR are attenuated. It may be that there will need to be made a separation of what it is that employers seek; such as monitoring of content of communications, duration or volume of data traffic.[86]

With social media, tort and employment law have converged. Taking more generally from the tort idea of censuring harmful conduct,[87] the UK decisions suggest that workers have committed a wrong through their online comments. And yet, defamation operates in a manner that is not the orthodox application of tort. If a claimant has met the threefold criteria, defamation still permits conduct that qualifies as a tort because it has established (and continues to develop) defenses to fit the circumstances. As a result of this distinction, using the defamation model would not be a matter of simply transplanting the tort into the employment setting.[88] Rather, there would be a call for nuance. There must be scope for employers to protect their business reputations from these comments; for example, when an employee uses a social media platform to express discriminatory remarks (a discussion undertaken in Canadian labor arbitration decisions). Still, there is an expanse of expression before one arrives at these signposts. Here is where the focus of this paper has been: the law is a remarkable tool in many ways and there is scope within it to allow for the free expression defended in one of its disciplines (tort) to be found in another (employment).

B. Horizontal Direct Effect

Part of the difficulty with this issue, the law is encumbered when faced with horizontal direct effect scenarios; where a public freedom (speech) affects a private commercial entity. As has been referenced above, the permeation of these rights has been explored within European Union law; notably where there is a positive obligation on member states to secure certain rights under domestic law.[89] There remains a question as to whether this means of enforcement will remain part of UK domestic law after departure from the European Union. Recent decisions of UK appellate courts have elaborated upon the horizontal direct effect of rights. These cases do not necessarily establish a concrete rule. They do set a course for further consideration of the topic. In this manner, the decisions line up with the argument that there is an overlap between public rights in private law circumstances.

The Court of Appeal in *Benkharbouche & Anor v Embassy of the Republic of Sudan*[90] outlined the horizontal direct effect of Article 47 of the *Charter of Fundamental Rights of the*

[83] *Bărbulescu* (Grand Chamber) [80].
[84] *Ibid* [77]-[78].
[85] *Ibid* [121].
[86] The latter points being noted in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.
[87] P. Cane, "Retribution, Proportionality and Moral Luck in Tort Law" in P. Cane and J. Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998), 141.
[88] D. Mangan, "Regulating for Responsibility: Reputation and Social Media" (2015) 29 I.R.L.C.T. 16.
[89] *Redfearn v UK* (2013) 57 E.H.R.R. 2, [42]-[43].
[90] [2015] EWCA Civ 33. The reasoning of the Court of Appeal was applied in its later decision of *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [105]. Leave to appeal to the United Kingdom Supreme Court was granted

European Union (effective remedy for a violation of a right). The court grounded its decision in the more recent case law of the Court of Justice of the European Union (CJEU). The UK court took note of the CJEU's decision in *Kucukdeveci v Swedex GmbH and Co KG*[91] which found that non-discrimination (here, age discrimination) was a general principle of EU law to which effect must be given horizontally. This decision effectively extended the principle from *Mangold v Helm*[92] to the equivalent Charter provision. However, in *CGT (Union Association de mediation sociale v Union locale des syndicats CGT,*[93] the CJEU found that workers' right to information and consultation (Article 27) did not have horizontal direct effect without enabling national legislation. Article 47 was distinguished as a provision that did not require national legislation to be effective. And so, the question remains "which rights and principles contained in the Charter might be capable of having horizontal direct effect and which would not".[94] The *Benkharbouche* Court ruled that Article 47 was "enshrined … as a general principle of Union law"[95] based upon the aforementioned CJEU decisions coupled with explanations accompanying the Charter.[96] These decisions suggest scope for the argument that speech rights permeate the public/private divide. Article 11 (free speech) of the *Charter of Fundamental Rights of the European* Union would seem to be one of the general principles of EU law (akin to Article 47 in *Benkharbouche*).

Despite the UK's referendum decision to depart from the European Union, free speech remains an important right that has garnered persistent attention; for example, the efforts to reform defamation law lead to the passage of the *Defamation Act 2013* that codified (among other points) the common law defenses. The status of certain rights can give effect to opportunities for individual development. On that point, the UK Supreme Court in *Preddy v Bull*[97] (notably Baroness Hale) discussed the concept of rights permeating the private setting. The Court unanimously found that the couple (Mr and Mrs Bull) who owned and operated a private hotel had discriminated against the same sex couple (Mr Preddy and Mr Hall) by refusing them a room with a double-bed. While the Bulls were religious and objected on those grounds, Parliament had stepped in "to secure that people of homosexual orientation were treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services".[98] The importance of this measure stems from the notion of individual personhood: "[s]exual orientation is a core component of a person's identity".[99] Finally, the Supreme Court's decision in *Kennedy v Information Commissioner*[100] suggests that the courts may be willing to use the common law in order to give effect to rights. In that decision, the majority discussed the "common law presumption of openness";[101] though the dissent's skepticism should be noted.

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23 July 2015 on this issue. The Supreme Court dismissed the appeal against the Court of Appeal's decision, [2017] UKSC 62. The Supreme Court engaged little with Art.47 as extensively as did the Court of Appeal.

[91] Case C-555/07 [2010] All ER (EC) 867.

[92] Case C-144/04 [2005] E.C.R. I-9981.

[93] Case C-176/12 [2014] I.C.R. 411.

[94] *Benkharbouche* [80].

[95] Ibid. It should be noted that the arguments here do not depend upon the finding that the Lisbon Treaty accorded the Charter of Fundamental Rights with the same status as a treaty [78]. This has been a contested point: A. Sanger, "State immunity and the right of access to a court under the EU Charter of Fundamental Rights" (2016) 65 I.C.L.Q. 213; J. Folkard, "Privacy and conflicts in the Court of Appeal" (2016) 132 L.Q.R. 31.

[96] OJ 2007 C303, p17.

[97] [2013] UKSC 73.

[98] Ibid [38].

[99] Ibid [52].

[100] [2014] UKSC 20.

[101] Ibid [47]. Consider Lord Mance's statement: "Since the passing of the Human Rights Act 1998, there has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention

Gathered together, these appellate level rulings fall short of unequivocal statements on future directions. Nevertheless, they do suggest a willingness by UK courts to move in a direction of giving effect to rights in both horizontal and vertical manners.

IV. A PERSPECTIVE ON BALANCING BUSINESS REPUTATION AND WORKERS' SPEECH

Canadian labor arbitration decisions, in comparison, offer less of a strict contractual approach. The issue has been treated as embedded within the existing labor law adjudication parameters, as opposed to being an overt issue. Generally, employers in these decisions are alerted about the content of social media postings by their own workers. The aim in discussing the Canadian example, in contrast with the UK caselaw, is to elaborate on the critique of the UK decisions by demonstrating that there is a less strict manner in which similar objectives (protection of business reputation) may be achieved. This argument also underlines that, just as in defamation law, there is no right to a pristine reputation and treating it as such in the employment setting does not align well with the expanding scope for protection of free speech.

One example of more nuance rulings is consideration of the settings on social media platforms. In *Chatham-Kent (Municipality) v CAW-Canada Local 127*,[102] 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".[103] The arbitrator relied upon a number of factors ("her comments, their hostility, and the language used to express them")[104] including the widespread accessibility to the public of this site to uphold the grievor's termination. In decisions where Facebook was the platform in question, arbitrators have been considering grievors' privacy settings.[105] In *Groves v Cargojet Holdings Ltd.*,[106] the arbitrator distinguished between Facebook and blogs because the former permitted subscribers to limit the audience to which comments were made. Still, Facebook settings will not excuse all comments.[107]

In Canada, harm to an employer's reputation is not readily presumed in cases involving social media.[108] While similar to the UK in that 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,[109] the Canadian decisions tease out distinctions not found in the UK cases. This does not appear to be an overt attempt at protecting speech. Instead, the matter is subsumed within the existing framework of labor arbitration; that is, a determination of the appropriateness of the discipline levied on the worker based upon the circumstances has the indirect effect of also touching on the grievor's speech rights. And so, adjudication of discipline for social media speech draws attention to

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rights. But the Convention rights represent a threshold protection; and, especially in view of the contribution which common lawyers made to the Convention's inception, they may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law."

[102] (2007), 159 L.A.C. (4th) 321.

[103] Ibid [2].

[104] Ibid [31].

[105] It should be noted that privacy issues also arise in Canadian employment decisions. Labor arbitrators there have recognized some form of privacy for workers dating back some time: *Re United Automobile Workers, Local 444 and Chrysler Canada* (1961), 11 L.A.C. 152; *Re Amalgamated Electric Corp. Ltd. (Markham)* (1974), 6 L.A.C. (2d) 28.

[106] *Groves v Cargojet Holdings Ltd.* [2011] C.L.A.D. 257.

[107] *Bell Technical Solutions and CEP (Facebook Postings)* (2012) 224 L.A.C. (4th) 287, [153].

[108] *Millhaven Fibres Ltd v Oil, Chemical, & Atomic Workers International Union, Local 9-670 (Mattis Grievance)* [1967] O.L.A.A. No. 4 remains the test where the issue is one of off-duty conduct.

[109] *Toronto District School Board v CUPE Local 4400 (Van Word)* (2009) 181 L.A.C. (4th) 49, [65].

the circumstances and context in which the comments were made. Duration of time between remarks has been considered. In *Canada Post Corp v CUPW,*[110] 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".[111] The sustained barrage of remarks distinguished this situation from that of one-off venting of frustration.[112] Comments, which may have been ignored if they were spoken, once written online, were recognized as "mean, nasty, and highly personal … well beyond general criticism of management and essentially target[ed] one person with a degree of venom that is unmatched in other social media cases".[113] This was no "momentary lapse" or "short-lived fit of rage".[114] 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. *Canada Post* contributes to this discussion insofar as there is acceptance that workers may occasionally act inappropriately but discipline will not always be necessary for a 'momentary lapse'.

It remains questionable whether a similar stance would be taken in the UK where there is rare opportunity given for a worker to render dismissal unfair.[115] In *Creighton v Together Housing Association Ltd.*.[116] Creighton had amassed over twenty-five years with the employer. In the course of an investigation into alleged bullying, the claimant was dismissed for gross misconduct based upon derogatory tweets he made about his employer and colleagues from three years prior.[117] The suggestion from the Canadian decisions canvassed is that there is leeway for a 'momentary lapse'. There were no indications Creighton's tweets were over a long period or short-lived. Moreover, *Creighton* signifies a challenging precedent that any negative remarks made at any point in time can form the basis of summary dismissal. To some, *Creighton* may be the correct decision; that is, why should Together Housing tolerate these remarks? Recall the statement made earlier in relation to *Bărbulescu:* try as we might, we cannot regulate human foibles out of employment law. Creighton's tweets were uncovered in the course of an investigation into alleged bullying. Perhaps these tweets could have suggested another disciplinary matter. To have them stand on their own as the basis for dismissal suggests that the workforce as a whole will remain in a tenuous state of engagement, pending discovery of some 'offensive' remark on social media.

Discriminatory comments by an employee made to the public at large must be the epitome of potential 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), the decision in *Wasaya Airways LP v Air Line Pilots Assn, International (Wyndels Grievance)*[118] offers a preferable perspective.[119]

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[110] (2012) 216 L.A.C. (4th) 207.
[111] Ibid [1].
[112] It is important to note that this distinction has been argued in England (for example, *Pepper v Webb* [1965] 1 W.L.R. 514), but does not appear (let alone has it been accepted) in the social media discipline/termination cases from the same jurisdiction.
[113] Ibid [104].
[114] Ibid.
[115] In *Bates v Cumbria County Council and another* ET/2510893/09 (unreported), the claimant teacher had accessed a dating website momentarily while he was teaching. The dismissal was ruled unfair, but his compensation was lowered by 15%.
[116] ET/2400878/2016 (unreported). The decision was outlined in S. Simpson, "Social media misconduct: fair dismissal over historic tweets" *Personnel Today* 19 January 2017.
[117] The tweets included a post to two colleagues stating: "just carry on and pick up your wage, this place is f*****. It's full of absolute bell ends who ant [sic] got any balls."
[118] (2010) 195 L.A.C. (4th) 1.

The grievor posted a note on his Facebook page that 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.

A further example of online discriminatory remarks crossing the threshold for potential reputational harm to a business is *City of Toronto v TPFFA, Local 3888 (Bowman).*[120] The grievor of 2.5 years' work experience was terminated for off-duty use of his Twitter account: "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".[121] 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 arguably harmed the reputation of the Service and must be viewed as a key factor in Bowman's termination. The labor 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.[122] The fact of public sector employment adds to the consideration.[123] A serious breach of a discrimination policy or the provincial Human Rights Code may harm this reputation and justify the employer's subsequent response. In comparison to the UK approach which has permitted discipline for the guilty act alone (without other factors being considered), in *Bowman*, the arbitrator placed weight upon the absence of sincerity in the grievor's apology established by post-incident behavior (such as statements to a counsellor) to uphold the termination. Bowman remained oblivious to the wrongs committed as he tried to "excuse, minimize and rationalize his conduct".[124] *Bowman* demonstrated how apologies (as noted in McGoldrick[125]) can and have been considerations in deliberation of social media issues in the employment setting. From this decision, there was implicit acceptance that social media is a platform on which individuals may speak in a moment of poor judgement and should not necessarily be punished with the harshest

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[119] Notably as compared to *EV Logistics v Retail Wholesale Union, Local 580 (Discharge Grievance)* [2008] B.C.C.A.A.A. No. 22 where the arbitrator found termination too extreme for "the reckless ranting of an emotionally impulsive" then twenty-two-year-old grievor who posted discriminatory remarks regarding "those good for nothing people from South Asia aka INDIA" and blogged about his "love" of Adolf Hitler.

[120] 2014 CanLII 76886 (12 November 2014).

[121] Ibid 1.

[122] *Ottawa-Carleton District School Board and OSSTF, District 25, (Cobb),* (2006) 154 L.A.C. (4th) 387.

[123] Ibid 394: "Employees of school boards, like other employees, do not surrender their personal autonomy when they commence the employment relationship. 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."

[124] *Bowman* 11.

[125] D. McGoldrick, "The Limits of Freedom of Expression on *Facebook* and Social Networking Sites: A UK Perspective" (2013) 13 H.R.L.R. 125.

employment penalty.[126] The arbitrator concluded the evidence constituted very serious misconduct as she upheld Bowman's termination.

The companion decision (though from a different arbitrator) of *City of Toronto v. TPFFA, Local 3888 (Edwards)*[127] arose from overlapping facts insofar as Edwards (a "Black Jamaican Canadian male")[128] called out Bowman for a racial slur in one of his tweets. This response and some of Edwards' other 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" for saying "like" too many times; another tweet in which Edwards wrote "go get it sweetie" to a friend and potential female applicant to the Fire Services;[129] and finally the aforementioned tweet in which Edwards repeated a derogatory ethnic and racial term in calling out Bowman. The Fire Services emphasized 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".[130] The arbitrator substituted termination with a three-day unpaid suspension.[131]

There is a mixed texture to *Edwards.* First, Edwards' confronting Bowman about his racist language remains praiseworthy and certainly played a role in rescinding his termination. This exchange draws attention to a positive aspect of social media that is often obfuscated by negative examples. Second, however, the use of sexist and violent language towards women remains troubling. It certainly attenuates the laudable in these facts. This point will be returned to later. Finally, *Edwards,* as one example, does not do much to draw a line between on- and off-duty conduct. It remains advisable for employers to discipline (even terminate) for social media usage because the benchmark for reputational harm (anything that could reflect poorly on the employer) remains robust. In this way, there appear to be elements of a privileged position for employers regarding remarks that may offend; that is, the negative effect on business reputation (especially if it can be characterized in some manner such as poor recruitment or sales opportunities) affords a fair bit of room within which employers may articulate the potential harm of workers' remarks on social media.

The firefighter decisions demonstrate how advances in communications technologies are associated with societal developments[132] and the workplace is often where the challenges of change are met. With the more nuanced approach in Canada, there has been an opportunity to delve into pernicious areas such as the toxic workplace. These decisions were not only about a right to free speech but about the power of speech as a means of redress for those

[126] Apologies fit within the case law in this more limited manner (with regards to inappropriate comments) as distinct from a more general approach to workers expressing rights as discussed in P. Wragg, "Free Speech Rights at Work: Resolving Differences between Practice and Liberal Principle" (2015) 44 I.L.J. 1.
[127] 2014 CanLII 62879.
[128] Ibid [9]. Edwards was one of the 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].
[129] The arbitrator did not find either of these remarks to be worthy of termination based on the evidence. While the comment about "swatting" a woman in the back of the head was inappropriate, the arbitrator found that the remark was part of an exchange with an exercise coach and did not create a toxic work environment for women.
[130] The Division Chief in charge of community outreach and public relations seemed unaware of the social media policy's content: Ibid [113].
[131] Ibid., at para. [216].
[132] Harold Innis first raised this point in communications theory: H.A. Innis, *Empire and Communications* (Oxford 1950). For an extended discussion of Harold Innis as an influence on contemporary information technology law see D. Mac Síthigh, *Medium Law* (Routledge 2017).

marginalized by the remarks. On the power of speech, there remains an equivocal outcome. Catherine MacKinnon has pointedly criticized free speech arguments: "Speech theory does not disclose or even consider how to deal with power vanquishing powerlessness; it tends to transmute this into truth vanquishing falsehood, meaning what power wins becomes considered true. Speech, then the lines within which much of life can be lived, belongs to those who own it".[133] While MacKinnon wrote of 'big corporations', here the argument is found in the workplace. Both of the Toronto Fire Services cases suggested a more profound potential for social media and adjudication of the cases touching on social inequality. Social media platforms may be a mirror to society.

By publishing offensive comments, authors expose themselves (as demonstrated in *Edwards*) to a corrective response.[134] Within the context of social change and employment, the idea of the toxic workplace comes to the forefront.[135] On the matters of the power of words as well as the potential for social change with respect to inequality, *United Steel Workers, Local 9548 v Tenaris Algoma Tubes (D Grievance)*[136] illustrates. The male grievor posted remarks about a female co-worker's (though unnamed, he did allude to her identity) ability and suggested that she perform a violent and humiliating sexual act.[137] The remark was visible to all who looked at the grievor's Facebook page. The collective agreement stated: "No Harassment or Discrimination … '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'".[138] In the province of Ontario, the amended *Occupational Health and Safety Act*[139] directly addressed this matter by having "real potential to protect the emotional health of workers who are the victims of violence".[140] 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".[141] As words constituting violence (even though not of immediate harm) falling under the purview of the *Occupational Health*

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[133] C. MacKinnon, *Only Words* (Harper Collins 1994), 56.

[134] In the UK, a similar circumstance developed around the television documentary 'Benefits Street' when misunderstandings in Twitter comments about the numbers and characteristics of benefit claimants were challenged by individuals as well as campaigning groups: W. Housley, R. Proctor, A. Edwards, P. Burnap, M. Williams, L. Sloan, O. Rana, J. Morgan, A. Voss and A. Greenhill, "Big and broad social data and the sociological imagination: A collaborative response" (2014) *Big Data & Society* 1, 5.

[135] Social media is not the genesis of the toxic work environment as witnessed from cases pre-dating the various platforms such as *Re Tenaquip Ltd and Teamsters Canada, Local 419* (2002) 112 L.A.C. (4th) 60.

[136] (2014) 244 L.A.C. (4th) 63 [*Tenaris*].

[137] 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].

[138] *Tenaris* [8]. There are other instances of social media comments being framed as workplace violence. Finding that the grievor's comments had 'only minimally impaired the company's reputation for service', the arbitrator in *Groves v Cargojet Holdings Ltd.* [2011] C.L.A.D. 257 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." In *Lougheed Imports Ltd v UFCW, Local 1518* (2010) C.L.R.B.R. (2d) 186, the ruling 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.

[139] RSO 1990, C.O.1, as amended by *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 S.O. 2009, C23 (specifically ss. 1(1) ("workplace harassment" & "workplace violence"), 25(2)(h), 27(2)(c), 28(1)(d) & Part III.0.1).

[140] *City of Kingston v Canadian Union of Public Workers, Local 109* 2011 CanLII 50313 53

[141] Ibid 54.

and Safety Act, these remarks on social media platforms carry distinct ground for discipline (up to and including dismissal).[142] Imbuing social issues (such as sexist and misogynistic remarks) with legal implications by way of social media speech relating to the workplace 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.

V. CONSTANT SURVEILLANCE

The Canadian decisions also uncover challenges that remain to be engaged. In this final section, two such matters are discussed.

A. Challenge for Employers

Social media is not exclusively a matter of workers' speech rights. Commercial entities seeking to build up goodwill with consumers through the various media may incur risks in so doing. The decision in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*[143] illustrates the obligations businesses (as employers) have to their workers when developing a social media presence. The guidance coming from this decision is that a business' social media presence that is interactive with the public would need to also be a space free of "language that is vulgar, offensive, abusive, racist, homophobic, sexist, and/or threatening".[144]

The dominant view of employers regarding social media is likely that of its business utility for public outreach. The Toronto Transit Commission (TTC) endeavored to utilize the medium of Twitter to "clarify, provide additional information, and de-escalate situations".[145] Based on this objective, it was a novel approach for the TTC to be without a social media policy. The existing case law has dealt primarily with the discipline of workers for what they have posted on their own social media accounts. *@TTChelps* involved a practical, though foreseeable, question of whether or not an employer's use of social media for business purposes could contribute to a toxic work environment. The arbitrator found the 'workplace' included the online environment for the purposes of the application of the *Human Rights Code*.[146] As an example, one witness testified of her anger and embarrassment in being called derogatory terms "for all the world to read".[147]

This ruling raised concerns for businesses because it obliged employers (especially service-oriented businesses) to police "language that is vulgar, offensive, abusive, racist, homophobic, sexist, and/or threatening" because these are remarks may offend relevant legislation or contract clauses regarding safe work environments. These steps may seem to be onerous to business. Of interest, the criticism of the law would be that employers are being placed in the position of regulating speech. And so, the risk/benefit of social media for businesses comes full circle. The decision to use social media for business purposes reinforces the premise that while employers may discipline workers where comments violate contract clauses or workplace policies, employers may also have obligations to their workers.

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[142] Contrast *Tenaris* with the finding in the UK employment tribunal case of *Teggart v TeleTech UK Ltd.*[2012] NIIT 00704_11IT where the claimant's speech rights were found not to be engaged. The difference here is that speech rights were evident but overridden by the toxic work environment they created (i.e. sexualized comments about a co-worker).

[143] (2016), 270 LAC (4th) 341 [*@TTChelps*].

[144] Ibid [122].

[145] Ibid [143].

[146] Ibid [130].

[147] Ibid [61]. Some remarks expressed somewhat longstanding biases – 'union jerks'. But many went further and in some respects wandered into very serious territory: for example, calling a TTC staff member a racist was a serious allegation. Other comments were discriminatory in nature (such as being racist or homophobic).

A further challenge approaches in the form of the General Data Protection Regulation (GDPR) which was passed as a regulation of the European Union in 2016[148] and coming into force as of 25 May 2018.[149] This regulation is the successor to Directive 95/46/EC that was adopted in 1995 and came into effect on 25 October 1998.[150] The GDPR, compared with its predecessor, contains enhancements that will pose challenges for the workplace. Notably, the GDPR strengthens individual rights by deepening obligations of companies (as data controllers) and increasing the sanctions available for national information commissioners. GDPR presents a more direct challenge for the workplace than its predecessor. A casual look at the GDPR may lead to the conclusion that there is modest change from the 1995 Directive. Overall, the Directive established and the Regulation maintains: personal data must be processed fairly and lawfully; collected for legitimate and specified reasons; adequate, relevant, and not excessive in relation to the purposes for which it is collected: accurate, where necessary kept up-to-date, and; retained as identifiable data for no longer than necessary to serve the purposes for which the data were collected. Though there is not space to investigate this Regulation in detail, two brief points are noted.

In *Schrems (Maximilian) v Data Protection Commissioner*,[151] the CJEU reinforced the importance of substantial similarity between EU data protection regulation and third-party countries that trade with the EU. With regards to the challenge of adequacy (substantial similarity) that third party countries will face, Bruno Gencarelli, Head of the Data Protection Unit at the European Commission, has spoken about the adequacy regime for third countries.[152] He stated: "Adequacy is not about being a photocopy." For him, the effective implementation of privacy rights requires a foreign system to deliver similar protection; what was called "essential equivalence". Gencarelli seemed to admit to a certain level of fluctuation in the term adequacy. He commented: "Adequacy is a finding at a certain point in time. A country can evolve. An adequacy decision is a living document and must be monitored." The elements considered in a ruling regarding adequacy can be found through the work of the Article 29 Working Party. As well, Art. 45 of the GDPR contains a detailed list of items to be considered. An emphasis was placed upon equivalence not meaning symmetrical or a point to point duplication. Rather, it was suggested the key principles of the GDPR must be addressed; but protection can be reached by different means.

Aside from the substantial similarity requirement, employers have relied upon the employment contract for consent to a range of matters. The GDPR places this type of consent in question. Article 7(2) states: "If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language."[153] Based on this provision, an employer would likely need to draw the worker's attention specifically to a distinct part of the contract that deals with personal data processing. And yet, there is a further consideration. Article 7(4) states: "When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including

[148] Regulation (EU) 2016/679.
[149] The Regulation avoids the process involved with the Directive: the Regulation will be automatically in force; whereas the Directive required domestic enabling legislation of each EU Member State.
[150] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31
[151] Case C-362/14, (CJEU, 6 October 2015).
[152] "EU Adequacy Status for International Data Transfers" Computers, Privacy and Data Protection, Brussels, Belgium, January 25, 2017. This speech is found at: https://www.youtube.com/watch?v=DylC9xCSskU
[153] Article 7 would be read in conjunction with Article 9 (processing of special categories of personal data). In particular Article 9 (1), (2)(a), (b) would be applicable.

the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract." This provision appears to contemplate an employment situation in which a job offer is made by way of a standard form contract on a 'take it or leave it' basis. The battleground may be (in the scenario where an employer wishes to monitor social media activity) whether or not the processing is necessary for the performance of the employment contract. The employer would argue that there must be the capacity to determine whether or not workers are adhering to contractual obligations. In addition, there can be a security dimension: are workers adhering workplace IT security protocols and/or conducting themselves in a way that does not breach information security? These could both be viewed as aspects of the performance of the employment contract. *Bărbulescu* suggests that at work monitoring may be permissible in order to ensure that workers are performing contractual duties. It may also be that where an employer has placed a social media policy within the employment contract, then it would form part of the performance of the contract. If this is to be the case, it may be wondered whether or not the rights outlined within the GDPR are attenuated. It may be that there will need to be made a separation of what it is that employers seek; such as monitoring of content of communications, duration or volume of data traffic.[154]

B. Challenge for Workers

Despite the remarkable scope of social media for connection and speech, workers must remain aware of the associated perils. Foremost, while the Canadian decisions offer greater scope for online remarks without necessarily drawing workplace discipline, it should be noted that contract clauses (or workplace policies that have contractual effect) remain potent tools for employers. Targeting adjudicators of these employment cases, the above argument outlines that there should be scope for online speech without necessarily triggering workplace discipline, but this does not exclude such a response. Employers may assess the best course of action to be discipline. It should also be noted that the referenced Canadian decisions all involved unionized workplaces. The non-unionized worker is more vulnerable in this regard.

Additionally, there may be occasion when the particular position of the worker places him/her in a situation in which greater care must be taken with online remarks. The point was passingly referred to in the UK decision of *Game Retail* and the Canadian firefighters cases. A more explicit example comes from a decision of the Leuven Labor Tribunal[155] which upheld a dismissal where the critical statements of a business development manager[156] on his Facebook account constituted serious misconduct warranting dismissal. Aside from the company's communications policy, his work as a manager coupled with the timing of the comments (around the time when the CEO had been reassuring markets about the company's strength) factored into upholding his dismissal.

Perhaps one of the more unsettling aspects of the capacities with information technology is that, unlike a workday, a posting on social media remains online regardless of the time of day. This means that a posting made outside of work time may lead to workplace discipline. A point of convergence is that the online presence of a company as well as a worker transcends the workday. The *@TTChelps* decision demonstrated. Racist, sexist or homophobic remarks posted to the TTC's twitter account existed in a permanent form; unless and until TTC personnel took them down. The notion of time again arises. There can be a

[154] The latter points being noted in Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

[155] (2012) 46 *Revue du Droit des Technologies de l'Information* 79.

[156] The position held (such as at a managerial level) may contribute to a finding against the worker: *British Telecommunications plc v Ticehurst* [1992] I.R.L.R. 219 (CA).

distinction between a one-off or short period of questionable postings as compared to sustained postings over a longer duration. Here, the length of time the posting was publicly visible may also affect the sustainability and/or outcome of a claim. Regardless of duration, a posting on social media made at home or at work may equally expose the worker to employer discipline. Furthermore, there appears to be no limitation period for a posting to give rise to such discipline. The implication is that postings from a time pre-dating current employment may form the basis of proceedings at a later date; even giving rise to a matter of opinion between two employers where one employer takes disciplinary action for a remark that a prior employer did not deem troublesome.

VI. CONCLUSION

In contrast to Canada, speech of workers on social media platforms garners noticeably less protection in the UK. The matter is made stark by the disconnect between these decisions and recent legislative and common law movement regarding UK defamation law. The potential for an employer to dismiss (coupled with case law vindicating the decision) has a deterrent effect on speech in general as it contrasts unfavorably with the protection that guides libel adjudication. While workers' speech on social media is the subject of legitimate concerns over business interests, this matter alone should not easily displace the *prima facie* right to free expression.

The distance in protection of speech for workers versus media must be critically engaged. It is a troubling distinction when the law protects in the tort of defamation writing about a range of matters when a worker's remarks may also fit under the same heading. There should be more robust scope for a worker to speak. As it stands, there appear to be limitations not in concert with defamation law. The underlying difficulty is the categorization of social media as a lower form of speech; an intimation mainstream media is at a higher level that is worthy of protection. Social media may be an equivocal development because it dramatizes the positive and negative of human interaction. And yet, its very mixed nature may be a tool for societal development.