FREEDOM OF EXPRESSION IN THE WORKPLACE AND BEYOND: SHOULD EMPLOYERS BE ABLE TO DISMISS THEIR EMPLOYEES FOR THEIR SOCIAL MEDIA USE?

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Abstract

Social media has had an insurmountable impact on contemporary society, allowing individuals to be more interconnected than ever before. Individuals can share their opinions to a potentially unlimited audience and with ruthless social media attacks becoming the norm, the limits of social acceptability are being stretched. This has raised significant questions about the parameters of the right to Freedom of Expression, particularly in the context of employment. By examining the importance of free speech in the workplace and beyond, this dissertation aims to establish whether employers should be permitted to dismiss their employees for their social media use. Firstly, the dissertation will analyse the employee's interest in free speech against the employer's interest in preventing political polarisation and maintaining their reputation, concluding that free speech is fundamental for personal development, political engagement and networking and it should only be outweighed by the employer's interests in the most pressing circumstances. Subsequently, it will be argued that the law of unfair dismissal is severely inadequate as it precludes the courts from scrutinising the employer's reason for dismissal, meaning the employer's interests prevail and the importance of free speech is overlooked. Regarding social media dismissals, this raises serious questions about the right to privacy in the context of employment. Finally, it will be concluded that unfair dismissal law needs to be reformed in a manner which obliges the courts to scrutinise the employer's decision in light of the employee's interest in free speech, privacy and job security.

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List of Abbreviations

ECHR	European Convention on Human Rights 1950
HRA	Human Rights Act 1998
ERA	Employment Rights Act 1996
RORR	Range of Reasonable Responses
ACAS	Advisory, Conciliation and Arbitration Service
EAT	Employment Appeal Tribunal
ECtHR	European Court of Human Rights

Table of Cases

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22

Crisp v Apple Retail (UK) Ltd [2011] ET/1500258/2011

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Lee v Ashers Baking Company Ltd and Others (Northern Ireland) [2018] UKSC 49

London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220

R (on the application of M) and The Parole Board v Secretary of State for Justice and Associated Newspapers Limited [2013] EWHC 1360 (Admin)

Robert Bates Wrekin Landscapes Ltd v Knight [2013] UKEAT/0164/13/GE

Saunders v Scottish National Camps [1980] IRLR 174

Secretary of State for Justice v Lown [2015] UKEAT/0082/15/BA

Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch)

Trainer v Malhota Group Plc [2018] 2501569/2017

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Introduction

The rise of social media has undoubtedly changed the way individuals exchange ideas and the significance of online platforms appears to be growing exponentially. In fact, social media has now become a primary mechanism for individuals to exercise their right to Freedom of Expression.[1] The right to Freedom of Expression is secured by Article 10 of the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA),[2] though defining the parameters of the right has been the subject of rigorous academic debate. Whilst political expression is widely accepted as a crucial component of a democratic society, the extent to which non-political expression ought to be protected is contentious. Social media adds a new dimension to the nuanced challenge of defining the limits of free speech, as the capacity for misuse is ample. In particular, the prominence of social media has raised significant questions about the limits of Freedom of Expression in the workplace.

The Employment Rights Act 1996 (ERA) claims to protect employees against unfair dismissal by subjecting the employer's reason for dismissal to an assessment of reasonableness.[3] Yet, employees may be dismissed for their social media use outside of working hours and beyond the scope of their employment. The courts' application of the ERA has weakened the test of fairness to a 'range of reasonable responses' (RORR) test.[4] The RORR test is gravely inadequate as it permits the courts to blindly accept the employer's reason for dismissal without subjecting the decision to a proper examination. This has led to a dreadfully low standard of reasonableness, meaning employees may be dismissed for trivial online transgressions. Moreover, the test has distorted the extent of employer control, allowing managerial prerogatives to take precedence,

[1] *Yildirim v Turkey* [2012] ECHR 2074 [56].
[2] European Convention on Human Rights (1950); Human Rights Act 1998.
[3] Employment Rights Act 1996, s98.
[4] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 601.

even when the dismissal raises human rights issues.[5] If the RORR test persists, the future of free speech in the workplace appears bleak.

Admittedly, the right to Freedom of Expression is qualified and interference may be justified where the expression violates the rights and reputation of others.[6] Therefore, dismissal may be justified if the social media misconduct in question puts the employer at serious risk of reputation damage. For that reason, it is important to establish the extent to which Freedom of Expression ought to be protected in the workplace and define the scope of employer control beyond working hours. This dissertation seeks to argue that Freedom of Expression is a fundamental element of personal autonomy and human development, and the value of free speech in the workplace should not be overlooked. Following this, the law of unfair dismissal fails to capture the significance of unencumbered discussions both within and beyond the workplace, leaving employees vulnerable to excessive governance beyond their employment. Accordingly, this dissertation will conclude that the calls for reform are justified and to adequately protect the right to Freedom of Expression in the workplace, the law ought to move away from the RORR test.

To reach this conclusion, this dissertation will consider the value of free speech in the workplace; examine the current approach to unfair dismissal; and explore alternatives to the RORR test. Chapter one will assess the court's interpretation of free speech rights, criticising the stark contrast between the protection of political and non-political speech. It will examine employers' concerns about political polarisation and reputation damage and to what extent these concerns ought to justify an interference with employees' free speech rights. Chapter two will analyse the courts' approach to resolving the conflicting rights of the employer and the employee through the RORR test. It will argue that the RORR test is unsatisfactory as the employer's interests take precedence and references

[5] George Letsas and Virginia Mantouvalou,'Censoring Gary Lineker' (*UK Labour Law Blog*, 13 March 2023) <https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/> accessed 2 November 2023.
[6] *Palomo Sánchez and Others v Spain* [2011] ECHR 1319.

to the employee's free speech rights are scarce. Finally, chapter three will evaluate different mechanisms of reform, concluding that while the judiciary are best placed to reform the RORR test, judicial enterprise seems unlikely and thus we may have to rely on alternative measures such as ACAS intervention and public education.

Chapter 1: Freedom of Expression in the Workplace

Introduction

This chapter will examine the extent to which Article 10 ought to be protected in the workplace, in light of Articles 8 and 11. Typically, Convention rights are only applicable against the state, however, it has been established that the HRA is applicable to private employment relationships.[7] This chapter will criticise the UK approach for creating a stark contrast between political and non-political expression, arguing that employee expression ought to be protected regardless of whether the expression serves an important societal purpose. The chapter will begin by discussing the extent to which political expression ought to be protected in the workplace, in light of the employer's interest in preventing political polarisation. The second half of the chapter will discuss the extent to which non-political expression ought to be protected in the workplace, in light of the employer's interest in protecting their reputation. The chapter will conclude that both political and non-political speech are fundamental for social development and thus the employer's interests should only take precedence where absolutely necessary.

Article 10 Protection in the Workplace

The European Court of Human Rights (ECtHR) has long held that Freedom of Expression encompasses the right to express opinions that 'offend, shock or disturb the state or any sector of the population'.[8] So whilst the right is qualified, the protection of Article 10 in the workplace ought to be rather extensive. The UK courts acknowledged this in *Smith* when an employee was dismissed for sharing an article about gay marriage to his Facebook page with the caption 'an equality too far'.[9] The court described the expression as moderate and held that this subsequent dismissal was unfair.[10] McGoldrick praises the decision in *Smith* for

[7] *X v Y* [2004] EWCA Civ 662.
[8] *Handyside v UK* [1976] ECHR 5.
[9] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).
[10] ibid [63].

its ‘principled and sensible approach’ that ‘rightly gave considerable weight to the importance of freedom of speech’.[11]

Whilst the approach in *Smith* ought to be praised, it is questionable whether the court’s leniency is likely to be replicated in future cases. Legalising same sex marriage in the church has become an important debate within contemporary society, meaning the expression in *Smith* contributed to political discourse, an element of speech which has historically been strongly protected in the UK.[12] The court’s leniency might also be attributed to the fact that the comment expressed a distaste towards gay marriage, rather than being directed at any specific individual. The Supreme Court have previously held in a similar case that the refusal of a Christian run bakery to make a cake with the phrase ‘support gay marriage’ on did not amount to discrimination because they had refused on the basis that they did not agree with the message, not because the customer was gay.[13] So whilst the courts were right to find in favour of the employee in *Smith*, their decision appears to be predicated on the belief that the expression can be justified.

However, we might consider that the right to free speech ought to be protected regardless of whether we can justify the expression or not. The decision in *Smith* aligns well with Punta’s view that we cannot only defend the right to Freedom of Expression when the expression corresponds to what we believe a reasonable person should think.[14] Similarly, Paz-Fuchs argues that if Freedom of Expression is to be protected in the workplace, the same principles should be applied when an employee expresses an offensive opinion that as a society we wish did not exist.[15] Therefore, if Freedom of Expression is to be protected in the workplace,

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[11] Dominic McGoldrick, ‘The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective’ (2013) 13 Human Rights Law Review 125, 149.
[12] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.
[13] *Lee v Ashers Baking Company Ltd and Others* (Northern Ireland) [2018] UKSC 49.
[14] Riccardo Del Punta, ‘Social Media and Workers’ Rights: What is at Stake?’ (2019) 35 International Journal of Comparative Labour Law and Industrial Relations 79, 98.
[15] Amir Paz-Fuchs, ‘Principles into Practice: Protecting Offensive Beliefs in the Workplace’ (*UK Labour Law Blog*, 12 February 2020) <https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/> accessed 30 January 2024.

the courts should be willing to find in favour of the employee regardless of whether their expression can be justified or not.

Political Polarisation

The court's reluctance to accept this level of free speech protection in the workplace may be attributed to employers' concerns about political polarisation. Allowing controversial expression in the workplace may have adverse effects for the employer because political polarisation may disrupt workplace cohesion and productivity.[16] For example, an American study found that one in four employees were negatively affected by political discussions at work during the 2016 campaign season before Donald Trump became president.[17] The study reported that some employees felt tense, were more negative at work, were less productive and produced lower quality work.[18] In the UK, workplace bullying and harassment reportedly arose following the outcome of the Brexit referendum.[19] It is not difficult to imagine why an employer may want to restrict this kind of expression if it is creating friction and impeding workplace productivity, however, discussing controversial issues with peers is an important element of personal and social development.

Barry and Wragg argue that unrestricted workplace discussions are valuable because they enable employees to exchange views about important social and political issues, facilitating community engagement and personal growth.[20] Barry also acknowledges that Freedom of Expression within the workplace is an increasingly important issue because employees are spending more time working than they did in the past and therefore opportunities to engage in these

[16] Peter Buell Hirsch, 'Trolls in the Cafeteria: Managing Political Speech in the Workplace' (2018) 39(6) Journal of Business Strategy 56, 56.
[17] ibid.
[18] ibid.
[19] ibid 57.
[20] Bruce Barry, 'The Cringing and Craven: Freedom of Expression in, around, and beyond the Workplace' (2007) 17(2) Business Ethics Quarterly 263, 267; Paul Wragg, 'Free Speech Rights at Work: Resolving the Difference Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 7.

discussions outside of working hours have become more limited.[21] Even more importantly, the workplace facilitates networking across different social demographics such as race, culture and ethnicity and these workplace interactions can influence the broader political life of employees.[22] It is undeniable that the workplace is an important mechanism for facilitating political debate amongst groups of people who would not normally interact with each other, which is essential for raising awareness about different social issues and alternative ways of thinking. Furthermore, engaging in social debates is an important element of personal autonomy which is likely to be associated with better employee engagement and lower levels of stress, absenteeism and staff turnover.[23] So whilst concerns about political polarisation might be legitimate, facilitating political discussions in the workplace is essential for employee wellbeing and social inclusion.

The Frequency and Intensity of the Expression

Arguably, the benefits of free speech in the workplace might be outweighed by the employer's concerns if an employee's expression is particularly frequent or intense. Even if the expression occurs outside of the workplace, social media comments can have spill over effects into the workplace.[24] In *Forstater,* for example, several staff members raised concerns about Ms Forstater who regularly posted her gender-critical beliefs on social media.[25] The Employment Appeal Tribunal (EAT) held that her views amounted to a philosophical belief according to the *Grainger* criteria because they were widely shared and did not undermine the rights of transgender persons.[26] Of course, employers should not

[21] Bruce Barry, 'The Cringing and Craven: Freedom of Expression in, around, and beyond the Workplace' (2007) 17(2) Business Ethics Quarterly 263, 267.
[22] ibid 281.
[23] Andrew Hambler, 'Managing Workplace Religious Expression within the Legal Constraints' (2016) 38(3) Employee Relations 406, 413.
[24] Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) Industrial Law Journal 429, 431.
[25] *Forstater v CGD Europe and Others* UKEAT/0105/20/JOJ [9]-[10].
[26] ibid.

simply ignore hate speech in the workplace that is clearly directed at another employee.[27]

However, if an employee is merely expressing an opinion, as in *Forstater*, then their employer should not be able to intervene, regardless of the frequency of the expression. Even mainstream views have the potential to provoke other employees and it would be absurd to suggest that employers could adopt a blanket ban on any expression that conveys a political opinion. As the High Court acknowledged in *Smith,* when employers encourage diversity in their recruitment processes, they are bound to end up with a workforce with varied religious and political beliefs, some of which may distress others with opposing views.[28] Allowing employers to respond to this tension by dismissing their employees would greatly undermine the right to Freedom of Expression and distort the level of control employers ought to have over their employees.

Censorship and Control

The ability to sanction employees for expressing their political views on social media raises serious concerns about censorship and control. For example, Gary Lineker was suspended from the BBC following a Twitter post in which he criticised the UK government's approach to asylum seekers.[29] Letsas and Mantouvalou argue that Lineker's suspension contrasts sharply with instances of other BBC workers airing their right-leaning political views and such inconsistency strongly implies that it was the substance of Lineker's political beliefs that led to the suspension, rather than the fact he expressed them.[30] Permitting disciplinary action for political expression outside of work allows employers to abuse their position of authority to impose their moralistic

[27] Amir Paz-Fuchs, 'Principles into Practice: Protecting Offensive Beliefs in the Workplace' (*UK Labour Law Blog, 12 February 2020*) <https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/> accessed 30 January 2024.
[28] *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch) [62].
[29] George Letsas and Virginia Mantouvalou, 'Censoring Gary Lineker' (*UK Labour Law Blog*, 13 March 2023) <https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/> accessed 2 November 2023.
[30] ibid.

preferences on their employees.[31] In the age of social media where individuals share information about themselves and their beliefs online, the right to Freedom of Expression is practically meaningless if an individual's ability to engage in controversial debates is predicated on the political preferences of their employer. That is not to say that hate speech should be permitted outside of the workplace, however it is up to the government to deal with those individuals, not their employer.[32]

Political Association

Concerns about employer domination may also arise regarding employees who are affiliated with controversial political parties. Here, the Article 11 right to Freedom of Assembly and Association is likely to be engaged. The employer has an obvious interest in dismissal if their employee's political activity is incompatible with their profession, however, when the two are unrelated, the interest in dismissal is less obvious.[33] This issue arose in *Redfearn v UK* when a bus driver was dismissed for his involvement with the British National Party.[34] Disappointingly, the ECtHR failed to comment on the substantive facts of the case, instead finding that the violation of Article 11 was because the qualifying period of employment requirement in the UK meant he could not challenge his dismissal. Regardless, the case is still useful because it allows us to recognise that political association is not always relevant to one's employment. As Cariolou argues, nothing in the Redfearn judgements indicate that the employee actually provoked the fear and anxiety which he was discharged for and considering there was no disruption to the services provided by the employer, there is no reason

[31] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 925.
[32] Amir Paz-Fuchs, 'Principles into Practice: Protecting Offensive Beliefs in the Workplace' (*UK Labour Law Blog*, 12 February 2020) <https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/> accessed 30 January 2024.
[33] Leto Cariolou, 'The Right Not to be Offended by Members of the British National Party: An Analysis of Secro Ltd v Redfearn in the Light of the European Convention of Human Rights' (2006) 35(4) Industrial Law Journal 415, 429.
[34] *Redfearn v UK* [2012] ECHR 1878.

why he should not have been trusted to do his job.[35] Moreover, if the employee's words or actions were to undermine the performance of the employer, he would be acting unprofessionally, and his dismissal could be justified on different grounds.[36]

Regardless of whether the beliefs are undesirable, an employer should have no power to punish their employees for beliefs that do not preclude them from competently carrying out their role. As Collins and Mantouvalou argue, we should not try to eliminate obnoxious views by imposing economic hardship through dismissal.[37] They argue that it is not up to employers to decide what values are acceptable and the control of objectionable beliefs ought to be achieved through education on human rights, equality and difference.[38] Paz-Fuchs elaborates, arguing that employers ought to encourage their employees to engage in open discussions rather than punishing them for their beliefs.[39] It is undeniable that the control of offensive beliefs should not be left with employers, however, it is questionable whether education is a viable alternative. If individuals have strongly held beliefs, it seems unlikely that they could be educated out of those beliefs. This discussion will be revisited in chapter three where the dissertation will analyse options for reform.

Non – Political Expression

The first section of this chapter has focused on the protection of political speech in the workplace. The remainder of the chapter will consider the extent to which non-political expression ought to be protected. Political expression tends to

[35] Leto Cariolou, 'The Right Not to be Offended by Members of the British National Party: An Analysis of Secro Ltd v Redfearn in the Light of the European Convention of Human Rights' (2006) 35(4) Industrial Law Journal 415, 430.
[36] ibid.
[37] Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76(5) Modern Law Review 909, 923.
[38] ibid.
[39] Amir Paz-Fuchs, 'Principles into Practice: Protecting Offensive Beliefs in the Workplace' (*UK Labour Law Blog*, 12 February 2020) <https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/> accessed 30 January 2024.

receive the most attention because it is generally accepted that political discourse serves an important societal purpose. Historically, political expression has been fiercely protected by the courts, with Lady Hale commenting in *Campbell* that 'the free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy'.[40] Wragg criticises the courts' focus on the value of political expression because other forms of speech are societally valuable as they allow individuals to discover themselves, refine their opinions and influence how others perceive them.[41] He argues that workplace interactions enable individuals to develop new ideas, and in some circumstances these interactions may contribute to democratic participation but even if they do not, they are still valuable because they promote personal growth and allow employees to develop relationships with like-minded people.[42]

However, employers might have an interest in restricting some forms of non-political expression on social media if there is a chance they will suffer reputation damage because of it. Potential harm to business reputation is generally accepted as a reasonable ground to justify the dismissal of employees for their social media use.[43] For example, in *Laws*, the EAT held that the employee's offensive tweets could amount to gross misconduct and justify dismissal.[44] Collins heavily criticises the decision in *Laws* on the basis that the courts were far too eager to accept the employer's claim that the comments posed a risk to their reputation rather than 'making a genuine attempt to assess the likelihood of harm'.[45] An in-depth assessment of the how UK courts resolve the conflicting rights of the employer and employee is beyond the scope of this chapter and will

[40] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22 [148].
[41] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 7.
[42] ibid.
[43] David Mangan, 'A Platform for Discipline: Social Media Speech and the Workplace' (2015) 11(2) Osgoode Legal Studies Research Paper Series 1, 9.
[44] *Game v Laws* [2014] UKEAT/0188/14/DA.
[45] Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, 524.

be discussed at length throughout chapter two. However, it is noteworthy that the courts tend to over-indulge in the employer's perspective and the employee's Article 10 rights are often dismissed as if they are an unimportant consideration.[46] This is problematic because it represents a stark contrast to the strong protection offered to political expression, which sends the message that the right to Freedom of Expression, a fundamental right, will only be protected in the workplace when the expression serves some sort of function in society.

Nevertheless, the potential for employees to damage their employer's reputation is great, particularly in the age of cancel culture. Velasco explains that cancel culture is a spontaneous mechanism of public shaming on social media which is primarily targeted towards 'public figures who break the loose norms of social acceptability'.[47] Despite cancel culture primarily affecting public figures, it is still important to consider in this context because 'on social media, any user can be the judge, jury and executioner of any individual'.[48] Furthermore, customers with passionate views are urging boycotts of businesses with employees who choose to share their opposing opinions online.[49] Therefore, it is understandable that employers may want to protect their business and profitability by sanctioning their employees for their social media misuse.

However, the business reputation argument can be problematic because it is not always easy to decipher whether the employer will suffer any harm. Particularly as behaviour that is deemed unacceptable is 'constantly evolving', it is 'difficult to assess which types of transgression will result in approval or condemnation'.[50] If an employee's controversial online expression goes viral, employers might be

[46] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 2.
[47] Joseph Ching Velasco, 'You Are *Cancelled*: Virtual Collective Consciousness and the Emergence of Cancel Culture as Ideological Purging' (2020) 12(5) Rupkatha Journal on Interdisciplinary Studies in Humanities 1, 2.
[48] ibid.
[49] Peter Buell Hirsch, 'Trolls in the Cafeteria: Managing Political Speech in the Workplace' (2018) 39(6) Journal of Business Strategy 56, 56.
[50] Joseph Ching Velasco, 'You are *Cancelled*: Virtual Collective Consciousness and the Emergence of Cancel Culture as Ideological Purging' (2020) 12(5) Rupkatha Journal on Interdisciplinary Studies in Humanities 1, 3.

tempted to sanction the employee immediately to minimise any risk to their reputation. In *Gibbins*, an employee was dismissed after her comments about the monarchy went viral and were featured in various newspapers, who misreported her and created the impression that she had made a derogatory comment about Prince George.[51] Despite finding the dismissal fair, the court admitted that the employer had thrown the employee to the wolves to appease the public.[52] The courts approval of the employer's hasty reaction in *Gibbins* highlights how easy it is for an employer to sacrifice their employees to save their reputation. Although employers clearly have an interest in protecting their reputation, it is questionable whether discharging employees for what is most likely to be a fleeting moment of negative publicity is a rationale response, especially considering that finding a replacement is likely to be a laborious endeavour. More importantly, the ability to dismiss in these circumstances raises serious concerns about job security.

The Right to Privacy

These concerns about job security are amplified when we consider that *Gibbins* was dismissed for her conduct outside of working hours. This raises significant questions about the Article 8 Right to Privacy in the employment context. Mantouvalou argues that the right to privacy should be valued in the workplace because individuals may have controversial preferences which they wish to explore and privacy allows these interests to be pursued unobstructed.[53] Furthermore, extending conduct restrictions to non-working hours is problematic because employees have no power to resist demands to act a certain way outside of work because of their economic dependency.[54] As Mantouvalou notes, this can be detrimental to work life balance.[55] Coupled with the rise of home working which means employees may work unusual or variable hours, the pressure to conform to certain preferences outside of working hours means the

[51] *Gibbins v British Council* [2017] 2200088/2017.
[52] ibid [138].
[53] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 923.
[54] ibid 925.
[55] ibid 927.

boundaries between work and home life have started to disappear entirely.[56] This is deeply problematic as it fails to recognise the employee's right to a private life 'unencumbered by reference to the employer's inclinations'.[57]

The privacy argument may be of less value if the employee's expression relates to the employer. For example, in *Crisp* an employee was dismissed after making several Facebook posts criticising Apple products.[58] The privacy argument is unlikely to suffice here as the expression clearly relates to the employment. Chapter two will consider whether subtlety about employment could mitigate the employer's concerns about reputation damage; the purpose of this chapter is to define the boundaries of free speech in the context of employment. Mangan criticises the UK approach for representing business reputation as a 'fragile entity that any negative comment may damage', especially because criticism of employers could serve a similar function to political criticism, which is viewed positively.[59] In *Crisp*, the expression may well have been in the public interest considering the consumer relationship at stake and the prominent sales of Apple products.[60]

Regardless of whether the expression refers to the quality of products, employee criticism on social media may still be worthy of protection. Social media represents a free space where employees can express their feelings about work and tough punishments may be disproportionate in these circumstances because this kind of social media use may be of low harm and read by a relatively small group of people.[61] As Wragg argues, the power to dismiss in these

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[56] Philippa Collins, 'The Right to Privacy, Surveillance by Software and the 'Home Workplace'' (*UK Labour Law Blog*, 3 September 2020) <https://uklabourlawblog.com/2020/09/03/the-right-to-privacy-surveillance-by-software-and-the-home-workplace-by-dr-philippa-collins/> accessed 30 January 2024.
[57] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616.
[58] *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/2011.
[59] David Mangan, 'A Platform for Discipline: Social Media Speech and the Workplace' (2015) 11(2) Osgoode Legal Studies Research Paper Series 1, 13.
[60] ibid 11.
[61] Andrea Broughton, Tom Higgins, Ben Hicks, Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (Research Paper 41954, ACAS, August 2011), 15.

circumstances should be limited to situations where the harm to the business necessitates it.[62] Broughton et al suggest that if employers are worried about employees criticising them online, they ought to consider alternative mechanisms for employees to discuss issues that are bothering them without fear of reprisal.[63] This could mitigate the possibility of employees posting damaging comments online without undermining the employee's interests in free speech and job security. Although, for some individuals, particularly the younger generation, social media is irreplaceable because so much of their lives are online.[64] Arguably, these individuals should be free to comment on social media without fear of disciplinary action from their employer.

Conclusion

This chapter has examined the extent to which Article 10 is protected in the workplace, finding that political expression is valued significantly more so than non-political expression. It has been asserted that political expression should be strongly protected in the workplace, regardless of the employer's concerns about political polarisation. In relation to social media, employers should not have the power to eliminate offensive beliefs via dismissal, as this raises serious concerns about censorship and control. Furthermore, it has been asserted that non-political expression is an essential means of self-discovery and personal development and its value in the employment context is often overlooked. Although employers have an interest in maintaining their reputation, extending conduct restrictions beyond working hours raises serious concerns about free speech, the right to privacy and work-life balance. The following chapter will examine the courts' approach to resolving the conflicting rights of the employer and the employee through the RORR test.

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[62] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 9.
[63] Andrea Broughton, Tom Higgins, Ben Hicks and Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (Research Paper 41954, ACAS, August 2011) 12.
[64] Dominic McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13 Human Rights Law Review 125, 150.

Chapter Two: The Law of Unfair Dismissal

Introduction

Chapter one established the importance of both political and non-political expression in the workplace and beyond. This chapter will examine the courts' approach to controversial social media use through the law of unfair dismissal. Although the law is flawed more broadly in relation to employment status, qualifying service periods, and the 'some other substantial reason category',[65] these shortcomings will not be discussed as they are beyond the scope of this dissertation's research aims. Instead, the discussion will focus on the RORR test adopted by the judiciary. The RORR test has undoubtedly attracted considerable criticism in the academic discourse, resulting in extensive calls for reform. The RORR test is unsatisfactory as too much emphasis is placed on managerial prerogatives; the standard of reasonableness is significantly low; and references to the standard practice of employers are illogical. Before addressing the deficiencies of the RORR test, this chapter will outline the current provisions of unfair dismissal law and the origins of the test. The discussion will then move on to explore the deference to managerial prerogatives; the standard of reasonableness in the RORR test; and finally, the focus on the standard practice of employers.

The RORR Test

The RORR test is not a statutory principle; the ERA provides that the courts should consider the reason shown by the employer and decide whether they have acted reasonably in the circumstances by treating that reason as one which is sufficient to justify dismissal.[66] As Collins argues, this test has been loosened

[65] See for example, Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598.
[66] Employment Rights Act, s 98 (4)(a).

by judicial interpretation.[67] The EAT defined the tribunal's role as determining whether the decision to dismiss 'fell within the band of reasonable responses which a reasonable employer might have adopted'.[68] The RORR test has come under extensive academic scrutiny and this chapter will explore these criticisms through the lens of social media dismissals.

Managerial Prerogatives

Collins, Letsas and Mantouvalou argue that the courts give employers a wide range of discretion when applying the RORR test due to their concern of interfering with managerial prerogatives.[69] This deference has been heavily criticised on the basis that employees need time away from the workplace to express themselves, develop fulfilling interests, and make independent choices without the burden of their employer's inclinations.[70] Furthermore, in contemporary society where the lines between work and personal life are increasingly blurred, allowing employers to extend their conduct restrictions beyond working hours raises concerns about the employee's right to privacy and may be detrimental to their work life balance.[71] The courts' deference to managerial prerogatives completely disregards the employee's interest in privacy and free speech, which may have a huge impact on their personal development and wellbeing.

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[67] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 601.
[68] *Iceland Frozen Foods Ltd v Jones* [1982] UKEAT/62/82/2907.
[69] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 612; Virginia Mantouvalou, 'I Lost my Job over a Facebook Post: Was that Fair?' (*UK Labour Law Blog*, 22 June 2018) <https://uklabourlawblog.com/2018/06/22/i-lost-my-job-over-a-facebook-post-was-that-fair/>accessed 4 November 2023; George Letsas and Virginia Mantouvalou, 'Censoring Gary Lineker' (*UK Labour Law Blog*, 13 March 2023) <https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/> accessed 2 November 2023.
[70] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616.
[71] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) Modern Law Review 71(6) 912, 927.

The deference to managerial prerogatives can be evidenced by the fact that reputation damage has been widely accepted as a valid reason for dismissal. In *Trainer,* the dismissal of a care home worker for posting derogatory comments relating to the home was held to be substantively fair because the 'sensitive area of the respondent's work' meant that 'maintaining its reputation was very important'.[72] Similarly, in *Crisp* the employee was fairly dismissed for criticising Apple products on his Facebook page.[73] Arguably, employers have an interest in restricting this kind of expression because on social media comments can spread quickly and be shared with a large volume of people and so the capacity to damage a company's reputation is great.[74]

However, this interest ought to be carefully balanced against the employee's right to free speech. The RORR test fails to allow this sort of scrutiny to take place and even when the right to Freedom of Expression is considered, the analysis tends to be superficial.[75] The courts have even valued the employer's interest in maintaining their reputation over the employee's interest in free speech when the employee's social media page is private. In *Crisp*, the tribunal disregarded the fact that the employee's Facebook page was private because the comments could have easily been forwarded on to others.[76] Similarly, in *Gibbins*, the employee's use of privacy settings was irrelevant because her comments entered the public domain.[77] In *Ward*, the tribunal concluded that the employee had been fairly dismissed after making one offensive remark about an area manager because some of their Facebook friends were colleagues and would have known who the employee was referring to.[78] These cases highlight the court's willingness to find in favour of the employer, even when the prospect of harm is relatively small. The courts haste to find the employer's reason for dismissal fair

[72] *Trainer v Malhota Group plc* [2018] 2501569/2017 [74].
[73] *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/2011 [41].
[74] Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) Industrial Law Journal 429, 433.
[75] Paul Wragg, 'Free Speech Rights at Work: Resolving the Difference Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 2.
[76] *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/2011 [39].
[77] *Gibbins v British Council* [2017] 2200088/2017 [28].
[78] *Ward v Marston's Plc* ET/2600869/13.

is deeply problematic as it completely disregards the importance of free speech and makes no attempt to determine whether dismissal was a justified response in the circumstances.

This concern is exacerbated by the fact that the deference to managerial prerogatives is not limited to comments relating to the employer and employees may find themselves fairly dismissed for comments that are entirely unrelated to their employment.[79] As Wragg argues, this is problematic because it is difficult to discern how the expression, or the reaction to it, compromises the employee's ability to do their job.[80] Pearson postulates that employers do not want to be seen as condoning the expression and thus undermining public trust in the company.[81] This is understandable if the expression is at odds with the aim of employment.[82] However, it seems rather illogical to imagine a distasteful comment on social media would lead a reasonable reader to hold the author's employer accountable. Regarding Gary Lineker's suspension from the BBC, Letsas and Mantouvalou argue that it is absurd to suggest that the public are less likely to trust the impartiality of the BBC news because of Lineker's political views.[83] They argue that the public understand that Lineker's personal Twitter account is separate from the BBC and to suggest otherwise would significantly undermine the intelligence of the British public.[84] The RORR test fails to take this distinction into account and has allowed the courts to repeatedly find in favour of the employer, even if there was no evidence to suggest they suffered any harm to their reputation.[85] This is deeply problematic as it allows the courts to overlook

[79] *Game v Laws* [2014] UKEAT/0188/14/DA.
[80] Paul Wragg, 'Free Speech Rights at Work: Resolving the Difference Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 3.
[81] Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) Industrial Law Journal 429, 445.
[82] ibid.
[83] George Letsas and Virginia Mantouvalou, 'Censoring Gary Lineker' (*UK Labour Law Blog*, 13 March 2023) <https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/> accessed 2 November 2023.
[84] ibid.
[85] *Game v Laws* [2014] UKEAT/0188/14/DA; *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/2011.

the employee's right to free speech even if there is no evidence to support the employer's claim.

Furthermore, the broad discretion inherent in the RORR test has allowed the courts to find in favour of the employer even when the employee has not declared their employment on social media. Arguably, subtlety about employment may mitigate the employer's concerns about reputation damage because a viewer can hardly condemn an employer if they are not identified on the employee's social media page. However, the courts have disregarded any attempts to separate social media posts from the employer, arguing in *Crisp* that it did not matter that the employee's Facebook page did not specify that he worked at Apple because his friends would know that he worked there.[86] Similarly, in *Gibbins*, the fact the employee's Facebook page did not disclose that she worked for the Council was irrelevant because her name was linked to her employer through her LinkedIn and Twitter accounts.[87] Whilst the courts may be right that information about an individual's employment may be accessible via some other means, it is absurd to suggest that an individual's job security should be left hanging in the balance purely because someone who disagrees with their social media comments might be able to find out where they work. The RORR test blatantly ignores the employee's right to Freedom of Expression in favour of the employer's concerns about reputation damage, even when these concerns are ill-founded.

The Threshold of Reasonableness

According to the EAT, the RORR test does not permit a tribunal to lay down 'the only permissible standard of the reasonable employer'.[88] The tribunal must consider 'whether the employer acted fairly and reasonably in all the

[86] *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/2011 [39].
[87] *Gibbins v British Council* [2017] 2200088/2017.
[88] *Secretary of State for Justice v Lown* [2015] UKEAT/0082/15/BA [54].

circumstances at the time of the dismissal' without referring to their own ideas of reasonableness to avoid slipping into the 'substitution mindset'.[89] This interpretation of the RORR test obliges judges to 'imagine without evidence' a standard which is presumably more tolerant of harshness than their own.[90] Consequently, the RORR test has become so broad that almost any decision may be considered reasonable. At the very least, the RORR test has forced the judiciary to adopt 'an artificially low standard' of reasonableness.[91]

This low threshold means employees may be dismissed for trivial misconduct. In *Knight,* an employee was dismissed for leaving a bag of bolts he found while litter picking in his van instead of handing them in.[92] Despite the EAT conceding that the dismissal was 'undoubtedly harsh' they found it within the RORR open to an employer.[93] The court seemed to be persuaded by the employer's concerns that the employee's actions may jeopardise an important business contract.[94] However, this justification is rather unsatisfying because it is absurd to suggest that a business would terminate a contract over a bag of bolts worth around £2, particularly when there was evidence to support the conclusion that the claimant had merely forgotten to hand them in.[95]

Even if the employer was right to be concerned about the commercial relationship at stake, arguably, a less severe disciplinary action would have been sufficient to satisfy the third party. Yet this sort of analysis is beyond the scope of the tribunal's assessment because the threshold of reasonableness is so low. Consequently, employees may be ruthlessly dismissed for minor misconduct. As Collins argues, dismissals for trivial misconduct are problematic because they run

[89] *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220 [43].
[90] Aaron Baker, 'The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50(2) Industrial Law Journal 226, 234.
[91] ibid 245.
[92] *Robert Bates Wrekin Landscapes Ltd v Knight* [2013] UKEAT/0164/13/GE.
[93] ibid [34].
[94] ibid.
[95] ibid [10].

'contrary to the protective aims of the statute'.[96] Ostensibly, the statute protects employees from unreasonable dismissals but in reality, the courts have due regard for the harsh decisions of employers and in most cases, the dismissal will be substantively fair unless the reason is particularly absurd.[97] This is particularly problematic in the case of social media dismissals because social media is such a prevalent feature of modern life, and individuals may not be so prudent online because the publication of spontaneous and often callous comments is perceived as normal.[98] McGoldrick even goes as far as to say that individuals communicate via social media as if they are in a law free zone.[99] The low threshold of reasonableness fails to make allowances for the impulsive and ruthless nature of social media use in contemporary society, leaving employees exceptionally vulnerable to extreme disciplinary action for a minor online blunder.

In *Gibbins*, a social media storm broke out after an employee of the Council commented on a Facebook post which insulted Prince George.[100] The court admitted that the claimant 'deserves some sympathy for her slip of judgement' and that 'a robust leadership may have sought to face down the press by disciplining the claimant short of dismissal' yet they could not conclude the dismissal was unfair.[101] Although employers undoubtedly have an interest in suppressing public criticism, such negative publicity is likely to be brief and dismissal seems reckless, especially considering the time invested in finding a replacement. As the court themselves suggested, the Council could have easily appeased the critics with a less drastic sanction and stood by their employee in the face of the public's wrath. Yet the low threshold of reasonableness fails to

[96] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 609.
[97] ibid 602.
[98] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 3; Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616.
[99] Dominic McGoldrick, 'The Limits of Freedom of Expression on Fscebook and Social Networking Sites: A UK Perspective' (2013) 13 Human Rights Law Review 125, 130.
[100] *Gibbins v British Council* [2017] 2200088/2017.
[101] ibid [141].

take these arguments into account, meaning dismissal may be permitted for a mere 'slip of judgement'.[102] This raises significant concerns about the substandard job security that employees experience under the ERA.[103] These concerns are amplified when we consider the impact dismissal can have on one's income, reputation, confidence and ability to find alternative employment.[104]

Even more significantly, the low threshold of reasonableness poses a serious threat to employees' right to Freedom of Expression. As the ECtHR have acknowledged, social media 'has now become one of the principle means by which individuals exercise their right to Freedom of Expression'.[105] Permitting dismissal for minor online transgressions deprives employees of a primary mechanism for exercising their right to free speech, which may be detrimental to their personal development and impede their ability to engage in important social debates. Furthermore, legitimising dismissal for trivial online behaviour fails to acknowledge that Article 10 applies equally to material that causes 'offence, shock or disturbance'.[106] Thus, the low threshold of reasonableness is terribly inadequate for protecting employees' Article 10 rights.

The Standard Practice of Employers

The courts' refusal to acknowledge their own ideas of reasonableness has led the judiciary to associate the standard of the reasonable employer with the current practice of employers. In *Saunders*, the EAT held the dismissal was fair because a 'considerable proportion of employers' would take the same view as

[102] ibid.
[103] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 602.
[104] Virginia Mantouvalou, 'I Lost my Job over a Facebook Post: Was that Fair?' (*UK Labour Law Blog*, 22 June 2018) <https://uklabourlawblog.com/2018/06/22/i-lost-my-job-over-a-facebook-post-was-that-fair/> accessed 4 November 2023; Philippa M Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, 505; Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 14.
[105] *Yildirim v Turkey* [2012] ECHR 2074 [56].
[106] *R (on the application of M) and The Parole Board v Secretary of State for Justice and Associated Newspapers Limited* [2013] EWHC 1360 (Admin) [27].

the employer in question'.[107] As Baker argues, this shows that if a judge believes, without evidence, that a substantial number of employers would have acted in the same way as the employer in question, it is irrelevant whether those employers would be acting reasonably.[108] This approach is rather distressing as it allows an employer to interfere with their employees' human rights if another employer would have done so in the same way.[109] This exacerbates concerns about Freedom of Expression in the workplace because it leaves no scope for the judiciary to scrutinise the employer's claim and strike an appropriate balance between the competing interests. Instead, the employer's interests take precedence, provided that other employers would react the same way to the expression in question. This leaves employees with an astronomically low level of protection against arbitrary dismissals and means their Article 10 rights are practically meaningless in the context of dismissal.

The courts' ignorance towards employees' Article 10 rights is unjustifiable, particularly since the emphasis on the standard practice of employers is rather misguided and illogical. Baker heavily criticises the association of reasonableness with the standard practice of employers because although it is important that judges recognise their lack of knowledge about employment practices, it is equally important to ensure that employer expertise are not exaggerated because ultimately the business of employment is just a small fraction of their work.[110] As Baker argues, the courts must acknowledge their lack of industry expertise and give some deference to employers, yet there needs to be some guidance as to how far this deference should go to avoid conflating the standard of reasonableness with the standard practice of employers.[111] The RORR test compels judges to assume that most employers are reasonable and

[107] *Saunders v Scottish National Camps* [1980] IRLR 174 [8].
[108] Aaron Baker, 'The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50(2) Industrial Law Journal 226, 241.
[109] Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, 519.
[110] Aaron Baker, 'The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50(2) Industrial Law Journal 226, 258.
[111] ibid.

thus if most employers would have acted the same way, then the dismissal must be fair.[112] This distorts the meaning of reasonableness and precludes the judiciary from subjecting the employer's decision to any measure of scrutiny. This is problematic because it allows employers to set the standard of reasonableness, regardless of their level of training and experience in disciplinary action. As Baker argues, suggesting that most employers have expertise about workplace discipline 'is either to imagine a business world populated entirely by HR professionals, or to fancy that dismissal happens a lot more frequently than it really does'.[113]

Conclusion

This chapter has analysed the RORR test through the lens of social media dismissal, finding that employees can be dismissed for all but the most outrageous reasons and there is little, if any, scope for the tribunals to disagree with the employer's reason for dismissal. This chapter has shown that the RORR test allows managerial prerogatives to take precedence; the threshold for reasonableness is abysmally low; and the test artificially constructs employers as experts in disciplinary action. In relation to social media, these shortcomings are significant because employees can be punished for online misconduct that does not relate to their role at work, meaning the lines between work and personal life are blurred and the extent of managerial control is distorted. Furthermore, despite impulsive and savage comments being the norm on social media, employees remain exposed to harsh dismissals. Most significantly, employers can interfere with their employees' Freedom of Expression, without any repercussions. This chapter has problematised the RORR test through the lens of social media dismissals and concluded that the extensive calls for reform are justified. The following chapter will consider proposals for reform and how they may rectify the shortcomings identified in this chapter.

[112] ibid 257.
[113] ibid 258.

Chapter Three: Reforming the RORR Test

Introduction

The previous two chapters established that the protection of Article 10 in the workplace is inadequate, meaning employees may be dismissed for their online transgressions, regardless of whether their employer suffers meaningful harm. Most significantly, chapter two problematised the RORR test, finding that managerial prerogatives often take precedence and references to the employees' interests are scarce. This chapter will consider amendments to the RORR test and how they might more adequately balance the competing interests of the employee and their employer. It will also consider whether legal reform is feasible, concluding that neither parliamentary nor judicial development of the current law seem likely. Thus, the chapter will analyse alternative reforms, such as ACAS intervention and public education. The chapter will begin by analysing proposed legal reforms such as shifting to a proportionality test or adopting Collins' legislative amendment to section 98(2)(b) of the ERA.[114] It will then move on to analyse whether legal reform is a viable option, finishing by discussing alternative reforms such as ACAS intervention and public education.

Legal Reform

As established in chapter two, the main defect of the RORR test is that there is little scope for the courts to deviate from the employer's reason for dismissal, meaning managerial prerogatives typically take precedence and the employee's interests are often ignored. Therefore, calls for reform generally centre around facilitating greater scrutiny of the employer's reason for dismissal and requiring the courts to find a more appropriate balance between the competing interests of the employer and the employee. One way this might be achieved is by replacing the RORR test with a test that is more akin to the ECtHR's proportionality test. Shifting to a proportionality test would require the employer to provide a

[114] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616

legitimate aim for infringing their employees' human rights and oblige the courts to make a proportionality assessment which considers the impact on the individual's personal life, reputation and job security.[115] This would firmly acknowledge the employee's interests and enable the courts to strike a more appropriate balance between the rights of the two parties.

Shifting towards a proportionality test would allow the employer's decision to be subjected to a more rigorous examination, allowing the courts to consider the connection between the expression and the employment. Mantouvalou argues that conduct which undermines the employee's ability to do their job or damages the business' reputation is a legitimate reason for dismissal, however, an employer should not be able to argue that they have a legitimate aim for interfering with their employees' human rights merely because they disagree with their choices.[116] Restrictions on Freedom of Expression for conduct outside of working hours should be extremely rare and the employers' decision ought to be examined meticulously because it is doubtful that such activities will have an impact on business interests.[117] Applying the proportionality test would enable the courts to closely examine the employers' interest in dismissal and determine whether it sufficiently outweighs the employees' interest in job security, privacy and Freedom of Expression. This would counterbalance managerial prerogatives, allowing the statute to better align with its original intention of protecting employees by removing the power to dismiss employees 'on a whim for reasons that have no effect on workplace performance'.[118]

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[115] Philippa M Collins 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, 518.
[116] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 931.
[117] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 932; Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) Industrial Law Journal 429, 445.
[118] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 603; Virginia Mantouvalou, 'I Lost My Job over a Facebook Post: Was that Fair?' (*UK Labour Law Blog*, 22 June 2018) <https://uklabourlawblog.com/2018/06/22/i-lost-my-job-over-a-facebook-post-was-that-fair/> accessed 4 November 2023.

Mantouvalou emphasises that 'speculative or marginal danger' to the economic interests of the business should not satisfy the proportionality test, suggesting that employers must substantiate their claim with evidence of actual or likely harm to their business to satisfy the requirements.[119] Wragg and Sanders agree that employers should be required to provide evidence or logical that suggests they have or will suffer meaningful harm to their business for the dismissal to be fair.[120] Obliging employers to provide evidence of the harm they have suffered may rectify the low threshold of reasonableness because the employer will need to show the employee's misconduct had a real and substantial impact, meaning trivial forms of misconduct are unlikely to be sufficient. Furthermore, the evidence requirement of the proportionality test may alleviate the strong deference to managerial prerogatives because it would remove the RORR's fateful substitution mindset and shift the default position to finding in favour of the employee unless the employer can prove they have suffered substantial harm.

Those in favour of managerial prerogatives might argue that the proportionality test places an onerous burden on the employer to validate their reason for dismissal. Employers may find their employee's online expression embarrassing, particularly if it contradicts their commitment to diversity and non-discrimination.[121] However, mere embarrassment is insufficient and disciplinary action should not be used to control employees' moral development and political outlook.[122] As established in chapter one, Freedom of Expression is a fundamental right which is crucial for facilitating democracy, social relationships and personal autonomy and it should not be so easily defeated by the interests of the employer unless the harm they have suffered is so severe as to justify an infringement. The proportionality test is a suitable compromise between the

[119] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 936.
[120] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 19; Astrid Sanders, 'The Law of Unfair Dismissal and Behaviour Outside of Work' (2014) 34 (2) Legal Studies 328, 350.
[121] Megan Pearson, 'Offensive Expression and the Workplace' (2014) 43(4) Industrial Law Journal 429, 432.
[122] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 11.

conflicting rights that allows the courts consider the interests of the employer where necessary, whilst still providing employees with protection against unjustified interference with their fundamental rights.

Similarly to the proportionality test, Collins' proposed amendment to the ERA may enable the courts to scrutinise the employers' reason for dismissal more closely and achieve a more desirable balance between the competing interests.[123] Specifically, Collins recommends a legislative amendment to section 98(2)(b) which specifies that the employee's conduct must encompass serious misconduct which negatively impacts the employment relationship and undermines the employee's ability to perform their role.[124] She argues that this would 'rebalance the scales between the employer and employee' and ensure the conduct is related to the job role, allowing employees more freedom to conduct themselves as they please outside of working hours.[125]

By providing a threshold as to when the conduct of the employee will be sufficient to justify dismissal, Collins' recommendation would enable the courts to consider whether the dismissal was a justified response in the circumstances without fear of slipping into the substitution mindset. Defining the conduct requirement in this way would shift the courts' role away from determining whether a reasonable employer might have acted in the same way and towards analysing whether dismissal was a fair and proportionate response in the circumstances. In fact, the language of Collins' proposed reform means the amendment would likely have a similar effect to that of the proportionality test by requiring employers to show a clear connection between the misconduct and the employment. The requirement that the misconduct must negatively impact the employment relationship would likely translate to a requirement that employers provide evidence of reputation damage in cases of social media dismissal, meaning managerial prerogatives would no longer prevail.

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[123] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616.
[124] ibid.
[125] ibid.

By ensuring that the interests of both parties are fully considered and a clear connection between the conduct and the employment is present, the amendment would better acknowledge the importance of time away from work and the likelihood of harm to the employer. As discussed in chapter one, employees need time away from their employer's gaze to express themselves, discover fulfilling interests and make independent choices and the RORR test fails to recognise the employee's right to a private life unencumbered by their employer's preferences.[126] By obliging the courts to consider the connection between the employee's conduct and their employment, Collins' amendment acknowledges these concerns and ensures employees are not restrained by their employers' desires outside of working hours. Not only would this improve work life balance, but it would also address the restrictions on Freedom of Expression in the case of social media dismissals.

Furthermore, the requirement that the employees' conduct be related to their employment better acknowledges the likelihood that the employer will suffer harm because of their employees' online transgressions. As established in chapter two, it seems unlikely that an employee's online expression on their personal social media account would be attributed to their employer and so it is difficult to appreciate the employer's interest in dismissal. Dismissal in these circumstances is problematic because there is no logical connection between the conduct and the employment, meaning the dismissal is merely a way of punishing the employee for their expression rather than remedying a specific harm.[127] Collins' amendment would remove this aspect of employer control by requiring the courts to consider the impact of the expression on the employment, meaning mere concerns about reputation damage would no longer suffice. This would firmly acknowledge the employee's right to Freedom of Expression and ensure any

[126] Philippa M Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51(3) Industrial Law Journal 598, 616.
[127] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 14.

interference with the right is justified, striking a fair balance between the two competing interests.

The Likelihood of Legal Reform

The issue with proposed amendments to the RORR test is that such improvements require either Parliament or the judiciary to acknowledge the deficiencies of the current law and enact meaningful change. This is a problem because Parliament appears to be either blissfully unaware of the inadequacies with the RORR test or entirely unbothered by the impact such inadequacies have on employees. Baker acknowledges that the government have little incentive to correct the statutory language because the RORR test aligns well with the New Labour, Coalition and Conservative governments' preference of policies which allow employers to limit employee flexibility.[128] He argues that it is unlikely that these governments would opt to improve a doctrine which seemingly protects against unreasonable dismissals but in reality, allows employers to dismiss for 'all but the most perverse reasons'.[129] Reliance on parliamentary intervention is therefore impractical because Parliament is unlikely to recognise the deficiencies of the RORR test, let alone rectify them. Even if Parliament had an incentive to intervene, they are unlikely to do so because policy makers tend to believe the meaning of free speech is better interpreted by the judiciary.[130]

However, Parliament's passivity on the matter may discourage the judiciary from making the necessary changes to the law, particularly as any reform that would adequately address the human rights issues present would 'need to be so extensive that the entire framework of the cause of action would change

[128] Aaron Baker, 'The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50(2) Industrial Law Journal 226, 236.
[129] ibid.
[130] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 20.

completely'.[131] Baker argues that Parliamentary inaction is an inadequate reason for failing to correct the 'misguided and distorting interpretations' of the statute and Sanders suggests that any changes to the law ought to be achieved via case law because the law already seems to be developing through 'judicially added guidelines' rather than statutory changes, which have been minimal since the introduction of the legislation.[132] Although the judiciary might be best placed to rectify the RORR test, we must consider that tribunal judges may lack the confidence to make such significant changes to the law and since these cases are unlikely to reach the appellate courts, judicial activism is an unlikely solution.[133]

ACAS Intervention

The law appears to have reach an impasse whereby Parliament has no interest in making improvements to the RORR test, and the likelihood of judicial activism seems tenuous. As Wragg argues, one way we might get around this issue is through ACAS intervention.[134] ACAS is an independent public body which provides employers and employees with advice on employment rights, best practice and policies and conflict resolution.[135] Wragg suggests that if ACAS included more information in their social media policy about free speech rights and why different types of employee expression might be worthy of protection then the prevailing culture may shift towards employment practices that better reflect the importance of Freedom of Speech.[136] By acknowledging the importance of free speech in their own social media policy, ACAS may

[131] Philippa M Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47(4) Industrial Law Journal 504, 529.
[132] Aaron Baker, 'The 'Range of Reasonable Responses' Test: A Poor Substitution for the Statutory Language' (2021) 50(2) Industrial Law Journal 226, 254; Astrid Sanders, 'The Law of Unfair Dismissal and Behaviour Outside Work' (2014) 34 (2) Legal Studies 328, 352.
[133] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 26.
[134] ibid 27.
[135] 'About Us: What We Do' (ACAS 2022) <https://www.acas.org.uk/about-us/what-we-do> accessed 5 April 2024.
[136] Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44(1) Industrial Law Journal 1, 27.

encourage employers to embrace free expression in the workplace and adopt less restrictive social media policies. As argued in chapter one, employees often have no choice but to accept the terms of employment due to their economic dependency.[137] Therefore, shifting the employment culture to one that welcomes all kinds of expression is imperative for securing greater protection of the fundamental right to free speech.

Whilst I agree that ACAS intervention may spark change in employment practices and encourage employers to recognise the importance of Freedom of Expression, this is a slow process as it requires a significant change in attitudes which will only happen over time. That is not to say that ACAS should not intervene. The approach to Freedom of Expression in unfair dismissal cases is in dire need of change and a step towards improving employment standards seems like a good place to start. ACAS intervention may even encourage the judiciary to pay more attention to the importance of Freedom of Expression since the RORR test has led the judiciary to refer to the standard practice of employers when considering the reasonableness of the decision to dismiss. If those standards begin to change and show greater appreciation for employees' Freedom of Expression, then the judiciary may be less inclined to automatically find in favour of the employer.

In the meantime, ACAS could encourage employers to be more transparent about the ramifications of posting on social media. Employees may not be aware of how far their comments might travel, the difficulty of removing them and the damage that may be caused to careers and reputations as a result.[138] Workplace training informing employees about the restrictions on Freedom of Expression within the workplace would allow individuals to make more informed decisions about what they post on social media. Whilst this does not address the lack of

[137] Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71(6) Modern Law Review 912, 923.
[138] Andrea Broughton, Tom Higgins, Ben Hicks and Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (Research Paper 41954, ACAS, August 2011); Mark Taylor, John Haggerty, David Gresty, Chris Wren and Tom Berry, 'Avoiding the Misuse of Social Media by Employees' (2016) 5 Network Security 1, 8.

Article 10 protection in the workplace, it would alert employees to the potential consequences of certain social media expression and allow them to adapt their social media use accordingly. There is no denying that educating employees about the current provisions does not go far enough to rectify the issue of Freedom of Expression in the workplace, however, it may prevent some unfortunate cases of dismissal until meaningful change is made.

ACAS could also encourage employers to facilitate open and honest discussions in the workplace so that employees can raise issues that are troubling them. Broughton et al argue that companies ought to implement systems that allow employees raise their concerns without fear of retribution, such as internal online chat rooms where employees can write about their concerns.[139] This would allow employees to voice their concerns about the workplace in private rather than on social media, where the potential for damage is much greater. However, for some individuals exposing their workplace troubles might be an important part of remedying the harm they feel they have experienced. Moreover, individuals may wish to post about their experiences at work to connect with others that have encountered similar experiences. Thus, internal complaint systems are unlikely to go far in mitigating the possibility of dismissal.

Public Education

Instead of focussing on how to secure greater Article 10 protection in the workplace, we might consider how as a society we can control offensive expression and foster a more accepting and inclusive culture. Collins and Mantouvalou argue that as a society we ought to regulate offensive views by educating individuals on equality and the importance of human rights.[140] However, it is questionable whether education is a viable mechanism for controlling abusive and derogatory expressions. This dissertation does not seek

[139] Andrea Broughton, Tom Higgins, Ben Hicks and Annette Cox, 'Workplaces and Social Networking: The Implications for Employment Relations' (Research Paper 41954, ACAS, August 2011).
[140] Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76(5) Modern Law Review 909, 923.

to undermine the importance of education on equality and difference for fostering social cohesion and humanity among children and young people. However, it is extremely doubtful whether adults can be educated out of their views, especially if their views are strongly held. This doubt is exacerbated by the fact that hostile and obnoxious views are continually fuelled by influential political figures and hateful narratives in the tabloid press.[141] If individuals with objectionable views continue to be spurred on by the media and prominent politicians, then education on equality and difference is unlikely to scratch the surface. So, whilst at first thought education might seem like a pragmatic solution, it is a rather inelegant remedy for such a complex challenge.

Conclusion

To conclude, this chapter has analysed different mechanisms of reform for resolving the deficiencies of the RORR test identified in chapter two. It has been asserted that replacing the RORR test with a proportionality test or enacting Collins' legislative amendment would recognise the importance of free speech and strike a more appropriate balance between the interests of the employer and the employee. However, as legal reform appears unlikely and the effectiveness of public education is doubtful, we may have to rely on ACAS intervention. ACAS intervention may encourage employers to shift towards employment practices which acknowledge the importance of free speech, however, such a monumental shift is a slow process. In the meantime, ACAS ought to encourage employers to educate their employees about the potential consequences of posting on social media and facilitate open discussions in the workplace where employees can raise their concerns to mitigate the possibility of ruthless social media dismissals.

[141] Amir Paz-Fuchs, 'Principles into Practice: Protecting Offensive Beliefs in the Workplace' (*UK Labour Law Blog*, 12 February 2020) <https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/> accessed 30 January 2024.

Conclusion

To conclude, the future of free speech in the workplace is tenuous and the rise of social media means employer control has started to spill out of the workplace and into employees' private lives. The RORR test has distorted the meaning of reasonableness, meaning employers have a wide range of discretion in the decision dismiss and there is little, if any, scope for the tribunals to scrutinise the employer's reason for dismissal. The prominence of social media in contemporary society has added a new dimension to the employment relationship and the RORR test has proved inadequate in balancing the competing interests of the employer and the employee. The deference to managerial prerogatives coupled with the low threshold of reasonableness means employees may be dismissed for trivial online transgressions which are entirely unrelated to their role at work. As a result, the already blurred line between work life and home life has become completely fragmented and the right to Freedom of Expression is practically meaningless in the context employment.

It has been asserted that the RORR test is an inadequate response to the nuanced challenge of balancing the competing interests of the employer and the employee. The test places too much emphasis on the employer's perception of the conduct in question and their reason for dismissal is subject to little, if any, scrutiny. In relation to social media dismissal, this is deeply problematic because the connection between the employment and the conduct is tenuous and arguments about reputation damage are often unconvincing and lacking in evidence. Not only does this leave employees with a tremendously low level of Article 10 protection, but it also poses a serious threat to their job security. With this in mind, this dissertation has asserted that the RORR test needs to be replaced with a test that recognises the importance of Freedom of Expression and allows the courts to thoroughly scrutinise the employer's reason for dismissal.

Chapter one explored the parameters of free speech in the UK, analysing the extent to which Freedom of Expression ought to be protected in the workplace.

The chapter criticised the stark binary between political and non-political expression, arguing that the courts are far too eager to dismiss the value of non-political expression. Moreover, it was asserted that unfettered discussions ought to be facilitated in the workplace because, with individuals working more hours than they did previously, opportunities to discuss matters with their peers outside of work may be more limited.

Chapter two problematised the RORR test through the lens of social media dismissal, finding that damage to business reputation is widely accepted as a valid reason for dismissal and the current approach precludes any form of scrutiny of the employers' decision in all but the most exceptional circumstances. It was asserted that the RORR test is entirely inadequate because employees may be dismissed for trivial online transgressions and by distorting the meaning of reasonableness the courts have allowed employers to interfere with their employees Freedom of Expression, provided another employer would have done so too. Furthermore, it was argued that the RORR test allows managerial control to extend beyond working hours, which has profound implications on work life balance and the right to privacy.

Finally, chapter three considered how the law might be reformed to better address the right to Freedom of Expression in the workplace. It was asserted that the RORR test should be replaced with a proportionality test or Collins' legislative amendment to section 98(2)(b) should be enacted. Both of these reforms would allow the courts to properly scrutinise the employer's reason for dismissal and appropriately balance the competing interests. The chapter found that legal reform appears unlikely and subsequently, it was argued that we may have to rely on ACAS intervention to encourage employers to shift towards employment practices which recognise the importance of free speech. In the meantime, ACAS ought to encourage employers to educate their employees about the dangers of posting on social media and the potential consequences it may have on their employment.

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