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Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle

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ACAS reports increasing disciplinary action against employees over expression that employers dislike. Given the prominence of social media in contemporary life this is a significant current legal issue yet one which has attracted relatively little academic comment. This paper examines the compatibility of unfair dismissal doctrine in this context with traditional liberal principle. Arguably, doctrine provides only flimsy protection. Although the common law recognises the importance of individual autonomy generally when determining rights claims this well-established liberal value appears to have little influence on unfair dismissal doctrine. The dominant academic view on realising greater workplace human rights protection through greater application of the proportionality principle is unlikely to address this problem; reconceptualization of the substantive free speech right at stake is required. This paper offers a strategy on how this might be achieved – and so how differences between practice and principle might be reconciled – through a sympathetic reading of the Strasbourg and UK jurisprudence and potential policy-maker intervention.

1. Introduction

Dismissals concerning employee use of social media are rising, according to ACAS.[1] This trend may seem unremarkable where the expression at stake is hostile and directed toward employers,[2] colleagues[3] and/or customers[4] (assuming the Public Interest Disclosure Act 1998 is inapplicable). Yet the trend includes dismissals where the connection between speech and employment is more tenuous, which is troubling. Surveying decided cases, including those involving more conventional forms of speech, there is a palpable sense that disciplinary action against employees is often motivated by management's idiosyncratic, subjective perspectives on the employee's behaviour, and that courts and employment tribunals are

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[1] A. Broughton, T. Higgins, B. Hicks and A. Cox, (2010) ACAS Research Paper: 'Workplaces and Social Networking: the Implications for Employment Relations', 12 ('ACAS Report').

[2] Crisp v Apple Retail, Case No ET/1500258/2011, November 2011, (referred to in D. McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13(1) HRLR 125, 142).

[3] Teggart v Teletech UK [2004] IRLR 625.

[4] Preece v JD Wetherspoon plc, Case No ET/2104806/10, May 2011, (referred to in McGoldrick, n 2, 139).

over-indulging such responses when determining claims. In particular, as will be shown, the harm of the expression to the employer's interests is often either assumed or otherwise ignored, as if it were an apparently unimportant consideration. Simultaneously, courts and tribunals do not, as a matter of course, consider the extent to which the employee's right to freedom of expression under Art 10 of the European Convention on Human Rights ('ECHR') is engaged in such cases. On those rare occasions where the right is considered, the analysis is often superficial. As will be shown, by assuming that Art 10 is concerned to protect 'important speech' the courts and tribunals diminish the value of the right in an employment context. This is disappointing since, even though the disliked expression may be offensive, disturbing or inane, there are important matters of free speech principle at stake in these cases that have nothing to do with the apparent societal value of the expression. Consequently, it will be argued that employee free speech rights are not being taken seriously.

Admittedly, the minimalistic protection of human rights in the workplace is a familiar complaint and a sizeable literature on it exists.[5] By far the most persuasive argument is that greater judicial engagement with the proportionality principle is required.[6] Yet even if this strategy were adopted more consistently employees would not necessarily be better protected due to the weak conceptualisation of the right to free speech apparent in the doctrinal approach. Further discussion is required on how to better protect employee free speech rights whilst preserving legitimate employer interests. So far, the debate has approached the issue narrowly, focusing on the limitations that contract imposes on employers who discipline employees over disliked expression,[7] and has largely ignored, or has otherwise made assumptions about, underlying issues concerning the nature and meaning of employee free speech rights. As a result, the case for the protection of spontaneous and disliked trivial speech has not been made out, doctrinally or normatively. This paper addresses this lacuna by challenging the prevailing view that the right to freedom of speech in the UK and Europe protects, and should protect, expression based upon its discernible social value, narrowly defined. It will be argued that this approach is incompatible with the traditional liberal argument, found elsewhere in the law, that the legitimacy of an interference with human autonomy depends upon the extent of the harm caused by the actor's behaviour and not upon appraisal of its apparent inherent worth. This paper offers a strategy on how this argument might be realised in practice through a concerted and sympathetic treatment by the judiciary of the free speech principles evident in the domestic and supranational jurisprudence, and buttressed by modification of the ACAS guidance on social media.

2. The Distance between Practice and Liberal Principle

[5] See, eg, G. Morris, 'Fundamental Rights: Exclusion by Agreement?' (2001) 30 ILJ 49; L. Vickers, 'The Protection of Freedom of Political Opinion in Employment' (2002) EHRLR 468; A. McColgan, 'Do Human Rights Disappear in the Workplace?' (2003) EHRLR 119; L. Vickers, 'Unfair Dismissal and Human Rights' (2004) 33 ILJ 52; H. Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 MLR 619; V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; H. Collins, K. Ewing and A. McColgan, Labour Law, (CUP, 2012); H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 MLR 909, 917-921; A. Sanders, 'The law of unfair dismissal and behaviour outside work' (2014) 34(2) Legal Studies 328.

[6] See Mantouvalou, n 5, in particular.

[7] See, eg, McGoldrick, n 2.

a) Employee free speech rights in practice

Social media usage is a prevalent feature of modern life and the publication of frequent, impetuous and sometimes brutal observations is seen as normal. This attitude generates risks that, ACAS reports,[8] users are often apparently oblivious to. When a message is transmitted, the author has limited or no control over who reads it or over subsequent dissemination. Where it offends others it is understandable that employers may fear damage to their business interests through association with the employee. As ACAS also reports, there is growing evidence of employers disciplining employees not only for online expression critical of the organisation but also for 'using social media to express views which employers do not wish to be connected with their organisation'.[9] Examples of this reaction are readily identifiable in the press, such as the trainee accountant who was suspended following bad publicity over her tweet: 'definitely knocked a cyclist off his bike earlier – I have right of way he doesn't even pay road tax #bloodycyclists'[10] or the trainee solicitor who, whilst apparently drunk, appeared to suggest in a YouTube video that his job involved 'fucking people over for money'.[11] His employer took particular exception and commented publicly that his job was in jeopardy. Similarly, a PR executive was dismissed following public outrage at her tweet: 'Going to Africa. Hope I don't get AIDS. Just kidding. I'm white'.[12]

Yet, as these examples also show, not only may the expression have little or no direct connection to the employer's organisation but also it may be difficult to identify, objectively, how the expression, or the hostile reaction to it, undermines the employee's ability to perform their job. Where disciplinary action follows, the adequacy of the doctrinal response to this phenomenon is questionable. Although there is a paucity of cases, the discernible similarities between them indicate claims are resolved with little or no meaningful engagement with the attendant free speech rights at stake. This leaves the employee's claim vulnerable and deprived of a potentially valuable argument in its favour. Matters are also complicated by the limited availability of human rights protection for claimants. The right to freedom of expression under Art 10 can be relied upon only where the employer is a public authority or where the claim has a statutory basis.[13]

Smith v Trafford Housing Trust[14] is paradigmatic. The claimant was demoted for expressing the view, on Facebook, that same sex marriage in church was 'an equality too far'. Although successful in his claim for breach of contract, the outcome would have been different, the court noted, if Mr Smith had 'promoted' his view in the workplace (as in proselytising or canvassing)[15] or if it had been expressed in more intemperate terms so as to cause 'genuine offence' to colleagues on Facebook[16] since either eventuality would have breached the employer's policy and justified the demotion. Admittedly, this was a wrongful

[8] N 1, 32.
[9] N 1, 12.
[10] Daily Mail, 23 May 2013.
[11] The Independent, 13 September 2013.
[12] The Telegraph, 23 December 2013.
[13] X v Y [2004] EWCA Civ 662, [18].
[14] [2012] EWHC 3221 (Ch).
[15] ibid, [65]-[79].
[16] ibid, [80]-[85].

dismissal claim, so it was understandable that the court would focus on the narrow question of whether the terms of the contract, express[17] or implied,[18] allowed the employer to discipline the employee for expressing an opinion. However, there remains something distinctly intellectually unsatisfying about the treatment of employee free speech rights within the judgment (as will be discussed below), particularly since it does not explain why, even in contractual terms, the employer could (or should) discipline its employee for, or even assume responsibility for, discussions taking place outside the workplace even if they did cause offence to other employees.

In order to justify disciplinary action, an employer might argue that the behaviour amounted to a significant breach of the implied term of mutual trust and confidence because, for example, the conduct brought them into disrepute. Yet whether the level of harm required by the court/tribunal to satisfy this claim is sufficiently high enough to recognise an employee's right to free expression is debatable. For example, in Gosden v Lifeline Project Ltd,[19] the claimant's contract of employment specified gross misconduct as, amongst other things, 'any act which is or is calculated to or may damage the company's reputation or integrity' (emphasis added). The speculative 'may' rendered the clause particularly wide, allowing the tribunal to find that the claimant's conduct – the act of forwarding an offensive e-mail, whilst at home, from a private account to the private account of an acquaintance working for the employer's largest client – was something that 'might damage the Respondent's reputation and integrity' (emphasis added)[20] even though it was the client's employee who subsequently distributed it through the client's e-mail system and even though the Respondent could not clearly identify how the act had, in fact, damaged their reputation or integrity.

Other decisions involving disliked expression (albeit not always involving digital speech) echo this concern. In North West London Hospitals NHS Trust v Bowater,[21] the EAT found that the employee's decision to make light of a traumatic situation through a spontaneous but ill-judged comment was a sufficient reason to justify her dismissal. Whilst sitting astride a naked, fitting man, in an attempt to restrain him and prevent serious injury, the respondent, a nurse, had purportedly remarked 'it's been a few months since I have been in this position with a man underneath me'. Although heard by no one other than colleagues (the patient's condition rendered him unaware) the employer found the comment disrespected the dignity of the patient, implied sexual innuendo with a patient, was inconsistent with the nurse's professional duties and could have caused offence if overheard by a member of the public (emphasis added).[22] In Look Ahead Housing and Care Ltd v Rudder[23] an organisation providing housing, care and support services to vulnerable people and operating a 'zero tolerance' policy on 'any form of discriminatory behaviour' dismissed the respondent following a brief altercation with another member of staff which led to a complaint from a

[17] Pringle v Lucas Industrial Equipment [1975] IRLR 266.
[18] ie, was the conduct is sufficiently serious that it shows a disregard for the 'essential conditions' of employment, Laws v London Chronicle Ltd [1959] 2 All ER 285, 287.
[19] Gosden v Lifeline Project Limited, case no. 2802731/2009.
[20] ibid, [11.3.4].
[21] [2011] EWCA Civ 63.
[22] ibid, [41].
[23] 2010 WL 5139369.

resident. The respondent had wanted to use a locked consultation room bearing a note marked 'Praying'. When chastised by a colleague for ignoring the note, the respondent allegedly said 'This is not a place for prayer. If people need to do so, they should go to church'. Later, the respondent also allegedly said 'It is not appropriate to use this space, as [the building] is limited for space anyway and I feel that Muslims are pushing us out'. The EAT found that either statement would have been sufficient to justify dismissal. In Rustamova v The Governing Body of Calder High School,[24] a teacher was dismissed for publishing a book online, written by some of her pupils (as part of a school project), which was described as 'racy' and featured characters said to be recognisable as current staff and students. Although, initially, the head had praised Mrs Rustamova for her work, calling it 'a triumph' for the way it had inspired the disengaged students involved, his attitude changed after publication. The governing body found Rustamova's actions to be 'wholly unacceptable', having concluded that publication breached confidentiality, brought the school and teaching profession into disrepute and undermined the head's authority. The ET and EAT accepted this assessment even though the question of how the publication did each of these things was left unsubstantiated in their decisions. In Teggart v Teletech UK[25] the employee harassed and bullied a colleague through Facebook. His claim for unfair dismissal failed; the Tribunal accepted the employer's view that his behaviour amounted to gross misconduct and brought the company into disrepute. As with Rustamova, the latter element was not substantiated in the decision.

Those protected by unfair dismissal law have a distinct advantage – in principle, at least – to those who may only bring a wrongful dismissal action since, of course, the 'reasonableness' of the decision to dismiss will be considered as part of that claim. During this process certain factors are taken into account, such as the employee's length of service, their general performance and whether alternatives to dismissal were considered. McGoldrick has noted that signs of repentance are also particularly important.[26] Yet such considerations sit awkwardly with free speech principle: for example, why should an employee show remorse for exercising their rights?

Regardless of their merits, these cases are linked by two common features: first, the discernible view that the offence (or potential offence) caused by the expression was a sufficient reason to justify dismissal and, secondly (relatedly), the dismissive treatment of the free speech rights at stake, in which the claim was either analysed superficially or else entirely overlooked. In Gosden, Rustamova, Rudder and Bowater, the prospective Art 10 claims were not considered by the court, which is particularly surprising in Rustamova given the facts. In Smith, although the court acknowledged counsel's view that the case provoked important issues of principle about employee free speech rights, its treatment of the issue was cursory. Since the employer was not a public authority and a statutory claim was not pursued, the right was found to provide only contextual significance to the dispute[27] but, whatever this significance might have been, it is difficult to discern any meaningful contribution of free speech principle to the decision; the substantive outcome was dictated purely by contractual

[24] Unreported, UKEAT/0284/11/ZT, November 2013.
[25] [2004] IRLR 625.
[26] McGoldrick, n 2, 140-141.
[27] Smith, n 14, [8].

principles. In Teggart the Tribunal was satisfied that the employee's Art 10 rights had not been interfered with disproportionately because Art 10 'brings with it the responsibility to exercise that right in a way that is necessary for the protection of the reputation and rights of others'.[28] This formulation echoes that used in an unrelated ET decision: that freedom of expression 'must be exercised judiciously, responsibly and not recklessly'.[29] Yet this approach is deeply problematic. It stimulates the use of morality to determine outcomes: that dismissal is acceptable where right-thinking people would not think the speech worth protecting. Moreover, it is an attitude that inhibits free speech and damages societal discourse; it is akin to finding that the strength of an employee's right to speak is linked to some independent assessment of whether it was prudent to exercise that right in the circumstances. As will be shown, this manner of thinking conflicts with established free speech principle.

The object of this paper is not to challenge (necessarily) the outcomes of these cases (Teggart, in particular, is not a hard case) but rather to examine what they tell us about underlying attitudes toward employee free speech rights and doctrine's capacity to safeguard those rights effectively. The problem, it is submitted, stems from judicial neglect of, and misunderstanding of, the underlying free speech rights at stake such that instances of unpalatable and trivial expression are afforded little or no weight when determining the employee's legal position. It will be argued that the current doctrinal treatment of the right is weak and unreliable because: it envisages free speech as a right to be used 'responsibly' (implying that it should be used civilly or else only where 'important matters' are discussed); it employs too low a standard (potential offence) to justify dismissal for disliked expression, and so fails to guard against management oversensitivity; and it does not give voice to the broader value of free speech, as articulated in the established literature and wider case law.

Sadly, this dismissive approach to free speech rights is discernible elsewhere in the common law. Numerous examples exist of the courts treating Art 10 as if the level of protection it guarantees depends upon the inherent worth of the speech at stake, such that 'important' expression is more deserving than 'unimportant' expression.[30] For example, in Connolly v DPP,[31] the court concluded that interference with the offensive political expression of an anti-abortionist was justified based on the lower value of inefficient expression – the targeting of chemists stocking the morning after pill – over more effective expression, such as petitioning an MP.[32] Similarly, in Sanders v Kingston (No 1),[33] the court concluded that the ignorant, angry and unsolicited views of a town counsellor about Northern Ireland (which resulted in his dismissal) were not protected by Art 10 because they were instances of 'personal anger' and 'vulgar abuse' and, therefore, undeserving of any protection let alone the 'high levels' afforded to political expression.[34] 'Importance', in these terms, is measured narrowly by the discernible contribution that the expression makes to democratic

[28] Teggart, n 25, [6, (17)(c)].
[29] Hill v Great Tey Primary School [2013] ICR 691, [14].
[30] See discussion in J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech' (2012) CLJ 355, 368-370.
[31] Connolly v DPP [2007] EWHC 237 (Admin).
[32] ibid., [31]-[32].
[33] [2005] EWHC 1145 (Admin).
[34] See, ibid, [79], [80] and [84].

participation or as a check on abuses of power.[35] The type of expression at stake in the typical social media dismissal case is unlikely to fare well on this scale. Trivial expression, whether of an offensive, spontaneous, or otherwise anodyne nature, often has no such immediate value. If the workplace free speech right protects expression only to the extent it demonstrably furthers democratic participation then it is no more than a weak right. Of all the innumerable social interactions that take place in the workplace and outside of it there is very little an employee might say that would satisfy this test, particularly when scrutinised in the clinical environment of legal proceedings.

Yet this approach to freedom of speech conceptualises the 'value' of expression far too narrowly. Even if the discernible value of the expression was taken to be a legitimate means of determining protection (which is debatable), it is possible to show how typical 'unimportant' workplace speech may be societally valuable. For example, employees need freedom to discover themselves, to present themselves (and their views) to others so as to influence how others see them, to refine their opinions based upon how others receive them, and to discover new and alternative ways of living through those interactions. Individuals develop ideas and opinions about the world both in and outside the workplace. These opinions might contribute to democratic participation (even in an indiscernible way) but, more immediately, they help employees form relationships with like-minded people or else promote personal growth through exposure to ideas and opinions that challenge their own. Employee expression is therefore valuable both instrumentally (for the self-discovery that follows) and intrinsically (because a society that allows such freedom is desirable regardless of the quality of the expression). To allow employers ostensible control over employee expression impacts upon these important social interactions. Yet a legal system of free speech protection that depends upon the inherent worth of the expression at stake is deeply problematic because, of course, courts and tribunals cannot measure this value reliably: they cannot say what the societal or individual benefits of this type of expression are or how that value compares with the value of the employer's interests because the two are incommensurable; equally, they cannot reliably measure the societal value of 'important' speech either without resorting to conjecture.

Of course, freedom of expression can be conceptualised in different ways.[36] In what follows, it will be argued that there is another pressing reason why courts and tribunals should not determine the extent of a person's right to speak freely based upon some ad hoc appraisal of its apparent inherent worth, especially given its inability to do so reliably. This reason lies in the established philosophical claim that individuality is an independent value and should be protected by the state from unwarranted coercive measures. This liberal principle, however, seems to have little or no influence in judicial decision-making in the type of employment law claims considered above despite being determinative in other contexts, as will be shown. Before showing how the law might better reflect this value, the following unpacks how this established liberal principle relates to the right to freedom of speech, particularly in an employment context.

[35] See H. Fenwick and G. Phillipson, Media Freedom under the Human Rights Act (OUP, 2006).
[36] See, eg, F. Schauer, Free Speech: a Philosophical Enquiry, (Cambridge University Press, 1982)

b) Individuality and freedom of expression

As is well-known, the connection between individuality and freedom of expression underpins John Stuart Mill's classic argument in On Liberty.[37] Mill argues persuasively that interferences with expression are justified only by the harm of the expression and not due to its inherent worth. His strong defence of free speech follows from the view that individuals in a free society should be treated as autonomous beings who are entitled to live relatively free from interference as they strive to realise their own conception of a worthwhile and satisfying life. Through this process, though, they may acquire viewpoints that others find unpleasant, distasteful or offensive. Mill is adamant, however, that expression deserves special treatment from interference not because the speech is valuable but because the discovery of individual ways of thinking and living is valuable. Since individuals are autonomous beings, it is not for the state, or anyone else, to interfere with this process of self-discovery unless it is necessary (see discussion below about this standard). Mill's theory is often treated as a consequentialist argument that relatively uninhibited expression will lead to the discovery of the 'truth'.[38] As other commentators have noted, such accounts tend to underestimate the sophistication of his position.[39] His essay may be more accurately described as an appeal for the law to provide a protective environment for the development of individuality, free from undue social pressure to conform. The argument, therefore, seeks not only to constrain government but also to articulate a positive duty on them to protect individuals from the 'tyrannical' effect of the majority imposing its view of morality on others. In Mill's words, it is an argument against:

> 'the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.'[40]

Comparison may be made between Mill's 'tyrannical majority' and the employer who dismisses an employee for expression that it dislikes on moral grounds. The protection of employer action in these circumstances evokes Mill's concern about state tolerance of coercive means to ensure conformity with orthodox moral viewpoints and so nullify unorthodox ones. In extreme cases, the enduring stigmatic quality of dismissal on an employee's prospects of re-employment serves to ostracise that individual and might severely inhibit personal growth. A similar effect may be achieved without recourse to dismissal where the threat of sanction exists. Disciplinary action, or the threat of it, expresses condemnation of a particular viewpoint or way of life whilst judicial legitimation of that decision provides powerful public approval of the action.[41] Employees who can only bring

[37] J. S. Mill, On Liberty, in Collected Works of John Stuart Mill, volume XVII, (University of Toronto Press, 1977).
[38] See, eg, L. Bollinger, The Tolerant Society (OUP, 1986), 74.
[39] L. Alexander, Is There a Right to Freedom of Expression? (CUP, 2005), 128.
[40] ibid, 220.
[41] See discussion in J. Raz, 'Free Expression and Personal Identification' (1991) 11(3) OJLS 303 about freedom of expression as a means of validating different ways of life.

wrongful dismissal proceedings are particularly disadvantaged, to the extent that the law's focus extends no further than those narrow questions of contractual interpretation and so ignores the broader question of whether liberal principle would tolerate the coercive action of controlling an individual's personal development through the threat of dismissal or the public chastisement that dismissal brings. In an unfair dismissal context, the law's gaze is wider yet the liberty argument is far from fully realised given the inherent limitations within the court's formulation of the band of reasonable responses test and the tacit sanctioning of managerial prerogative that accompanies it.[42]

The gap between practice and liberal principle illustrates the absence of the autonomy value at work. This has an interesting effect on the legal anatomy of the opinionated employee. In so many other contexts the actor's autonomy animates the law's response to the central issue. For example, in cases concerning unlawful detention,[43] assisted suicide,[44] misuse of private information[45] and quiet enjoyment of the home,[46] the courts clearly visualise the individual as an autonomous being who should be able to resist the attempts of others to deprive her of her liberty, or interfere with her bodily integrity or disclose personal information about her. In an employment context, though, the value seems to fall away entirely but there is no obvious reason why employment law is so different and pressing reasons why meaningful protection against subjugation is necessary. This is not to say that employers should never be able to discipline their employees for their expression. As Mill recognises, there will be times where coercive measures against expression are justified but only in those limited circumstances where the harm to others requires it.[47] This harm principle is, as Sadurski has neatly summarised, a non-perfectionistic political principle: 'its use is not conditional on the moral worth of individual actions, but only on the test of discernible harm to other people. Coercive restraint must be independent of considerations of moral worth displayed by the action, or of moral virtue exhibited by the agent'.[48] Since harm acts as a limiting principle the absence of any harm caused to the employer's interests ought to prevent the employer taking action against the employee even though the employer may find the behaviour 'foolish, perverse or wrong'.[49] Similarly, the location in which the employee expressed herself should be considered irrelevant to the process of determining protection. These points are expanded upon below.

Even if the reconciliation of practice with liberal principle is thought desirable, realising this goal is not straightforward. As noted above, the established literature on enhancing human rights in the workplace advocates greater judicial engagement with the proportionality principle. The following section argues that this approach will not reconcile

[42] H. Collins, Justice in Dismissal: The Law of Termination of Employment (OUP, 1992); see also J. Bowers and A. Clark, 'Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason'' (1981) 10 ILJ 34.
[43] Secretary of State for the Home Department v JJ [2007] UKHL 45; (2008) 1 AC 385, [37] per Lord Hoffmann.
[44] R (Pretty) v Director of Public Prosecutions [2001] UKHL 61; (2002) 1 AC 800, [23] per Lord Bingham, [61] per Lord Steyn; R (Purdy) v Director of Public Prosecutions [2009] UKHL 45; (2010) 1 AC 345, [65]-[66] per Baroness Hale.
[45] Campbell v MGN Ltd [2004] UKHL 22, [50] per Lord Hoffmann.
[46] Harrow LBC v Qazi [2003] UKHL 43, (2004) 1 AC 983 [50] per Lord Hope.
[47] N 37, 213-310.
[48] W. Sadurski, 'Joseph Raz on Liberal Neutrality and the Harm Principle' (1990) 10 OJLS 122, 122.
[49] N 37, 226.

the differences with liberal principle unless the approach to Art 10 in an employment law context also changes. The final section outlines one strategy by which this reconciliation might be achieved.

3. Greater Engagement with the Proportionality Principle

There is a rich and well-established academic debate about the appropriate treatment of human rights in employment law.[50] Although the judiciary has sought to better realise such protection in the workplace it is commonly agreed that there remains much work to be done. For example, Collins has argued that the law's protection of the individual from unfair dismissal should recognise, more explicitly, the liberal values of dignity and autonomy.[51] Mantouvalou has developed this by arguing that the law should safeguard against undue employer domination of the employee, particularly where the conduct occurs outside work. These arguments specifically recognise the typical imbalance of power between employer and employee generated by economic dependence, which gives the employer a ready means of interfering with individual liberty[52] and significantly constrains an individual's ability 'to make her life choices as an autonomous agent'.[53] To ensure that these values are properly respected, commentators have consistently advocated closer engagement with the Strasbourg proportionality principle as a means of augmenting the fairness test in unfair dismissal law.[54] In short, the proportionality principle, as interpreted by the European Court of Human Rights ("ECtHR"), states that interferences with a qualified right (such as Art 10) are justified only when prescribed by law, where a legitimate aim is furthered (as specified in Art 10(2)) and when proportionate to the realisation of that aim.[55] The protection of an employer's business interests would count as a legitimate aim.[56] Mantouvalou, in particular, advocates a temporal distinction so that dismissals for behaviour outside of working time are justified only where the employer can demonstrate either the employee's behaviour directly affected her work (or there is a strong likelihood that it would have) or damaged the employer's reputation (or there is a strong likelihood it would have).[57]

For the paradigm case of trivial employee expression, encouraging judges to apply the proportionality principle is not enough even when Mantouvalou's formulation is applied. Further judicial direction is required. Mantouvalou's claims about the temporal distinction are important but her context is privacy. Whilst the argument may have relevance in

[50] See n 5.
[51] Collins, n 5. Vickers has expressed a similar view, 'The Protection of Freedom of Political Opinion in Employment', n 5, 471.
[52] See Mantouvalou, n 5, 925-926; Vickers, 'The Protection of Freedom of Political Opinion in Employment', n 5, 470.
[53] Mantouvalou, n 5, 926. Vickers makes a similar comment in respect of free speech, 'The Protection of Freedom of Political Opinion in Employment', n 5, 470.
[54] McColgan, n 5, 129; Vickers, 'The Protection of Freedom of Political Opinion in Employment', n 5, 477-479; Mantouvalou, n 5, 931-937; H. Collins and V. Mantouvalou, 'Redfearn v UK: Political Association and Dismissal', n 5, 917-921.
[55] See, more generally, D. Harris, M. O'Boyle & C. Warbrick, Law of the European Convention on Human Rights, (OUP, 2009), 443-514.
[56] Sanchez v Spain (2012) 54 EHRR 24, [57].
[57] Mantouvalou, n 5, 931.

dismissals concerning disliked expression (it may have addressed the problem in Smith and Gosden for example) it does not engage with the central claim of this paper that free speech rights may arise both outside and within the workplace. Moreover, there is a distinct possibility that judges may conclude the current approach to resolving disputes already complies with the proportionality principle: that the interferences are proportionate to the weight of the free speech claim. This approach can be seen, for example, in Connolly and Sanders, outlined above. Underpinning it is a view that 'unimportant expression' requires less protection than 'important expression', which of itself may be informed by the ECtHR principle that interferences with political expression are rarely justifiable.[58] The legitimacy of this treatment is addressed below. Yet its effect on proportionality is to lower the level of harm required to justify interference with trivial expression. There is evidence of this low standard at work in the cases discussed above. For example, in Gosden, the tribunal did not rely upon evidence of actual harm to reach their decision but, instead, was satisfied that prospective harm, arising from clients thinking less of the employer, was sufficient. Similarly, in Teggart the tribunal found the employee's behaviour was capable of bringing the employer into disrepute yet its reasoning is elliptical (though, to be sure, the effect on the bullied employee was unassailable proof of harm justifying dismissal). Likewise, in Rustamova the tribunal accepted the employer's assessment that the employee's idiosyncratic behaviour somehow brought the school and profession into disrepute yet the reasoning is similarly elusive. Through this treatment, 'unimportant' expression may be readily interfered with. Consequently, more is required to ensure that those same assessments of inherent worth creeping into determinations about the reasonableness of dismissal do not inform discussions about the proportionality of interference.

Reconceptualization of the substantive workplace free speech right is required to address this problem. This involves two stages. First, the substantive free speech right should be bolstered: there should be sustained judicial recognition that Art 10 values speech not only for its contribution to democratic participation but also for its contribution to, and as a signifier of, individual autonomy and self-realisation. The judicial task, therefore, is not to assign a specific value to the expression itself, contingent upon some ad hoc assessment of its inherent worth in democratic participation terms, but to assume a constant high value in recognition of the societal importance of these broader underlying values. Secondly, modification of the judicial approach to proportionality is also required. This requires a paradigm shift in thinking. Disputes concerning employee expression should not be resolved by judges asking, in effect, why unimportant expression should be protected, especially where others react adversely to it, but rather by asking what warrants an employer controlling (or otherwise insidiously influencing) the formation of its employees' opinions. To do otherwise allows employers to interfere with individual autonomy, by reprimanding the employee and seeking to dictate their moral development through coercive means, in circumstances where a state actor would be unable to. This change in perspective better accords with the liberal principle at stake in these cases. It is one thing for employers to discipline employees where their duties and responsibilities are adversely affected, or where the employer can demonstrate sufficient harm has been or would be caused to its reputation,

[58] Redfearn v UK (2013) 57 EHRR 2, [43].

but it is another to permit employer control over an employee's development of their moral, political and social outlook. By raising the standard of harm required and by ensuring that views about the inherent worth of the expression form no part of the proportionality exercise, these concerns may be addressed.

Mill's harm principle lends itself to this reconceptualization. Mill argues that harm is a necessary but not sufficient reason to interfere with expression[59] (and this view is apparent elsewhere in liberal argument).[60] Thus his argument is not that expression should be restricted because it harms others but, rather, that expression should not be restricted where it does not harm. In other words, the harm principle is a limiting principle, it seeks to do no more than exclude penalties for behaviour that does not harm but it does not justify penalties for all harm. Once harm is identified, Millian reasoning requires further consideration of the extent to which the harm is prevented or else remedied through the proposed penalty; it is the trigger point for debate about the most appropriate method of dealing with the expression in a manner that best upholds liberal principles, including the protection of rights.

Determining the standard of harm required to justify interference is a matter for further debate so far as Mill is concerned. Some general observations might be made about this standard applied to an employment law context. Despite its apparent simplicity the harm principle is 'a very complex concept with hidden normative dimensions'[61] and its nature and meaning deserves consideration. Where the principle is apparent in the cases examined above, it appears to have been given an intuitive meaning. For example, the actual or prospective alteration of views held by a third party about the employer due to the expression is taken to be evidence of harm. As one commentator has argued, an intuitive understanding of the term 'harm' is prone to this type of approach such that any speech which influences a recipient to change their view may fall within the definition.[62] Moreover, harm is treated as a particularly powerful validation for employer interference in this context. Although this is understandable, there are many instances in which an identifiable harm suffered by the employer would not automatically justify subsequent disciplinary action. For example, ill-health, divorce, bereavement, ill-health of a dependent, tardiness, insomnia, pregnancy, paternity and financial troubles may all detrimentally impact upon an employee's productivity and, ultimately, the employer's profitability. It is not simply that some of these factors are statutorily protected or that sanctions would be contrary to good employment practices. It is also, surely, because we accept that no employee can constantly perform at optimal efficiency, work in perfect harmony with colleagues or meet every customer's service expectations. The reasons for this chime with notions of dignity and respect but also liberty and individual autonomy. These observations suggest that both the meaning and effect of harm requires a sophisticated level of treatment.

In the context of the criminal law, Feinberg has argued that the harm principle is only satisfied when an individual acts in a way that is wrong and 'morally indefensible' and 'not only sets back the victim's interest but also violates his right'.[63] Whilst the application of a

[59] Mill, n 37, 292.
[60] See, eg, H.L. Hart, Law, Liberty and Morality (OUP, 1963); Feinberg, n 61.
[61] J. Feinberg, Harm to Others, (OUP, 1984), 214.
[62] C.E. Baker, Human Liberty and Freedom of Speech, (OUP, 1989), 73.
[63] N 61, 215.

criminal standard is not appropriate to a civil context, the term 'wrongdoing' could be used to signify wrongdoing under the contract of employment and so capture acts that are inconsistent with its terms. Feinberg's argument is particularly useful since it excludes liability for 'set-back interests produced by justified or excused conduct ("harms" that are not wrongs) and violations of rights that do not set back interests (wrongs that are not "harms")'.[64] This approach is appealing since it conceives harm narrowly, which is vital if the principle is to serve its instrumental function in the liberal strategy to normalise tolerance in all right-thinking members of society.[65] Applying this modified version of Feinberg's analysis to the cases considered above, the operative notion of wrongdoing is problematic in several whilst other cases indicate some blurring between wrongdoing and harm to justify the dismissal. Gosden stands out as an example of harm without accompanying wrongdoing. The tribunal's view of the reputational damage caused by disseminating the offensive e-mail was framed in these terms: 'one of its largest customers was now of the view that it had been content to employ a person who held...views which were inimical to its objects and values'.[66] Yet this is (or otherwise seems to be) a moral judgement on the behaviour and not an evaluation of contractual breach; the Tribunal does not say how the act of dissemination breached the employee's contractual obligations nor does it account for the fact of the recipient's further dissemination. Conversely, Bowater appears to be an example of wrongdoing without harm. Bowater may have acted unprofessionally however it is not clear how the wrongdoing 'harmed' the employer given that no member of the public witnessed the event. Of course, it is possible to treat the risk of harm as harm if it is sufficiently serious enough[67] though, arguably, the standard is not met here. Some discussion might also be had as to whether Bowater's actions were sufficiently serious to warrant classification as wrongdoing. Unprofessional behaviour such as venting, gossiping or clowning about with colleagues away from public gaze is, surely, of a different character to behaving in a similar manner in front of clients or customers. The EAT does not seem to have considered this important distinction. In Rustamova there is no real consideration of how the act of online publication (which seems to have been the critical issue) breached the employee's contract (vague references to obligations like confidentiality aside) or how the act did in fact harm either the school or the profession's reputation prospectively or actually.

We may, therefore, debate whether Feinberg's standard of harm has been reached in these cases but, even if it has, further discussion is still required as to whether this harm ought to be treated as sufficient to justify the disciplinary action taken. The proportionality principle is of assistance since it requires the court to examine the reasons why the employer's response was proportionate to the harm caused. The tribunal needs to be persuaded that the harm was sufficiently serious to justify the ultimate sanction of dismissal. As noted above, it has been argued that the proportionality test requires evidence of a 'clear and present impact or a high likelihood of such impact on [the employee's ability to] work'.[68]

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[64] ibid, 215.
[65] See, eg, D. Dripps, 'The Liberal Critique of the Harm Principle' (1998) 17 Crim. Just. Ethics 3, 4; L. Bollinger, The Tolerant Society, (OUP, 1986).
[66] Gosden, n 19, [11.3.4].
[67] C. Finkelstein, 'Is Risk a Harm?' (2002-2003) 151 U. Pa. L. Rev. 963.
[68] Mantouvalou, n 5, 935-936.

Also, arguably, it should be shown how disciplinary action remedied the harm caused. This requires careful examination of the actual harm suffered. Arguably, the employer is most justified when responding in a manner that does no more than neutralise the harm caused. Thus the proper response is not necessarily to punish the expression but, rather, to consider whether it is possible to neutralise or otherwise diminish the harm caused by it whilst preserving the rights at stake. In certain circumstances, disciplinary action, including dismissal, will be an appropriate sanction. For example, the dismissal of the employee in Teggart was proportionate to the harm caused to his colleague and a legitimate means of extinguishing that harm. However, disciplinary action is not usually a method of compensating the employer for the harm caused but rather serves as a means of punishing the employee for her behaviour. It is a coercive measure that may have severe and long-lasting consequences for the affected employee on their reputation, confidence and ability to secure meaningful alternative employment. In the paradigmatic case, it is not just harm to the employer's interests that are at stake, the employee's interests are also harmed, for example, due to the stigmatic quality of dismissal, the loss of income, the difficulties of finding a suitable alternative position, etc. Often, then, it is not simply a matter of the court protecting one form of harm but rather choosing between two types of harm. The final section considers how these observations on proportionality might be realised in practice.

4. Strategy for Realisation in Practice

The view that the inherent worth of speech rather than the harm it causes is the determinative factor for proportionality purposes is evident in the academic literature[69] and is discernible in the Strasbourg jurisprudence.[70] Former ECtHR President Luzius Wildhaber has written, extra-judicially, that 'ultimately it is the role played in democratic society by the expression at issue which determines the level of protection that will be accorded to it'.[71] Yet these views are not unassailable. First, although the inherent worth of the expression may be relevant it is not determinative: although political expression is so closely allied to democracy that interference is rarely permissible,[72] the ECtHR has made it tolerably clear that interference with other types of expression is only acceptable where the reasoning is coherent and speaks directly to one of the harmful effects outlined in Art 10(2), such as national security, public safety, the rights of others, etc.[73]

Secondly, even if inherent worth was treated as determinative by the ECtHR, it does not follow that the UK's approach must replicate this system of free speech protection. It is generally accepted that the ECHR establishes a floor of rights, not a ceiling, which member states are encouraged to develop to suit their own local conditions.[74] Sadly, the opportunity for judicial activism that this might otherwise signify has stalled in the UK due to the

[69] See, eg, Fenwick and Phillipson, n 35 and Rowbottom, n 30.
[70] See, eg, Lingens v Austria (1986) 8 EHRR 407.
[71] L. Wildhaber, 'The right to offend, shock or disturb? Aspects of freedom of expression under the European Convention on Human Rights' (2001) Irish Jurist 17, 31.
[72] See, eg, Castells v Spain (1992) 14 EHRR 445, [46].
[73] See, eg, Krone Verlag GmbH v Austria (No. 3) (2006) 42 EHRR 28; Vereinigung Bildender Kunstler v Austria (2007) ECDR 7.
[74] Lord Irvine, 'Constitutional reform and a Bill of Rights' (1997) EHRLR 483.

judiciary's decidedly deferential view that UK courts must 'keep pace' with Strasbourg 'no more, no less'.[75] This 'mirror principle' has been the subject of constant academic criticism.[76] As Baroness Hale, writing extra-judicially, reminds us, the principle is 'odd' since the Strasbourg jurisprudence 'is not binding upon anyone, even upon them. They have no concepts of ratio decidendi and stare decisis. Their decisions are, at best, an indication of the broad approach which Strasbourg will take to a particular problem'.[77] Hale questions the strictness of the mirror principle, in any event, having identified three House of Lords decisions that went beyond Strasbourg principle.[78] Yet, thirdly, even if the mirror principle is applied strictly, its limiting effect is considerably lessened given that Strasbourg has yet to decide a case matching the paradigm of trivial but disliked employee expression. With these points in mind, the following navigates a way through the Strasbourg then UK jurisprudence in order to challenge the view that the ECtHR's approach to Art 10 protection is based on the inherent worth of expression, not the harm caused, and so construct a set of supportive principles endorsing the liberal approach advocated above.

The ECtHR has consistently stated that freedom of expression 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.'[79] The inclusion of this latter phrase clearly acknowledges that Art 10 applies to a broader range of values than simply democratic participation. Since self-fulfilment is valuable both instrumentally and intrinsically, the beneficial effect of particular speech upon the speaker or audience is not only unmeasurable (reliably, at least) in an instrumental sense but also to treat this calculation as determinative would neglect the value of a legal system that allows people to express themselves freely. Similarly, the ECtHR has said Art 10 applies 'not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'.[80] Consequently, although the inherent worth of expression might be recognised judicially, a precise calculation of it should not inform the outcome of the claim. Such an approach is apparent, from time to time, in the Strasbourg jurisprudence. For example, in Krone Verlag GmbH v Austria, a case concerning comparative advertising, the court acknowledged the value of the expression in broad terms: 'for the public, advertising is a means of discovering the characteristics of services and goods offered to them'.[81] Significantly, there was neither further appraisal of its inherent worth nor derogative comparison to political expression. Instead, the proportionality analysis was conducted solely by reference to whether the potential harm of the expression justified the interference:

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[75] R (on the application of Ullah) v Special Adjudicator [2004] UKHL 26, [20].
[76] R. Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (2004) PL 725; J. Lewis, 'The European ceiling on human rights' (2007) PL 720; J. Wright, 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) PL 595; F. Klug and H. Wildbore, 'Follow or lead? The Human Rights Act and the European Court of Human Rights' (2010) EHRLR 621.
[77] B. Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLR 65, 68.
[78] ibid, 71-72.
[79] Lingens v Austria (1986) 8 EHRR 407, [41] (emphasis added); see also, eg, Nilsen and Johnsen v Norway (2000) 30 E.H.R.R. 878, [43]; Tammer v Estonia (2003) 37 EHRR 43, [59].
[80] Lingens, ibid, [41].
[81] (2006) 42 EHRR 28, [31].

> 'Sometimes [advertising may] be restricted, especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, even the publication of objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions. Any such restrictions must, however, be closely scrutinised by the Court, which must weigh the requirements of those particular features against the advertising in questions'[82]

Thus, having recognised comparative advertising as something deserving of protection under Art 10, the court's analysis of its inherent worth played no part in determining whether the right had been violated. This approach provides a more supportive environment for trivial expression than UK doctrine does. Faced with the paradigm, the Strasbourg court might recognise that social media has positive effects in allowing people, as one commentator has put it, to rant, vent or converse.[83] It might also reiterate that Art 10 protects speech that shocks, offends or disturbs.

The recent ECtHR decision in Redfearn v UK[84] provides some encouragement for judicial reappraisal of employee Art 10 rights and the need to treat free speech claims seriously. Redfearn's employer dismissed him after his election as a local councillor for the BNP, fearing this would cause anxiety to clients and damage its reputation. The ECtHR accepted the applicant's submission that dismissal was 'capable of striking at the very substance of his rights' under Arts 10 and 11 (freedom of association).[85] Significantly, the court's stern criticism of existing UK law (it insisted the UK must relax its rules on the minimum qualifying period for unfair dismissal complaints concerning political expression) positively ignored any attendant difficulties with the nature of the expression at stake.[86] The Court might have been more magnanimous: in other circumstances it has said that political parties whose mandate conflicts with democratic principles cannot claim protection under the ECHR.[87] Instead, the Court reiterated[88] its well-established principle that Art 11 (and, by extension, Art 10) applies to expression that 'offends, shocks or disturbs'.[89]

In determining whether an interference is proportionate, the Strasbourg court allows member states a 'margin of appreciation' to determine how best to secure the right in light of local conditions.[90] This requires consideration of the provisions in Art 10(2). Although it is said the right carries 'duties and responsibilities', the view (noted above) that this means the right must be exercised 'responsibly' is profoundly mistaken. As noted in the academic literature, 'to argue…such wording suggests an inherent greater limitation envisaged in the freedom of expression is untenable. Indeed, there is no room for implied limitations in Article 10'.[91] It has been argued the notion only applies where speakers have some demonstrable, special societal obligation, either due to the nature of their position, ie, because

[82] ibid.
[83] Rowbottom, n 30.
[84] N 58.
[85] ibid, [47].
[86] ibid, [57].
[87] Refah Partisi v Turkey (2002) 35 EHRR 3, [46].
[88] N 58, [56].
[89] Handyside v UK (1976) 1 EHRR 737.
[90] ibid, [48]-[49].
[91] D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, Law of the European Convention on Human Rights, 2nd edn. (OUP, 2009), 493.

they are lawyers, journalists, civil servants, etc,[92] or due to the nature of the information divulged, ie, because they are whistle-blowing.[93] Therefore, no general obligation to use the right 'responsibly' can be inferred. Instead, interference is only potentially lawful where one (or more) of the nine legitimate aims listed in Art 10(2) is at stake. These aims all speak to different types of harms that might justify interference. Where trivial expression is involved, the protection of morals or the rights of others are most likely relevant. The court will allow a wide discretion where there is 'no consensus' across Europe on how an issue should be treated, particularly where 'sensitive moral or ethical issues' are involved.[94]

Yet this discretion does not provide member states with carte blanche. The ECtHR has consistently stated that the margin of appreciation goes 'hand in hand with European supervision' such that the court is 'empowered to give the final ruling on whether a 'restriction' is reconcilable' with the Convention right.[95] Consequently, the court must be satisfied that the member state 'applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts'.[96] In other words, the court must be satisfied that the reasons for interference are coherent and persuasive. The court will, therefore, scrutinise the reasons offered for why the nature of the breach of obligations by the employee and the damage suffered by the employer were so severe as to justify the ultimate sanction of dismissal.[97] This requires careful analysis of the seriousness of its consequences.[98]

These overarching statements of principle in the Strasbourg jurisprudence are also discernible in the wider domestic case law. For example, recognition of the broader values underpinning Art 10, beyond democratic participation, can be seen in Lord Steyn's oft-quoted speech in ex parte Simms:

> 'Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important... First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market"... Thirdly, freedom of speech is the lifeblood of democracy'[99]

In apparent recognition of the self-fulfilment value, the Court of Appeal has found that to treat trivial content, like 'social banter or discourtesy', as defamatory would violate Art 10.[100] Similarly, in a privacy context, it has been held that Art 10 is capable of protecting 'banal or trivial expression'.[101] In Chambers v DPP, the High Court was at pains to point out that the Communications Act 2003 had no 'chilling effect' on irreverence:

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[92] ibid, 494-499.
[93] See, eg, Heinisch v Germany (2014) 58 EHRR 31, [67].
[94] See, eg, Evans v UK (2007) 46 EHRR 728, [77].
[95] See, eg, Heinisch, n 93, [62].
[96] ibid.
[97] ibid, [68].
[98] N 58, [46].
[99] R v Secretary of State for the Home Department ex parte Simms (2000) 2 AC 115, 126 (emphasis added).
[100] Cammish v Hughes [2013] EMLR 13, [38], applied in McGrath v Independent Print Ltd [2013] EWHC 2202 (QB), [29] and Euromoney Institutional Investor Plc v Aviation News Ltd [2013] EWHC 1505 (QB), [19].
[101] Ferdinand v MGN Ltd [2011] EWHC 2454 QB, [62]; Rocknroll v News Group Newspapers Ltd [2013] EWHC 24 (Ch), [30].

> 'Satirical, or iconoclastic, or rude comment, the expression of unpopular or unfashionable opinion about serious or trivial matter, banter or humour, even if distasteful to some or painful to those subjected to it should and no doubt will continue at their customary level, quite undiminished by this legislation... [users] are free to speak not what they ought to say, but what they feel'[102]

Similarly, the UK courts have recognised that Art 10 applies equally to expression which shocks, disturbs or offends.[103] For example, the High Court has previously noted that 'freedom only to speak inoffensively is not worth having'.[104]

Moreover, the case law reveals some judicial disquiet with the view that expression should be protected according to its inherent worth. In Hill v Great Tey Primary School, the EAT was highly critical of the ET's reductive treatment of Art 10 as a right that must be exercised 'judiciously, responsibly and not recklessly'.[105] Away from employment law, the High Court has also expressed concern at narrow readings of Art 10. In Miranda v Secretary of State for the Home Department,[106] the court noted that 'freedom of speech may indeed be "the lifeblood of democracy"; but...the perception of free expression as a servant of democracy...would tend to devalue non-political speech... [F]ree thought, which is a condition of every man's flourishing, needs free expression... I introduce these reflections...because, it seems to me, they make the ideal of free speech larger not smaller'.

In an employment law context, a judicial finding that Art 10 applies should, in principle, alter the court's approach to the fairness test so as to ensure the right is more robustly protected. It is not enough that the tribunal thinks it understandable that an employer or their clients might react adversely to the expression.[107] There should be careful consideration of the alleged breach of obligation by the employee, the harmful effect caused by the expression and on the seriousness of the sanction in order to determine if the interference with Art 10 is justified.[108] Harm is determinative: a technical or trivial breach of an obligation is not of itself sufficient to justify dismissal. For example, by analogy, the House of Lords has previously stated that the law does not protect trivial breaches of confidence.[109] Similarly, prospective employer claims that the expression undermines mutual trust and confidence must meet the seriousness threshold set for this implied term.[110] Adoption of this general approach recognises Feinberg's claim that there should be both a 'wrong' and 'harm' before interferences are justified. Whilst the requisite level of harm is fact-specific, crucially, it is not contingent upon the inherent worth of the expression.

In assessing the detriment to the employer, the tribunal may recognise the 'interest in protecting the commercial success and viability of companies for the benefit of shareholders

[102] Chambers v DPP [2013] 1 WLR 1833, [28].
[103] R (on the application of M) v Parole Board [2013] EWHC 1360 (Admin), [27]; Rocknroll v News Group Newspapers Ltd [2013] EWHC 24 (Ch).
[104] Redmond-Bate v DPP [2000] HRLR 249, [20].
[105] [2013] ICR 691, [44].
[106] [2014] EWHC 255 (Admin) [45]-[46].
[107] Boychuk v H J Symons Holdings [1977] IRLR 395.
[108] Heinisch, n 93, [64], [68] & [70].
[109] OBG Ltd v Allan [2007] UKHL 21.
[110] Hagen v ICI Chemicals and Polymers Ltd [2002] IRLR 31, [55].

and employees [and] also for the wider economic good',[111] however, the tribunal must be satisfied that damage has been or would be caused to those interests by the employee's expression. This ought not to be assumed and some scrutiny of the employer's claim is required. In defamation law there is recognition that the proportionality principle requires the resultant harm of the expression to meet a level of seriousness before it is actionable[112] since penalising trivial harms would violate Art 10.[113] To this end, there has been recent judicial reliance[114] on the dicta of Lord Atkins in Sim v Stretch:[115]

> 'That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs'

In defamation, the seriousness threshold depends on whether 'the ordinary, reasonable and sensible person' would think less of the claimant as a consequence.[116] This standard may be transposed easily to the employment context and applied to the prospective or actual damage caused, whether external (eg, clients/customers) or internal (eg, other employees). Where other employees object to the expression the tribunal should consider whether it was reasonable not only that the affected employee was offended but also that it was reasonable that the offended employee should attribute offence to the employer's actions (or inactions) or that it was reasonable that the offended employee should expect the employer to intervene due to their subjective reaction. This also gives the tribunal scope to restrict the operation of wide and discretionary disciplinary clauses (or similar provisions), particularly those ostensibly regulating employee behaviour outside work, such as in Smith. The tribunal might similarly consider steps taken by the employer to minimise any prospective reputational damage through disassociation; a step Hardwicke chambers took recently when a leading barrister expressed concern for aged celebrities accused of historic sex offences.[117]

By adopting the above strategy, employee free speech rights may be better protected. Yet there are two particular issues with realising this strategy that require addressing. First, it relies upon a degree of judicial activism both in recognition of the threat to liberty and the consequent concerted sympathetic response required to resolve the problem. There may be less appetite for this at tribunal level. Therefore, realising meaningful change may require policy-maker intervention. Recent Art 10 related inquiries give hope for political support for this view. In his much publicised inquiry into the culture and ethics of the press, Lord Justice Leveson pointedly distinguished press freedom from individual freedom of expression on the basis that the latter 'has its roots in a very personal conception of what it is to be human'.[118] Similarly, in its recommendations for changes to defamation law, the Ministry of Justice

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[111] Steel and Morris v UK (2005) 41 EHRR 22, [94].
[112] S 1, Defamation Act 2013; Jameel v Dow Jones [2005] EWCA Civ 75, [55]; Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 (QB), [89].
[113] Jameel, ibid, [40].
[114] Thornton, n 112; Daniels v BBC [2010] EWHC 3057 (QB), [42].
[115] (1936) 2 All ER 1237, 1242.
[116] Daniels, n 114, [48]-[50].
[117] http://www.hardwicke.co.uk/unrelated/statement-from-hardwicke.
[118] Lord Justice Leveson, An Inquiry into the Culture, Practices and Ethics of the Press: Report (HC 780, 2012), 55, [3.3].

proposed that, to be actionable, claimants must demonstrate that the contested expression caused substantial harm, so as to ensure compatibility with Art 10.[119] Whilst such comments suggest political support for liberty arguments, political intervention through legislative change is unlikely to resolve the problem since (aside from other concerns) policy-makers tend to conclude that the meaning of free speech is a matter best left to judges.[120] Yet if tribunal judges lack confidence to engage in the requisite level of judicial activism, and given that such disputes will rarely progress to appellate level, then the status quo is likely to remain. One possible solution might be through ACAS intervention. ACAS already has a policy on social media but this says nothing about the meaning of free speech or why trivial employee speech might deserve protection. If ACAS modified its policy to reflect the discussion above then the prospect of changing the prevailing culture at ground level would be increased.

Secondly, even if these obstacles are overcome, this would create a two-tier system of protection in which those qualifying for unfair dismissal law protection or those working in the public sector would have greater rights than everyone else. Individuals with only a wrongful dismissal claim are particularly vulnerable given that purely contractual approaches govern the outcome, as Smith shows. Greater debate is required on how these individuals might be better protected. Whilst it is not an ideal solution, the judiciary might develop its common law principles (when the High Court route is taken) to reflect, more explicitly, liberal reasoning, as it has done in restraint of trade cases, even where a clear, contrary contractual clause exists.[121] The courts have invalidated restraint of trade clauses that go beyond what is necessary to protect the legitimate business interests of the employer on the basis that it deprives the employee of 'individual liberty of action in trading'.[122]

5. Conclusion

The doctrinal approach to employee free speech rights is disappointing and perhaps demonstrates a lack of familiarity with the importance of individual freedom of expression. Whilst it may be that the type of expression at stake is not significant or important, objectively speaking, trivial expression does not deserve trivial protection. The disconnection from liberal principle is stark: doctrine does not show sufficient recognition either that individual expression is vital to individuality and self-fulfilment or of its intrinsic value as a signifier of a liberal society that treats individuals as autonomous beings. Consequently, even greater engagement with the proportionality principle would do little to bolster employee free speech rights because the necessity of the interference is often linked to the significance of the expression involved. Yet greater realisation of liberal principle is possible. The Strasbourg jurisprudence and domestic case law shows ample recognition of these values. Through a concerted and sympathetic judicial approach, doctrinal inadequacies may be addressed by removing consideration of inherent worth from the process of determining harm during the proportionality exercise. Modification of the ACAS policy on

[119] Ministry of Justice, Draft Defamation Bill Consultation, Consultation Paper CP3/11 (Cm 8020), 8-9.
[120] N 118, 1508, [4.3]; Joint Committee on Privacy and Injunctions: Report (HL Paper 273; HC 1443), [50].
[121] De Francesco v Barnum (1890) 45 Ch. D. 430, 438.
[122] Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd [1894] AC 535.

social media would buttress this strategy so as to achieve more immediate results at ground level. Through this strategy, practice would recognise that freedom of expression is not a right that must be used judiciously, responsibly or diplomatically. It is far greater than that.