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‘I Lost my Job Over a Facebook Post – Was that Fair?’¹ Discipline and Dismissal for Social Media Activity

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1. Introduction

A few hours before I started writing this article, I posted a photo of a beautiful beach from my holidays on my Facebook page, which friends and family can access. Some of my friends are also colleagues. I have a nickname on Facebook, but it is not impossible for people to find out who I am through my list of friends. More importantly perhaps, as I was posting the photo, I remembered that my boss, the Dean of the UCL Law Faculty, is also my Facebook friend (he was my Facebook friend before he became my boss!). I view my Facebook page as relatively personal, with my nickname and short list of friends, but I am conscious that many people, including my Dean, can access it, so I try not to get carried away with what I post. Unlike my more private Facebook profile, I view my Twitter page as more public and professional. It has my real name and affiliation. My employer encourages academics to use Twitter in order to promote academic work to the broader public. The last few days I posted on Twitter a message congratulating a colleague on his new book, some information on a book that I co-edited, and shared a couple of tweets on the UK University strikes, critical of the marketisation of education. A few days before, I had tweeted a photo from the picket line, which my Dean spotted. Through Twitter I have also been following the latest debates on the employers’ response to UK university employees’ demands. I am on social media but I do not view myself as an avid user.

Not everyone uses Facebook, Twitter and other social media in the way that I do, of course. Some people use social media to express views and engage in discussions on everyday life, others to debate politics, and yet others to share their news with their loved (or not so loved) ones. Some people are required or encouraged by their employers to use social media for work purposes – be it the employer’s social media page or their personal page. Sometimes the employer clearly states that employees are not allowed to use social media for personal purposes. But my experience, and many other people’s experience, suggests that it is hard to keep the personal and the professional clearly demarcated.

¹ ‘I Lost my Job Over a Facebook Post – Was that Fair?’, <http://www.bbc.com/news/stories-41851771>

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There are numerous examples of how the personal and professional become blurred on social media, with grave implications for the employee. A cheerleader was dismissed for posting a photo of herself in lingerie on her Instagram page.² A woman employed by a US government contractor lost her job because she was photographed extending her middle finger at the motorcade of President Trump when she was away from work, and she posted the photo on her Facebook and Twitter page.³ An employee of a care home was dismissed for posting on Facebook a video and a photo of a music night, which she regularly organized for the residents, where one of them with Down's syndrome was visible, and was tagged.⁴ The examples are endless.

Is it fair to be dismissed for social media activity, and are there any limitations to the employer's managerial prerogative? These are the questions that this article seeks to address by examining the compatibility of discipline or dismissal with human rights law, with a primary focus on United Kingdom (UK) and European human rights law. It argues that UK courts and tribunals erroneously accept the lawfulness of such dismissals most of the time. This is due both to weaknesses in the English law of unfair dismissal, and to courts' and tribunals' limited engagement with human rights at work. Technical aspects of social media usage, with which courts and tribunals are often unfamiliar, add a further layer of complexity. Two factors make dismissals for social media activity particularly challenging for courts: first, the fact that social media are online platforms that everyone can potentially access, and hence public rather than private space; second, that expression on social media, often spontaneous and thoughtless, is not viewed as a particularly valuable form of speech.

My position is that dismissal for social media activity should be viewed as lawful in very limited occasions, for employers should not have the right to censor the moral, political and other views and preferences of their employees even if it causes business harm. I suggest that workers' social media usage should be protected both as an aspect of their right to private life and as an aspect of their right to free speech, both of which should be interpreted in a manner that is sensitive to the inequality of power that typically characterises the employment relation. The right to private life (or privacy) can protect acts in public space. This right to freedom of expression should be understood as covering not only speech that is viewed as especially valuable by courts, but also spontaneous and trivial speech, which is often the type of speech that we find on social media, and possibly unpleasant or offensive speech, against employer interference. That social media usage should be covered by privacy and free speech principles does not make all limitations to it unlawful. But the value of interests in privacy and free speech makes it imperative that strong protection be afforded to employees against employers' disciplinary power.

The structure of the article is as follows. In the next section, I discuss what are social media, what is their value for individuals, and what challenges they present in the employment context, particularly because of how they challenge commonly held assumptions about the public/private divide. Social media activity is often accessible to the public, so for some

² See 'NFL Cheerleader Says She Was Fired Over Instagram Photo' <http://www.bbc.com/news/world-us-canada-43576681>; 'How N.F.L. Teams Use Social Media to Promote, and Control Cheerleaders' <https://www.nytimes.com/2018/04/11/sports/nfl-cheerleaders.html>.

³ Woman Who Was Fired for Giving Trump the Middle Finger Sues Former Employer <https://www.nytimes.com/2018/04/05/us/juli-briskman-middle-finger-trump.html>

⁴ 'I Lost my Job Over a Facebook Post – Was that Fair?', <http://www.bbc.com/news/stories-41851771>

they are not part of the employees' private life. This understanding of the public/private divide will be questioned. Is disciplinary action for social media usage compatible with workers' human rights? In the third section, I assess this question by considering whether the conduct falls in the ambit, first, of the right to private life, and second, the right to freedom of expression. I argue that both of these rights are implicated and potentially violated in cases of dismissal for social media usage. The characteristics of submission and subordination of the employee in the workplace provide the appropriate context for the interpretation of both rights.⁵ Privacy needs to be interpreted in this particular context not as covering activities in private space but as covering life away from work.⁶ Free speech should cover spontaneous or unpleasant speech, but also possibly speech that offends, because of the value of freedom of expression for individual autonomy.⁷ The fact that the content is often publicly accessible, that expression may be unpopular, and other such criteria that courts employ, does not altogether remove the activity from the scope of human rights protection.

What are the limits to what we can post without risking losing our job? This is the question that the fourth section addresses by applying a test of proportionality to assess the lawfulness of dismissal for social media activity, developed along the lines of the case law of the European Court of Human Rights (ECtHR) that examines whether a limitation has a legitimate aim, and whether the means employed are proportionate to the aim pursued. Good workplace performance is a legitimate aim for the employer to pursue through its instructions to employees and through disciplinary action. Protection of employees, customers and others from bullying and harassment also constitutes a legitimate aim in exercising disciplinary power, as well as the preservation of the business reputation in certain circumstances. The nature of the worker's job and the size of the business are important factors that need to be taken into account in assessing damage on the employer's reputation. The view of the employer or the tabloid press on the value or morality of social media posts is irrelevant. The employer is not a judge of employees' moral character, nor should it police employees' conduct that has no bearing on their performance.

In the case law, then, it would be a positive starting point if courts stated clearly that employees' social media posts that have no link to workplace performance or the nature of the job should not be understood to represent the employers' views or harm their interests. There should be a presumption of privacy or protected speech. Drawing a clear, bright line in judicial reasoning that separates workplace conduct or performance, and social media activity, can protect employees from employers' oppression, and can also help employers who are concerned about the effect of social media on their reputation.

⁵ Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens 1983) 18. See the analysis in Hugh Collins, 'Is the Contract of Employment Illiberal?' in Collins, Lester, Mantouvalou (eds) *Philosophical Foundations of Labour Law*, OUP, 2018, p 48; Guy Davidov, *A Purposive Approach to Labour Law*, OUP, 2016, pp 52-54.

⁶ Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces', (2008) 71 *Modern Law Review* 912. On privacy and contextual integrity see Helen Nissenbaum, 'Respecting Context to Protect Privacy' (2015) *Science and Engineering Ethics* 1; Helen Nissenbaum, 'Privacy as Contextual Integrity', (2004) 79 *Washington Law Review* 101; Helen Nissenbaum, *Privacy in Context – Technology, Policy, and the Integrity of Social Life*, Stanford University Press, 2010.

⁷ Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle' (2015) 44 *ILJ* 1.

2. Social Media and Employment

Social media are online platforms through which people create connections and share content with others. These include Facebook, Twitter, YouTube and Instagram. The role that social media play in people's lives varies for each person in different societies and contexts.⁸ A common reason why people use them is in order to associate with others. Through the use of social media people sustain relations with friends, family or acquaintances, in a way that might not otherwise be possible. Sustaining relations of love and other intimate relations is one of the functions of social media that we value. Social media also help build relationships with new people, some of whom we may have never met in real life. We associate ourselves with those who have shared interests with us on work-related issues, politics, arts or other activities. We become members of new communities, which we deem valuable, express opinions and exchange information and views on matters that interest us. Through social media, moreover, we receive information that is shared by others, which is not available on mainstream media. By using anonymous accounts, people can also express opinions on issues that they would normally not be able to express, for instance, if they live in an authoritarian state, which they criticise. In addition, through social media people engage in trivial interactions with others, such as conversations about sports or the weather. Social media are not only a way of sustaining intimate, personal relations, or a way to participate in democratic debates, but also a way to be an autonomous person who engages in everyday discussions with others.

Even though social media can be a valuable means of communication, building communities, engaging in debates and accessing information, their use is not without perils. People can instantly post opinions that they form during heated debates, and engage in lengthy online exchanges which can be accessed by many, and which they may later regret; social media privacy settings are a challenge, with users having limited ability to control whom their posts reach; anonymous social media accounts may be used to abuse and harass; the platforms themselves are imperfect, and need to be regulated: they sometimes make it hard to understand and control privacy settings; Twitter bots, namely accounts that tweet of their own accord, and Facebook Apps have played a role in manipulating public opinion,⁹ and the platforms are not always willing to address the relevant problems.¹⁰ For reasons such as these, many people either refrain from using social media, or use them with care and moderation.

When it comes to the employment context, the main change that social media have brought about is that employees can express themselves with great ease and speed in the public domain, in a way that is permanent and can often be accessed by colleagues, customers, the general public, and the employer, while through their profile they can be linked to their workplace. This occurs, for instance, when workers name their employer explicitly on their profile or when they have connections that help identify it. Unlike conversations in the pub, a café or by the watercooler, comments on social media leave a permanent record.

⁸ See, for instance, the UCL project, 'Why We Post', available at <http://www.ucl.ac.uk/why-we-post>.

⁹ See the Oxford Internet Institute study, Computational Propaganda Project, <http://comprop.oii.ox.ac.uk/research/working-papers/computational-propaganda-worldwide-executive-summary/>.

¹⁰ See the Cambridge Analytica scandal <https://www.theguardian.com/news/series/cambridge-analytica-files>.

With the use of social media, many aspects of our personality and life that would have been kept private or expressed to a small group, become part of the public space. People may realize this and may have consented to sharing information with a large number of others by having their social media profile open to the public; they may not realize immediately, or not at all, that some information that they share is accessible to the broader public. Some social media platforms give users limited control over who can access their posts. They often revise their (often unnecessarily complicated) privacy settings, so posts which users thought were private, shared with a small number of followers, become part of the public space, accessible by anyone. In addition, posts, sometimes spontaneous or expressed in a heated moment, may be shared by others and reach a great number of users, far greater than the audience that people originally intended to reach. A comment for a few dozen followers can be potentially viewed by thousands of people, if shared or retweeted.

Many people have lost their job because of their social media activity, and many cases have been brought to courts and tribunals.¹¹ I will discuss the facts of two English court cases here, in order to highlight different aspects of the problem. Mr Laws was employed by a games retailer with 300 stores in the UK.¹² He was responsible for assessing risk and preventing loss in about 100 of the stores. The employer had several official Twitter accounts for the stores, and Mr Laws also opened a personal one to follow them. He did not identify his employer on his account, but he was followed back by 65 of the stores when he was linked to the employer in someone else's tweet, which he retweeted. At some point, it was found out that Mr Laws had posted offensive tweets on various groups, such as dentists, caravan drivers, a hospital Accident and Emergency Department, Newcastle supporters, and disabled people, from his Twitter account that was accessible by the public. He was dismissed. The Employment Appeal Tribunal examined the question whether the Twitter account had acquired a sufficiently work-related context, and whether the settings were public or private. Having been satisfied that the context was sufficiently work-related, and that many could access Mr Laws's tweets, it found the dismissal fair. The *Laws* case shows how personal messages become attributed to the employer simply by virtue of one's job.

Ms Gibbins was employed by the British Council as Head of Global Estates, overseeing the Council's property globally. One day when she was logged onto Facebook, she saw on her newsfeed a photograph of Prince George, who was 2 years old at the time, which had been posted on the page of the band Dub Pistols, accompanied by the comment 'I know he's only 2 years old, but Prince George already looks like a Fucking Dickhead'. The image appeared on her feed because some of her friends had commented on it. She added the following comment: 'White privilege. That cheeky grin is the (already locked-in) innate knowledge that he is Royal, rich, advantaged and will never know *any* difficulties or hardships in life. Let's find photos of 3yo Syrian refugee children and see if they look alike, eh?'. She further explained that she disagrees with systems that privilege some people over others, that she is a socialist, atheist and Republican, and that in her view a royal family has no place in a modern democracy. Ms Gibbins had the highest Facebook privacy settings, but her employer could be identified. Despite her privacy settings, someone came across the post and sent it to the tabloid press. The story was misreported on the front page of the Sun, which said that Prince George was 'hit by vile rant from British Council boss paid

¹¹ For an overview of the issues in several different jurisdictions, see Riccardo del Punta, 'Social Media and Workers' Rights: What is at Stake?' in this issue. See also the special issue (2017-2018) 39 *Comparative Labor Law and Policy Journal* on 'Employer Access and Use of Employee Social Media'.

¹² *Game Retail Limited v Laws*, Appeal No. UKEAT/0188/14/DA, 3 November 2014, 2014 WL 6862769.

thousands by taxpayers to promote UK'. The front page attributed the offensive comment about Prince George to Ms Gibbins. The misquotation was circulated widely online and in the press (the Metro newspaper, and the Daily Mail), and great pressure was put on the British Council, including by members of the far right group Britain First. Following disciplinary proceedings, Ms Gibbins was dismissed for gross misconduct and specifically because she had brought the British Council in disrepute. The Employment Tribunal found her dismissal lawful, having rejected her claims of discrimination because of philosophical belief, wrongful dismissal and unfair dismissal.¹³ Gibbins shows that a user of social media can be attacked for statements that the user has not made. Although the allegations were false, the embarrassment of the employer was enough reason to dismiss her.

3. Dismissal for Social Media Usage, and Human Rights

Some preliminary remarks on horizontality of human rights and their application in the employment context are due. When the European Convention on Human Rights (ECHR) was initially conceived, its aim was to place limitations on state action. Over the years, the Court developed a range of positive obligations on states with a view to ensuring the protection of rights in relations between private individuals.¹⁴ The Court has repeatedly ruled that human rights have horizontal effect in the employment relation, and some of the relevant case law involves dismissal by private employers.¹⁵ The ECHR does not explicitly contain a human right to be protected against unjust dismissal. However, the ECtHR has developed an extensive line of case law, examining the compatibility of dismissals with human rights law.¹⁶ State authorities have duties to legislate and implement the law in a way that safeguards Convention rights in the employment relation.

According to the Human Rights Act 1998 (HRA), which incorporated the ECHR in English law, courts have a duty to interpret legislation, including employment legislation, in accordance with the HRA,¹⁷ and to strike down legislation that is incompatible with it.¹⁸ In addition, courts and tribunals are public authorities, and have a duty, as a result, to act in accordance with the rights enshrined in the HRA.¹⁹ Human rights do not have a direct horizontal effect: they do not form a cause of action for employees who are dismissed by their private sector employers. They have indirect horizontal effect. Workers may have a direct human rights claim in a dismissal against their employer, if the employer is the public

¹³ *Ms A Gibbins v British Council*: 2200088/2017, 3 November 2017 (Employment Tribunal).

¹⁴ See Dean Spielmann, 'The European Convention on Human Rights – The European Court of Human Rights', in Oliver and Fedtke (eds), *Human Rights and the Private Sphere*, Routledge, 2007, p 427. On this, see also the landmark *Marckx v Belgium* (1979) 2 EHRR 330.

¹⁵ For a recent example, see *IB v Greece*, App No 552/10, Judgment of 3 October 2013.

¹⁶ See, for instance, *Lustig-Prean and Beckett v United Kingdom* App Nos 31417/96 and 32377/96, Judgment of 27 September 1999; *IB v Greece*, as above; *Pay v United Kingdom*, App No 32792/05, Admissibility decision of 16 September 2008; *Obst v Germany* App No 425/03; *Schuth v Germany* App No 1620/03, Judgments of 23 September 2010; *Fernandez Martinez v Spain* App No 56030/07, Judgment of 12 June 2014; *Eneida v United Kingdom* App Nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013; *Vogt v Germany* App No 17851/91, Judgment of 26 September 1995.

¹⁷ Section 3.

¹⁸ Section 4.

¹⁹ Section 6.

sector,²⁰ and an indirect claim if the employer is a private entity. English courts have accepted that unfair dismissal legislation has to be interpreted in light of the HRA.²¹

When applying human rights in the employment context, it is important to appreciate the particularities of this context. Both human rights law and the law of unfair dismissal, for instance, pursue values such as dignity and autonomy.²² How should we develop these in the employment context? This can be done by reference to the ideas of submission and subordination, famously articulated by Kahn-Freund, who said that the contract of employment is in its inception ‘an act of submission’, in its operation ‘a condition of subordination’.²³ It has been argued that by submission we mean the entry into a contract on terms that the employer decides, and which the employee has very little power to question or amend.²⁴ This gives the employer the ability to impose duties to which the employee would not agree, had it not been for the economic need and the resulting inequality of bargaining power. The concept of subordination, which is inherent in the employment contract, means that employees ‘must always subordinate or sacrifice their personal wishes to those that support the promotion and fulfillment of the goals of the employer’.²⁵ These features of the contract of employment create particular challenges for values such as freedom, autonomy, and equality at work, and constitute the right context in which we should be assessing dismissal for social media activity.

Private Life in the Employment Context

Article 8(1) of the ECHR reads as follows: ‘Everyone has the right to respect for his private and family life, his home and his correspondence’. In order to consider whether social media posts are covered by the right to private life, we need to ask: can it be said that social media posts are private?

The normative scope of privacy is contested. On one view, anything posted on social media is public, while the right to privacy only covers information that individuals keep private. Judith Jarvis Thomson has argued that as soon as we place private information in the public domain, we waive our right to privacy. We cannot claim that a right to privacy can protect us, since we have waived it.²⁶ Taking an approach to the right to workplace privacy that mirrors Thomson’s view, in cases that examined the fairness of dismissal for off-duty conduct, English courts have ruled that anything that takes place in public space is public, and cannot fall in the ambit of the right to private life.²⁷ In *Pay v Lancashire Probation Service*,²⁸ Mr Pay, a probation officer, was dismissed when his employer found out about his activities that included selling Bondage Domination and Sado-Masochism equipment on the internet, and dancing semi-naked in private clubs. In *X v Y*, Mr X, who

²⁰ *Hill v Governing Body of Great Tey Primary School*, UKEAT/0237/12/SM.

²¹ *X v Y* [2004] EWCA Civ 662, ICR 1634.

²² On human rights see for instance, James Griffin, *On Human Rights*, p 45 (on dignity) and p 150 (on autonomy); see also Ronald Dworkin, *Justice for Hedgehogs*, Harvard University Press, 2011. On the law of unfair dismissal, see Hugh Collins, ‘The Meaning of Job Security’, (1991) 20 ILJ 227; Hugh Collins, *Justice in Dismissal*, OUP, 1992, Chapter 1.

²³ Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law*, 3rd edn, Stevens 1983, p 18. See the discussion in Guy Davidov, *A Purposive Approach to Labour Law*, OUP, 2016, pp 52-54.

²⁴ Collins, above n 5.

²⁵ Collins, above.

²⁶ Judith Jarvis Thomson, ‘The Right to Privacy’, (1975) 4 *Philosophy and Public Affairs* 295 at 301-302.

²⁷ See Mantouvalou, above n 6.

²⁸ *Pay v Lancashire Probation Service* [2004] ICR 187.

was employed by a charity working with young offenders, was dismissed when his employer found out that his name had been included in a sex offenders register, for the reason that he had been caught by a police officer having consensual gay sex in a toilet in a public café, outside the workplace and working time. In the employment tribunal decision *Lawrence v Secretary of State for Justice*,²⁹ Mrs Lawrence was dismissed from her post as a Delivery Manager in the public sector for posting sexually graphic images and videos of herself on the internet. In response to the question whether the right to private life was implicated in these dismissals, UK courts and tribunals took a narrow approach to the right to privacy. In *X v Y*, Mummery LJ said that that ‘the applicant’s conduct did not take place in his private life nor was it within the scope of application of the right to respect for it. It happened in a place to which the public had, and were permitted to have, access’.³⁰ The same approach was taken in the case of *Pay*, where the Employment Appeal Tribunal ruled that his right to private life was not implicated, because he publicised his activities on the internet, and in bars where the public had access.³¹ The spatial criterion in the interpretation of the right to privacy was reaffirmed in *Lawrence*.³²

This spatial approach to the right to private life has been followed in decisions on dismissal for social media activity. In *Crisp v Apple Retail*,³³ for instance, the Employment Tribunal found that Mr Crisp’s Facebook comments that were critical of his employer’s products did not engage his right to private life. His Facebook profile was not private for the reason that his friends could access it, and forward his comments to others. He could not have an expectation of privacy on the internet, on the view of the tribunal, and as an employee of Apple, a company that specializes in technology, he should have known that. As he had no expectation of privacy for comments he posted on Facebook, his right to private life was not engaged,³⁴ and his dismissal was ruled to be harsh but fair.

I have argued elsewhere that accounts of the right to private life as a right to act in seclusion are insufficiently appreciative of both the value of privacy and its particular extension in the employment context.³⁵ The answer to the question what is covered by the right to private life at work (as well as in other contexts) is more nuanced and complex than what the spatial dichotomy suggests. The location of an activity is not determinative as to whether that activity is public or private. Privacy is contextually dependent.³⁶ Different activities are public for some purposes and private for others. For instance, sharing a secret in public space with a loved one, while a passer-by deliberately eavesdrops and then shares the secret with others constitutes a breach of privacy despite the fact that the act occurred in public space.

Examining the concept of privacy in the context of technological change, Nissenbaum argued that the answer to the question what information is public and what information is

²⁹ *Lawrence v Secretary of State for Justice*: 3401016/2016, 23 March 2017 (Employment Tribunal).

³⁰ *X v Y* [2004] EWCA Civ 662 [2004] ICR 1634 [2004] IRLR 624, 52.

³¹ *Pay*, 36. For criticism of these decisions, see Mantouvalou, above n 6. On dismissal for conduct away from work, see also Astrid Sanders, ‘The Law of Unfair Dismissal and Behaviour Outside Work’, (2014) 45 *Legal Studies* 328; Matthew Finkin, ‘Life Away from Work’, (2006) 66 *Louisiana Law Review* 945; Stephen Sugarman, ‘Lifestyle Discrimination in Employment’, (2003) 24 *Berkeley Journal of Employment and Labor Law* 377.

³² Para 42.

³³ *Crisp v Apple Retail (UK) Ltd*, 5 August 2011.

³⁴ *Crisp*, para 45.

³⁵ Mantouvalou, above n 6.

³⁶ Ferdinand Schoeman, ‘Privacy: Philosophical Dimensions of the Literature’, in Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology*, CUP, 1984, p 1.

private should be defined on the basis of ‘contextual integrity’.³⁷ Whether the information is in the public domain is not crucial. What is crucial is the particular context in which the information is shared, for each of the spheres or contexts where people operate may be governed by distinct sets of norms on roles, expectations and practices.³⁸ Contexts are social spheres that serve as organising principles that define expectations of privacy, according to her. The idea of contextual integrity brings in a normative element to the account of expectations of privacy of the ECtHR, for it is not the agreement between the employer and the employee that determines what counts as private, but a list of normative principles that are relevant to a particular context.

It is important to emphasise at this point that the ECtHR itself has ruled that conduct in public space may be protected by the right to private life.³⁹ The key criterion for the ECtHR in privacy and dismissal cases is whether the individual had a ‘reasonable expectation of privacy’, when engaging in the relevant activity. If there is a reasonable expectation of privacy because, for instance, the employer has reassured the employee that she can use her social media for private purposes, and then dismisses her for her social media usage, this would violate the employee’s reasonable expectation of privacy, and hence her right to private life.⁴⁰

However, it is questionable whether the reasonable expectation of privacy criterion is suitable for the employment context.⁴¹ Its application brings to the forefront the following problem: employers can (and often do) include a standard term in the employment contracts, according to which employees’ social media accounts cannot be used for personal purposes, or that they can always be monitored. Employers are often advised to have a clear policy on social media, in order to be able to control employees’ usage both at work and away from work. They may explicitly prohibit all employees from expressing political opinions on social media, or from having social media accounts for private purposes altogether. As employees are offered their contract of employment on a take it or leave it basis, and have no bargaining power to negotiate different terms,⁴² they may waive all expectations of privacy.⁴³ The analysis of privacy on the basis of expectations needs further refinement for present purposes. A concern with placing the expectations of privacy in the centre of the analysis in the employment context is that if an expectation of privacy is viewed as a *descriptive* term, it may lead to ‘the possibility of a downward spiral’, and that the state or other powerful actors can create conditions where there is no expectation of privacy.⁴⁴ This concern is grounded on the feature of submission in the

³⁷ See Nissenbaum, as above n 6. For further discussion of Nissenbaum’s work in the employment context see Tammy Katsabian, ‘Employees’ Privacy in the Internet Age: Towards a New Procedural Approach’, forthcoming in the *Berkeley Journal of Employment and Labor Law*.

³⁸ Nissenbaum, ‘Privacy as Contextual Integrity’, above n 6, p 119.

³⁹ *Von Hannover v Germany*, (2005) 40 EHRR 1; *Pay v UK*, App No 32792/05, Admissibility Decision of 16 September 2008. For analysis, see Virginia Mantouvalou and Hugh Collins, ‘Private Life and Dismissal: *Pay v UK*’ (2009) 38 *Industrial Law Journal* 133.

⁴⁰ The principle is derived from *Halford v UK* [1997] ECHR 32. See also *Copland v UK* [2007] ECHR 253.

⁴¹ The test has also been criticised in the context of media law. See Eric Barendt, ‘“A Reasonable Expectation of Privacy”: A Coherent or Redundant Concept?’ in AT Kenyon (ed), *Comparative Defamation and Privacy Law*, CUP, 2016, 96.

⁴² See Kahn-Freund, and analysis in Collins, above n 5.

⁴³ Hugh Collins and Virginia Mantouvalou, ‘Human Rights and the Contract of Employment’ in Freedland (ed), *The Contract of Employment*, OUP, 2015, p 158; Gillian Morris, ‘Fundamental Rights: Exclusion by Agreement?’, (2001) 30 *ILJ* 49.

⁴⁴ Joe Atkinson, ‘Workplace Monitoring and the Right to Private Life at Work’, (2018) 81 *MLR* 688 at 696.

employment relation, and raises the following pressing question: Are contractual terms and other social media policies that waive the right to private life at work compatible with the ECHR? What is the weight to be given to the employees' consent to these terms?

The ECtHR examined the question of waiver of privacy rights for social media usage in *Barbulescu v Romania*,⁴⁵ a landmark judgment that was sensitive to the concept of submission in the employment context. The case involved the question whether the applicant, a sales engineer, who was dismissed from his job for using his work Yahoo Messenger account for private communications on his health and sex life with his partner and brother, suffered a violation of article 8 rights. Mr Barbulescu had signed internal regulations that prohibited using computers for personal purposes. As a result, when his employer found out that he had used his work Messenger account for communications that involved intimate aspects of his private life, he was dismissed. In examining the question of the reasonable expectation of privacy in light of the fact that the applicant had signed up to the internal regulations, the ECtHR said: 'It is open to question whether and if so, to what extent the employer's restrictive regulations left the applicant with a reasonable expectation of privacy. Be that as it may, an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary'.⁴⁶ Even though the Court clearly stated that not all privacy rights can be waived through the contract of employment, it did not provide clear guidance on the role of the expectations of privacy in the employment relationship. Moral and political principles, such as equality and freedom, should help us construe the value of privacy in the employment context, and guide the interpretation of the right against the background features of submission and subordination in this context.

Social media posts can always fall within the scope of the right to private life, to conclude this section, irrespective of whether the user has public or private settings, whether they identify the employer on their profile, or whether the employer has imposed on them contractual terms that are supposed to waive all expectations of privacy for social media usage. The right to private life is a broad normative concept, which can protect individuals from employer domination for conduct within or outside the workplace and working time, in public and in private space.⁴⁷ The interpretation of privacy as contextual integrity, understood here as a right that protects individuals' private activities against submission and subordination to the employer, covers social media posts of employees. That social media posts fall within the scope of the right to private life does not mean that dismissal for all social media activity is unlawful. A test of proportionality has to be applied that will be discussed later on. Before turning to that, I will discuss the right to freedom of expression and dismissal for social media activity.

Freedom of Expression

The right to free speech can also warrant protection from discipline or dismissal for social media activity.⁴⁸ This right is protected under article 10(1) of the ECHR that reads as follows, insofar as relevant: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.

⁴⁵ *Barbulescu v Romania*, App No 61496/08, Grand Chamber judgment of 5 September 2017.

⁴⁶ *Barbulescu*, para 80.

⁴⁷ Mantouvalou, above n 6.

⁴⁸ See generally Wragg, above n 7.

According to the ECtHR, 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’,⁴⁹ while theoretical literature grounds it on a plurality of foundations, such as the discovery of the truth,⁵⁰ personal development,⁵¹ democracy,⁵² or autonomy.⁵³ It is generally accepted that different types of speech justify different degrees of protection,⁵⁴ with the example of political speech being given as a kind of speech that warrants particularly high protection because of the special value of pluralism in a democracy. A lot of what we are free to say in a liberal state should not be hindered by the employer’s economic power.⁵⁵ Indeed, in the employment context, the ECtHR has protected workers from discipline or dismissal for holding or expressing political views,⁵⁶ making comments that are critical of the employer or others,⁵⁷ and has afforded particularly strong protection to whistle-blowers.⁵⁸

The ECtHR has recognised the importance of social media for freedom of expression in a case involving political speech. In *Cengiz and Others v Turkey*,⁵⁹ the applicants were law lecturers and professors in different institutions in Turkey, experts in human rights law and free speech. They complained to the ECtHR because Turkey blocked access to YouTube, a platform where people can post and view video files. The applicants, active YouTube users, complained that their freedom of expression was violated, because blocking the site restricted their right to share and access information and ideas. They argued that this was particularly important for their job as academics, as they used the platform to upload and access professional video files. The Court said that:

User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression [...]. In this connection, the Court observes that YouTube is a video-hosting website on which users can upload, view and share videos and is undoubtedly an important means of exercising the freedom to receive and impart information and ideas. In particular, as the applicants rightly noted, political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism. From that perspective the Court accepts that YouTube is a unique platform on account of its characteristics, its accessibility and above all its potential impact, and that no alternatives were available to the applicants.⁶⁰

To return to the case of *Gibbins*, given the special weight typically attached to political expression, and the role of social media for free speech, it is clear that her remarks on Facebook on white privilege and royalty qualify for protection under the right to free

⁴⁹ See, for instance, *Lingens v Austria* (1986) 8 EHRR 407, para 41.

⁵⁰ John Stuart Mill, *On Liberty*, Prometheus Books, 1986.

⁵¹ Eric Barendt, *Freedom of Speech*, OUP, 2007.

⁵² Cass Sunstein, *Democracy and the Problem of Free Speech*, Free Press, 1995.

⁵³ Mill, above n 50; Thomas Scanlon, ‘A Theory of Freedom of Expression’, (1972) 1 *Philosophy and Public Affairs* 204.

⁵⁴ TM Scanlon, *The Difficulty of Tolerance – Essays in Political Philosophy*, CUP, 2009, p 84.

⁵⁵ See the parallels drawn by Collins, above n 5.

⁵⁶ *Vogt*, above n 16.

⁵⁷ *Fuentes Bobo v Spain*, App No 39293/98, judgment of 29 February 2000; *Vellutini and Michel v France*, App No 32820/09, judgment of 6 October 2011.

⁵⁸ *Heinisch v Germany*, App No 28274/08, judgment of 21 July 2011.

⁵⁹ *Cengiz and Others v Turkey*, App Nos 48226/10 and 14027/11, judgment of 1 December 2015.

⁶⁰ Para 52.

speech.⁶¹ However, the Tribunal did not enter into this discussion, and applied the test of reasonable responses, which is found in section 98 of Employment Rights Act. It said:

no member of the tribunal was able to say that no reasonable employer could dismiss the claimant for these reasons and after this process. A robust leadership may have sought to face down the press by disciplining the claimant short of dismissal, but it cannot be said the decision was one that no reasonable employer could have made. Clearly the claimant deserves some sympathy for her slip of judgment, but that does not mean the decision was unfair.⁶²

This test is clearly unsuitable for a dismissal that interferes with the right to freedom of expression generally, and political expression particularly.

The ECtHR recognises the value of political expression in employment as well as the role of social media for free speech. However, a further problem to address in the context of expression on social media is that it is often thoughtless and spontaneous, rather than thoughtful and deep. In these instances, there is a tendency, both in employment and in other contexts involving digital speech, to view this kind of speech as less worthy of protection.⁶³ For this reason, and focusing on the employment context Wragg argued that the approach of English courts and tribunals in cases of discipline and dismissal gives a great degree of discretion to employers and does not appreciate the true value of free speech.⁶⁴ Indeed, courts have been too ready to assess the lawfulness of dismissals depending on the inherent worth of speech. This can be exemplified by the approach of the Employment Tribunal in *Crisp*, where the right was found to be engaged, but the tribunal said that the comments of Mr Crisp were not the type of comments that are particularly valuable for free expression, unlike political opinions.⁶⁵ In many cases of dismissal for social media activity, as Wragg observed, ‘spontaneous and disliked trivial speech’⁶⁶ has not been protected as an aspect of free speech in judicial reasoning.⁶⁷ Drawing on John Stuart Mill, he argued that free speech needs to be reconceptualised in the employment context. Speech that is not political may be grounded on respect for individual autonomy, namely the freedom of people to form and pursue their own conception of a good life.⁶⁸ The value of autonomy suggests that if individuals adopt and express views that are distasteful or offensive to some, it is not the role of the state to impose sanctions on them. Individuals should be free to express their views, which can be challenged by others (and they very often are challenged on social media), and this process may lead to their self-discovery.

In liberal political theory, it is usually the state that is viewed as a threat to free speech, with a key concern being that of paternalism, namely that the state should not choose which views are valuable and which are not. Yet the power of the employer to decide what speech is compatible with its economic interests, or what kind of expression is agreeable to it on moral grounds, is not scrutinised with similar intensity. The realisation that there are types

⁶¹ It is a separate question whether the dismissal was fair, which will be discussed later on.

⁶² Para 141.

⁶³ This argument is advanced by Jacob Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’, (2012) 71 *Cambridge Law Journal* 355; and Wragg, above n 7.

⁶⁴ Wragg, as above.

⁶⁵ *Crisp*, para 46.

⁶⁶ Wragg, above n 7, p 3.

⁶⁷ Cf *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157.

⁶⁸ See the discussion of autonomy in T.M. Scanlon, *The Difficulty of Tolerance*, Cambridge University Press, 2003, p 15 ff.

of speech that are protected against state interference, but not against employer interference, is particularly disturbing. Spontaneous remarks that may be disagreeable, distasteful or possibly offensive to some on social media may still have value for individual autonomy – not only for the protection of the autonomy of those who express them, but also for the autonomy of those who are exposed to these views, as by being exposed to them they can freely decide whether to endorse or reject them.

Dismissal because of the use of social media makes the employer a moral arbiter on issues of workers' expression, not only within but also outside the workplace. While it may be acceptable (and indeed necessary) for the state to outlaw some types of speech, such as hate speech, and for the employer to limit some types of speech in the workplace for the purpose of harmonious relations, giving the employer the power to determine the value of speech on social media outside work carries significant dangers. Free speech should be defended rigorously in the workplace, for otherwise employers can exercise tyrannical power over employees who hold views that they find disagreeable or distasteful.⁶⁹

The High Court supported the position that distasteful speech can be protected in *Smith v Trafford Housing Trust*.⁷⁰ Mr Adrian Smith, a Housing Manager, was demoted for disciplinary reasons when he posted on his Facebook page an article entitled 'Gay Church "Marriages" Set to Go Ahead', commenting 'an equality too far'. In response to a colleague who asked him if he disapproves, he said: 'No not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose its rules on places of faith and conscience'.⁷¹ Disciplinary proceedings followed, and Mr Smith was demoted to a non-managerial post, with a 40% reduction of his pay, because of gross misconduct. The employer suggested that the statements breached the employer's code of conduct or equal opportunities policy. The High Court found his demotion unlawful. Briggs J said: 'I cannot envisage how his moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager'.⁷²

Turning to the ECtHR, the protection of freedom of expression does not only cover speech that is deemed valuable by the Court or the majorities, but also ideas that 'offend, shock or disturb the state, or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.⁷³ Different aspects of speech in social media, including unpleasant and distasteful speech, seem to fall in the scope of the provision, though they may not necessarily be protected when it conflicts with other rights or interests, as the section that follows explains. This position was also espoused in the case *Redfearn v UK*,⁷⁴ which involved the dismissal of a bus driver in a small town with a large Asian population, for the reason that he was an active member of a far-right political party, the British National Party (BNP). By upholding Mr Redfearn's complaint that UK law had not protected him from dismissal on the ground of membership of the BNP, the ECtHR protected freedom of association for members of

⁶⁹ Wragg, above n 7.

⁷⁰ *Smith v Trafford Housing Trust*, High Court of Justice Chancery Division Manchester District Registry, 16 November 2012, [2012] EWHC 3221 (Ch).

⁷¹ Para 4.

⁷² Para 63.

⁷³ *Handyside v UK*, App No 5493/72 Judgment of 7 December 1976, para 49.

⁷⁴ *Redfearn v United Kingdom*, App No 47335/06, Judgment of 6 November 2012.

political parties against interference by an employer, even if the political parties hold racist beliefs and oppose fundamental principles of the Convention.⁷⁵ Human rights morality and law may protect ‘a right to do wrong’⁷⁶ to a certain degree. A dismissal that engages human rights has to be assessed using a test of proportionality, to which we now turn.

4. The Limits to What We Post

I have suggested this far that, contrary to the approach of English courts and tribunals, discipline and dismissal for social media activity can engage the right to private life and freedom of expression, if correctly applied in the employment context. Both rights need to be reconceptualised by English courts, in a manner that appreciates their value for individual autonomy, and the problem of submission and subordination in the workplace. The real question for courts is not whether someone’s social media profile is public or private, not least because users often cannot control the privacy of what they post, as many social media cases indicate. Nor is it relevant if the employer can be identified through someone’s social media profile, because it will often be possible to link someone’s profile to her or his employer. For reasons such as these, we need different criteria to assess whether this kind of dismissals are ever lawful, and under what circumstances.

That we may have a right to something does not mean that we enjoy absolute protection against interference with our right.⁷⁷ Rights can come into conflict with other rights or other important values. Articles 8 and 10 of the ECHR recognise that rights can be restricted if there is a legitimate aim and in a manner that is proportionate to the aim pursued.⁷⁸ This higher standard of protection that requires a test of proportionality, which we find in ECtHR case law, is more suitable to the nature and stringency of human rights norms than the approach of English courts that most of the times afford a great degree of discretion to the employer in cases of dismissal.⁷⁹ The test of reasonable responses uncritically places business interests at the centre of attention.

⁷⁵ Hugh Collins and Virginia Mantouvalou, ‘*Redfern v UK: Political Association and Dismissal*’ (2013) 76 *Modern Law Review* 909.

⁷⁶ Jeremy Waldron, ‘A Right to Do Wrong’, in *Liberal Rights – Collected Papers*, CUP, 1993, 63.

⁷⁷ With exceptions, such as the prohibition of torture, inhuman and degrading treatment, and slavery, servitude, forced and compulsory labour.

⁷⁸ Article 8(2) provides that: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.

Article 10(2) provides: ‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’.

⁷⁹ Hugh Collins, ‘The Protection of Civil Liberties in the Workplace’, (2006) 69 *Modern Law Review* 619; Mantouvalou, above n 6; Collins and Mantouvalou, above n 75; Wragg, above n 7; Davidov, *A Purposive Approach*, pp 180-192.

However, as dismissal is the most serious form of disciplinary action, with very significant effects on workers' interests, reputation and private life,⁸⁰ including their health,⁸¹ the test of proportionality can provide more suitable protection of employees, taking into account not just business interests but a broader range of considerations. It should therefore be adopted in cases of dismissal for social media activity, when human rights, such as the right to private life or freedom of expression, are implicated.

In *Denisov v Ukraine*,⁸² the Grand Chamber of the ECtHR analysed extensively the relationship between dismissal and the right to private life. It explained that dismissals that stigmatise and have severe effects on an employee's reputation may violate article 8.⁸³ Many dismissals because of social media activity carry particularly heavy consequences for workers' private life. A grave stigma is often attached to them, because of the public and permanent record that social media leave, with implications not just for the particular job from which they are dismissed, but also for their future employment prospects, with severe implications for their private life. This is exemplified by the story of Justine Sacco, who lost her job because of a tweet that was so widely shared that it had catastrophic effects for her job prospects and personal life.⁸⁴

What constitutes a legitimate aim when limiting human rights in the employment context is not uncontroversial. At a general level, it can be said that the promotion of business interests is a legitimate aim for the employer who takes disciplinary action. 'Business interests' is a vague concept though that needs to be further refined. The analysis of business interests should primarily centre on the employee's workplace performance. Employees who spend most of their working time on social media, and hence cannot perform their job may legitimately be disciplined for their activity. Disciplinary action is also justified when employees use social media to harass or bully other workers.⁸⁵ Protection from bullying and harassment at work is a legitimate reason for disciplinary action, irrespective of where it occurs (in the workplace and during working time, or away from work), for bullying and harassment can have a harmful effect on individuals and on workplace relations.⁸⁶

Employer's Reputation

An aspect of business interests that is often invoked in dismissals for social media use is the protection of the reputation of the employer. Protection of reputation may constitute a legitimate aim to be pursued. Employees have a duty of loyalty towards their employer, and deliberate infliction of reputational damage may breach that. In ECtHR case law on freedom of expression, the protection of reputation of an individual (not an employer) is analysed as an aspect of article 8 of the Convention, and is viewed as a legitimate reason to set limits to free speech. However, given the conflicting Convention rights at stake (namely free speech and private life) the Court has ruled that a careful balancing exercise

⁸⁰ *Denisov v Ukraine*, App No 76639/11, Grand Chamber judgment of 25 September 2018; *Obst v Germany*, App. No. 425/03; *Schuth v Germany*, App. No. 1620/03. Judgments of 23 September 2010; see also *Szjima v Hungary* that involved demotion rather than dismissal.

⁸¹ See, for instance, Kate W Strully, 'Job Loss and Health in the US Labor Market', (2009) 46 *Demography* 221.

⁸² *Denisov v Ukraine*, above n 80.

⁸³ *Denisov*, para 107 ff.

⁸⁴ See Jon Ronson, 'How One Stupid Tweet Blew Up Justine Sacco's Life', *New York Times*, 12 February 2015. See further, Jon Ronson, *So You've Been Publicly Shamed*, Picador, 2015.

⁸⁵ *Teggart v Teletech*, NIIT 704/11.

⁸⁶ On the effects of bullying at work, see Lizzie Barmes, *Bullying and Behavioural Conflict at Work*, OUP, 2016.

must be performed.⁸⁷ ‘In order for Article 8 to come into play [...] an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life’.⁸⁸ The same reasoning has to be applied in the employment context. With the employer being an economic entity, and not a private person most of the time, the Convention provision at stake is the right to private property, which is protected in article 1 of Additional Protocol 1. There is therefore a conflict to resolve between the right to private life or freedom of expression of the employee, and the right to property of the employer. In a manner analogous to the above passage from *Axel Springer*, an attack on business reputation has to be especially serious for limitations on free speech or private life to be justified.

There are a number of considerations to keep in mind when resolving the conflict between freedom of expression or privacy of the worker, on the one hand, and business interests on the other. These explain also why there is a need for close scrutiny of alleged reputational damage. First, a significant danger with accepting too quickly that actual or potential damage on reputation justifies dismissal is that this may open the door for societal prejudice and majoritarian preferences to dictate which views and preferences are acceptable and which are not.⁸⁹ In the case of *Gibbins*, for instance, it was particularly troubling to see that the tabloid press played a major role in pressurising the employer to dismiss her. This is even more troubling given that the tabloid press misrepresented the incident. The role of human rights law is exactly to protect individuals and minorities from the imposition of majoritarian views and preferences. Unpopular political views may have an effect on business reputation, but should not constitute a legitimate reason for dismissal.

It is also important to appreciate that sometimes employers use the effects of social media posts on their reputation as a pretext to discipline or dismiss, without this being the real reason for the termination. This can be seen in the case of *Mason*. Mr Mason, a rugby player, was contracted by Huddersfield Giants to play for four years.⁹⁰ During a traditional, long, drinking session with his co-players, Mr Mason left his phone briefly, which another player used to take a photo of his anus. Later his girlfriend tweeted the image through his phone and account, tagging another player. Mr Mason’s followers (over 4,000 of them) could access the photo. Mr Mason deleted the tweet two days later, but his employer decided to terminate his contract for gross misconduct. His contract provided that he should preserve the club’s name and reputation, and that he should not engage in any conduct that could bring the club into disrepute. His employer explained that players are role models, and they should use social media responsibly. The High Court that heard the case found his dismissal wrongful. Judge Saffman explained, inter alia, that it was not immediately obvious that the photo on social media was of someone’s anus, as it was said that it looked more like a photograph of a ‘hairy peach’.⁹¹ He also suggested that there is a certain degree of hypocrisy in dismissing Mr Mason for his social media post which was viewed as incompatible with family values, given that the particular club (as many other clubs) has a tradition of the so-called Naked Monday, where players have to undertake a naked run in public.⁹² How could the Facebook post of a naked body part be viewed as

⁸⁷ *Axel Springer AG v Germany*, Grand Chamber Judgment of 7 February 2012.

⁸⁸ As above, para 83.

⁸⁹ On the role that societal prejudice can play in dismissal, see *IB v Greece*, above n 15.

⁹⁰ *Mason v Huddersfield Giants LTD*, 2014 WL 3925309, 15 July 2014.

⁹¹ As above, para 88.

⁹² Paras 53 and 120.

problematic by the employer, who at the same time permitted naked runs of players in public space? The case suggested that the real reason for termination was Mr Mason's performance, which had not been as his employer expected. *Mason* is not the only case where social media activity is a mere pretext for dismissal, while the real reason involves workplace relations.⁹³

While it should be accepted that the protection of reputation is a legitimate aim for an employer to pursue through disciplinary action, safeguarding morality particularly in the area of employees' sex-related activities is none of the employer's business.⁹⁴ It is important to emphasise that respect for autonomy that underlies aspects of human rights law does not permit the imposition of the employer's moral views and preferences on employees,⁹⁵ unless a particular workplace has the promotion of a particular moral outlook as its central aim.⁹⁶ This could be the case with a religious organisation, for instance, that promotes a particular conception of the good. When an organization has a particular ethos, it is only when the worker's activity has a direct link to the nature of the job that it should be considered as potentially damaging to reputation. This was accepted by the ECtHR in the cases *Obst v Germany* and *Schuth v Germany*. In these cases both applicants were dismissed from their job (Mr Obst as a director of public relations in the Mormon Church and Mr Schuth as an organist for the Catholic Church) because they had extramarital affairs, which was viewed as incompatible with the employer's ethos. The Court ruled that the right to private life had not been breached in *Obst*, because of the nature of the applicant's job as responsible for public relations, namely a role where higher obligations could be imposed by the employer. Returning to the case of *Gibbins*, if it is accepted that the British Council has a particular ideology, it is important to recall that her job was not public-facing, so it is difficult to see why she should accept limitations on her freedom of political expression.

Moreover, a bright line could be usefully drawn by courts.⁹⁷ When it comes to the effect of employees' social media activity on business reputation, it would be a positive starting point if courts stated clearly that employees' social media posts that have no link to workplace performance or the nature of the job should never be understood to represent the employer's views. There should be a presumption of privacy or protected speech. Drawing a clear, bright line that separates workplace conduct or performance, and off-duty social media activity, can protect employees from employers' oppression, and can also help employers who are concerned about the effect of social media on their reputation. This position was adopted in the case of Adrian Smith, where the Court ruled that '[t]he right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life'.⁹⁸ The ECtHR also recognised this principle in *Ozpinar v Turkey*,⁹⁹ where it accepted that the applicant's

⁹³ See, for instance, *The British Waterways Board trading as Scottish Canals v David Smith*, 2015 WL 4635329, 3 August 2015. The employee was dismissed for a past Facebook post, after he made complaints of bullying and harassment against his employer.

⁹⁴ Mantouvalou, above n 6.

⁹⁵ *Smith and Grady v UK*, App Nos 33985/96 and 33986/96, Judgment of 27 September 1999.

⁹⁶ I discuss this further in Virginia Mantouvalou, 'Ideological Organisations and Dismissal For Private Activities', in Casadevall et al (eds), *Essays in Honour of Dean Spielmann*, Wolf Legal Publishers, 2015.

⁹⁷ See also Mantouvalou, above n 6.

⁹⁸ Para 66.

⁹⁹ *Ozpinar v Turkey*, App No 20999/04, Judgment of 19 October 2010, paras 43 and 47.

dismissal was for reasons that were covered by her right to private life (her close personal relations, the clothes and make-up she used, and the fact that she did not live with her mother), and later on in *Denisov*, that emphasised that reasons for dismissal that involve life away from work are in principle covered by article 8.¹⁰⁰

Offensive speech and workplace conflict

It was earlier said that protection from bullying and harassment justifies restrictions on the right to freedom of expression. Are offensive comments in the context of workplace conflict protected by human rights law? The ECtHR was divided on this question, in an unfortunate decision that involved the dismissal of trade union members following the publication of the union newsletter. The applicants were delivery men for an industrial bakery company, and were involved in a dispute with the employer, seeking to be recognised as salaried workers, rather than self-employed or non-salaried workers. They set up a trade union in this context, and published a cartoon in the newsletter depicting employees who had testified against the union, queuing under the desk of a manager in order to satisfy him sexually. In the same publication, there was an article with the title ‘When you’ve rented out your arse you can’t shit when you please’. They were dismissed for gross misconduct. In Strasbourg, the Court examined whether their dismissal violated their right to free speech under article 10, interpreted in light of article 11 (the right to form and join a trade union). The majority of the Court found the dismissal fair. It said that ‘in order to be fruitful, labour relations must be based on mutual trust. [...] even if the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer’s interests, certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations [...]. Moreover, an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions’.¹⁰¹

Yet a powerful and strongly worded dissenting opinion argued that the majority paid insufficient attention to the value of free speech in the trade union context. The industrial dispute in the context of which the comments were made, the dissenting judges argued, should have warranted a high degree of protection.¹⁰² The dissent underlined that even though free speech is not unlimited, the well-established case law of the Strasbourg Court is that article 10 protects freedom of expression, even when the views expressed shock, offend and disturb.

The majority view in *Palomo Sanchez* can be contrasted with the decision of a New York federate appellate court,¹⁰³ where a worker was dismissed from his job because he posted on his Facebook page, which was open to the public, comments that were vulgar and critical of his supervisor. The court upheld the National Labour Relations Board (NLRB) decision that the applicant’s dismissal violated the National Labour Relations Act (NLRA).

¹⁰⁰ *Denisov*, paras 103-106.

¹⁰¹ *Palomo Sanchez v Spain*, App Nos 28955/06, 28957/06, 28959/06 and 28964/06, judgment of 12 September 2011, para 76.

¹⁰² See paras 5-7 of the dissenting opinion.

¹⁰³ *NLRB v Pier Sixty, LLC* (2d Cir. 2017).

The court highlighted that the comments expressed concerns about treatment in the workplace, they were posted in the context of a dispute with the supervisor and a union election, and no other worker had been dismissed in the past for profanity. The court also paid attention to the fact that the comments were made on an online platform that is used for employee communication and organizing, not in the presence of customers, and did not disrupt the employment environment.

To conclude this section, disciplinary action for social media posts may pursue a legitimate aim, such as workplace performance, harmonious relations at work, and business reputation. Dismissal, though, is the harshest form of punishment that can be imposed by an employer on an employee, and courts should always assess carefully whether it is proportionate to the aim pursued. The issue of the employer's reputation should be approached with particular care, because it may constitute a pretext, it may disguise an employer's moralistic views about how employees should lead their lives, or it may lead to the imposition of majority views (through pressure from the tabloid press, for instance) on individuals, minorities or other groups.

5. Conclusion

It is important to guard against dismissal and disciplinary action that infringes workers' human rights, and this kind of dismissals have become all the more frequent in the age of social media. The usage of social media is important for the exercise of people's autonomy, and should be covered by the right to private life and the right to free speech. Employers should not have the right to censor the moral, political and other views and preferences of their employees even if they cause business harm. The question whether social media posts are accessible to the public does not remove them from the scope of protection of private life, if privacy is suitably interpreted in the employment context. Spontaneous speech, and even speech that disturbs some, can have value for individual autonomy and freedom, and should be defended against employer interference. A rigorous test of proportionality should be applied by courts in these cases, with special attention to be paid both to the legitimacy of the aim that is pursued, and the suitability of dismissal rather than other disciplinary action that is less harsh for the employee.

Employers' major concern in many of the relevant cases involves the effects of employees' activity on business reputation. At a practical level, then, and as a starting point, courts have to adopt a clear line that employees' social media activity should never be viewed as representing the views of the employer. The recognition that social media activity is a valuable exercise of individual autonomy and freedom, and the realisation that employees should enjoy human rights at work without employer interference as much as they enjoy them outside work without state interference, are the crucial principles that should guide our thinking in the field.