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Freedom of Expressions of Employees: Justifications, Limitations and Proposed Rules of Thumb

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Sammendrag	Disputes about employees' freedom of expression are increasingly common. The goal of this article is to offer a normative analysis of how such cases should be decided. It starts with a review of the main justifications for freedom of expression and how they apply in the context of employment. It then moves on to discussing the limitations on freedom of expression (both internal and external) that can be justified, with a particular focus on how the proportionality tests should be applied in the employment context, and what role should be given (if at all) to contractual waivers. The article then distinguishes between several types and sub-types of employee speech: speech about work or during work (including: speech concerning unionization or rights at work; speech against other employees or customers; political and personal identity expression during work; information or opinion about the employer or co-workers voiced externally), and speech seemingly unrelated to work (including speech that is claimed to damage the business's reputation; speech claimed to be harmful to other employees or customers; speech affecting an employee's ability to perform a specific job). For each sub-type, I discuss the conflicting considerations and how they should be balanced in the specific context, proposing some rules of thumb that are designed to improve determinacy.

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Innholdsfortegnelse

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I. Introduction*

A theatre production company from Leicester dismissed an actress who was hired to play a gay character, after it was revealed on social media that a few years earlier she had written ‘I do not believe you can be born gay, and I do not believe homosexuality is right’.[1] The actress claimed that she was discriminated against on the basis of her religious beliefs, but the UK Employment Appeal Tribunal concluded that the dismissal was justified, mainly because of the substantial risk of financial damage to the employer as a result of the public uproar on social media. The fear of strained relations with other actors in the same production was also cited. In another case, a local council in London dismissed an employee because of comments he made in a private conversation that were caught on camera and posted on social media. The employee, who describes himself as

anti-Zionist, made comments that were construed by many as anti-Semitic and offensive, which the council viewed as harmful for its reputation. The Employment Tribunal concluded that the dismissal was unfair and ordered reinstatement.[2] In yet another case, a group of workers in Barcelona who had a dispute with their employer have organized and set up a new union. Some other workers cooperated with the employer against them. The initiators of the union published a newsletter criticising those workers in a vulgar way (including a caricature of them performing oral sex on the human resource manager), and were dismissed as a result. The Spanish courts rejected their claim for violation of freedom of expression and the European Court of Human Rights affirmed this result.[3] These three examples are just a fraction of the numerous situations in which workers are sanctioned for speech or other expression. The goal of this paper is to offer a normative analysis of how such cases should be decided.

The term 'normative' refers to what the law *should* be. Such an examination necessarily involves some degree of subjectivity; my personal opinions about the importance of free speech and the importance of conflicting considerations can undoubtedly influence my thinking. But a normative discussion should not be confused with a mere presentation of personal views. The task is rather to engage with arguments and justifications, and to offer a principled analysis based on those arguments, leading to the proposed solutions. The idea of such a normative discussion is to convince readers that the proposals are justified and present a desirable legal state of affairs; alternatively, it is hoped at the very least that readers will find the discussion helpful and stimulating for thinking about these issues.

There is, of course, an additional question of how to bring about the desired legal solution. One option is specific legislation; in the later parts of the article, I discuss some legislation protecting freedom of speech at work, which the normative discussion can help to justify and explain. But much more commonly, the protection of employees' free speech is left to courts, to be secured through judicially developed legal rules and balancing against other interests. In this context as well, the article is not trying to invent entirely new grounds, but is rather based on existing legal doctrines and connects with some existing strands of case-law, while criticising others. The doctrinal entry points which allow for the required balancing differ between legal systems, but they do exist, at least to some extent, thereby opening the door for judicial discretion. This is where the normative discussion becomes necessary. Such a discussion is therefore relevant for any legal system, although it might need to be adjusted somewhat in light of a specific legal context.

The article discusses examples from several legal systems, but with a special focus on examples from the UK. Let me use the UK, then, as an example, to explain what I mean by 'doctrinal entry points'. In some countries, workers can bring a direct claim for a violation of their right to freedom of expression enshrined in Article 10 of the European Convention of Human Rights (ECHR). In the UK this is possible only against a public employer.[4] However, freedom of expression arguments can also come up before UK courts against private employers; for example, when considering whether dismissals are unfair, the relevant legislation has to be interpreted in a manner compatible with the ECHR.[5] The same is true with regard to common law doctrines, given that courts are considered a 'public authority' obliged to act in line with Convention rights.[6] Specifically, the contract of employment is understood to include an implied duty of trust and confidence,[7] which arguably should require some level of respect for workers' human rights.[8] Alternatively, it has been proposed to recognize a new implied term that 'explicitly asserts a legal requirement of respect for the human rights of employees'.[9] The issue can also come up indirectly, as part of claims against discrimination (which could follow from a worker's speech),[10] or a violation of the freedom of religion (when the expression leading to sanctions is tied to a religious belief),[11] or a violation of the right to privacy (when the expression in question is concerned with one's private life).[12] In all of these cases, the importance and limits of freedom of expression should arguably be taken into account when considering the infringement of the other rights. In short, although the exact legal form for bringing forward freedom of expression claims will vary, in accordance with the legal claim and the jurisdiction, the basic normative considerations are similar, and the focus of the current article is on this level.

The article starts with a review of the main justifications for freedom of expression and how they apply in the context of employment (part II). I then move on to discussing the limitations on freedom of expression that can be justified, with a particular focus on how the proportionality tests should be applied in the employment context, and what role should be given (if any) to contractual waivers (part III). The article then distinguishes between several types of employee speech and offers an analysis of how the conflicting considerations should be balanced in each context, proposing some rules of thumb that are designed to improve determinacy (part IV). Throughout the article, I use the terms 'freedom of expression' and 'freedom of speech' interchangeably.[13]

I focus on speech by employees, but the discussion is also relevant for those in intermediate categories (such as 'workers' in the UK), and possibly also to some extent for self-employed workers. For these groups the arguments might require some adaptation, which is outside the scope of the current contribution.

II. Justifications in Context

It is widely agreed that freedom of expression is important and must be protected. In most legal systems it is recognised as a fundamental (and often constitutional) human right. There are different theories attempting to explain *why* freedom of expression is important; for the most part they can live side by side, each adding further support for this moral and legal right. The main and most influential justifications rely on ideas of autonomy, truth-seeking, and democracy.[14] Below I briefly discuss these justifications (and some variations of them), before turning to consider how they apply in the specific context of employment relations.

(a) Justifications

Freedom of expression theories are often divided into those focusing on the speakers and those focusing on the listeners.[15] *Autonomy* considerations are prominent in both of them. For the speaker, the ability to express oneself – to convey one's thoughts, views and ideas to others – is a crucial aspect of personal autonomy. It is important for self-realisation[16] and the possibility to be the authors of our own lives.[17] When a person is prevented from expressing themselves, they are (to some extent) not free to govern themselves, but are instead ruled by others. For the listeners, it is similarly crucial to be free to hear all points of view. If the government (or someone else) prevents me from hearing certain contents, it shows disrespect for my ability to make such decisions by myself, as an autonomous, self-governing individual.[18]

There is also a strong connection between freedom of expression and freedom of thought. *Thinker-based* theories bring the perspectives of speakers and listeners together by focusing on 'the individual agent's interest in the protection of the free development and operation of her mind'.[19] Our ability to think about issues, and to develop our thoughts, depends on the ability to engage with others – both as speakers and as listeners – without censorship.

Free public discourse is crucial not only for individuals, but also for the (instrumental) societal interest in *seeking the truth*. By allowing a 'marketplace of ideas',[20] where different ideas and perceptions can be raised and discussed – including through consideration of objections and opposing views – it is believed that the true facts, and best ideas, will win the day.[21] This may seem naïve, reflecting perhaps wishful thinking more than empirical fact.[22] But the argument makes a lot of sense when we consider the alternative. If the government – or any other entity – is given power to decide which facts and views are 'correct', and to prohibit the expression of other views, this will be much worse for the truth-seeking endeavour.[23] A market (of ideas) controlled by someone with monopoly power will surely produce bad results. At the same time, arguably some regulation of this market could be justified, to ensure that it is working effectively with opportunities for all to 'compete'. For example, if some people have excessive power which they use to silence others by way of intimidation or by 'flooding' the market, this is detrimental to truth-seeking and justifies some intervention.

The prospect of the government – or some other powerful actor – silencing the truth when it is inconvenient for them, or otherwise suppressing unpopular expressions, is obviously troubling. It connects directly with another justification, which sees freedom of expression as a crucial component of *democracy*.[24] There are no free elections without the possibility of having a free and open debate beforehand. And once a government is elected, democracy requires ongoing deliberations, including the ability to challenge the government, question its decisions, and so on. This is a strong justification for protecting freedom of speech, although especially relevant for political speech (however broadly conceived). Moreover, this justification seems compatible with regulations designed to protect democracy itself, for example by preventing speech that attempts to topple the democratic foundations of the state.

A somewhat related justification focuses on *tolerance*.[25] The exposure to other views – even extreme and unpopular ones – teaches us to accept views that are very different from our own. In this way, it is argued, freedom of expression is crucial for training people to become tolerant to others, which is arguably necessary for open public discourse in a democratic society. This justification is especially supportive towards offensive

speech, which apparently is seen as an educational opportunity. However, one might wonder whether every expression warrants tolerance. Perhaps hate speech, for example, should not enjoy this accepting attitude.[26]

(b) The employment context

Legal instruments have to be interpreted purposively – in a manner that advances their purpose.[27] Interpretation of Article 10 of the ECHR therefore has to rely on the justifications noted above, and indeed (to some extent) it has.[28] These justifications are similarly relevant when we consider how to integrate freedom of expression into the interpretation of employment laws or contract of employment doctrines. A purposive analysis also requires attention to the context. When interpreting a legal right, we have to ensure that it is effective – can achieve the purpose – in the specific context and taking into account the social reality.[29] When we consider what the right to freedom of expression should mean *specifically for employees* vis-à-vis an employer, we must do so in light of the characteristics of employment relations.[30]

Another way to conceptualize the need to ensure the effectiveness of the right is through the idea of capabilities. The capability approach was developed by Amartya Sen as a critique of the rights discourse, which focuses on abstract ideas without sufficient attention to the actual ability of different people to enjoy those rights in practice. By contrast, the capability approach advocates putting the focus on ensuring that people have a sufficient level of capabilities to enable them to secure 'functionings' – things that they want to be or do, and have reason to value.[31] It is not enough to declare that all people have freedom of expression, if we ignore the difference between a billionaire and a homeless person in the ability to use this freedom. Sen himself did not specify which capabilities should be secured, but Martha Nussbaum later developed an influential list of 'central human capabilities' that she derived from human dignity.[32] She mentions the importance of freedom of expression as part of the capability for 'senses, imagination, and thought' as well as the capability for 'control over one's environment' (which includes more specifically the political environment). The important point for current purposes is the required sensitivity for the *actual ability* to effectively pursue the things that we value, including freedom of expression. And this ability depends on the context.

Two characteristics of employment that are important for understanding the purpose of labour law are also highly relevant for employees' freedom of expression. First is the inequality of bargaining power between an employer and its employees.[33] Second is the importance of work for individuals and the centrality of working life to our lives in general. I describe each of those characteristics briefly and explain their impact on freedom of expression.

Consider the imbalance of power first. The employment relationship is characterised by subordination and dependency.[34] Employees have to follow the directions of the employer; within certain (broad) boundaries, they have to do what the boss tells them to do. This is an inherent aspect of employment relations. Employees also rely on the continuance of the relationship for their livelihood, and for the fulfilment of social and psychological needs (more on that below). This dependency, alongside the subordination to the employer's demands, makes them vulnerable. The relationship has also been described as authoritarian,[35] or a relationship of domination, where the employer enjoys arbitrary power and employees often lack the ability to contest its decisions or to 'look [the employer] in the eye'.[36] These are different ways to express and explain the vulnerability of employees vis-à-vis the employer. Labour laws are designed to address and counter this vulnerability, while accepting that the power of the employer, and the managerial prerogative that comes with it, are generally legitimate.[37] The goal is to prevent *abuse* of this power and to ensure a degree of fairness and distributive justice in the relationship. In the context of freedom of expression, abuse of power is a real and serious possibility; the employer can tell an employee what to say and what not to say, even in their free time outside of work, and threaten dismissals if the employee refuses to obey. Imagine, as an extreme example, that the employer supports a certain political position, and prohibits the employee from expressing an opposing position. This will quite clearly implicate all the justifications for free speech mentioned above. Although formally the employee is free to resign and look for another employment, in practice this is often difficult or at least costly. Some people will not find an alternative job at a given time (which they did not choose). Others will have to accept a job that is not as good, or at least requires them to start from a lower position. Note also that an expression that led to dismissal is likely to impact the chances of finding favour with other employers. A direction from the employer on what not to say thus carries a lot of weight and amounts to *de facto* censorship.[38] If the employee is silenced from voicing a political opinion, it is an affront to autonomy;

detrimental to the marketplace of ideas; and harmful to democracy. It can also be described as a failure to treat employees as equal moral agents.[39]

The centrality of work in our lives adds another dimension. Work is not only a source of income; it is also important for self-realization and self-fulfilment, as well as for social relationships.[40] We spend most of our waking hours at work. It is a place to meet other people and have opportunities for meaningful interactions with them. It is also where we can advance our professional and creative aspirations, and feel that we are contributing to society (or at least to some useful productive goal).[41] This is relevant to free speech in two different ways. First, because work is so important for us, we want to speak about it. Employees need to be able to express themselves with regard to employment rights and benefits, and with regard to other working conditions. If they have an opinion about how the workplace is managed, it will also be important for them (autonomy-wise) to express it, given the strong connection that people have to their work.[42] The ability to speak about the work and about work conditions is also important for democratic reasons, in the sense of internal democracy in the workplace (which labour law aims, to some extent, to advance).[43] Second, workplaces are an important domain of public discourse. This is the case, both because we spend so much time at work, but also because a workplace creates opportunities to engage with people who are different from us, coming from diverse social circles and backgrounds.[44] While the workplace is by no means the main domain of public discourse, it has been described as a 'satellite domain'.[45] In this respect, free discourse in the workplace is an important element of a vibrant 'marketplace of ideas' in society at large.

III. Limitations in Context

We have seen that freedom of expression for employees is highly important. But of course, the right is not absolute. When discussing the boundaries of free speech, it is useful to distinguish between *internal* constraints based on the same justifications for free speech, and *external* constraints resulting from conflicts with other rights and interests. I will discuss each of these in turn (sections (a) and (b) respectively), starting in each case from general freedom of expression theory and then moving onto the employment context. Equality considerations will be examined together with the internal constraints, for reasons explained below. At the end of the day, both types of constraints require a proportionality analysis, and I offer some general comments on how to apply it in the current context (section c). The final section of this part will consider the possibility of limiting free speech by contract.

(a) Internal constraints and equality

As already noted in the previous part, if freedom of expression is based on ensuring a vibrant marketplace of ideas, the same justification also explains the need for some limitations, to ensure that the market really is 'free' and not dominated by a few voices with excessive power. Similarly, if freedom of expression is justified as a crucial element of democracy, preserving democracy can explain the need to prohibit expressions that are a threat to democracy itself. In both cases, the limitations can be described as 'internal', in the sense that the limits on freedom of expression can be determined without any balance with conflicting rights or interests. Rather, we can ask what is the best way to advance the justifications behind freedom of speech. The answer might include a component of *limiting* some speech to ensure that more people have opportunities to speak and be heard.

The importance of such limitations has grown dramatically following the technological advancements of the last couple of decades. The internet has opened unlimited opportunities for expression in the public sphere, and this abundance of speech means that 'it is no longer speech itself that is scarce, but the attention of listeners'.[46] Social media has created a reality in which many people are not exposed to a variety of viewpoints but only to those they are expected to like. The algorithms deciding which expressions to 'feed' us are also designed to excite and attract maximum traffic by giving prominence to extreme and provocative posts. As a result, the abundance of speech through the internet, alongside social media algorithms, lead to widespread harassment, intimidation, hate speech and fake news. The ascent of Artificial Intelligence gives a further dramatic boost to the proliferation of fake news, through the possibility of creating 'deep fake' videos and recordings. The result is a new alarming reality in which people will soon have a hard time trusting anything they see or hear online. All of these technological advancements significantly strengthen the case for regulating speech to protect the listeners and the public discourse.

The risks to a free marketplace of ideas, and to democracy, do not come from every one of us in equal measure. Those with economic, social and political power have far greater resources to manipulate and control the marketplace of ideas. One simple example is the ability to pay for the illusion of support through 'likes' or 'shares' by automated bots, i.e. fake support for one's expressions on social media.[47] But of course, there are many other ways in which rich and powerful people – and especially giant corporations – can use their resources to monopolize a debate (or at least have a disproportionate impact on it). In this reality, we are not truly equal before the law. The need to limit the speech of some to protect the speech of others is therefore strongly tied in with the right to equality. Of course, it would be naïve to assume that we can ever achieve full equality of speech power in a capitalistic society. The rich and powerful will always have more influence. But we can strive to ensure at least a *sufficient* level of capabilities to participate in public discourse.[48] Along these lines, scholars have argued that the anti-subordination principle, used in equality analyses, should also inform the analysis of free speech;[49] and that a 'relational' view of free speech should be adopted, with the goal of ensuring that both speakers and listeners are free from domination.[50] On a related point, but focusing more on the protection of democracy, it has been argued that the democratic justification for freedom of expression should be given priority over the other justifications (in particular autonomy);[51] and that regulations of speech are generally justified in situations where the government is less likely to abuse its power.[52] The shared goal behind these proposals is to prevent free speech from being 'weaponized' by the powerful to their advantage in a disproportionate, excessive manner, and to ensure that free speech is available to everyone.[53]

These developments in freedom of expression scholarship are also highly relevant for the context of employment, in two ways. First, given that powerful individuals and corporations can be a threat to free speech just like governments, limitations on the free speech of employers are sometimes justified and necessary. For example, if an employer's speech has the effect of silencing employees, this speech arguably does not warrant protection. The employees' freedom of speech, protected because of the justifications listed in the previous part, can be said to be superior to the employer's speech when the latter has the effect of silencing vulnerable employees. Second, given that an employer has control over the workplace, they should also bear responsibility for protecting the public discourse between employees within the workplace. They cannot do so by silencing all employees, because (as noted in the previous part) this is a major domain of discourse, highly important for the lives of employees. Employers must allow public discourse in the workplace, but at the same time they need to ensure that some employees are not silencing other employees and dominating this sphere. As Catherine Fisk explained, free expression at work can promote, but can also undermine, liberty and equality.[54] The challenge is to find the way to protect the former type of speech and limit the latter one.

Are the 'internal' limitations discussed in this section really different from external limitations on freedom of speech? If some types of speech are not supported by freedom of expression justifications, it could be concluded that such speech is 'unprotected', i.e. not covered by the legal right, for 'internal' reasons.[55] However, if we agree that the three main justifications for freedom of expression are all valid and important – as I think we should – then we should not ignore the fact that limiting some speech for 'internal' reasons still infringes upon someone's autonomy. We limit the speech of some individual, or entity, to protect the speech rights of others. Those who face the limitation – in the current context, the employer or a powerful employee – might not be able to rely on the 'marketplace of ideas' or democratic justifications, but the autonomy justification is still valid for them. Therefore, it seems that the same analysis as that employed to balance conflicting rights and interests should be used here as well. As will be explained below, a conflict with other rights and interests is resolved through the tests of proportionality. The same tests can be used for internal conflicts, to ensure that the harm to autonomy is taken into account, and that the limitations do not exceed the degree that is really necessary. Still, when doing this analysis, it will be important to remember that even internally, when thinking only about freedom of expression, some types of speech should enjoy relatively little protection, because of their harmful effects on the marketplace of ideas or on democracy.

(b) Conflict with other rights and interests

There is little doubt that freedom of speech cannot be absolute; some restrictions are necessary to prevent harm. There are, however, three questions that have been the subject of discussion by freedom of speech scholars and by legislatures and courts around the world. First, what types of harm could justify limitations on free speech? In particular, is 'offensiveness' of speech, which hurts some listeners' feelings, a reason to curtail it? Second, does the harm have to be certain and immediate? To put it another way, to what extent is it justified to limit speech because of harm that might occur sometime in the future? Third, how much harm is enough to justify

limiting speech? Specifically, what kind of formula should be used to balance the conflicting rights and interests?

With regard to the first question, Article 10 of the ECHR includes the following list of interests that can justify limitations on freedom of expression: national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of health and morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. This is a wide-ranging list, recognizing that speech has the potential to harm others in a variety of ways. Note, however, that Article 10 requires all limitations to be 'prescribed by law' and 'necessary in a democratic society'. Another approach, adopted in the Canadian Charter of Rights and Freedoms, is to avoid listing the types of harm that can justify limitations on free speech, instead generally allowing 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[56] This has been interpreted as requiring a 'pressing and substantial' reason for curtailing free speech,[57] but this threshold is relatively easy to pass, shifting most of the focus onto the next stage of examining the proportionality of the limitation. Turning to the employment context, the reason for limitations imposed by the employer will usually be either to protect its own property rights or to protect the rights of other employees. Both of these goals seem sufficient in principle to justify limitations, by analogy to the sources mentioned above. However, an employer will still need to convince a court that its property rights, or the rights of other employees, are actually in danger. And of course, any limitation will have to be subject to the principle of proportionality.

One goal that is generally *not* accepted for limiting speech is to protect the feelings of other people from expressions that they find offensive. This should be distinguished from speech that is directed against specific people or specific groups – such as 'hate speech' – which leads to other harms and will be discussed separately below. The point here is that when people are exposed to views they oppose, they sometimes find them offensive. This is especially so with regard to views that are exceptional, provocative, or otherwise out of the mainstream. While the emotional harm can be real, it is usually understood to be an integral part of living in a society. People have to learn to accept different views and be tolerant towards them. Curtailing every speech that some people find offensive will not leave much from the promise of free public discourse. Is the employment context different? An employer might argue that any employee speech which other employees find offensive leads to tension at work, which in turn can reduce efficiency, thereby harming the employer's property rights. This seems like a legitimate claim in principle, but should be treated with some suspicion when requiring the employer to prove this harm and its magnitude. If people are used to hearing opposing views in society at large, we can assume that they can also tolerate such speech at the workplace, without losing the ability to do their work efficiently.

Hate speech is a different matter. Many countries prohibit speech that conveys hatred against others on the basis of their race, religion, sexual orientation or similar characteristics. The criminal prohibition varies between legal systems; some countries prohibit any speech against such groups that is insulting or degrading,[58] while in many other countries it is only inciting others to hatred that is criminalized.[59] Either way, when people have to endure hate due to being part of a group, especially one they did not choose, this is an affront to their dignity.[60] This is different from feeling offended by a general provocative view, because the insult is much more personal and refers to core (and usually innate) characteristics. An environment of hate also puts people in danger of other harms (from discrimination to violence), which societies understandably try to minimise in advance rather than just punishing after the fact. But the harm to dignity is arguably sufficient in itself to justify speech restrictions, especially in the context of employment. Employers have a duty to ensure a safe work environment, including safety from harassment and intimidation. Indeed, protection from bullying is increasingly recognised as a requirement on employers in many legal systems.[61] In this respect, the protection of dignity is stronger in the workplace than in other areas of life; it is not limited to prohibiting expressions that amount to hate speech against protected groups, but also restricts other offensive speech that is directed at a specific person (and reaches the level of bullying).

I now turn to the second question noted above, regarding indirect harm. Some speech causes harm directly and immediately. For example, when private information is exposed, privacy is harmed right away. But in many other cases, the harm is expected at a later stage. This later stage might arrive very soon – as in the case of someone shouting 'fire' in a crowded theatre – or much later in the future. Either way, because the harm is not inherent in the speech itself but is rather a by-product of it, it is, by definition, not certain. There is no doubt that speech can be limited to prevent such indirect harms as well; the question is what level of probability for the occurrence of the harm can justify limitations. Legislatures and courts use different formulas to describe the

required probability. In the US, where free speech is exceptionally highly protected, even at the expense of other rights and interests, there is usually a requirement for a rather immediate harm, which suggests a very high probability. Incitement of violence can be criminalized only when 'imminent lawless action... is likely'.[62] A previous formula required 'clear and present danger'[63] of violence. Hate speech is not generally prohibited in the US (unlike most other democracies), but 'fighting words' that 'tend to incite an immediate breach of the peace' can be prohibited.[64] By contrast, in other legal systems hate speech is prohibited when it is 'likely' to incite to violence or hatred,[65] or when it is 'likely' to stir up hatred.[66] In some countries it is even enough that the speech is 'reasonably likely... to offend' when based on race, colour or national or ethnic origin.[67] The term 'likely' can be understood as suggesting 'reasonable probability',[68] although it can also be interpreted as requiring high probability.[69]

The required probability will vary, depending on the severity of the harm on the one hand (for example, a threat to national security can justify limitations on speech even with relatively low probability), and the value of the speech on the other hand (for example, incitement to hatred is accorded less protection because of its low value according to freedom of expression justifications, and accordingly can justify limitations even with relatively low probability). In the context of employment, the main issue for discussion concerns the probability of an economic loss to the employer as a result of employee speech. For example, the employer might argue that severe tension between employees will disrupt the efficiency of the workplace, or that an angry response from customers will lead to loss of income. In some cases, the employer moves to curtail the speech only after the harm has already occurred, but often it is done to prevent the harm, based on speculations. Given that the harm is financial and often short-lived and very limited, it seems justified to generally require high probability before limiting speech. But this might change when the financial harm appears very significant or irreparable.

If the burden of proof is high, it has to be acknowledged that employers might suffer harm in some cases, due to inability to convince the court that the harm is likely. Arguably, this is a cost we should accept, in the same way that we expect employers to bear some costs for accommodating employees with disabilities, or (in some legal systems) to accommodate religious practices.[70] Rights related to maternity leave and parental care also impose some costs on employers which are similar to accommodations for parental needs. In all of these cases, a strong societal interest is seen as justifying the costs. When an employer decides to employ *people*, it has to acknowledge their human needs and respect their human rights. If the right to equality could justify imposing costs on a private employer, why not the right to free speech? Admittedly, equality accommodations are seen as necessary for the ability of people to find a job, while making controversial speech is a choice rather than an innate characteristic. But the ability to make this choice is a crucial aspect of autonomy, democracy and the search for truth, as discussed above. It is important for society to protect this freedom just as it does the right to equality. As long as the costs are reasonable and do not reach the level of 'undue hardship',[71] in principle they can be justified.

This brings us to the third question raised at the beginning of this section: how much harm is enough to justify limitations on speech? Obviously, it will be hard to justify preventing people from expressing themselves, just to prevent some trivial, insignificant harm. Imagine, for example, that we know for sure that a certain employee speech will create some loss to the employer, but this loss will be extremely small (say, losing one customer, who would have bought one item). Some form of balancing is required to take all the competing considerations into account, putting the severity and probability of harm on the one side, and the importance of allowing the speech on the other. This is done, in most legal systems, through the proportionality test. I now turn to discussing the main elements of this test and how they apply in the context of employee speech.

(c) Proportionality

Assuming there is some harm or danger that in principle could justify limitations on speech, the specific limitations must then be justified according to the principle of proportionality. The proportionality tests have been adopted by many courts around the world as the legal mechanism for examining whether limitations on human rights are justified.[72] In the UK, although courts examine proportionality when referring to rights enshrined in the ECHR, they often fail to make reference to this in employment cases, and have also been criticized for too easily accepting managerial concerns as being sufficient to justify infringements of human rights.[73] In other words, it is not enough to recognize the role of proportionality in principle; courts have to apply it properly. The goal of this section is to discuss how proportionality should be applied in the specific context of employees' freedom of expression.

The proportionality tests help to make the analysis transparent and analytically structured, with a clear requirement to provide justification for infringing the right and an explicit discussion of balancing.[74] There are three tests: rational connection, minimal impairment (necessity), and harm-benefit balancing (also known as proportionality in the narrow sense). They are all designed to examine whether the means chosen to advance the legitimate goal can be justified. The first test asks whether the means chosen can rationally advance the goal. In most cases this is obvious; when measures fail this test it is usually because they have been adopted for some other goal, which is hidden because it is illegitimate. In such cases, the measure might not advance the professed goal at all. The second test examines whether the goal can be achieved by less intrusive means, that is, with less harm to the affected right (in the current context, freedom of speech). If the same goal can be achieved with less harm – i.e. more respect for the rights of others – then the measure adopted is not necessary and fails the minimal impairment test. Finally, the third test requires a balance between the goal behind the measure (in our context, the decision limiting speech) and the harm it imposes in terms of the affected right. If the costs (to those affected) are disproportionate, given the expected benefit from the measure, then the measure fails the third proportionality test.

When applying these tests in the context of freedom of expression, it is important to start with the understanding that restrictions on the '*time, place and manner*' of the expression are less damaging to free speech than content-based restrictions.[75] Viewpoint-based restrictions are the most harmful. An employer prohibiting employees from expressing progressive views while allowing other employees to express conservative views, or vice versa, will most probably fail to justify this practice. An employer restricting political speech of any kind during specific times or at a specific place – while leaving sufficient time and space for those expressions – is more likely to succeed. This principle is relevant to the minimal impairment analysis. It can be said that we expect employers to accommodate the speech interests of employees, but at the same time require those employees to reciprocate by respecting reasonable time and place constraints that will minimize the disruption or other harms.[76] Also relevant for minimal impairment are the *possibilities available to the employer for reducing the harm*. The employer can distance themselves from the speech in various ways, and can also request retraction or apology (if relevant) from the employee.[77] This can be justified only if the speech caused harm, as an alternative to more drastic measures. If the employer's goal can be achieved in this way – and the harm prevented – then this is what the employer must do. A more severe sanction would fail the second (minimal impairment) proportionality test in these circumstances.

A few additional principles can be useful when applying the third (balancing) test. When assessing the harm expected to the employer as a result of the speech, the *type of business/workplace* should be considered. In particular, a public employer should arguably be willing to accept greater costs in order to protect free speech. Similarly, a large employer should be able to bear certain costs, which might be negligible for a big business, but sometimes substantial for a small one. Also, some employers can be seen as having an institutional role in supporting public discourse (educational institutions for example); arguably they can be expected to allow more leeway for employee speech than other employers. And by contrast, some employers are 'ideological organisations' committed to a specific world-view – for example a Church – which could justify more limitations than are normally accepted.[78] The *type of job* is also a relevant factor. A senior employee has more impact, and the harm from their speech is likely to be bigger compared to a junior employee. Similarly, an employee who has direct contact with customers, and said something harmful, is not the same as an employee who works by themselves on the computer.

When assessing the harm to the employee's freedom of speech, the *type of speech* should be assessed in light of the justifications discussed above. For example, political speech should obviously enjoy strong protection – with any limitation considered especially harmful.[79] By contrast, expressions disparaging other people, and especially minority groups who are more vulnerable, should enjoy only minimal protection. Also, the *breadth of the limitation* in terms of time, place and manner should be considered in assessing the harm. The broader the limitations, the less freedom of speech is left for the employee. Limitations that also affect the employee outside the workplace and outside of working time are a clear example of this. On the other hand, an expectation that views will be expressed in a polite, respectful manner, to minimize the offence to others, imposes relatively minimal infringement on the speaker, so far as the justifications for free speech are concerned. Finally, the *sanction imposed by the employer* is crucial for assessing the harm to the employee. Dismissals are generally considered the last resort – the most extreme sanction. For the employee, the threat of dismissals has a strong silencing effect. Milder sanctions are somewhat less damaging for free speech.

All of the considerations listed in this section can help in deciding whether a given limitation on employee speech stands up to the requirements of proportionality.[80] They can lead to a nuanced analysis which respects both freedom of speech and the legitimate interests of the employer. However, given the multiplicity of variables involved, a high degree of indeterminacy remains. This is especially problematic for employees, who face multiple barriers in taking the employer to court.[81] With such a degree of indeterminacy, the chances of success are usually unclear, with the result that many employees are likely to avoid the costs and risks associated with suing the employer. As a result, restrictions on employee speech can be expected to be much broader *de facto* than what the law appears to allow *de jure*.[82] Can we improve determinacy, while still leaving room for considering the unique characteristics of each case? While it is not possible to come up with an exact formula, the next part distinguishes between several situations that frequently arise before courts. For each group of cases, my aim is to help enrich the analysis. At the same time, I propose some 'rules of thumb' for each of these situations, with the aim of improving determinacy.

(d) Contract

Before moving on to considering specific types of employee speech and their limitations, it is pertinent to consider the relevance of contract to this analysis. To what extent can freedom of speech be limited by contract? More specifically, when employers wish to limit employee speech, is putting it into the contract (i.e. acquiring employee consent) necessary? Sufficient? Is it otherwise relevant for the analysis?

Let me first reject the proposition that a contract might be *sufficient* to validate limitations on freedom of expression. Given the inequality of power characterizing employment relations, together with the fact that almost all of us have to work for others in order to make a living, consent in contracts of employment is questionable.[83] It should not be enough to justify limitations on fundamental human rights. At the very least, courts can use contractual doctrines of unconscionability or public policy to examine whether contractual waivers of human rights should be valid. More often, courts examine such limitations through the prism of proportionality.[84] In some legal systems, notably the U.S., waivers of human rights at work are often accepted.[85] In the UK as well, courts often give significant weight to codes of conduct drafted by the employer and considered part of the employment contract, thereby in effect allowing waivers of the right to free speech.[86] But normatively speaking, from any understanding of the nature of employment relationships, this cannot be justified.[87]

Should we require employee consent as a *necessary* (but not sufficient) condition for the validity of free speech limitations? In practice, such limitations are often imposed by the employer unilaterally, by using the managerial prerogative. Imagine, for example, instructions to avoid chatting on controversial political issues with customers. Or instructions to avoid wearing shirts with political slogans to work. Notwithstanding the fact that such limitations will have to comply with the proportionality tests, should there also be a requirement to secure consent from the affected employees? In terms of existing laws there is no such requirement – at least not for explicit, specific consent (as opposed to general consent to the managerial prerogative). It seems to me that there is no justification for a sweeping requirement for consent. It will put a significant limitation on the managerial prerogative to make day-to-day managerial decisions, including ones that are entirely reasonable and stand up to the tests of proportionality. This will have a negative effect especially on small employers, who do not usually draft codes of conduct. It might also cause judges to give too much weight to the (questionable) consent, rather than putting most of the focus on the proportionality analysis.[88]

At the same time, it could be justified to require consent for some specific types of limitations that are more severe. This could apply, for example, to limitations that affect free speech outside of the workplace or outside of working time. Consider, for example, an employer policy that purports to place limitations on what employees can post on social media. A legal rule requiring explicit employee consent for such a policy will not change the fact that consent is questionable. The protection of free speech in such cases will rely mostly on the proportionality analysis. However, an additional requirement for consent can have several advantages. *First*, assuming the policy is included in the initial contract of employment, employees will know in advance whether the employer has an overly interventionist policy and to what extent the employer appears to respect free speech. Many employees will not be able to do anything about this, but at least *some* prospective employees might be in a position to look for alternative employment, after being exposed to this information. This is often easier than leaving the employment after being settled in the job. *Second*, the employer will have to draft the policy in advance, and at least in the case of large employers, it is likely to go through the legal and human

resource departments, thereby being subject to some oversight. This can lead to more sensitivity to employee rights, compared to a situation in which any manager makes their own policy on the spot. *Third*, when an employer wishes to adopt a new policy for existing employees, some of them might have enough bargaining power to object and refuse to sign. This is especially the case for employees who enjoy strong job security. If we require consent in some cases, as suggested here, it is possible to add some procedural requirements to increase the chances of consent being free and informed.[89]

If we require consent in some types of cases, then it will be a threshold that the employer has to pass in order for the limitation to be valid. Once consent is secured, we then move on to examining proportionality. Assume, however, a situation in which consent is *not* required, but was nonetheless secured. For example, the employer asks all employees to sign a policy that prohibits wearing shirts with political slogans at work. As noted above, such a managerial decision does not generally require consent; but once given, should we give it any weight when assessing the proportionality of the limitation? There is some suggestion to that effect in the European Court of Human Rights' judgment in the case of Eweida (albeit in the context of freedom of religion). It was argued in that case before the Court that the employee, who was denied the possibility of wearing a cross at work, was free to leave the employment at any time and therefore her rights have not been violated.[90] Indirectly, this seems to suggest that remaining in the same employment implies consent to the employer's policies. The Court rightly rejected this approach. At the same time, the Court noted that the possibility of changing jobs should be weighed as part of the proportionality analysis.[91] In practice, this possibility was not mentioned when the Court applied the proportionality test and concluded that the infringement in this case could not be justified. It is not entirely clear, then, when and how this consideration should be weighed. As far as the general theoretical possibility to change jobs is concerned, it is difficult to accept its relevance, given the inequality of bargaining power and the high cost of changing jobs in many cases.[92] Perhaps, however, in specific situations, when it is clear that a specific employee has other options, the fact that they explicitly consented to some policy of the employer can be given some weight, when considering the severity of the harm as part of the proportionality analysis.

IV. Rules of Thumb for Different Types of Employee Speech

I now turn to examining some specific situations in which employers curtail employee speech and whether this can be justified. It is useful to distinguish, first, between speech that is *about* work or made *during* work, as opposed to speech that is *seemingly unrelated* to work. In the first group, the employer generally has more legitimacy to regulate speech, but this should be limited to different degrees, depending on the context or content of the speech. I suggest below (in section a) four categories of employee speech that are about work or made during work and propose some rules of thumb for addressing them. In the second group of cases – involving speech that is seemingly unrelated to work – the burden on the employer to justify limitations is much higher. The starting point would be that speech outside of work and not about work is none of the employer's business. However, there are three possible exceptions, which I discuss in section (b) below.[93]

Some of the types of speech discussed in this part are already regulated. If there is existing legislation regulating a specific type of speech, the discussion below could help in interpreting and applying such legislation. But quite often, speech currently being censored by employers is not covered by legislation, but instead is brought up as part of claims regarding unfair dismissals, discrimination, the limits of the managerial prerogative, or as a direct claim against a violation of the right to freedom of expression. For such cases, the rules of thumb proposed below can hopefully offer guidance and increase determinacy.

(a) Speech about work or during work

A review of the case-law from different countries reveals four types of speech about work or during work that employers sometimes curb. It is useful to distinguish between them and consider the appropriate regulation for each type, in light of the discussion above regarding free speech justifications and limitations. I conclude the examination of each type with a proposed rule of thumb that summarizes the discussion.

1. Speech concerning unionization or rights at work

The first group of cases is the easiest to address. When employees are trying to set up a union or talk about joining a union, or otherwise discuss this issue among themselves, there is no justification whatsoever for employers to prevent such speech. This type of speech is protected in many countries by specific legislation,[94] as well as by a constitutional right to freedom of association. The degree of protection varies between legal systems, with the U.S. (not surprisingly) providing an example of insufficient protection.[95] At the normative level, alongside reasons related to freedom of association to protect such speech, it is also strongly supported by the justifications for freedom of expression. It can be considered political speech, or at least very similar to it, given its importance for the governance of the workplace and the allocation of power between capital and labour. Speech about unionization is important for democracy within the workplace (which is one of the goals of labour law), and also for democracy more broadly, given the role of unions as part of a functioning democracy.[96] It is therefore strongly supported by the democratic justification, as well as by the 'marketplace of ideas' justification. Moreover, as the stronger party in the relationship, the employer should not be allowed to use its power to prevent employees from pursuing their legal right to unionize, including by speaking about it. Note, however, that some restrictions on the 'time, place and manner' of the speech could be accepted. For example, it might be reasonable for an employer to prohibit discussions on unionization between workers in front of customers at a shop, so long as they have sufficient alternative opportunities to have these discussions during breaks etc. More controversially, the ECtHR affirmed the dismissal of employees who criticized co-workers for cooperating with management in a dispute against the union, because the critique was made in a highly vulgar and offensive way.[97] It is doubted if this limitation on 'manner' was justified, given the importance of free speech in this context.[98]

Speech about rights at work should similarly receive the strongest protection. When employees complain about violations of labour laws, they are seeking to uphold the rule of law – a fundamental element of democracy. Just like speech about unionization, such complaints are supported by free speech justifications (notably the democratic one), alongside the general justifications of labour law. To ensure that employees are able to enjoy labour law and enforce their rights, we have to protect their ability to speak freely about violations and discuss claimed violations, whether between themselves or with people outside of the workplace. An employer should not have the power to silence claims that it is violating the law.

What about speech demanding new benefits at work, as opposed to protecting rights secured by law? Imagine, for example, that employees who earn the minimum wage are demanding higher pay, citing the hard work they perform and the high profits of the employer. If they wish to discuss such demands among themselves, such speech is very similar to speech about unionization. It is a 'concerted activity' or at least a preliminary stage towards a concerted activity that should enjoy the same protection.[99] In contrast, if employees raise such complaints in public, the employer will arguably have legitimate concerns about the effect on its reputation and a possible breach of the duty of loyalty. I discuss such situations separately in sub-section (4) below.

Proposed rule of thumb #1: Employee speech about unionisation, or about claimed violations of labour laws, should enjoy the strongest protection. Only time, place and manner restrictions can be allowed, and these should be minimal. Speech regarding demands for new benefits should enjoy the same strong protection, at least when done internally among workers.

2. Speech against other employees or customers

Another type of employee speech that is relatively easy to analyse is speech harmful to third parties, specifically co-workers or customers/clients. The discussion here is concerned with harmful expressions at the workplace, and expressions made outside of work if directed personally against another employee, but not speech external to the work context, which will be discussed separately in section (b) below. Consider, for example, the case of Sagit Revivo, who was dismissed from her job at an Israeli construction company after saying to co-workers that she 'does not like Arabs', adding some curse words, and proclaiming that she does not want to work with them or give them service.[100] The company has Arab workers and is also cooperating with Arab sub-contractors. The Israeli Regional Labour Court rejected the claims against the dismissals.

When an employee personally attacks a co-worker by hate speech, harassment or bullying, the employer has a right – and often also a legal duty – to protect the harmed employee. Limitations on such speech can be justified because of internal free speech considerations (the negative impact on the listener, including potential

silencing), alongside external balancing (given the low value of the speech from democratic and truth-seeking perspectives, versus the significant harm caused). The key question, however, is where to draw the line; i.e. how to decide if a certain speech falls into these categories.

One possible approach is to allow limitations on speech against co-workers or customers only when the speech is illegal. According to this view, hate speech will only be prohibited at work if it falls within the definitions of relevant criminal laws, which often only cover incitement of others. It seems to me that such an approach would give too much protection to speech that does not warrant such protection. An employer has a managerial prerogative and also a duty to ensure a safe working place, where the dignity of all workers is respected. When balanced against the freedom of an employee to speak their mind, the harm caused by hateful or harassing speech significantly limits the weight accorded to such speech. It is legitimate and perhaps even praiseworthy for an employer to demand a high level of civility and mutual respect at the workplace. This should not be limited, in my view, by a standard of illegality of the curbed speech. It should be clarified that the employer should not be allowed to use this power as an excuse to censor political speech (discussed separately below). But it seems sufficient to ask if a reasonable employer could conclude that certain speech is harmful to other employees or customers, because it expresses hate towards them (or a group they belong to), or constitutes harassment or bullying. If so, the employer has justification to limit it. I realize that this formulation is very general and would require further discussion on the exact boundaries.[101] The main point is that expressions made at the workplace which create a hostile, unsafe or unwelcoming environment for other employees do not have to be tolerated by the employer.

Proposed rule of thumb #2: Employee speech that can reasonably be understood as constituting hate speech, harassment or bullying towards co-workers or customers can be limited by the employer.

3. Political and personal identity expressions during work

A timely and difficult question concerns the appropriate limitations on political expressions at work. Consider, for example, an employer policy prohibiting clothing with any slogans, messages and logos. This was the dress code of Whole Foods Market, a U.S. chain, and it was used to prevent employees from wearing ‘Black Lives Matter’ face masks (during Covid) following the George Floyd murder. Several employees claimed discrimination, because the policy was not previously enforced with regard to other political slogans.[102] Putting that claim aside, can the policy itself be justified, assuming it is applied without discrimination?

As explained in part II above, the workplace is a domain of public discourse. It is an important site for employees to express themselves, especially given that this is where they spend most of their waking hours and where they meet people from various backgrounds. With this in mind, a flat prohibition on political speech cannot be accepted. It will be too harmful for the autonomy of employees, and also for the democratic and truth-seeking goals. At the same time, the employer has legitimate interests in regulating such speech. First, political speech is often controversial and can lead to arguments with both co-workers and customers. To some extent this should be celebrated as a lively public discourse, but it can also be disruptive to the work environment (in the case of heated arguments between co-workers). Second, customers unhappy with the speech might take their business elsewhere. Third, the expression could interfere with the employer’s business strategy, unrelated to the content of the expression. For example, the employer might require all employees to wear a uniform, and considers this to be helpful for building the brand name or for the customer experience at the shop. Any personalized clothing item might detract from these goals.

In all three cases, there could be a loss to the employer if freedom of expression is protected. The question is what is the right balance between the competing considerations, and to what extent an employer can be expected to accept incurring a loss in the name of employees’ freedom to express political views at work. Given the legitimate interests of employers, and (in the private sector) their property rights, as well as the fact that this is not the *only* site available for employees’ political speech, it seems quite straightforward to conclude that a definite and significant economic loss can justify limitations on speech. However, it seems fair to expect the employer to accept a small, insignificant loss (with the understanding of what amounts to merely insignificant loss dependent on the size of the employer). The employer should also be required, as part of the proportionality analysis, to take all possible steps to minimize the loss, for example by using other methods to diffuse tensions between co-workers. More difficult are situations (which are likely to be more common) in which the loss is not certain, but where it can be expected with some probability.

Assuming there are no other steps that can be taken to prevent the loss, and that the potential loss is not insignificant, what probability could justify limitations on employees' political speech at work? As a general rule, I suggest adopting the preponderance of probabilities standard: if a loss is more likely than not, then some limitations on political speech at work can be justified. In many legal systems, the standard for infringing the constitutional right to freedom of expression is higher, but we cannot ignore the fact that legitimate interests and rights of a private employer are involved. The crucial point, in my view, is to insist that the burden should be on the employer to be able to prove that the loss is more likely than not. Mere speculation should not be enough to infringe freedom of speech. Moreover, the fact that some co-workers or customers will find the views offensive should not be presumed to suggest a consequent loss. As discussed above, people should tolerate disagreements, including exposure to views out of the mainstream – and it should be assumed that they can indeed tolerate them. Also, the assessment of the probable harm should distinguish between different types of employers, workers, etc., as discussed in part III(c) above.

At the same time, the standard can be lower if the potential harm to the employer is excessive. Imagine, for example, that for some exceptional reason an employee expression might lead in specific circumstances to losing half the customers. This is an enormous risk that the employer should not have to take, even if the probability of such a loss is only 30% (for example). The level of proof in such cases can be lower. Similarly, if the limitation is relatively mild – for example time, place and manner limits that leave room for political speech at work when it is less disruptive – it could still be justified, in my view, even if the probability of the harm is lower than 50%.

So far, this sub-section considered political speech. Expressions that can be characterized as attached to personal identity invite a similar analysis. Consider, for example, wearing a cross to work, or placing a small pride flag on one's desk. Although such expressions are not strongly related to the democratic justification, they are highly important for individuals' realization of their autonomy. For people who want to publicly express their affiliation to a certain group, this can be important for self-identity; telling them not to do so at work leaves them with relatively few opportunities for such expressions in public. Of course, here as well the employer has legitimate contradicting considerations. It seems that the same analysis as that proposed above for political speech is fitting. In practice, it will probably be very difficult for an employer to prove that a loss (which is not insignificant) is likely, unless the expression is also political and not just personal. For example, in the case of Eweida, the ECtHR rightly concluded that British Airways did not have sufficient justification for preventing the wearing of a small cross. The employer's aim 'to project a certain corporate image', while legitimate, could not justify the infringement of the employee's freedom to manifest her religion in these circumstances.[103] The balancing will be different if, for example, an employee wears a shirt with a religious slogan or quote that is argumentative or even derogatory to other groups. In such cases the possibility of harm can more easily be proven.[104] Either way, the requirement regarding proof of harm provides sufficient protection for employees, in my view, while at the same time showing proper respect for the legitimate interests of the employer.

Proposed rule of thumb #3: Political and personal identity expressions at work can be limited if the employer can prove that they are likely to lead to economic loss which is not insignificant. Offensiveness of the message cannot be presumed in itself to lead to a loss. If the loss can be prevented by other measures, curbing the expression would not be justified. The likelihood of the harm should generally be proved by more than 50% probability, unless the potential harm is excessive or the measures limiting the speech are minimal.

4. Information or opinions about the employer voiced externally

Another type of case involves employees exposing inside information to third parties or to the world at large. This can be information about the employer, or about co-workers. It can be factual claims or can be a critical opinion. Such speech is especially protected because of the truth-seeking justification. The free speech concerns will easily gain prominence over other considerations when an employee exposes illegal behaviour. In many legal systems there are specific protections for whistleblowing.[105] But for the purpose of the current discussion, let us assume that no illegality is involved. If an employee exposes confidential information, they breach the duty of confidentiality, which is implied in contracts of employment[106] – and is often made express in written contracts. The justifications for free speech are not strong when a person wishes to expose confidential information of another. There are sometimes disputes about whether specific information obtained at work is confidential, and matters of public concern should generally be excluded from this definition. For example, if

an employer considers salaries to be confidential, this is against the public interest of advancing a free labour market and preventing gender pay gaps.[107] But the duty of confidentiality is generally a sufficient reason to limit employee speech, and it continues to apply post-employment.

When the expression involves a critical opinion rather than information, the employer can claim a breach of the duty of loyalty (or 'fidelity'), also implied in contracts of employment.[108] It seems reasonable for the employer to expect that employees will not undercut its reputation and economic interests during the term of employment. Even if a critique does not amount to defamation, private-sector employers should not be required to accept publicly made critiques from current employees.[109] Do these limits continue after the end of the relationship? From the employer's point of view, an employee should not use the knowledge accumulated during the relationship to harm the employer's interests, even post-employment. But preventing critiques becomes highly problematic at this stage. Once the relationship ends, there is a strong societal interest in allowing the employee to speak freely, especially because of the truth-seeking justification. If this is a bad place of employment, former employees should be able to say so. If the products sold by the employer are of poor quality, former employees should not be prevented from giving their honest opinion. The employer can always use its own freedom of speech to respond and contradict the claims.

Proposed rule of thumb #4: Disclosure of confidential information is prohibited, but matters of public concern are not generally confidential. Critiques of the employer can be curbed during the time of employment, but not afterwards.

(b) Speech seemingly unrelated to work

A separate group of cases concerns speech that is seemingly unrelated to work. When people speak their mind in their free time, outside of the workplace and outside of working time, there should be a strong presumption against any interference with their freedom.[110] Needless to say, employees have private lives outside of work; they do not 'belong' to the employer and are not under the control of the employer outside of working time. Given the inequality of power, any attempt to limit employee speech outside of work is a great danger to a free society and undercuts all of the freedom of expression justifications. Nonetheless, there are possible exceptions, which fall into three groups.

1. Protecting the employer's reputation

The first reason that could potentially justify limitations on employee speech outside of work concerns harm to the employer's reputation. In recent years, this is most commonly raised following a controversial post by an employee on social media, or otherwise being caught on camera acting in a controversial way (with the video being posted by others on social media). This was the case of Stan Keable, who was dismissed from his job at a London local council because of things he said in his free time (videoed without his knowledge and posted on social media), which were understood by some as anti-Semitic.[111] This was also the case of Tamara Sweety, who posted a message expressing sorrow for the death of a suspected terrorist shot by the police after stabbing a teenager in Jerusalem. She was dismissed from her job at an Israeli cellular company, even though she explained that she does not condone terrorism, and that the reason for her post was that the suspected terrorist was a personal friend of hers (and she did not believe the accusations against him).[112] Another example is the case of Amy Cooper, who got into an argument with another person while walking her dog in Central Park, and was caught on camera making baseless and racist accusations. After the video went viral online, she was dismissed from her job at an American investment firm.[113] In all of these cases, the expression made outside of work appears to be unrelated to the ability of the employee to do their job. But the employer fears that being associated with the employee speech will reflect badly on it. Private employers fear that their reputation will be tarnished, leading to loss of business. Public employers similarly fear appearing to condone controversial or even loathsome views, which will diminish their reputation among the constituents.

The threat to freedom of speech in such dismissals is obvious and severe. People who express themselves outside of work (and not about work) do so as private individuals who lead their own lives, not as employees. They are making statements that are within their rights to make, as citizens and human beings enjoying freedom of expression, for all the reasons discussed in part II above. Nonetheless, people need to make a living. If any unpopular or controversial expression will lead to dismissals, freedom of speech will remain an illusion. Courts

sometimes accept reputational fears as sufficient justification for limiting employee speech, but this seems highly problematic.[114] While an employer certainly has a legitimate interest in protecting its reputation, I would argue that the law needs to take a clear stance against 'reputation by association' arguments in this context.[115] The views of an employee expressed outside of work are by definition not the views of the employer, and therefore cannot justify any steps against them, unless they fall into one of the two groups of cases discussed separately below, which concern actual impact on the ability to do one's job. The right to a private life, protected in Article 8 of the ECHR provides another justification for this conclusion. Fears concerning reputation, by themselves, should therefore be irrelevant. A clear stance of the law on this point would help educate the public that employers are not associated with private views of employees and are legally prevented from acting against them.[116] By contrast, if the law allows dismissals for reasons of 'reputation by association', it helps to perpetuate an irrational and harmful practice of associating the private opinions of employees with their employer.

An additional reason for a clear rule against reputation arguments is the protection of minority groups. Employers who are allowed to dismiss employees because of political views – using the reputational harm excuse – are likely to use these powers only against expressions that are out of the mainstream. In practice, the mainstream views are shaped by the majority group in a given society, so regulation by employers can be expected to silence people who hold minority opinions, and at least in some contexts these will be people from minority groups who already suffer discrimination.

It should be clarified that the proposed flat rule does not prevent the employer from taking other steps to protect its reputation. If an employee mentions association with the employer on a social media bio, asking the employee to delete this association following a controversial post can be a legitimate step. It is also possible for the employer to use its own free speech and explicitly disassociate itself from the employee's expression or views. Such steps should not be seen as limitations on the employee's freedom of expression.

Proposed rule of thumb #5: Employee speech unrelated to the work context is generally irrelevant to the employer; employers' fears of reputational harms cannot justify any sanction or limitation.

2. Speech harmful to other employees or customers

As noted in section (a)2 above, offensive expressions directed against other employees or against customers should not enjoy protection. But what if the offensive speech is made outside of work, and is not directed specifically against co-workers or customers? The employer might argue that once co-workers and customers are exposed to offensive views made by an employee in public, this can be disruptive to the ability to work together. I have argued above that offensiveness in itself is not a sufficient reason to limit speech. People can find unpopular and provocative opinions offensive, but should tolerate them in a democratic society. But what about statements that amount to hate speech? Imagine, for example, that an employee posts a racist message on social media. It is done in their free time and does not mention the employer or other workers in any way. The question then is to what extent the employer should be allowed in such cases to dismiss the employee, or otherwise take steps that censor the speech.

In principle, a disruption to the relations between co-workers can justify limitations on speech. But a disruption as a result of expression outside of work cannot be assumed; speculation is not enough. A crucial demand should be for the employer to *prove* the harm to business interests, as a result of hateful expressions which are seemingly unrelated to the workplace. In the context of political speech made at work (section (a)3 above), I have argued that employers should prove that the expected harm is not insignificant. Given that interference with speech outside of work is much more intrusive, the burden should be higher. I suggest to require proof that the expected harm is *significant* to justify limitations on speech (including, of course, dismissals because of the speech). I agree with Virginia Mantouvalou, who argued that 'off-duty conduct may lead to lawful dismissal *only* if there is a clear and present impact or a high likelihood of such impact on work, whilst a speculative and marginal danger does not suffice'.[117] A probability of 51% should suffice, in my view, so long as the likely harm is indeed significant.[118]

To assess the level of harm, if any, courts should examine the content of the speech, and also the type of work, the seniority of the employee, the degree of working in cooperation with others, the extent to which co-workers were exposed to the speech, and other contextual facts. In terms of the content, it is often difficult to draw clear lines when deciding whether an expression amounts to hate speech.[119] For current purposes, a crucial question

in my view is whether a co-worker belonging to the targeted group could feel personally attacked by the expression. If an employee could reasonably feel unsafe or unwelcome in the workplace, as a result of extramural speech by a co-worker, this becomes a personal attack that justifies action by the employer. The same is true with regard to customers, if they are regulars who have an ongoing contact with the employee who made the hateful speech. By contrast, if the speech is 'merely' offensive to others because of their deep disagreement with the views expressed, or because the views are repugnant, this cannot justify action by the employer. Assuming that harm can be proved, as part of the proportionality requirement steps against an employee can be justified only after exploring other options to prevent or minimize the harm, such as giving the employee an opportunity to explain themselves or apologize.

In some cases, the employer might argue that steps are taken not because of any concrete harm to the business as a result of the speech, but because the speech exposed some new information that was previously unknown about the employee. For example, if an employee made racist or homophobic comments, the employer could argue that the comments revealed a character flaw, or poor judgment, leading to loss of trust in the employee's abilities or loss of confidence in their fit for the workplace. From the perspective of freedom of speech, such arguments should be treated with suspicion. If we accept them as a justified reason to dismiss an employee for speech made outside of work, then the silencing effect on unpopular views can be enormous. It seems to me that employers should be required to give employees an opportunity to show that their controversial (and even offensive) views do not affect their work and their ability to cooperate with others at work. Otherwise put, an argument about the revelation of a character flaw should not replace the need to prove harm.

Consider a few examples. In the case of Omooba, the actor wrote on her Facebook page: 'I do not believe you can be born gay, and I do not believe homosexuality is right'. She also added: 'God loves everyone, just because he doesn't agree with your decisions doesn't mean he doesn't love you'.[120] The main focus in this case was the employer's fear of losing money because the public would not buy tickets to the play, an issue discussed separately below. But the judgment also briefly raised the issue of co-workers; some of the other actors, and the play's directors, were gay and upset about those statements.[121] If we examine this issue separately, is the harm to co-workers enough to justify dismissals? There is no doubt that the actor's expression was offensive to gay people (and others). However, it was made several years earlier; was related to the actor's religious convictions; and was not (especially given the second statement) intended to incite hatred. It seems to me that the statements should not be seen as an attack on gay co-workers. We should be careful of reaching a reality in which every misguided and offensive comment leads to dismissals and possibly 'cancelling' and total exclusion from the labour market.

In another UK case, Adrian Smith made a comment on Facebook opposing gay marriage in church (while accepting civil marriages for same sex couples).[122] In terms of the language and tone, he expressed his views 'moderately'.[123] One co-worker took offence, regarding the comments as expressing 'blatant homophobia'.[124] This led the employer – Trafford Housing Trust – to initiate disciplinary proceedings, which concluded with a decision to demote Smith to a non-managerial position, including a 40% wage reduction. The Court determined that this was a breach of contract by the employer. Indeed, the specific worker who was offended seems to have interpreted the comments too harshly, and in any case such offence taken from the expression of a general religious or political view should not be enough to substantiate a claim of significant harm.[125] By contrast, if an employee quotes religious scriptures suggesting that gay people are 'evil' and should be 'put to death', gay co-workers can certainly be expected to see this as a personal attack on them, even if the expression is made outside of work and does not refer specifically to them. In such a case the disruption to the work environment is very likely and significant.[126] Even less extreme statements can justify limitations, if they clearly express hatred towards the group ('evil' would have been enough in the above example, in my view, when referring to an innate characteristic).

Drawing the line is inevitably hard in borderline cases. Consider for example the case of Tracey Webb, an employee of London Underground, who was dismissed after 32 years of work because of several social media posts. The expressions in question followed the George Floyd murder and were made in the context of the ensuing 'Black Lives Matter' (BLM) demonstrations, which spread from the US to several other countries, including the UK. Webb shared a post highlighting George Floyd's history of criminal convictions, and wrote: 'Never deserved to be murdered by a police man. But... really was not a nice guy'. In response to comments made on this post, she referred to Floyd as 'scum' after alluding again to his past criminal record. In another post she wrote: 'On 22 May 2013, no-one rioted in the UK when two black men hacked Lee Rigby to death. It's time to bring back the death penalty. Where were you all then? «All lives matter»'. A third post showed a

photo of a police officer who was apparently injured during a BLM demonstration, and said: 'time to hit back hard like in other European countries. Tear gas, bullets and water canons'.[127] There is no doubt that these statements are offensive and insensitive, but should they be prohibited in a democratic, tolerant society? Are they outside the boundaries of free speech? More specifically, do these statements – made outside of work – justify the dismissal of a long-serving employee with an otherwise unblemished record?[128] The UK Employment Tribunal thought so.[129] Given the overall circumstances and context, I tend to agree; but for me this is a hard case. People should be able to express controversial views, and that includes criticizing the BLM movement, advocating for stronger police reaction against demonstrators, etc. However, there is clearly a racist (anti-Black) undertone in the posts, especially if taken together. Moreover, Webb had a managerial role, 'with line management responsibilities for an ethnically mixed team'.[130] Several Black employees complained; at least two expressed reservations about working with Webb in the future. Crucially, in my view, it seems reasonable to conclude that these co-workers understood the posts as expressing racist views, ultimately directed also at them.

Proposed rule of thumb #6: Employee speech made outside of work can lead to sanctions or limitations when it amounts to hate speech that creates a disruption to the work environment, provided that the employer can prove (by more than 50% probability) that significant harm will occur. The assessment of possible harm should be made in light of the overall context, giving particular attention to whether co-workers or regular customers can reasonably feel personally attacked by the expression. Dismissals would not be justified if the harm can be prevented by other means such as giving the employee an opportunity to apologize or explain.

3. Speech directly impacting the ability to do the job

The final group of cases concerns speech that is made outside of work and is seemingly unrelated to work, but actually has a direct impact on the ability of the employee to perform their specific job. Consider, for example, an employee who works as the spokesperson of a left-leaning political organisation, who publishes a post on social media expressing right-leaning political views. Or an employee in charge of diversity programs at a university, who publishes a post on social media against such programs. Although the employees in these examples can claim to be able to separate their personal views from doing the job, it is fair to assume that this will be very hard to do, and in any case, they will lose the trust of the people they work with, in a way that significantly jeopardizes their job performance. In such cases the impact on the interests of the employer is strong and so are the justifications for employer actions.

This means that there should be an opening for the employer to show that extramural speech affects the job, even in cases not concerned with hate speech. But such an opening should be narrow. In line with the suggestions made above, the employer should bear the burden of proving the harm. Here, again, I would argue that the harm should be both significant and likely (more than 51%), to justify limitations on speech. In the current context, the harm can be proved by showing the direct connection between the expression and the *specific* job, taking into account contextual factors such as the seniority of the employee etc. As noted in section (b)1 above, fears related to reputation should be excluded from this analysis.

The case of Seyi Omooba, the actor who was supposed to play a gay character and was dismissed after her anti-gay posts were revealed,[131] probably serves as an example. I say probably, because the judgment does not explicitly examine the probability and severity of the harm in light of all the contextual factors. But it appears that the employer, a small, local theater company, faced a high risk of substantial loss as a result of the actor's speech.[132] The actor was supposed to play the leading role and the public uproar against her playing a gay character, given her views, was apparently serious and sustained. The Court accepted the theatre's claim that the likelihood of people not buying tickets to this show given the public reaction was high. This was not a problem of the employer's reputation, but rather a specific harm resulting from the impact of the speech on the ability of the actor to play the specific role. Moreover, the actor was given an opportunity to clarify or retract previous posts but refused.[133]

Public employees are often expected to show neutrality, in order to protect the legitimacy of (and confidence in) the public service. This leads in some countries to policies that prevent employees from making political expressions, or from participating in demonstrations and so on. For example, in Israel numerous public sector employees are subject to such limitations, including all lawyers representing the state.[134] The analysis of such policies should be similar, in my view, to the one proposed in this sub-section. In particular, limitations on junior employees, who are not generally perceived as representing the official opinion of the state, are hard to

justify. Those employees should not lose their freedom to participate in public discourse on political matters, assuming the speech is not related to a particular case or directly related to their area of responsibility.[135]

Proposed rule of thumb #7: Employee speech made outside of work can lead to sanctions or limitations when it has a direct impact on the ability of the employee to perform the specific job, provided that the employer can prove (by more than 50% probability) that significant harm will occur. The assessment of possible harm should be made in light of the overall context, giving particular attention to the connection between the expression and the specific job requirements.

V. Conclusion

Freedom of expression is considered a fundamental human right in any democracy. People do not lose this cherished right just because they work for others (which most of us have to do). It is therefore obvious that, to some extent at least, an employer has to respect the freedom of its employees to express themselves. At the same time, the employer has its own rights and legitimate interests; the question is how to balance between these conflicting considerations. The issue is increasingly brought up before courts around the world, and this article has mentioned and discussed some of these cases. But this was not a comprehensive or systematic review of existing laws. Rather, the goal of this contribution was to offer a normative analysis, focusing on what the law *should* be.

The approach I have taken to address this problem starts from a purposive analysis: a discussion of the purpose (justifications) of freedom of expression, and possible limitations on this freedom, in the specific context of employment. The examination of specific cases should start from an understanding of *why* free speech is important in the given circumstances. The article discussed the various considerations that should be part of the analysis, considerations that in terms of legal form are brought up mainly as part of the examination of proportionality. This legal principle has the advantage of demanding justification from the employer for any infringement of free speech, and then providing a structure for balancing the conflicting considerations. There are obvious advantages for this type of open-ended concept, but also a disadvantage in terms of indeterminacy. A case-by-case balancing approach leaves too much uncertainty about the law, which leads in practice to common infringements of the right to free speech that are not being challenged in court. The article has attempted to address this difficulty by offering some rules of thumb for different types of employee speech. If courts and lawyers follow such rules of thumb, the potential benefit is greater predictability – and as a result better protection for free speech – without taking their open-ended discretion away from courts.

Notes

* This article is written by Guy Davidov: Professor, BI Norwegian Business School; and Elias Lieberman Professor of Labour Law, Hebrew University of Jerusalem (on leave). For helpful comments, I am thankful to Einat Albin and to participants in seminars at BI Norwegian Business School and at Ca' Foscari University of Venice.

1 *Omooba v Michael Garrett Associates Ltd*, [2024] EAT 30, par 7.

2 *Keable v London Borough of Hammersmith and Fulham*, [2019] UKET 2205904/2018, upheld in *London Borough of Hammersmith and Fulham v Keable*, [2021] UKEAT 2019-000733 (appeal on other grounds; there was no appeal regarding the substantive grounds for dismissal).

3 *Palomo Sanchez v Spain,* [2011] ECHR 934.

4 ECHR rights have been given effect in the UK by the Human Rights Act 1998, but without direct 'horizontal' effect between individuals.

5 Human Rights Act 1998, s 3. The right not to be unfairly dismissed is enshrined in s 94 of the Employment Rights Act 1996.

6 Human Rights Act 1998, s 6.

7 *Malik v Bank of Credit*, [1997] UKHL 23.

8 See Alan Bogg, Hugh Collins, ACL Davies and Virginia Mantouvalou, *Human Rights at Work: Reimagining Employment Law* (Hart, 2024) 16.

9 Hugh Collins and Virginia Mantouvalou, 'Human Rights and the Contract of Employment' in Mark Freedland et al (eds), *The Contract of Employment* (OUP 2016) 188, 205; Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 ILJ 515.

10 Equality Act 2010, s 39; ECHR Art 14.

11 ECHR Art 9.

12 ECHR Art 8.

13 Although 'expression' can be understood to be broader, the terms are usually used equivalently in the literature. See, e.g., Jeffrey W Howard, 'Freedom of Speech', *Stanford Encyclopedia of Philosophy* (2024), https://plato.stanford.edu/entries/freedom-speech/.

14 These three justifications appear explicitly in the Constitution of Norway, Article 100. They have also been adopted by courts around the world. See, e.g., *Vogt v Germany*, [1995] EHRR 205, par 52; *R v Secretary of State for the Home Department, Ex Parte Simms*, [1999] UKHL 33.

15 See, e.g., Matteo Bonotti and Jonathan Seglow, 'Freedom of Expression' (2021) 16(7) *Philosophy Compass* e12759; Howard (n 13).

16 See, e.g., Martin H Redish, 'The Value of Free Speech' (1982) 130 *U Penn L Rev* 591; Jonathan Gilmore, 'Expression as Realization: Speakers' Interests in Freedom of Speech' (2011) 30 *Law and Philosophy* 517.

17 Joseph Raz, *The Morality of Freedom* (OUP, 1988) 369 ('The autonomous person is (part) author of his own life').

18 See, e.g., Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP, 1996) 200.

19 Seana Valentine Shiffrin, 'A Thinker-Based Approach to Freedom of Speech' (2011) 27 *Constitutional Commentary* 283, 287. See also Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton UP, 2014).

20 The market metaphor was used by Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919).

21 John Stuart Mill, *On Liberty* (1959) Ch 2.

22 See Frederick Schauer, 'Social Epistemology, Holocaust Denial, and the Post-Millian Calculus' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech* (Cambridge UP, 2012) 129.

23 Brian Leiter sees this problem – the lack of a mechanism we can trust to prevent harmful expressions while allowing valuable ones – as the only convincing argument for freedom of speech. See Brian Leiter, 'The Case Against Free Speech' (2016) 38 *Sydney L Rev* 407, 433.

24 See, eg, Cass Sunstein, *Democracy and the Problem of Free Speech* (Free Press, 1993).

25 Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (OUP, 1986).

26 See, e.g., Jeremy Waldron, *The Harm in Hate Speech* (Harvard UP, 2012).

27 See, e.g., Aharon Barak, *Purposive Interpretation in Law* (Princeton UP, 2007).

28 See, e.g., *Vogt v Germany*, [1995] EHRR 205, par 52.

29 Dieter Grimm, 'The Basic Law at 60: Identity and Change' (2010) 11 *German LJ* 33, 44.

30 Virginia Mantouvalou, '«I Lost My Job over a Facebook Post: Was that Fair?» Discipline and Dismissal for Social Media Activity' (2019) 35 *Int J of Comp Lab & Indus Rel* 101, 103.

31 See generally Amartya Sen, *Development as Freedom* (OUP, 1999).

32 Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge UP, 2000) 70-80.

33 The classic exploration is in Paul Davies and Mark Freedland, *Kahn-Freund's Labour and the Law* (Stevens & Sons, 1983) 18.

34 Guy Davidov, *A Purposive Approach to Labour Law* (OUP, 2016) Ch 3 and references therein.

35 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives* (Princeton UP, 2017); Hugh Collins, 'Is the Contract of Employment Illiberal?', in Hugh Collins et al (eds), *Philosophical Foundations of Labour Law* (OUP, 2018) 48.

36 Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge UP, 2012) 84. For an application of the republican theory of non-domination in the labour law context, see e.g. Alan Bogg and Cynthia Estlund, 'The Right to Strike and Contestatory Citizenship' in Hugh Collins et al (eds), *Philosophical Foundations of Labour Law* (OUP, 2018) 229.

37 See Davidov (n 34) Ch 3; Alan Bogg and Cynthia Estlund, 'Between Authority and Domination: Taming the Managerial Prerogative' (2024) 44 *Comparative Lab L & Pol'y J* 237.

38 Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle' (2015) 44 *Industrial LJ* 1, 11.

39 Sabine Tsuruda, 'Working as Equal Moral Agents' (2020) 26 *Legal Theory* 305. This articulation is related to autonomy, but also equality – specifically, the ability to communicate as equals.

40 See Davidov (n 34) 43-4 and references there.

41 See also Anca Gheaus and Lisa Herzog, 'The Goods of Work (Other Than Money!)' (2016) 47 *J of Applied Philosophy* 70.

42 Tsuruda (n 39) highlights this aspect as well, as part of the idea of moral agency. As she points out, it includes in particular reactions people have to the way they are treated at work, including by peers.

43 See Davidov (n 34) 56 and references there.

44 Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (OUP, 2003).

45 Cynthia L Estlund, 'Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment' (1997) 75 *Texas L Rev* 687.

46 Tim Wu, 'Is the First Amendment Obsolete?' (2018) 117 *Michigan L Rev* 547, 548. See also Toni M Massaro and Helen Norton, 'Free Speech and Democracy: A Primer for Twenty-First Century Reformers' (2021) 54 *UC Davis L Rev* 1631, 1636 (the basic idea that more speech is always better is now being questioned).

47 See, e.g., Wu (n 46) 548.

48 Amartya Sen and Martha Nussbaum, the leading developers of the capabilities approach, have both adopted a 'sufficientarian' view,

designed to ensure a threshold/ sufficient level of basic capabilities. See Amartya Sen, *The Idea of Justice* (Harvard UP, 2009) 295; Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard UP, 2011) 38.

49 Luke A Boso, 'Anti-LGBT Free Speech and Group Subordination' (2021) 63 *Arizona L Rev* 341.

50 Matteo Bonotti and Jonathan Seglow, 'Freedom of Speech: A Relational Defence' (2022) 48 *Philosophy and Social Criticism* 515.

51 See, e.g., Sunstein (n 24). But see Jeremy K Kessler and David E Pozen, 'The Search for an Egalitarian First Amendment' (2018) 118 *Columbia L Rev* 1953, 1979 (arguing that while the democratic justification is more useful for taking socioeconomic inequalities into account, this is not enough; because the justification is very abstract, it does not lead to clear results).

52 Amy Kapczynski, 'The Lochnerized First Amendment and the FDA' (2018) 118 *Columbia L Rev Online* 179, 203.

53 The metaphor of 'weaponizing' in this context was used by Justice Kagan (dissenting) in *Janus v. AFSCME*, 138 S Ct 2448 (2018).

54 Catherine L Fisk, 'Freedom of Speech At and Away From Work', in Guy Davidov, Brian Langille and Gillian Lester, *Oxford Handbook of the Law of Work* (OUP, 2024) 645.

55 See, e.g., the Constitution of South Africa, Section 16, stating that the right to freedom of expression does not extend to several types of speech, notably 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Note also that Art 17 of the ECHR (prohibition of abuse of rights), was interpreted by the ECtHR as precluding a free speech claim if the speech is 'incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination' (*Norwood v United Kingdom*, judgment of Nov 16, 2004).

56 Section 1 of the Charter.

57 *R v Oakes*, [1986] 1 SCR 103, par 69.

58 See, e.g., the Norwegian Penal Code, s 185; Australian Federal Racial Discrimination Act 1975, s 18C.

59 See, e.g., UK Public Order Act 1986, s 18(1); Ireland Prohibition of Incitement to Hatred Act 1989, s 2(1).

60 See Waldron (n 26).

61 See David C Yamada, 'Protection Against Bullying' in Guy Davidov, Brian Langille and Gillian Lester, *Oxford Handbook of the Law of Work* (OUP, 2024) 589.

62 *Brandenburg v Ohio*, 395 U.S. 444, 447 (1969).

63 *Schenck v. United States*, 249 U.S. 47 (1919).

64 *Chaplinsky v New Hampshire*, 315 U.S. 568, 572 (1942); *Cohen v California*, 403 U.S. 15 (1971).

65 EU Council Framework Decision 2009/913/JHA of 28 November 2008 on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, Article 1.

66 UK Public Order Act 1986, s 18(1); Ireland Prohibition of Incitement to Hatred Act 1989, s 2(1).

67 Australian Federal Racial Discrimination Act 1975, s 18C.

68 See the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted by experts convened by the Office of the UN High Commissioner for Human Rights, available at https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action.

69 In Israel, a law (now abolished) that gave the government authority to suspend the publication of a newspaper when it is 'likely to endanger the public peace' was interpreted by the Supreme Court as requiring high probability (or 'close to certainty'). See *Kol Ha'am Ltd v Minister of the Interior* (1953).

70 See Tsuruda (n 39) (arguing that, to respect the equal moral agency of employees, employers need to allow and accommodate indignant and critical/political expression, even when it means accepting some costs).

71 Laws requiring workplace accommodation for disability or religious reasons set a limit on the expectation from employers; they are not expected to bear 'undue hardship'. See Mark Bell, 'Accommodations', in Guy Davidov, Brian Langille and Gillian Lester, *Oxford Handbook of the Law of Work* (OUP, 2024) 547.

72 See generally David M Beatty, *The Ultimate Rule of Law* (OUP, 2004). And see *Handyside v United Kingdom*, [1976] ECHR 5, par 49.

73 Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 *Modern L Rev* 619; Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern L Rev* 912; Wragg (n 45); Bogg et al (n 8).

74 On the justifications for Justice Kagan, dissenting using proportionality in the labour law context, see Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour La Contexts' (2013) 59 *McGill LJ* 375. For more general discussions (outside of the labour context) supporting proportionality and responding to critiques, see e.g. Beatty (n 72); Kai Moller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709.

75 For this doctrine, see eg *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

76 In a recent article about religious accommodations at work, James Nelson argues that the principle of reciprocity – demanding that employee requests for accommodation come together with a 'willingness to make mutual adjustments' and share some of the burden – can be found in U.S. case-law and is also justified (James D Nelson, 'Disestablishment at Work' (2025) 134 *Yale LJ* 1890). This idea can be applied to freedom of expression analysis, in the specific context of time, place and manner restrictions.

77 For some examples of cases showing the relevance of apology/retraction for the analysis see Dominic McGoldrick, 'The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective' (2013) 13 *Human Rights L Rev* 125, 140.

78 See, eg, the judgment of the ECtHR in *Obst v Germany*, judgment of Sep 23, 2010.

79 Paull Wragg (n 38) critiques the UK courts for insufficiently protecting 'unimportant' speech, and argues that all speech should receive the same protection (at 15). I agree with the critique but not with the proposed solution. The burden should be on employers to justify

limitations even on speech that is 'unimportant', but speech that is especially important in light of free speech justifications should trigger a higher burden.

80 For a list that includes some additional considerations that could be relevant see *Higgs v Farmor's School*, [2023] EAT 89, par 94. And see the discussion in Bogg et al (n 8) 266-7.

81 On the challenges of self-enforcement see Davidov (n 34) Ch 9.

82 This point was recently made by a Norwegian Commission for Freedom of Expression: 'The Commission believes it is important to address the uncertainty that is prevalent among both managers and employees regarding where boundaries are drawn for employees' freedom of expression and its limitations. Uncertainty creates a culture of caution whereby employees who may have important contributions to make to the public debate, and who also wish to contribute, refrain from doing so for fear of making a misstep'. See The Norwegian Commission for Freedom of Expression Report (2022), English summary, available at https://www.regjeringen.no/contentassets/753af2a75c21435795cd21bc86faeb2d/en-gb/pdfs/nou202220220009000engpdfs.pdf, at 24.The Commission made several recommendations to improve certainty, especially through education of managers and employees. These are valuable proposals, but in my view do not address the fact that the proportionality tests are inherently indeterminate, based on a case-by-case examination.

83 See Maayan Niezna and Guy Davidov, 'Consent in Contracts of Employment' (2023) 86 *Modern L Rev* 1134.

84 See ibid for examples.

85 The Restatement of Employment Law (2015), which is based to a large extent on existing U.S. laws, notes that employers cannot intrude upon employees' personal autonomy interests, unless the parties agree otherwise (at section 7.08(b)).

86 UK courts have been criticized for a tendency to focus mainly on contractual obligations, often failing even to mention freedom of speech. See Bogg et al (n 8) 243; David Mangan, 'Online Speech and the Workplace: Public Right, Private Regulation' (2018) 39 *Comp Lab L & Pol'y J* 357; Wragg (n 38).

87 See also Collins and Mantouvalou (n 9) 201.

88 In a recent study of Israeli cases dealing with privacy at work, Einat Albin and Gil Omer show that lower courts tend to put most of the focus on consent, even though the higher court precedents also require proportionality alongside consent. See Einat Albin and Gil Omer, 'The Right to Privacy at Work: Reviewing the Case of Isakov-Inbar and its Implementation', forthcoming in *Mishpatim LJ* [Hebrew].

89 On various procedural options see Niezna and Davidov (n 83).

90 *Eweida v The United Kingdom*, [2013] ECHR 37, par 59.

91 Ibid, par 83.

92 See Niezna and Davidov (n 83) 1160.

93 To some extent, the distinction between the two groups of cases follows a distinction between speech made as an employee and speech made as a citizen. In the second group, there is a presumption of sorts that speech is made as a citizen and therefore should enjoy stronger protection. But the lines are far from clear; employees can speak as citizens at the workplace as well. On the difficulty of drawing these lines, see Cynthia Estlund, 'Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem' (2006) *The Supreme Court Review* 115.

94 See, e.g., the UK Trade Union and Labour Relations (Consolidation) Act 1992, s 146.

95 See Catherine L Fisk, 'A Progressive Labor Vision of the First Amendment: Past as Prologue' (2018) 118 *Columbia L Rev* 2057.

96 See Bogg et al (n 8) 249. On the role of unions in a democratic society see also Kate Andrias, 'Labour and Democracy' in Guy Davidov, Brian Langille and Gillian Lester, *Oxford Handbook of the Law of Work* (OUP, 2024) 129.

97 *Palomo Sanchez v Spain* (n 3).

98 For a critique, supporting the dissenting opinion in this case, see Mantouvalou (n 30) 123. See also Bogg et al (n 8) 249-250.

99 In the U.S., for example, the National Labor Relations Act, s 7, which protects the right to unionize, also protects the right of employees 'to engage in other concerted activities for the purpose of... mutual aid or protection'.

100 *Sagit Revivo v David Ackerstein Ltd*, judgment of Mar 10, 2015 (Jerusalem Regional Labour Court).

101 For such a discussion see, e.g., Estlund (n 45).

102 The U.S. Court of Appeal (1st Circuit) rejected the claim of discrimination in the particular circumstances. See *Frith v Whole Food Market* (1st Cir, Jun 28, 2022).

103 *Eweida* (n 90), par 94.

104 A further complication is when an employee refuses to do some of the work because of religious or conscientious objections. For example, a refusal by a registrar of marriages to register gay marriages, even though they are recognized by the state. This was one of the cases jointly discussed in *Eweida* (n 90). Although it can be seen as an expressive act, it involves more directly the right to freedom of thought, conscience and religion. I will therefore not discuss it here.

105 See, for example, in the UK, the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996, s 43A ff; and see EU Whistleblower Directive (2019/1937).

106 See Zoe Adams et al, *Deakin and Morris' Labour* Law, 7th ed (Hart, 2021) par 3.85; Hugh Collins, KD Ewing and Aileen McColgan, *Labour Law, 2nd ed* (Cambridge UP, 2019) 157. On the balance between free speech and the duty of confidentiality and loyalty, see e.g. the European Court of Human Right's judgment in *Guja v Moldova*, Feb 12, 2008. For additional cases and analysis see Bogg et al (n 8) 253 ff.

107 See Cynthia Estlund, 'Extending the Case for Workplace Transparency to Information about Pay' (2014) 4 *UC Irvine L Rev* 781.

108 Deakin and Morris (n 106) par 3.81; Collins et al (n 106) 155.

109 A colourful example is the case of *Roni Tabin v Toar in the Port* (Tel-Aviv Regional Labour Court, judgment of Jan 2, 2021). A restaurant waitress posted a message on Snapchat suggesting that customers can expect diarrhoea after eating at the restaurant. Although it was sent only to a small group of friends, it reached the employer as well. The employee claimed that it was only a joke, but the employer, and the judge, were not amused. Her dismissal was approved.

110 See Mantouvalou (n 30) 122.

111 *Keable* (n 2). He was reinstated by the Tribunal.

112 *Sweety v Pelephone*, judgment of Apr 5, 2017 (Jerusalem Regional Labour Court). She was awarded damages, although the focus of the Court was mostly on the process rather than the merits of the dismissals.

113 *Cooper c Franklin Templeton*, judgment of Sep 21, 2022 (US District Court). There is no protection against unjust dismissals in the US; Cooper sued for discrimination, defamation and intentional infliction of emotional distress. Her suit was dismissed.

114 The Restatement of Employment Law (2015) offers the following test, based on U.S. case-law: 'The employer is not liable... [for intruding upon an employee's personal autonomy interests] if it can prove that it had a reasonable and good-faith belief that the employee's exercise of an autonomy interest interfered with the employer's legitimate business interests, including its orderly operations and reputation in the marketplace' (section 7/08 (c)). This test opens up a broad scope for reputation-related dismissals.

115 See similarly Mantouvalou (n 30) 120 ('Unpopular political views may have an effect on business reputation, but should not constitute a legitimate reason for dismissal').

116 Most people are likely to realize by themselves that expressions made by a person in their free time do not represent the views of the employer; see on this point *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), par 57-59 (UK High Court of Justice). A flat rejection of reputation claims in this context will further solidify this understanding.

117 Mantouvalou (n 73) 935.

118 Another formulation can be found in a Utah statute from 2015 which prohibits retaliation against employees for political expression made outside of work, 'unless the expression... in in direct conflict with the essential business-related interests of the employer' (Utah Code s 34A-5-112 (3), cited by Fisk (n 54) at 648).

119 For a useful review of attempts to define hate speech, see Andrew F Sellars, 'Defining Hate Speech', Berkman Klein Center Research Publication No. 2016-20, https://scholarship.law.bu.edu/faculty_scholarship/3702/.

120 *Omooba* (n 1) par 7.

121 Ibid par 23.

122 *Smith* (n 116).

123 Ibid par 62-3.

124 Ibid par 37.

125 The analysis of the Court in this case shows appropriate respect for freedom of speech, in my view; however, there are two very problematic aspects to this judgment. First, there is significant focus on the wording of the employer's code of conduct, attached to the employee's contract. Giving so much weight to the contract drafted by the employer when considering limits on freedom of speech is problematic (see part III(d) above). Second, the demotion was understood as a *de facto* dismissal, and because the employee was too late to submit an unfair dismissal claim, it was ruled to be wrongful dismissal with no actual damages. It is unfortunate that the employee was not awarded compensation for the violation of his freedom of speech in some other way, for example by considering this as being a violation of the duty of trust and confidence, or otherwise by awarding non-pecuniary damages for violation of human rights. On the last option see Collins and Mantouvalou (n 9) 206-7.

126 These expressions were made by an employee of Hewlett-Packard, who posted them in writing on office message boards in response to the employer's diversity posters. He claimed that the employer had to allow him to do so because of the duty (in the U.S.) to provide religious accommodation. The claim was rejected because such accommodation would inflict 'undue hardship' on the employer (*Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir 2004)). I argue here that such speech could also justify action against the employee, even if made outside of work.

127 *Webb v London Underground Ltd* (UK Employment Tribunal, judgment of Dec 12, 2022) pars 21-31.

128 On her record, see ibid par 126.

129 Ibid. The claim of discrimination based on race was rejected. A claim of unfair dismissal was accepted but only because of procedural errors in the hearing; the judgment clarified that on the merits the dismissal was justified, and the compensation awarded was minimal (the decision on remedy was given separately on Feb 24, 2023). Both judgements are available at https://www.gov.uk/employment-tribunal-decisions/ms-t-webb-v-london-underground-ltd-3306438-slash-2021. For a discussion of the case, supporting the conclusion, see Bogg et al (n 8) 276. And see additional examples from ECtHR caselaw there.

130 *Webb* (n 127) par 125.

131 *Omooba* (n 1).

132 Ibid at pars 48, 154. It should be noted that the main legal claim of the actor was discrimination, and the court discussion was accordingly structured around the relevant sections of the UK Equality Act 2010.

133 Ibid at pars 18-22.

134 See the Israeli Public Service Act (Limitations on Political Activity and Fundraising) 1959, which prohibits some State employees from participating in demonstrations concerning State matters, among other limitations.

135 The Israeli National Labour Court thought otherwise. In *Shaul Cohen v The State of Israel* (judgment of June 26, 2023), the Court

approved a decision to prevent all State lawyers from taking part in demonstrations against the Government’s judicial overhaul plan.