Writtem Evidence by Free Speech Union (HRW0068)

Section 1, Questions Addressed:

Does domestic law strike the right balance between workers' Article 9 right to freedom of religion or belief and the rights of employers? If not, what changes are needed?

Does domestic law strike the right balance between workers' Article 10 right to freedom of expression and the rights of employers? If not, what changes are needed?

1. Introduction

The Free Speech Union (FSU) is a non-partisan, mass membership public interest body that stands up for the speech rights of its 10,000 + members and campaigns for free speech more widely. Our data shows that **44%** of all closed FSU cases (since 2020) were cases involving the infringement of workers' right to freedom of expression ("worker cases"). This figure will likely inflate when we complete the migration of our oldest cases onto our new case management system. Our data shows that **52%** of worker cases relate to the expression of a belief (mainly related to sex/gender or religion) and **39%** relate to the expression of a political opinion.

Our data demonstrates that free speech is being stifled by employers at an increasingly alarming rate. The post-pandemic shift to at least partial work-from-home arrangements for many workers in the UK has contributed to this phenomenon. The personal and professional divide have become blurred, both in the physical as well as the online space. This, coupled with years of heightened political tension and a rising culture of "safetyism"[1] has lead to employers policing the speech of their workers beyond what is reasonable or proportionate. **As the law stands, the right to freedom of expression is, at best, elusive for workers, while the right to freedom of religion or belief is inadequately protected by the Equality Act 2010.**

We believe the best protection for both rights is amendment to the Employment Rights Act 1996 which provides **express protection for workers' right to freedom of expression** which places the burden on employers to prove that it is objectively reasonable to infringe a workers' right to freedom of expression. This would effect the following positive changes:

1. There would be, for the first time, real and effective protection for workers who wish to exercise their freedom of expression. Freedom of expression would no longer be incorporated tangentially as a piece of international law but take centre stage in litigation.
2. Employers would be put on notice that infringing workers' freedom of expression will create real and immediate liability and that they should therefore be carefully and seriously weighed against other potential liabilities.
3. As a result of (1), Article 10 protection would permeate the domestic, private landscape – in this way safeguarding workers' Article 10 rights even if the UK leaves the ECHR.
4. The EqA protected characteristic of "religion or belief" would be reserved for genuine expression that fall within these categories, instead of a catch-all for various expressions better understood as an opinion or the sharing of information.

[1] In their book, *The Coddling of the American Mind* (2018), Lukianoff and Haidt define "safetyism" as a belief that safety (including emotional safety) is a sacred value which trumps any other practical or moral concern.

5. Those who wish to defend the manifestation of their religion or belief could do so without needing to take the risk that a judge determine that their religion or belief is not "worthy of respect in a democratic society".
6. As a result of (2) the amendment would, inevitably, feed into employment policies and ACAS guidance, which would hopefully ensure that expressions are better contextualised (e.g. if they are historic or private) and trivial/spurious complaints rooted out more quickly so that workers are not subjected to distressing internal processes which cause havoc on their mental health and lead to widespread self-censorship.

Addressing this gap in the law is critical for the maintenance of liberal democratic society, and the FSU is pleased that the Joint Committee on Human Rights (JCHR) is examining this issue.

2. The Law

Employment rights are protected by the Employment Rights Act 1996 (ERA). Those in employment are also protected from discrimination and harassment on the basis of a "protected characteristic"[2] by the Equality Act 2010 (EqA). These statutory rights provide robust protection for those in employment because they cannot be contracted out of and have been made easily accessible to the public[3]. This is congruent with the general purpose of employment legislation: protecting vulnerable workers from unfair treatment[4].

While those in employment cannot be discriminated or harassed against on the basis of their protected characteristic of "religion or belief", there is currently **no express protection of a worker's right to freedom of expression**.

Freedom of expression and freedom of thought, conscience and religion are protected by the common law and the European Convention on Human Rights (ECHR), which was incorporated into domestic law by the Human Rights Act 1998 (HRA)[5]. However, the protections provided for in the HRA can only be claimed by those whose rights have been breached by a public authority. Freedom of expression (Article 10, ECHR) and freedom to manifest one's religion (Article 9, ECHR) are qualified rights. In the employment context, the FSU recognises that, along with obvious and lawful restraints to these rights (such as those imposed by the criminal law) employers have a legitimate and lawful interest in ensuring their workers do not infringe the rights of others or behave in such a way as to damage their company's brand or reputation.

This legitimate interest is, however, subject to the bounds of reason and proportionality, and Section 3 of the HRA obliges courts to interpret legislation consistently with ECHR rights

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[2] These are sex, age, ethnic and national origin, disability, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity, and religion and philosophical belief.

[3] The case of *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 abolished any fees associated with making a claim to the Employment Tribunal.

[4] This was recently affirmed in the landmark case of *Uber BV v Aslam* [2021] UKSC 5.

[5] See *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375 where Lord Justice Sedley confirmed that "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ..."; See Articles 9 and 10 here. In *Handyside v UK,* App. no. 5493/72 the Strasbourg Court confirmed that freedom of expression includes speech that "offends, shocks or disturbs" and it was highlighted that it is an "essential foundation of a democratic society". In *Kokkinakis v Greece,* App. no. 14307/88 the Strasbourg Court found that freedom of thought, conscience and religion is not just for those who are religious but is also a "precious asset for atheists, agnostics, sceptics and the unconcerned" and that "the pluralism indissociable from a democratic society which has been dearly won over the centuries, depends on it."

"so far as it is possible to do so". It is here where Article 9 and 10 can be incorporated for *all* those in employment, not only those working for public bodies. For example, while it is legitimate for employers to contractually oblige their workers to comply with certain policies and instructions, this is constricted by the principles established by the Strasbourg Court in *Herbai v Hungary,* App. no. 11608/15[6].

3.1 The Problem – A Cultural Shift

While this is true as a matter of law, the effective protection for freedom of expression in the workplace is best described as **elusive**. Application of Article 10 by Employment Tribunal judges takes political will (expanded on below), and it takes an immense amount of time, energy and resources to litigate employment issues into the higher courts.

Article 10 protection in the UK, as it stands currently, may be sufficient if our cultural context was one in which free expression is appreciated as the cornerstone of progressive liberal democracies:

> "A condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies, and in general those who wish to influence the public debate", indispensable in nurturing "the pluralism, tolerance and broadmindedness without which there is no 'democratic society'"[7].

The UK has a history of championing such a culture of freedom of expression. However, the increasing popularity of divisive ideologies[8] and the heightened political tensions present since 2016[9], coupled with a growing culture of "safetyism" – a term which encapsulates the position that individual "emotional safety" should be valued above any other practical or moral concern, including the maintenance of fundamental rights – has had a profoundly detrimental effect on this culture[10].

A 2022 report on freedom of speech in the UK produced some striking statistics, including that **36% of those surveyed would support a private company firing an employee for being a member of a political party** which expresses offensive views and 42% would support a colleague trying to get a co-worker fired for making sexist jokes[11].

These statistics are alarming. The severity of the sanction condoned (termination) is problematic while terms like "offensive" are, at least in part, inherently subjective. Further, by its very nature if a political party exists then its official stances are within the boundaries

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[6] When determining whether an employee's duty of loyalty might override their right to freedom of expression the Strasbourg Court established that domestic courts should weigh certain factors including 1) the nature of the speech, 2) the motives of the author, 3) the damage caused to the employer and 4) the severity of the sanction. The Court also provided guidance on each criteria, noting, for example, that academic and political speech should be highly protected.

[7] See *Palomo Sanchez and others v Spain*, Apps. Nos. 28955/06, 28957/06, 28959/06 and 28964/06; *Handyside v UK,* App. no. 5493/72; See also legal academic and former President of the American Civil Liberties Union Nadine Strossen's article '*Freedom of Speech and Equality: Do we Have to Choose?*', in which she argues that free speech and the values of equality, diversity and inclusion are "mutually reinforcing".

[8] E.g. The UK Commission on Race and Ethnic Disparities has criticised "strident" anti-racism and denounced "bleak new theories about race that insist on accentuating our differences".

[9] See for e.g. A report by University of Manchester Professors Rob Ford and Maria Sobolewska: 'Brexit and public opinion' by The UK in a Changing Europe, which underlines the divisions in UK society. Professor Anand Menon, director of The UK in a Changing Europe commented that "the referendum highlighted fundamental divisions in British society and superimposed a leave-remain distinction over them - this has the potential to profoundly disrupt our politics in the years to come."

[10] On "safetyism" see '*The Coddling of the American Mind'* (2018) by Lukianoff and Haidt.

[11] See The Policy Institute at King's College London report: 'Freedom of speech in the UK's "culture war"' (May 2022).

of the law. Those exercising their lawful and fundamental democratic rights – joining political parties, engaging in public debate – should not be at risk of losing their livelihood for doing so. Equally, termination for making ill-advised jokes will be disproportionate in most circumstances when mediation, education and warnings are alternative options.

Unfortunately, these statistics do not just reflect hypothetical situations, at the FSU we see exactly such scenarios play out in real life, for example:

Case Example 1, Anonymous (BB):

> BB worked as an Associate Lecturer for a School of Law in a university in the UK. BB had a clean record for the near 10 years that she had worked at this university. In 2022 BB was teaching a criminal law course and working entirely remotely. BB is disabled. BB holds gender critical beliefs and registered her concern regarding the inclusion of gender identity theory into criminal law teaching material on an online forum for law school staff. BB noted that the non-critical acceptance of gender identity theory within criminal justice could have serious repercussions for biological women (e.g. the erasure of "male-pattern crime" and the placing male-bodied offenders in female prisons). Complaints were made that her behaviour breached the university's bullying and harassment code of practice as well as the university's transgender policy, amongst other policies relating to the conduct of staff. After a protracted investigation BB was dismissed for gross misconduct.
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> *Note: This is an ongoing FSU case.*

Case Example 2 (Karen Sunderland):

> Karen was a senior business development manager at an online retail business, she was in the final months of her probation. Karen was asked to attend a HR meeting during which she was asked to explain the content of tweets she had posted three years prior when she was deeply involved with the Conservative Party. Karen was dismissed then and there, without any proper investigation, any chance to prepare a defence to the accusations against her, and without the right to be accompanied to the disciplinary meeting.
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> *Note: With the FSU's support this case was heard by the Employment Tribunal last month. Karen is awaiting judgement.*

Case Example 3 (Sean Corby):

> Sean is a senior conciliator at ACAS, the official body for workplace conduct. Sean made contributions to the intranet equality and diversity group which included sharing content on the problems embedded in the concept of "wokeness" by the Nigerian-British writer Ayisha Akanbi, as well as an article on the impact of anti-racist activism on interracial couples (Sean is in an inter-racial relationship). ACAS employees from a separate office whom Sean had never met made complaints about Sean's posts, alleging his behaviour was intimidating, racist and bullying. Sean was told to remove his posts. Following an investigation the complaints against Sean were not dismissed, but the complainants appealed this decision in January 2022.
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> *Note: This is an ongoing FSU case.*

These cases demonstrate the reality of "safetyism" culture on the ground. Terms like "harassment", "intimidation" and "offence" are losing all objective meaning as they are increasingly utilised to suppress unorthodox, challenging or controversial opinions and information. Many employers stretch the boundaries of the EqA to justify their behaviour

towards the transgressing worker[12]. This is because employers are not aware of the proper boundaries of the law when it comes to free speech protection (as above, Article 10 protection is elusive in the context of workers' rights) and/or they are aware but are more concerned with the immediate and clear liability presented by the EqA and other health and safety duties owed to their workers. Employers are at a particular liability risk in a culture where the bounds of "safety" are being expounded.

What's more, employers are not immune to the cultural context in which they operate and do not want to be seen by the public as insensitive or conservative. Tony Danker, director general of the Confederation of British Industry (CBI), recently urged employers to be "progressive – with a small p" at a Future of Work conference, adding that "younger workers especially" are willing to "challenge senior leaders on net zero credentials, commitment to equality, diversity and inclusion, or public advocacy…It is no longer just they work for us" he said, "we have to work for them".[13]

Stressful (often protracted) disciplinary procedures during which the transgressor is treated like a threat and a pariah will usually wear down the alleged transgressor; whether they are terminated or not, the process is the punishment. At the end of it, only the most robust will be able to even contemplate pursuit of a legal remedy. The chilling element of this process on the worker involved and their colleagues (i.e. self-censorship) cannot be underestimated[14].

3.2 The Problem – Legal Protection and Political Will

If a transgressing worker makes it to court and can call upon protection on the basis of his or her "philosophical belief", this is a wholly inadequate means of protecting freedom of expression more generally (including sharing opinion or information on matters of public interest and debate). This is not only because it sometimes requires an artificial iteration of an opinion into the category of "belief", but, as barrister Francis Hoar has argued, it requires a judge to determine whether that "philosophy" is coherent and even "worthy of respect in a democratic society"[15]. The danger inherent in this system – even for those who genuinely hold philosophical beliefs – is evident, he explains, in the original *Forstater v CGD* judgement (before it was appealed). In this judgement it was found that the claimant's gender critical belief was "not worthy of respect in a democratic society" and that it was "incompatible with the human rights of others" (emphasis our own)[16].

The appellate judge showed the political will to reverse this decision and assert that only views that are "akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms" could be considered "unworthy of respect in a democratic society"[17]. However, within the culture of "safetyism" that we reside in it is a very real possibility that this assertion is overruled in the future, and/or that the political will may present itself to put gender critical beliefs (along with other unpopular or controversial

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[12] For more on this see, for e.g. The Reindorf Review.

[13] https://www.telegraph.co.uk/business/2023/03/01/go-woke-go-broke-warns-cbi/

[14] E.g. a 2019 study from the University and College Union found that "35.5% of British academics self-censor for fear of negative repercussions, such as loss of privileges, demotion, physical harm, etc.";
Similarly, a 2020 Arts Professional survey on Freedom of Expression found that more than 80% of the 500 artists and arts workers surveyed thought that "workers in the arts and cultural sector who share controversial opinions risk being professionally ostracised.";
Generally, a 2021 YouGov survey found that "a majority of Britons (57%) say they have, at least sometimes, found themselves stopping themselves from expressing their political or social views for fear of judgement or negative responses from others."

[15] See his report, 'In Protection of Free Speech' (2021).

[16] See the judgement here.

[17] See the appeal judgement here.

beliefs) within the category of "espousing violence and hatred in the gravest forms" or as "akin to the pursuit of totalitarianism".

The Strasbourg Court may serve as a safety net against such an evolution, but to rely on this would be unwise. This is because the Strasbourg Court is firmly in a subsidiary position to member states like the UK[18]. Further, the possibility of the UK leaving the European Convention on Human Rights will likely remain a live issue for many years to come[19].

3.2 The Problem – The Online Space and Hybrid Working

The risks of employer over-reach in the policing of their workers' speech to a vibrant, multi-cultural democratic society cannot be over-stated. This is even more so considering the post-pandemic shift to at least partial work-from-home arrangements for many workers in the UK[20] .

It is a well-known fact that technology has meant that pub-style conversations (or staff room discussions) are no longer "heard in context, in person, and only by those present" and that social media has created the risk of these being spread to a large audience and surviving for decades[21]. In the cultural context described above this can cause even more fodder for animosity between workers (leading to workers trying to get each other fired) or between a worker and their employer. In addition to this, hybrid working models have further blurred the personal and professional divide, leading to an even stronger impulse of overreach by employers. For example:

Case Example 4 (Simon Isherwood)

> Simon worked as a rail conductor for West Midlands Trains (WMT). Simon had worked there for 11 years and had an unblemished disciplinary record. Simon voluntarily attended a webinar on "white privilege" hosted by his employer, specifically for staff. Simon accidentally failed to disconnect from the webinar after it finished and was heard saying to his wife, in the privacy of his own home, that he wishes he would have asked whether "black privilege" is something enjoyed by indigenous populations in Africa. Simon was suspended from duty that same day and eventually dismissed for "causing offence, bringing the company into disrepute, breaching the WMT code of conduct and breaching the WMT equality, diversity and inclusion policy".
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> *Note: With the FSU's help Simon brought a claim to the Employment Tribunal and won. The judge in the case said, "however contentious or odious some might regard the claimant's comments to be, the expression of his private view of the course to his wife in the confines of his own home was not blameworthy or culpable conduct." [22]*

While Simon's case ended as well as it could considering Simon lost his "job, income, reputation" and his "health [was] absolutely shot to pieces"[23], it is important to – again –

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[18] The principle of subsidiarity reflects an understanding that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The Convention system is therefore subsidiary to the safeguarding of human rights at national level. This principle was reaffirmed in 'Protocol 15' which came into force in August 2021.

[19] https://www.chathamhouse.org/2023/03/uk-must-not-sleepwalk-leaving-echr

[20] Data from the UK Household Longitudinal Study in September 2021 reported that 1 in 2 of the UK population were still working from home to some extent.

[21] https://unherd.com/2023/01/the-trouble-with-online-safetyism/

[22] See the judgement here.

[23] https://www.linkedin.com/pulse/fsu-member-simon-isherwood-emerges-victorious-from-employment-/

emphasise that Article 10 could only be brought in tangentially when the judge considered the reasonableness of the employers' actions.

4. Proposed Change

For all the above reasons the FSU supports the suggested statutory protection for employees' freedom of expression as proposed by barrister Francis Hoar at chapter VII of his report[24], we would suggest that it apply not only to employees but to workers as well.

Mr Hoar states that employment law, specifically the ERA "should be amended to include an **express protection for an employee's speech outside the course of employment**." This "express protection" amendment would create an assumption in favour of the right to freedom of expression, making exception to this only when an employer can prove that it is objectively reasonable to dismiss or discipline an employee for exercising their right to freedom of expression. The amendment would state that "an employer may only discipline or dismiss an employee [for his or her expression] if it can show that it was reasonably necessary to preserve its reputation or the rights and relations between its employees; or because it was reasonable to restrict the speech of an employee because of his or her role."

We further propose a time limit on employers' power to cite past speech as a ground for sanctioning or dismissing a worker. Therefore any extramural speech by a worker that is older than 12 months could not give rise any disciplinary procedure. This is especially important as workers such as Karen Sunderland find they are unable to find new employment simply because of comments made on social media long ago.

These express protections would have positive ramifications throughout the workforce.

1. There would be, for the first time, real and effective protection for workers who wish to exercise their freedom of expression. Freedom of expression would no longer be incorporated tangentially as a piece of international law but take centre stage in litigation.
2. Employers would be put on notice that infringing workers' freedom of expression will create real and immediate liability and that they should therefore be carefully and seriously weighed against other potential liabilities.
3. As a result of (1), Article 10 protection would permeate the domestic, private landscape – in this way safeguarding workers' Article 10 rights even if the UK leaves the ECHR.
4. The EqA protected characteristic of "religion or belief" would be reserved for genuine expression that fall within these categories, instead of a catch-all for various expressions better understood as an opinion or the sharing of information. Retaining the integrity of the law and legal tests is vital for the purpose of legitimacy in the eyes of the public.
5. Those who wish to defend the manifestation of their religion or belief could do so without needing to take the risk that a judge determine that their religion or belief is not "worthy of respect in a democratic society".
6. As a result of (2) the amendments would, inevitably, feed into employment policies and ACAS guidance, which would hopefully ensure that expressions are better contextualised (e.g. if they are historic or private) and trivial/spurious complaints rooted out more quickly so that workers are not subjected to distressing internal

[24] 'In Protection of Free Speech' (2021).

processes which cause havoc on their mental health and lead to widespread self-censorship.

Section 2, Question Addressed:

Does domestic law provide adequate protection for the rights of workers to be free from harassment at work by third parties on account of their religion or beliefs?

The FSU's case files reflect the fact that third party harassment of workers on account of religion or belief is miniscule. We further believe that providing workers protection from harassment on account of their religion or beliefs from third parties by imposing liability on employers would have grave implications for freedom of speech, as well as impose huge compliance costs on Britain's one-and-a-half million businesses.

For more information on this please see our briefing note on the Worker Protection (Amendment of the Equality Act 2010) Bill here.

02/05/2023