

Freedom and Dignity in the UK workplace

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Abstract

Freedom and dignity, two key aims of the Italian Workers' Statute of 1970, stand out as two concepts of debate in the UK workplace. Dignity has not been a frequently used term in UK employment law. Freedom has been a challenging concept in this jurisdiction. Freedom of association has been notably curbed in the UK since the 1980s. Even in the 21st century, the means through which trade unions can execute their representative functions have been limited by legislation. Freedom of expression has also been restricted, particularly through the remarkable force of contract clauses and policies that grant employers power to assess the online remarks of their workers. This situation has been lightly treated to date. Finally, there seem to be looming issues of access to justice for workers when one considers government attempts to (arguably) disincentivise recourse to employment tribunals.

Keywords: Employment rights; United Kingdom; Freedom of association; Freedom of expression; Access to justice

1. Introduction.

This collection commemorates the 50th anniversary of the Italian Workers' Statute which aimed to protect, among other points, workers' freedom and dignity. While the present contribution does not compare UK and Italian law, the prescience of the Statute's drafters is notable when considering UK labour law in the 21st century.¹ This report speaks to the areas commonly identified as distinctive of this piece of legislation: the legal protection of freedom and dignity of employees within the workplace, by limiting the employer's powers (direction, supervision, discipline) and by granting freedom of association and freedom of trade union

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¹ The present contribution does not consider developments in Italy after the passage of the Italian Workers' Statute.

activity at the workplace. Instead of a comprehensive assessment, workers' freedoms in the areas of association and expression are used as illustrations.

Balking at efforts to improve employment protections has been a consistent tactic dating back to Prime Minister Margaret Thatcher (who was in office 1979 to 1990). The UK resisted and eventually rejected ILO Convention 158 and Recommendation 166 (just cause provisions regarding employer-initiated termination of employment). It also unsuccessfully challenged the Working Time Directive.² Since the 1980s, UK governments have largely taken steps that remove limitations on employers' abilities to manage their workplaces as they see fit.

With this in mind, dignity is not a frequently used term in UK employment law; though it is mentioned in academic discourse. Cases centring on harassment or bullying in the workplace have used the term dignity.³ Instead, the UK approach has been to legislate 'a floor of rights for someone who was perceived as essentially a subordinate', omitting engagement with the individual's dignity because that was outside the legislature's remit.⁴ The Declaration of Philadelphia (1944), that labour is not a commodity⁵, intended to encapsulate the dignity aspect of the people who perform work;⁶ 'the objective of transaction in an employment relationship is not a commodity but the human being as such'.⁷ The infrequent discussion of dignity in work in the UK (as compared to Italy, for example) is instructive. In the early 21st century, labour in the UK seems to be viewed singularly as a commodity, compared to its stated place⁸ in 1919 in Article 427 of the Treaty of Versailles when 'labour should not be regarded merely as a commodity or article of commerce'.

The state of workplace freedoms such as association and expression have been weakened in the decades leading up to the 21st century, showing no indication of reversal as we move further into it. The 1980s legislative agenda effectively eroded the abilities of trade unions to represent their members, thereby diminishing the force of any association rights. It is argued here that the erosion of freedom of expression (using online platforms) has been an underappreciated subject. Largely this area is driven by case law which interprets employment contracts. While there has been no direct attempt to silence workers, there has certainly been a chilling effect when one considers the powers granted to employers with regards to

² Directive no. 2003/88/EC. See Court of Justice, C-84/94 *UK v Council* [1996] ECR I-5755 when the UK initiated proceedings to have the Directive annulled, arguing that working time was not a health and safety issue.

³ 'the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created': *Richmond Pharmacology Ltd v Dhalival* [2009] IRLR 336 (EAT), [15].

⁴ Lord Wedderburn of Charlton, *The Italian Workers' Statute – Some British Reflections*, in *Industrial Law Journal*, 19, 1990, 154, 158.

⁵ The Declaration of Philadelphia (1944) forms an annex to the International Labour Organization's Constitution.

⁶ Frank Hendrickx argued that labour is not merely a commodity (recognising elements of commodification as well as preserving the dignity of the human who performs the work): Hendrickx F., *Foundations and Functions of Contemporary Labour Law*, in *European Labour Law Journal*, 3, 2012, 108.

⁷ Weiss M., *Re-inventing labour law?*, in Davidov G., Langille B. (eds.), *The Idea of Labour Law*, Oxford: Oxford University Press, Oxford, 2011, 44.

⁸ The British delegation was responsible for this nuance: Shotwell J. T. (ed.), *The Origins of the International Labor Organisation*, Columbia University Press, New York, Vol. I., 1934, 78.

employees' online speech. Overall, it is contended that these two examples suggest a deepening precarity⁹ for UK workers as these freedoms are presently in a weakened state.

2. The decline in the freedom of association and the work of trade unions.

The exercise of reflecting upon the Italian Workers' Statute 1970 from a British perspective was undertaken by Lord Wedderburn in 1990,¹⁰ in celebration of the Statute's 20th anniversary. At that time, he considered it 'useful to cast an eye comparatively on the Italian Statuto dei lavoratori . . . , first for the rich material it contains and, secondly, as a way of reassessing British experience in the second half of the 1970s and, through that, prospects for the 1990s'.¹¹ Lord Wedderburn elaborated upon the decay in labour law through successive pieces of legislation through the 1980s. His reflections from Great Britain remain valuable because they reveal how matters have not improved since that time.

In the UK, there has been a history of encumbrances to the work of trade unions, largely around industrial action. The British system has long operated on the idea of 'immunities'. This means that Parliament grants, through legislation, protection for union activities which avoid criminal and/or civil liability for such actions. With this formulation, Parliament (particularly the governing party) carries much power with regards to how it can affect industrial action. It can narrow the parameters for immunities so that certain preconditions are met.¹² These are not 'rights' in the sense that an Italian audience would be familiar.

2.1. The 1980s: a meticulous undercutting of the freedom of association.

Upon Prime Minister Thatcher taking office, inflation and unemployment sat at high levels (15% and 5.3% (for the period May to June 1979)¹³, respectively). Improving the economy was the response. The method selected, monetarism, required abandoning collective laissez-faire¹⁴ because it was viewed as a root cause of a deficient economy.¹⁵ Since

⁹This is an argument put forward in Mangan D., *Deepening Precarity in the United Kingdom*, in Kenner J., Florczak I., Otto M. (eds), *Precarious Work. The Challenge for Labour Law in Europe*, Edward Elgar, Cheltenham, 2019.

¹⁰ See nt. (4), 154.

¹¹ *Ibid.*

¹² For a history of procedural reforms to industrial disputes, see Elgar J., Simpson B., *The Impact of the Law on Industrial Disputes Revisited*, in *Industrial Law Journal*, 46, 2017, 6.

¹³ Office of National Statistics, Unemployment Rate (aged 16 and over, seasonally adjusted) <https://www.ons.gov.uk/employmentandlabourmarket/peoplenotinwork/unemployment/timeseries/mgsx/lms>. During her time in office, unemployment reached a high of 11.9% in 1984.

¹⁴ The model championed by Otto Kahn-Freund. See for example, Kahn-Freund O., *Labour Law*, in Ginsberg M. (ed.), *Law and Opinion in England in the 20th Century*, Stevens, London, 1959, 224. This view has not escaped challenge: Clegg H.A., *Otto Kahn-Freund and British Industrial Relations*, in Wedderburn K.W., Lewis R., Clark J. (eds.), *Labour Law and Industrial Relations: Building on Kahn-Freund*, Clarendon Press, Oxford, 1983, 14-28.

¹⁵ See Hayek F.A., *The Constitution of Liberty*, University of Chicago Press Chicago, 2011, Chapter 18. Hayek was a guiding voice for the Conservative Government of the 1980s. In addition to Hayek, see also Department of Employment, *Employment: The Challenge for the Nation*, HMSO, London, 1985 which, among other points,

then, regulation in labour law has focused on enabling commerce by minimising or removing (perceived) restrictions on the competitiveness of businesses.¹⁶ Though arguably appropriate to view them as anti-inflation strategies at that time,¹⁷ ‘the notion of a market economy as the ideal for industrial society’¹⁸ pushed these changes to employment regulation beyond anti-inflation measures. The UK legislative agenda from the 1980s illustrated not only a notable shift away from collective labour law, but also the embedding of employment regulation within macro-economic policies.

Adopting a view of the coercive force of trade unions regarding their membership, the Government passed the Employment Act of 1980 which withdrew protections for trade union members participating in secondary picketing. The threshold for a vote in favour of establishing new closed union shops was increased to 80% of those eligible to vote or 85% of those voting. The definition of a trade dispute had been narrowed, thereby expanding the exposure of strikers (for example) to legal sanctions and making strike action a more perilous one for workers. The 1980 Act also withdrew (s.19) the recognition procedures for trade unions which had been put in place by the Labour Government in the form of the Employment Protection Act 1975¹⁹. A trade union that had earned a high level of worker support, but where the employer refused to recognise it, was left without legal remedies. The Employment Act 1982²⁰ further weakened the immunities for trade unions regarding industrial action and set no limit on damages against a union. This meant that employers could sue trade unions for damages stemming from industrial action falling outside of statutory immunity. In the Employment Act 1990 (s.6), the scope of application of damages was widened. There were those who pressed for even more definitive changes such as the removal of statutory immunities²¹ for trade union actions from tort liability.²² The push for the latter outcome had been based upon the ‘simplistic’²³ premise that trade unions had cost one million jobs.²⁴ As it now stands, trade union members have protection (immunity) from tort action if they fit within a detailed set of parameters beginning with Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.219 and s.238A. This is only determined upon compliance with a number of other provisions including: a proper voting

sought to instil ‘freedom’ ‘so that employers are not so burdened by regulation that they are reluctant to offer more jobs’.

¹⁶ Analyses that centred on market competitiveness and monetarist economics have put in issue not only such institutions as employment protection legislation but, much more profoundly, the collective base of labour relations’. Wedderburn K. W, *The Worker and the Law*, Penguin, Harmondsworth, 1965, 838.

¹⁷ As described in Collins H., *The Productive Disintegration of Labour Law*, in *Industrial Law Journal*, 26, 1997, 295, 303.

¹⁸ Davies P., Freedland M., *Labour Legislation and Public Policy*, Oxford University Press, Oxford, 1993, 526.

¹⁹ c.71, 1975.

²⁰ c.46. See ss.15-16.

²¹ In the UK, the law does not provide a positive right to strike. Rather, ‘immunities’ are provided, insulating those who undertake valid strike action from civil or criminal liability. Strike action can constitute (amongst other things) an inducement to breach a contract creating a situation of civil liability in tort: *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426 (HL). For further discussion see, Novitz T., Lorber P., *Industrial Conflict in the UK*, Ch. 5, Intersentia, Cambridge, 2012.

²² Identified in Ewing K.D., *Economics and Labour Law in Britain: Thatcher’s Radical Experiment*, in *Alberta Law Review*, 28, 1990, 632, 637.

²³ See nt. (16), 841.

²⁴ Minford P., *Trade Unions Destroy a Million Jobs*, in *Journal of the Institute of Economic Affairs*, 2, 1982, 73.

procedure (including ballots and timing of ballots sent to voters) is followed pursuant to ss. 226-230, 234; and that the results are properly provided to voters (s.231) and to the employer (s.231A).²⁵ If activity is undertaken that is itemised in ss.222-225 or ss.237, then it falls outside of the protected area.

While employment regulation had been reconfigured to support macro-economic aims, it may be surprising that the legislative changes during the 1980s did not themselves precipitate a marked increase, such as in production.²⁶ This outcome has been familiar in labour law where belief has often trumped evidence.²⁷ Although the fervent belief that trade unions had held the country back was challenged, the conviction remained.

The influence of the reforms of the Margaret Thatcher government remains well into the 21st century.

2.2. A new Labour Government, but not a return to the 1970s.

'New' Labour embodied a sentiment of hope when it was elected in 1997. And yet, the first Labour Government since the 1970s has been critically characterised as predominantly staying the course set by Margaret Thatcher.²⁸ This assessment remains sound.²⁹ With regards to trade unions in general, there was a different attitude which diverged from the Labour Party of years past.³⁰ Prime Minister Tony Blair's Labour Government would engage in dialogue with unions but he would direct the conversation. With respect to public sector unions, Blair's attitude appeared to be similar to that of Thatcher: 'he believed [that they] were stubbornly resisting his plans to privatise central and local government activities because they wanted to defend public-sector inefficiencies and their restrictive labour

²⁵ See for example, *British Airways v Unite* [2010] EWCA Civ 669

²⁶ See nt. (22), 645-647.

²⁷ For an elaboration of this critique, see Slinn S., *The Limitations of Pieces of Paper: A Role for Social Science in Labour Law*, in *Canadian Labour and Employment Law Journal*, 12, 2006, 291.

²⁸ One critic characterised 'New' Labour's 'Third Way' as neoliberalism 'by stealth': Fredman S., *The Ideology of New Labour Law*, in Barnard C., Deakin S., Morris G. S. (eds.), *The Future of Labour Law: Liber Amoricum Bob Hepple Q.C.*, Hart, Oxford, 2004, 9, 10. The period has also been called a 're-convergence of objectives': Davies P., Freedland M., *Towards a Flexible Labour Market*, Oxford University Press, Oxford, 2007, 42. The authors (page 43) contend: 'Our analysis will suggest that there was at least a partial sense in which a new way was found, though perhaps more at the level of methodology than at the underlying objectives.'

²⁹ Drawing from Collins H., *Regulating the Employment Relation for Competitiveness*, in *Industrial Law Journal*, 30, 2001, 17 in which he discusses 'flexible employment', Davies & Freedland argue that the over-arching aim of Labour during this time had been establishing 'managerial flexibility': 'the capacity of, and the propensity for, employing enterprises to engage in job re-structuring and institutional re-structuring': see nt. (28).

³⁰ This Labour Government was significantly influenced by the 'third way' which had been set out by Giddens A., *The Third Way: The Renewal of Social Democracy*, Polity Press, Cambridge, 1998. He later explained that 'Third Way politics – modernizing social democracy – can develop a political programme that is integrated and robust. Far from displacing social justice and solidarity, third way politics, I shall argue, represents the only effective means of pursuing these ideals today. Far from being unable to deal with questions of inequality and corporate power, it is the only approach able to do so in the context of the contemporary world': Giddens A., *The Third Way and its Critics*, Polity Press, Cambridge, 2000, 29.

practices.³¹ The Prime Minister's 'Foreword' in *Fairness at Work*³² outlined his view of industrial relations:

This White Paper is part of the Government's programme to replace the notion of conflict between employers and employees with the promotion of partnership.

The White Paper steers a way between the absence of minimum standards of protection at the workplace, and a return to the laws of the past. It is based on the rights of the individual, whether exercised on their own or with others, as a matter of their choice. It matches rights and responsibilities. It seeks to draw a line under the issue of industrial relations law.

Although workplace rights persist as an issue in labour market regulation, the Labour Government of Tony Blair entrenched the Thatcher approach to employment laws. Employment regulation remains adjunct to economic growth. With employment protections being subject to the perception of their potential negative economic impact, the dominant perspective seems to be that of transaction costs which are measured by their resulting efficiencies. Described as 'unashamedly managerialist' as applied to the labour market, transaction cost efficiency considers the 'minimising [of] the real resource costs of writing, monitoring and enforcing employment contracts.'³³

2.3. Coda: a return to the 1980s.

A significant achievement of the Labour Government at the turn of the 21st century was its passage of the Human Rights Act 1998 which contained explicit protection for freedom of association, 'including the right to form and to join trade unions for the protection of ... interests'.³⁴ This was a landmark piece of legislation. However, its protections only extend so far as 'prescribed by law and are necessary in a democratic society'.³⁵ Put another way, the protection extend to what the government of the day sets out.

The Trade Union Act 2016 offers a recent example. It required trade unions to meet a 50% threshold of members voting in favour of industrial action in order for the action to be legal.³⁶ A study of industrial action between 2002 and 2014 found 85 of the 158 strike ballots taken during the period would have met the 50% minimum.³⁷ One may query the 50% threshold. To suggest this is a 'democratizing' provision³⁸ strikes as disingenuous. If a similar

³¹ See nt. (28), 193.

³² President of the Board of Trade, *Fairness at Work* (Cm.3968) (London: The Stationary Office, 1998). Davies & Freedland called it a 'tour de force of draftsmanship' insofar as it grounded a reason for Labour's forthcoming legislative intervention: see nt. (28).

³³ Nolan P., *Understanding the employment relationship: markets, hierarchies and power*, in *Industrial Relations Journal*, 43, 2012, 359, 363.

³⁴ Human Rights Act 1998, c.42, Art.11(1).

³⁵ *Ibid* Art.11(2).

³⁶ Trade Union Act 2016, s2.

³⁷ Darlington R., Dobson J., *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions*, Institute of Employment Rights, 2015.

³⁸ Department of Business, Innovation and Skills (BIS), *Consultation on ballot thresholds in important public services* (OGL 2015), [3].

rule was applied to government elections, the 2012 London Mayoral election would have fallen short (38.1%) as would the 2015 UK General Election (37% of voters, with less than 25% supporting the new government).³⁹

The 40% turnout threshold for ‘important public services’⁴⁰ added to the hurdles for industrial action in high union density areas. The meaning of the 40% threshold is that of all members eligible to vote at least 40% of them must have voted in favour of industrial action. The Trade Union Act 2016 provided employers with ‘fertile ground’⁴¹ when seeking injunctions to stop industrial action. One may be mistaken for assuming that the Trade Union Act 2016 was somehow a vestige of the 1980s. It was not. Its tenor, though, suggested a similarly level of aggressive action towards trade unions; without acknowledging that the 1980s had muted trade unions’ impact.

3. Tweeting to unemployment.

The discussion of freedom of association and trade unions underscored the continued emphasis on facilitating economic growth. To meet this aim, it is said, there must be flexibility for undertakings. In the case of employment, this means the unilateral decision-making authority for employers to dispose of labour as they determine best. This ethos is also evident when looking at the speech opportunities of workers. With advances in information technology platforms, individuals have unprecedented means of communication. In the employment context, however, these technologies are perilous as they present occasions through which employment may be terminated. When considering the extent of the employer’s prerogative, it may be surprising to some to see that there is remarkable authority for employers; a power granted by employers through contract drafting.

There is a dearth of reported decisions on the topic of social media and employment in the UK⁴² that move beyond the employment tribunal stage. UK employment law generally accepts potential harm to business reputation as grounds justifying discipline of workers for work-related social media commentary. Enhancing protection for an employer, a well-crafted policy or contract clause about social media usage can permit an employer to take a wide variety of actions.

One of the more widely noted rulings has been *Smith v Trafford Housing Trust*.⁴³ The Trust demoted Smith because his posts expressing his opposition to same sex civil marriage on his Facebook page contravened its code of conduct and equal opportunities policy. Although the defendant had breached the employment contract by demoting Smith when it had,⁴⁴

³⁹ Statistics taken from Darlington, R., Dobson J., nt. (37), 11.

⁴⁰ Trade Union Act 2016, s3.

⁴¹ Elgar J., Simpson B., nt. (12), 16.

⁴² This section draws from Mangan D., *Online Speech and the Workplace: Public Right, Private Regulation*, in *Comparative Labor Law & Policy Journal*, 39, 2018, 357.

⁴³ [2012] EWHC 3221 (Ch.).

⁴⁴ Demotion was in lieu of dismissal for gross misconduct as a result of his many years of ‘loyal service’. The result was a demotion to a non-managerial position with a 40% reduction in pay phased in over five months.

Smith was only awarded salary for the twelve weeks before the assumption of his new demoted role. Smith's Convention claims (Articles 9 and 10) were dismissed because his employer was a private entity. While not all share Smith's beliefs, he has a right to state these views (so long as they do not incite violence against the LGBTQ Community) without necessarily suffering workplace discipline. Disciplining Smith seemed more attributable to Trafford's desire to protect its public identity. The Trust's Code of Conduct stated: 'given the fact that much of our work is dependent on a positive public profile, we further expect employees to promote a positive image of the Trust and of Trafford.'⁴⁵ *Smith* presented a repurposed freedom to say what we like as long as it does not generate harm, which includes potential detriment to a business reputation as defined by employers.

The scope of workplace policies has been extensive regarding the medium. Social media policies will often include a broad provision defining unacceptable use of social media that causes offence or brings the company into disrepute. In *British Waterways Board (t/a Scottish Canals) v Smith*,⁴⁶ the Employment Appeals Tribunal (EAT) determined the dismissal was within the reasonable range of responses by the employer. British Waterways applied the following policy: 'The following activities may expose BW and its employees, agents and contractors to unwarranted risks and are therefore disallowed: Any action on the internet which might embarrass or discredit BW (including defamation of third parties for example, by posting comments on bulletin boards or chat rooms).....' This case centred on trust; suggesting that if the employer contends it has lost trust in the worker, dismissal may be found to be a reasonable response.

Based on the above decisions, business reputation is likely to be interpreted in a manner that is so robust as to quell a remarkable range of comments which may or may not pertain to the workplace. Important considerations include: comments which were posted over a period of time; the existence of (and weight placed on) a policy related to the company's image; the impugned comments being read by others; how the worker uses the social media platform(s) (though *Smith* suggests that this may be a contested point). Violation of a social media policy usually leads to dismissal.⁴⁷ While there is scope to call that standard into question,⁴⁸ generally courts will require only the potential for harm to business reputation. Another important consideration, motive for a worker's remarks on a social media platform stands out as the basis for dismissal in *Crisp v Apple Retail (UK) Ltd.*⁴⁹ Distinguishing his remarks from those of a whistleblower,⁵⁰ Crisp seemed motivated by embarrassing his

⁴⁵ See nt. (43), *Smith* [21], [22].

⁴⁶ Appeal No. UKEATS/0004/15/SM.

⁴⁷ There is a rare opportunity for a worker to mitigate any damage and for this to render the dismissal unfair.

⁴⁸ See the discussion in *Whitham v Club 24 Ltd t/a Ventura* ET/1810462/10 and *Irwin v Charles Hurst Ltd.* [2012] NIIT 2254_12IT.

⁴⁹ ET/1500258/11. Motive is a consideration at the European Court of Human Rights in adjudicating freedom of expression issues in the workplace. See for example, *Heinisch v Germany* [2011] IRLR 923, [69]; *Guja v Moldova* (2011) 53 EHRR 16, [77].

⁵⁰ Whereas in the case of a whistleblower, the worker would have first communicated concerns to her employer as in *Heinisch* [69]. In that decision, the European Court of Human Rights looked to establish 'the individual acted in good faith and in the belief that the information was true, that it was in the public interest to disclose it, and that no other, more discreet means of remedying the wrongdoing was available to him or her'.

employer. The duty of loyalty in employment, then, is part of the measurement in weighing the worker's right to freedom of expression against the interests of the employer.⁵¹

Speech (like industrial action in the previous example) is framed as a disruption to business. But this is speech in a particular setting because generally the UK has sought to protect free speech. The different treatment in the employment setting underscores the common though no less important power imbalance which can hinder the occurrence of a free and open exchange.⁵² A strict view of business reputation is not the only interpretation available. Furthermore, the punishment of dismissal is an extreme response⁵³ to such a nuanced challenge. These decisions contrast poorly with the movement in UK defamation law to expand protection of free speech.⁵⁴

4. Procedural Challenges.

The above discussion has focused on freedoms of expression and association. In this final section, some procedural aspects in bringing and hearing employment claims (in order to give force to any workplace protections) are discussed. This may seem to be a technical area to explore. No doubt it is. And yet, the procedural rules for bringing and hearing claims by workers are often an underappreciated topic when considering the limitations (or otherwise) on employers actions.

While there are a number of ways through which workers' employment may be terminated, the most contentious is the disputed basis upon which an employer has dismissed a worker. This situation arises when a worker has been dismissed with or without notice; where notice is the period of time given to a worker prior to the official termination date. Notice varies depending upon the amount of time a worker is employed – from one to twelve weeks (the range spanning the period from one month to twelve years of employment).⁵⁵ Notice means that the employee may be obliged to work the entirety of that notice period or that s/he may be paid the time 'in lieu of notice'⁵⁶ (instead of working the period of their notice, the employer pays them for the equivalent time). Notice of termination is not needed where the employee's conduct falls under 'gross misconduct' which may include theft of employer property.⁵⁷ After two years of consecutive employment, employees may claim

⁵¹ This is a consideration found in the European Court of Human Rights decisions on the topic. *See* Heinisch, nt. (49), 64; *Marchenko v Ukraine* (2010) 51 EHRR 36, [45].

⁵² 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description': *Autoclenz v Belcher* [2011] UKSC 41, [35]. *See also* R (*on the application of UNISON*) v *Lord Chancellor* [2017] UKSC 21, [21], [24].

⁵³ As identified by the ECtHR in *Fuentes Bobo v Spain*, App. No. 39293/98, 29 February 2000.

⁵⁴ For an overview *see*, Mullis A., Scott A., *Tilting at Windmills: the Defamation Act 2013*, in *Modern Law Review*, 77, 2014, 87-109.

⁵⁵ This is outlined in the Employment Rights Act 1996, s.86(1). Employees are obliged to give no less than one week's notice: s.86(2).

⁵⁶ Employment Rights Act 1996, s.86(3) allows for this possibility.

⁵⁷ This framework is consistent with Article 11 of the ILO's Termination of Employment Convention 1982 (c.158): 'A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or

unfair dismissal protection as well as redundancy payments (the latter only if the individual is dismissed for economic reasons). In total, this means that an employee may be dismissed by an employer. There is no protection keeping an employee in work. There are two procedural dimensions (often arising with dismissal) that affect the potential for employees' opportunity to seek legal redress.

The process of dismissal must be fair,⁵⁸ but how this is assessed may be different from other jurisdictions. Employment contracts often outline the process for grievances and dismissals, including the details of any internal investigation route.⁵⁹ The UK Supreme Court has found that there is 'an implied contractual right to a fair process'.⁶⁰ While not binding,⁶¹ the Advisory, Conciliation and Arbitration Service (Acas) devised a code of practice on disciplinary and grievance procedures which outlined elements of a fair process.⁶² In order to claim unfair dismissal, an employee had to qualify through a period of consecutive service.⁶³ This had been one year: from the date of hire to the date of termination.⁶⁴ In April 2012, an increase from one to two years of consecutive employment with the same employer came into effect.⁶⁵ The argument for extension of the qualification period was the difficulty employers had in making such an important determination within one year of employing an individual.⁶⁶ Ewing and Hendy launched a fervent critique of the extended period.⁶⁷ The

compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.'

⁵⁸ 'An employee has the right not to be unfairly dismissed by his employer': Employment Rights Act 1996, s.94. The right was first put forward in the Industrial Relations Act 1971, ss.22-23 and had followed a recommendation in Donovan T., *Report of Royal Commission on Trade Unions and Employers' Associations* (Cmd 3623) (HMSO, 1968). Commenting on the 1971 Act, Lady Hale wrote in [2011] UKSC 58, [111]: 'There is no reason at all to suppose that, in enacting the Industrial Relations Act 1971, Parliament intended to cut down upon or reduce the remedies available to employees whose employers acted in breach of their contracts of employment. Quite the reverse. Parliament intended to create a new statutory remedy for unfair dismissal which would supplement whatever rights the employee already had under his contract of employment. Parliament did that because most employees had very few rights under their contracts of employment.'

⁵⁹ An employer's failure to adhere to this process would be relevant to a finding of unfair dismissal: *West Midlands Co-operative Society v Tipton* [1986] AC 536. A failure to follow this process may allow the employee to be granted an injunction: *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.

⁶⁰ *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [37].

⁶¹ Trade Union and Labour Relations (Consolidation) Act 1992, s.207(1) states: 'A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.' However, an employment tribunal may increase or decrease the amount of an award by no more than 25% where the Code applies, the employer failed to adhere to it, and the 'failure was unreasonable': s.207A(2), (3). The power to decrease an award reflects where an employee failed to comply with the Code.

⁶² Acas, Code of Practice 1: Code of practice on disciplinary and grievance procedures (published 11 March 2015), [4]. The Code can be found at: <https://www.acas.org.uk/acas-code-of-practice-for-disciplinary-and-grievance-procedures/html>

⁶³ In UK terms, only employees have this right, not workers. This is a reference to the distinction set out in s.230(3) of the Employment Rights Act 1996 which draws a distinction between two kinds of self-employed individuals. The relation between a 'worker' under English law and an employee in EU labour law was touched upon in Court of Justice, 22 April 2020, Case C-692/19, *B v Yodel Delivery Network Ltd.*, Case C-692/19.

⁶⁴ Employment Rights Act 1996, s.97 discusses the date of termination. Section 212 outlines how to calculate the period of employment, particularly where there are breaks.

⁶⁵ Section 108, Employment Rights Act 1996, as amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

⁶⁶ Beecroft A., *Report on Employment Law*, 24 October 2011, 4.

⁶⁷ Ewing K.D., Hendy QC J., *Unfair Dismissal Law Changes – Unfair?*, in *Industrial law Journal*, 41, 2012, 115.

authors challenged the premise of the reforms pointing to the absence of support for the assertion: ‘In the light of the government’s statistics, it is therefore hard to understand Mr Osborne’s comment that introducing tribunal fees would end “the one way bet against small businesses”’.⁶⁸

Second, the scope for employment tribunals to assess an employer’s decision to dismiss an employee has been narrow. This assessment has been called the reasonable responses test.⁶⁹ Pursuant to statute, the employer must provide the reasons for dismissal.⁷⁰ The tribunal may only evaluate whether the employer genuinely believed the employee’s alleged conduct constituted misconduct and this entails consideration of the reasonableness of the employer’s investigation as well as the grounds for the employer’s belief.⁷¹ The tribunal may only consider whether the employer acted as a reasonable employer would have.⁷² This latter point has been the subject of some concern, specifically over the ‘substitution mindset’: that an employment tribunal becomes sympathetic to the claimant’s cause and is ‘carried ... away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal’.⁷³ In order to satisfy the test, a tribunal is only permitted to consider whether the employer’s response fell outside what a reasonable employer would have done. This benchmark insulates employers from penetrating analysis by employment tribunals.

4.1. Access to Courts.

In 2013, the UK Government introduced fees for bringing employment claims.⁷⁴ Considering that there are fees for launching litigation in courts, the idea of fees for in order to bring an employment tribunal claim is not novel. The UK Supreme Court, in *R (on the application of UNISON) v Lord Chancellor*,⁷⁵ found the 2013 tribunal fees scheme (the structure of fees for launching employment claims) to be unlawful. The Supreme Court did not write of fees themselves being unlawful:

In the present case, it is clear that the fees were not set at the optimal price: the price elasticity of demand was greatly underestimated. It has not been shown that less onerous fees, or a more generous

⁶⁸ *Ibid*, 120.

⁶⁹ Employment Rights Act 1996, s.98.

⁷⁰ Employment Rights Act 1996, s.98(1)(b)-s.98(3).

⁷¹ *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT) (approved by the Court of Appeal in *Weddel & Co Ltd v Tepper* [1980] ICR 286). See also *HSBC Bank plc v Madden* [2000] EWCA Civ 3030. *Sainsbury’s Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588 held that the reasonableness of the investigation will be assessed based on the reasonable responses test. Section 98(4) of the Employment Rights Act 1996 also requires fairness in procedures which involves looking at the Acas Code on Disciplinary Procedures and the general requirements of a fair procedure.

⁷² *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 (EAT).

⁷³ *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [43]. See also *HSBC Bank plc v Madden* [2000] EWCA Civ 3030, [51]-[53].

⁷⁴ This section draws from Mangan D., ‘nt. (9).

⁷⁵ [2017] UKSC 51.

system of remission, would have been any less effective in meeting the objective of transferring the cost burden to users.⁷⁶

There remains scope for fees and the question of the threshold at which the level of fee constitutes ‘a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question’.⁷⁷

Unison has given rise to discussion of ‘common law fundamental rights’.⁷⁸ It has been praised for providing superior protection than EU law because ‘the rule of law recognised in *Unison* combined with the common law right of access to the courts ... provide a clearer and higher level protection’.⁷⁹ For good reason, *Unison* recognised, amongst other points, the importance of court decisions giving effect to rights. These decisions have a social utility insofar as they recognise the enforcement of rights.⁸⁰

Nevertheless, *Unison* does not preclude the charging of fees to bring employment claims. While it may be unfavourable, the impugned fee scheme in *Unison* was a good target because there was no rationale for the rate of the fees, which were quite high. The extreme nature of the fees were reminiscent of another notable recent appellate level decision in labour law, *Saskatchewan Federation of Labour v Saskatchewan*.⁸¹ *Saskatchewan* rewrote Canadian labour law textbooks by recognising that s.2(d) of the Canadian *Charter of Rights and Freedoms* protected a right to strike.⁸² And yet, the challenged legislation, the *Public Service Essential Services Act*,⁸³ granted the drafting government the unilateral authority to declare any public sector workers as ‘essential service employees’; prohibiting them from participating in strike action. The identification of essential service employees was even beyond adjudication by a labour relations board. Given the scope of the legislation, surprise would have been slight that such a one-sided statute was found to have violated s.2(d).

Unison does not preclude the UK government from returning to fees for raising an employment tribunal claim (or a combination of fees and remission schemes).⁸⁴ There may be a building argument for reintroducing fees⁸⁵ but in a format that is explicable and

⁷⁶ *Unison*, nt. (52), 100. Emphasis added.

⁷⁷ *Ibid.*, 80.

⁷⁸ See Bogg A., *Common Law and Statute in the Law of Employment*, in *Current Legal Problems*, 69, 2016, 67. See also Ford QC F., *Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court*, in *Industrial Law Journal*, 47, 2018, 1; Bogg A., *The Common Law Constitution at Work: R (on the application of UNISON) v Lord Chancellor*, in *Modern Law Review*, 81, 2018, 509.

⁷⁹ Ford, nt. (78), 3.

⁸⁰ ‘In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice’: *Unison*, nt. (52), 6.

⁸¹ 2015 SCC 4.

⁸² Of note for an Italian audience, *Saskatchewan* set aside the interpretation dating back to a decision of the Supreme Court of Canada from 1987 that freedom of association was an individual right and thereby accorded a limited interpretation.

⁸³ SS 2008, c.P-42.2.

⁸⁴ This is a power granted by the Tribunals, Courts and Enforcement Act 2007, s.42.

⁸⁵ The total number of employment claims filed since the UKSC’s decision in *Unison* has increased markedly: Ministry of Justice, *Tribunal and Gender Recognition Statistics Quarterly (October to December 2017) Provisional* (8 March 2018), 7. Likely contributing to the increase is the Government’s plan, *Gender Pay Gap*, which requires employers to publish gender pay gap information as of April 2018: <https://www.gov.uk/government/news/view-gender-pay-gap-information>

comparatively justifiable. On this point, the County Court fees were classified in *Unison* as having a ‘less deterrent effect’.⁸⁶ Comparing employment tribunal fees with the County Court (small claims), fees for the latter were based upon the claim’s value. Employment tribunal fees were divided into two categories of claims without reference to value. The Supreme Court assessed the County Court fees as having been ‘designed in a way which is likely to have a less deterrent effect on the bringing of small claims.’⁸⁷ What is intriguing about this assessment is that the fees seem to be more severe for the lowest amounts, moving to a lower proportionate figure as the claim value increases. Where the value was £300, the fee was £50 or approximately 17% of the total value. When the fee reached £745, the percentage total value varied from 14.9% (£5000) to 7.45% (£10,000). Though these percentages may not be as disproportionate as some of the results with the former ET fees’ scheme, there is scope here for future fees to be significant without necessarily being assessed as having a deterrent effect. With this in mind, attention should be paid to the nature of claims made because claims such as unfair dismissal are likely for much higher sums than for alleged violations of National Living Wage. The October to December 2017 data showed a notable number of claims for unauthorised deduction of wages with a remarkable increase from November (1,452) to December (6,325). It is likely that these claims would not be for large sums. An exemption for small business from certain employment protections may be contemplated.⁸⁸

If a revised fee scheme (or perhaps other regulation) was to be introduced, *Unison* firmly entrenches the courts’ role as moderator. This is consistent with the rule of law. The imbalance of bargaining power between parties recognised at common law, as noted in recent Supreme Court decisions,⁸⁹ has set out one parameter to adjudication. And yet, there is a question as to the extent of the courts’ role, particularly in managing this balance. Courts remain better equipped to dissect rights as concepts rather than the precise details of these concepts.

5. Conclusion.

The collective attenuation of UK workers’ freedom (and arguably dignity as it is understood under the Italian Workers’ Statute) outlined above should be viewed as significant. These instances are more than measures to strengthen an economy. The unilateral authority to determine what online speech is proper based on a commercial assessment should be the subject matter of more concerned discussion. The UK has a long tradition of free speech, particularly the free press, that it calls upon. It remains curious that status as a worker (of some kind) could undercut such an important freedom to a democracy. Where past examples of flexibility were formalised and specific, the casual treatment of important freedoms in a democracy instituted a grander flexibilisation effort. There were disincentives

⁸⁶ See *Unison*, nt. (52), 20.

⁸⁷ *Ibid.* [20].

⁸⁸ Of interest, this argument would allude to ILO Convention 158, Art.2(5).

⁸⁹ *Autoclenz v Belcher* [2011] UKSC 41, [35]; *Unison*, nt. (52), 21, 24.

to taking steps to utilise rights; but, most importantly, there was no formal, overt attempt to block them.

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