RIGHT TO PRIVACY OUTSIDE WORKPLACE AND UNFAIR DISMISSAL: A UK STANDPOINT

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Privacy is an elusive dream for most working professionals as employers' vigilance extends to various intricate aspects of one's private life. This begs the question of what is private life in the context of employment relation. The concept of controlling an employee's private affairs can be traced back to its roots of domestic service. The relationship between a master and servant, being industrialized back in nineteenth century[i] still acts as the key element in employer's power to control his employees. In present day, not surprisingly but unfortunately one's private life activities such as pursuing certain hobbies, getting associated with certain groups or building relationship with your co-worker and so on may lead to dismissal from workplace[ii]. Although worldwide modern legal regimes by enacting laws to protect employees' privacy have discarded employer control in favour of supervised regulation, intrusions of different kinds as noted above still remain at large. Intrusion is usually justified on ground of employer's interests ranging from financial to personal (that of ideological or moral clash)[iii]. Having identified core elements, i.e., i) private acts of employees & ii) employer's interest assessed against such acts; essential in assessing lawfulness of dismissal on ground of private acts committed by employees, this essay restricts scope of discussion to UK and EU jurisdiction. In the first part, I will deliberate upon right to private life addressing its scope and specifically critiquing the 'spatial' concept adopted by UK's domestic courts in *X v Y*[iv] and *Pay v UK*[v] to determine if an act is private. Second part of this essay reassesses the UK test for unfair dismissal under section 98 of Employment Relations Act, 1999. Furthermore, for the purpose of this essay right to freedom of expression, right to freedom of assembly and association, right to freedom of thought, conscience and religion will be considered within the umbrella of right to private life and deliberated upon to the extent they relate to the issue of unfair dismissal.

RIGHT TO PRIVATE LIFE THROUGH SPATIAL PERSPECTIVE:

European Convention on Human Rights (ECHR) under Art 8 protects right to private life of any person concerned. However, it doesn't attempt an explanation of private life. In its most rudimentary sense private life may be interchangeable with free time or leisure [Erwin Smigel].[vi] Private life activities whether viewed as leisure time or otherwise must be understood as "free, self-determined, reflective, and gratifying" [Joanne Ciulla] leading to one's enjoyment of his own company.[vii] This conceptual premise is much more difficult to comprehend in employment context. Employers are relentless to preserve their public images and thus pro-active in censoring employee activities that are in public eyes. This sentiment is reflected by the spatial approach[viii] often deployed by employer to ascertain the place of an act rather than its nature. In X v. Y, court's conclusion of consensual homosexual sex between two adult males in a public washroom not being a private action merely due to its location, is disappointing; as it failed to recognise documented[ix] oppressing history of gay minority in a culture dominated by Christian values. Additionally, court's refusal to recognise Mr. X's act as private is an unwarranted narrow interpretation and vastly different from ECTHR's observation in *Von Hannover v Germany.* ECTHR noted private life to be an important aspect for one's development of personality which encourages social interactions to build healthy relationship and therefore "even in a public context"[x] some acts may very well be private considering concerned individuals do have a reasonable expectation of privacy.[xi]Secondly, in respect of consenting homosexuality, ECTHR's established jurisprudence in *Dudgeon v UK*[xii] that 'criminal' nature of an act isn't sufficient to bring it outside the purview of private life; wasn't followed through.

Similarly, court's adoption of spatial approach in *Pay v. UK* is erroneous. The concerned individual in this case, a probation officer was dismissed from his employment owing a discovery of his status as a performer in BDSM events. Moreover, he was also the principle director of a company that dealt in BDSM equipment and organized such events among fellow members.[xiii] Employment tribunal and subsequently employment appellant tribunal refused to recognise violation of Art 8 of ECHR on a mirror approach to that of X v. Y. Interestingly enough, ECTHR's assessment of Pay's application to not be admissible before it does raises. It is established in ECTHR jurisprudence that during assessment admissibility of any application the court doesn't deal with the merits of the case in length. However, in this instance

they gave a detailed reasoning as to why Pay's application did not violate Art 8 of the ECHR. A pertinent court practice as academics have pointed out is that court's determination on admissibility would have remained same even the case was adjudicated on merits[xiv]. On the positive end, court was willing to accept applicant's argument that merely because his performances are public in nature, doesn't negate the fact an individual does expect his privacy to be respected while indulging in certain acts even in apparent public atmosphere.[xv] To that extent, applicant's argument that these actions were fundamental to his self-identity is a valid one.

In my opinion, a strict classification of what is private and public atmosphere is near impossible; if not, impractical to say very least. This irrational private-public distinction under spatial approach is further exposed when being applied to address more modern situations such as that of freedom of speech being expressed via social media. In this digitalised world everyone has access to internet. Therefore question arises if any and all actions of one should therefore be treated to be public activity. As noted, the traditional notion of spatial approach certainty answers that in positive. A good starting point on this matter is *Crisp v. Apple Retail (2011)*.[xvi] The applicant in this case was an apple employee who made certain posts in his Facebook page ridiculing his employer Apple. Keeping aside the proportionality test to determine if applicant's dismissal was fair, it is interesting to note employment tribunal's observation of Article 8 of ECHR not being violated in this instance due to the public nature of Facebook. The court's justification is half hearted and confusing as it accepted that applicant's social media setting is 'private' as his posts can only be seen by his Facebook friends; nevertheless concluded that applicant couldn't have restricted the reach of his post outside his friend circle as sharing is a common phenomenon in internet and one that applicant is well aware of being familiar with technology. In this respect, Nissenbaum's approach of determining private and public information on the basis of 'contextual integrity' is a viable option to consider.[xvii]

This issue can be summarised by pointing out a brilliant example put forth by Elizabeth Anderson while considering if employers are private government. The premise that an exclusive club membership is public to non-members but private to its members[xviii] is simple but continuously ignored. This example even draws parallel to the situation of Mr. Pay as discussed earlier. In its most rudimentary interpretation, sexual activities, liberty to pursue

hobbies are something that makes an individual's private life fulfilling and above all makes them human. Hence, consideration must be given to the nature of activity in question instead of a superficial conclusion based on the place of its happening.

THE TEST OF PROPORTIONALITY:

Domestic test:

As noted already each human right have their limitation. In a capitalist setting it's hardly surprising that employers are hell-bent on protecting their interests and in my opinion restriction on human rights in employment relations are justified on that ground. However the necessary question that keeps coming up is in respect of to what extent employer's interest should be protected or vice versa; i.e., employees' human rights. On this premise; in the UK jurisdiction, Employment Relation Act, 1996 (ERA) comes into play. Section 94 protects employees from being dismissed unfairly while section 98 lays down the test. This test adopts a two way process whereby firstly the burden is on employer to establish that the reason for dismissal falls within the statutory scope of section 98(2), followed by an assessment of whether the employer is reasonably justified in treating such reason a ground for dismissal[xix]. If these two criteria have been fulfilled, an employment tribunal proceeds in accordance with sub-section 4 of this provision to determine if under pertinent circumstance an employer has acted reasonably or unreasonably to consider the ground for dismissal as a sufficient justification.[xx] This last aspect of the test has to be determined on a case to case basis keeping in mind an open list of considerations such as size and administrative resources of the employer.[xxi] Prim facie, the test wouldn't suggest a major problem; however one must be mindful of the wordings of section 98(1)(b) which allows an employer to justify dismissal on other substantial ground apart from the ones mentioned under sub-clause (2) of this. The Range of Reasonable Response test (RORR) at this point becomes an instrument for employer's to exploit combined with the fact that employment tribunal has to adhere by the policy of not subsisting the employer's judgment with its own but to merely consider it on an objective scale.[xxii]

Supremacy of private government:

Elizabeth Anderson's argument of employers being private government stems from an idea of the subjects being un-free.[xxiii] Her line of thinking comes from the premise that government is a universally fundamental entity having characteristics of some sort of authority and backed by sanctions.[xxiv] In light of this, I argue that employers do fulfil this threshold as they hold power over their employees via contract of employment. This also encompasses the idea of employees being restricted in their actions and on disobeying or refusing to follow such orders they face sanctions in forms of dismissal, demotion or in any other form that threatens their employment or forces them to compromise to keep it. I reckon that this central idea has been failed to be acknowledged by the legislative body while drafting section 98(1)(b) of ERA and has not been rectified by the courts while interpreting RORR test. Going back to the case of *Pay v. UK*, court's readiness to accept that Pay's activity has brought his employer shame in public sphere is a great example of that failure. The fact that Pay's track record as a great employee succumbed to the pressure to protect the employer's public image is worrying and a warning to employees who may just want to express themselves in a certain way. *Crisp v. Apple Retail, Gibbins v. British Council*[xxv] keeps strengthening court's reluctance to prioritise employees' rights.

Ms. Gibbins was dismissed from her employment due to her remarks on a meme of Prince George. Her comment was against white privilege and a critique of UK monarchy's system in favour of a republican order. To some of his colleague, this comment of hers was unwarranted on a baby's picture. However once it garnered mainstream attention, her comment was severely misinterpreted which led to British Council terminating her employment on the ground of negative public image and its commitment to be a neutral institution in respect of political affiliation. Frustratingly enough, even after taking note that the case escalated due to misinterpretation of Gibbin's comments by press and British Council's inability to mitigate that; the court balanced the case in favour of the employer on the ground that applicant was reckless in her act.[xxvi] Just two months back British Council was again on spotlight due to its high profile suspension of Gary Linekar who being a vocal person, in strong words criticised UK government's new inhumane migration policy. While the situation didn't escalate further and later on the suspension was revoked, it certainly made one think what would have been the ultimate outcome had Linekar not been a UK football legend with a huge fan following[xxvii]. It

might have been very much plausible to see him facing the same fate that of Ms. Gibbins if not for his star-power.

On a bright side, the decision in *Smith v Trafford Housing Trust* (2013) must be appreciated. On the facts Mr. Smith is a devoted Christian who happens to disagree with the concept of gay marriages. On this context, upon coming against an article of BBC on the same matter, he posted it in his Facebook group while questioning if this kind of equality is too far.[xxviii] His employer argued that due to Mr. Smith's Facebook description identifying them as his employer, public perception will associate Mr. Smith's comment with the organization itself. As seen already this is a familiar trope that has been used over and over again by employer to justify its actions against an employee. In this case, the court determined on evidence that Mr. Smith's Facebook platform wasn't associated with his work life and used as a means of leisure. Therefore, a mere mention of Trafford Housing as his employer will not suffice for anyone to conclude his sentiment on gay marriage as that of his employers.

In my opinion this was a welcoming judgment as it followed a narrow interpretation than usual, bearing resemblance of ECTHR jurisprudence. It is prudent to differentiate between having a certain belief, however offensive and manifesting it. As evidenced from court's approach, it is very likely to allow thought policing by employers; but I argue in favour of the line to be drawn in the latter stage, i.e., if such beliefs are being manifested.[xxix]

Way forward through ECTHR jurisprudence:

Smith v. Grady is the starting point on this thread. The test under Art 8 is two-fold a) existence of interference in accordance with law b) if such interference is justified. The first ground is a factual test whereas the second ground requires cognizance. It's well settled in ECTHR jurisprudence that interference is justified if it's in consonance with Art 8(2) which sets out three criteria[xxx]

i) such interference was in pursuance to achieve a legitimate aim
ii) such interference must be necessary to achieve in a democratic society.

Applying this rationale, the court held the policy to administratively discharge homosexuals from armed forces to be in violation of Art 8 of the convention. While the court didn't contest

government's argument that the interference was justified as it was necessary for national security concern, it rejected its assertion that it was put in place to achieve the legitimate aim of keeping force moral high. Court's opinion was based on the ground that the policy doesn't indicate whatsoever if homosexual individuals are less capable to fight scientifically or otherwise and all the negative sentiments recorded were vague, stereotypical and predisposed bias.[xxxi] This rationale was applied in *IB v. Greece*[xxxii]. Subsequently *Melike v.Turkey,*[xxxiii] *Redfren v. UK*[xxxiv] followed this through on the backdrop of Art 9 & Art 11 of the convention. Furthermore, ECTHR jurisprudence also considers the probability of a dismissed worker to avail another job by assessing his skillset. The court reiterated in *Pay v. UK*[xxxv] that dismissal of a specialized employee should absolutely be the last option for consideration.

To conclude, this interpretation sits at a major odd with UK's RORR test where courts have allowed employers a wide spectrum without trying to put any viable restriction. Thus I am of the opinion that RORR test should be interpreted similar to that of 'narrow margin of appreciation' to justify their interference.[xxxvi] In *X v. Y* court's observation of indirect horizontal effect of Human Rights Act on private employers[xxxvii] was a hopeful beginning but that soon faded with its shallow interpretation of right to private life and a misguided notion of section 98 of ERA test for unfair dismissal being superior to that of ECHR. As recent events have raised suspicion of a withdrawal from ECTHR, it doesn't incite confidence in UK courts to honour its jurisprudence. Nevertheless, employees' rights have to be fiercely protected either through legislative amendment or restrictive interpretation by courts. Dismissal should be an exception to be justified under dire circumstances and not an everyday norm.

ENDNOTE

[i]Matthew W Finkin, 'Life Away From Work' (2005-2006) 66 LA. L. Rev, 945

[ii]SD Sugarman, "'Lifestyle" Discrimination in Employment', (2003) 24 Berkeley Journal of Employment and Labor Law, 101, 106-119

[iii]ibid

[iv]X v. Y[2004] EWCA Civ 662

[v]Pay v. UK[2009] IRLR 139

[vi]Matthew (n 1), 952

[vii]Ibid

[viii]Virginia Mantouvalou, ‘‘I lost My Job over a Facebook Post: Was that Fair?’ Discipline and Dismissal for Social Media Activity’ (2009) Industrial Journal of Comparative Labour Law and Industrial Relations 35, 101, 110

[ix]Steven Dryden, A short history of LGBT rights in the UK (British Library) <https://www.bl.uk/lgbtq-histories/articles/a-short-history-of-lgbt-rights-in-the-uk> accessed 10th April, 2022

[x]Von Hannover v Germany[2005] 40 EHRR 1 [50][51]

[xi]ibid

[xii]Virginia Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ [2008] 71 Modern Law Review 912, 933

[xiii]Pay (n 5) 2

[xiv]Virginia Mantouvalou & Hugh Collins, Private Life and Dismissal: Pay v. UK Application No 32792/05, 38 Industrial Law Journal 1 133,135

[xv]Pay (n 5) 13

[xvi]Crisp v Apple Retail (UK) Ltd ET/1500258/11 (2011)

[xvii]Virginia (n 9)111

[xviii]Elizabeth Anderson, ‘Private Government: How Employers rule Our Live and Why We Don’t Talk about It’ (2017 Princeton University Press),43-44

[xix]Tor Brodtkorb, ‘Employee misconduct and UK unfair dismissal law: Does the range of reasonable responses test require reform?’ 52 International Journal of Law and Management 6 429, 434-440

[xx]ibid

[xxi]ibid

[xxii]ibid

[xxiii]Elizabeth (n 19)41

[xxiv]ibid 42

[xxv]Gibbins v. British Council 2200088/2017(2017)

[xxvi]ibid [145]-[147]

[xxvii]George Letsas & Virginia Mantouvalou, ‘Censoring Gary Linekar’ (UK Labour Law Blog, March 13, 2023) ,< https://uklabourlawblog.com/2023/03/13/censoring-gary-lineker-by-george-letsas-and-virginia-mantouvalou/ > accessed 4th May, 2022

[xxviii]Mr. Adrian Smith v. Trafford Housing Trust [2012] EWHC 3221 [1] –[24]

[xxix]Amir Paz-Fuchs, ‘Principles into Practice: Protecting Offensive Beliefs in the Workplace’ (UK Labour Law Blog, February 12, 2020)< https://uklabourlawblog.com/2020/02/12/principles-into-practice-protecting-offensive-beliefs-in-the-workplace-by-amir-paz-fuchs/ >, accessed 7th May, 2022

[xxx]Smith and Grady v United Kingdom, App Nos 33985/96; 33986/96 (1999) [69]-[112]

[xxxi]ibid [97]

[xxxii]IB v. Greece (Application no. 552/10) (2013)

[xxxiii]Melike v Turkey, App No 35786/19 (2021)

[xxxiv]H Collins and V Mantouvalou, 'Redfearn v UK: Political Association and Dismissal', (2013) 76 Modern Law Review 909, 912

[xxxv]Pay(n 5) 13

[xxxvi]Ibid[77]

[xxxvii]X(n 4)[59]