



A Critical Discussion of the Limitations on the Employees' Free Speech at Work

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Abstract. Whether it is right for employers to limit employees' free speech at work has been a controversial question. On the one hand, the right to free speech is a human's basic right. Employees have the right to express themselves freely without employers' censorship. On the other hand, employers have legitimate interests in pursuing an efficient operation of the company. People from different backgrounds meet in the workplace, making it a logical place for political and social matters discussion. Sometimes the discussion can lead to offensive views and create a hostile work environment. These speeches can even harm the employers' reputation if made public. The employers, therefore, tend to limit employees' free speech. There arises the issue of how to balance employees' right to free speech and employers' business interests. I argue that assuming employees can complete their work assignments, employers should normally not limit their free speech at work, even if it may be offensive, except for two main circumstances: first, when excessive chatting compromises work productivity; and second, when their speech goes against public ethics.

Keywords: free speech, human rights, workplace.

1 Introduction

The conflict between employees' free speech and employers' business interests is complex. Limiting employees' free speech can harm their legitimate interests under Articles 10 and 8 of the European Convention on Human Rights (ECHR). However, employers may limit employees' free speech based on reasons from several perspectives. It is important to consider both perspectives.

On the one hand, limiting employees' free speech at work can harm employees' legitimate interests.¹ This is because the employees' free speech at work can be a part of the freedom of expression and right to privacy, which is protected by articles 10 and 8 of ECHR. Article 10 protects freedom of expression. The employees' free speech at the workplace falls into this scope. In "Handyside v United Kingdom"(1976), the European Court of Human Rights states that freedom of speech extends to the scope of ideas that offend or disturb. Hence, employees' offensive speech can also be under the protection of Article 10. Article 8 is focused on the right to private life. Free speech at work is not

related to private directly. However, much of the speech has nothing to do with work, which may be considered private life protected by Article 8 of ECHR.

However, employers can also limit employees' free speech on several grounds. Firstly, the employment relationship makes the employee submissive to the employer's decisions. It can be presumed that the employees give up free speech to some extent voluntarily if the employer decides to limit free speech. Secondly, free speech at work is not a part of private life and Article 8 of ECHR does not apply due to its publicity. Privacy normally means public inaccessibility. Free speeches at work happen in an open workplace with colleagues, which makes it a public, not a private act. Thirdly, employers can limit on the basis that free speeches should be compromised in the face of the employer's business interest. The employment contract builds the employment relationship which places employees on a duty of fidelity. According to *Ronald Anderson v Thiess Pty Ltd (2015)*, the duty stops employees from acting contrary to employers' business interests. However, employees' free speech may harm employers' business interests. Then, the harm caused justifies limiting free speech.² For example, Topics such as politics, and gender may make some employees feel offended, resulting in an aggressive workplace and affecting employee productivity.

As a result, there is a need to know when employers can and can not limit employees' free speech. This will be discussed in the following sections.

2 Circumstances Where the Employer Can Not Limit Free Speech

Free speeches at places can be undoubtedly protected by Articles 8 and 10 of ECHR. Restrictions on them may bring even more negativities and the negative effects of unlimited free speeches can be addressed in alternative ways. I argue that on the premise that employees can complete their daily work, the employer normally should not limit employees' free speech at work, even if their speech may be offensive.

Firstly, it can not be presumed that employees give up free speeches once they sign the employment contract. It is unfair to use mere contract terms to limit fundamental rights. Even the duty of fidelity does not justify the excessive exploitation of employees. Actually, the law never works in a vacuum.³ Determining whether employees have waived this right should be based not only on the employment contract but also on the realities of the labour market. The employer is normally in a much stronger position than the employees. This makes the employment contract a take-it-or-leave-it offer for the employees. The content of the employment contract is mostly determined by the employers. The employees normally have to agree to all content of the employment contract, including limitations on free speech. This creates an oppression of employees' free choices. The oppression will become worse if the employees' waiver of free speech is legally recognized. This means not only offensive speeches but also casual conversations may be restricted. The employees may then not know what speech is unrestricted. Thus, it is important to make sure employees' free speeches are not deprived of unfair contracts.

Secondly, in addition to Article 10 of ECHR, free speech at work is protected by Article 8 of ECHR when it constitutes private life. Much speech in the public workplace can be considered private. Instead of the right to act in public places, privacy can be seen as the right to control information.⁴ The ECtHR has already recognized acts that happened in public as privacy in several cases, such as *Peck v UK* (2003), *Von Hannover v Germany* (2004). This is also the same case in the UK, such as *Campbell v Mirror Group Newspapers Ltd* (2004). As a result, the employees have the right to control the exchange of information unrelated to work during short breaks. In addition, privacy is also contextually based.⁵ For example, family travelling is a private life even though it may happen on a public sunny beach. Working remotely at home during the COVID-19 pandemic is not private life, even though it takes place in a private home. As for the workplace, gossip about celebrities' affairs after completing work tasks can still be considered private. Therefore, speech at work can be protected as private life protected by Article 8 of ECHR in many cases, even though it happens at a public workplace.

Thirdly, it is unreasonable to limit free speech when such a limitation can bring more negative effects on business interests. According to *Heinisch v Germany* (2014), the harm caused is essential in justifying the interference with freedom of speech. Sometimes normal small talk and more often it is offensive speeches that are restricted. The main reasons for limiting them are fear of a decrease in productivity and the risk of reputational damage. However, neither of their harm to the workplace is insufficient to justify restrictions on it.⁶ The reason for this is that restrictions on it can bring even more harm. If restricted, there will be a chilling effect and employees will speak very carefully for fear of disciplinary action. The employer then misses the chance to build an open organisational culture.⁷ It discourages employees from criticizing workplace issues, which hinders workplace improvement. The workplace may even become less creative because good ideas normally come from open discussion. Therefore, employers can not limit free speech arbitrarily when the uncertainty about whether such an act brings more business interest still exists.

Fourthly, it is unfair to make employees suffer from fundamental dignity and autonomy loss when the negatives of not limiting free speech at work can be avoided in other ways. On the one hand, the loss of speech is the loss of employees' fundamental dignity and autonomy. Gossiping with colleagues fulfils the need for employees to take a break and socialise. Employees are not ruthlessly working machines. Restrictions on this freedom ignore the fundamental needs of employees as humans, undermining the dignity and autonomy of employees. In the case of offensive speeches, some offensive speeches can also be a part of freedom of speech and human autonomy.⁸ "Freedom to only non-offensive speeches is not worth having, as considered in *Redmond-Bate v DPP* (2000). Additionally, whether certain offensive speeches fall into the scope of freedom of speech is subjective. For example, opposing government speech is considered freedom of expression in some countries and not in others. Because of the employer's dominant position, the judgement is subject to the employer's preferences. Some offensive speeches may be acceptable to colleagues as freedom of speech but may not to employers. It is, therefore, also disrespectful of employees' dignity and autonomy when the power to determine whether certain offensive speeches are freedom of speech at the hands of employers.

On the other hand, the negative effects of free speeches can be avoided in alternative ways. There are two most common situations where freedom speeches can harm employers' business interests. The first situation is where offensive speeches create a hostile work environment with low productivity. This hostile work environment can be changed alternatively by establishing a fair dispute-resolution mechanism. Employees can feel free to make speeches and resort to the mechanism if feel offended. The second is offensive speeches may harm the employer's reputation if the speeches extend beyond the workplace. This can be solved by strengthening employee education and establishing efficient communication mechanisms. For example, the employer can educate employees that certain speeches can make people feel offended and should avoid making them outside the workplace. With an effective mechanism, the employees can file a complaint to the employer and solve employee dissatisfaction issues instead of putting criticism publicly. As a result, all two main types of major negatives of free speeches can be solved alternatively. So is the case for other circumstances. No one else should interfere with human autonomy unless necessary.⁹ Therefore, employers should not limit employees' free speech when there are alternative ways to address its negative effects.

Although employers are generally not allowed to restrict freedom of expression, freedom of speech for employees is not absolute. Employers may still restrict it in certain circumstances, which are discussed in the next section.

3 Circumstances Where the Employer Can Limit Free Speech

Considering employers' basic business interests and the degree of harm by speeches, I argue that it is right for employers to limit free speech in normally two circumstances. They are when excessive chatting impedes employees' daily work and when the speeches are against social morality.

The first scenario is when employees become obsessed with chatting at the expense of their work. According to *Eatock v Bolt* (2011), the right to free speech is not absolute and can be reconciled with countervailing interests. As previously discussed, the limitation of free speech is normally not justifiable. This is to prevent exploitation by employers because the excessive expansion of the employer's business interests can undermine the fundamental rights of employees. However, it is based on the premise that employees can finish their daily work. The employment contract gives the employer a reasonable expectation that the employee will work for him seriously while being paid, which is the countervailing interest of employees' free speech. Failure to achieve the expectation harms the employer's basic rather than "excessively expanded" business interests. Therefore, the employee should not chat excessively to harm the employer's basic commercial interest.

The second scenario is when the speeches are against social morality. Offensive speeches have a wide-ranging scope from minimal misconduct to moral decay.¹⁰ Different from normal offensive speech, speeches against social morality bring no benefits and are not justifiable with free speech. Normal offensive speech can be protected by freedom of speech for an inclusive, creative society. Advanced ideas arise in debates

containing normal offensive speeches, increasing total social welfare. Sometimes the offensive ideas become advanced ideas over time. For example, the idea of gender equality can be offensive in old times but widely accepted nowadays. However, the situation changes when the offensive speeches suffice the degree of violating social morality. Unlike normal offensive speeches such as “housework is only wife’s obligation”, such speeches violating social morality (e.g. supporting massacre, and Nazism) only lead to social welfare decrease and cause far more severe psychological harm. Tolerating such speeches degrades public mental health and leads to no progression of ideas. This is the same case in the workplace context. On the one side, tolerating normal offensive speeches make an embracive workplace where employees can better ways to work. For example, “your work efficiency is slower than a snail and never get a promotion” can inspire thoughts about how to improve work efficiency and facilitate synergy among colleagues. The employees are also unlikely to suffer from severe mental harm. On the other side, speeches against social morality can undermine the value of the workplace and cause irreversible psychological damage to colleagues if they are not restricted. For example, sexual harassment speeches against colleagues can cause irreversible depression. The speech supporting the massacre during a casual conversation harms employees’ feelings and undermines team cohesion. Such speeches will create a workplace harmful to employees’ mental health and tort the values of the workplace if not restricted. As a result, it is right to limit speeches against social morality.

4 Conclusion

In conclusion, I argue that the employer should normally not limit employees’ free speech as long as they can finish their daily work. The reasons for this are as followed. Firstly, it is unjust to presume the employees have given up free speeches voluntarily due to the power imbalance between employees and employers. Secondly, apart from Article 10 of ECHR, free speeches at work can also be protected by Article 8 of ECHR when the speeches constitute private life. Thirdly, it is unreasonable to limit free speeches when such limitation can cause greater harm. Fourthly, it is unjust to undermine employees’ free speech when the negative influences of free speech can be overcome in alternative ways. However, I also identify two main scenarios where the employer can justifiably limit free speech. They are the scenarios where the employees’ free speeches impede their daily work and make speeches against social morality. By striking such a balance, both the employees’ right to free speech and employers’ business interests will be protected.

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