Life After Work: Privacy and Dismissal

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Abstract:

he re-offended within five years. Having been cautioned for gross indecency, his name was placed on the Sex Offenders Register. His offence was to have engaged in homosexual activity in public with a consenting adult. Mr X was employed by a charity organising activities for young offenders. His employer, who had access to the Register, was informed of the offence. Mr X was dismissed.

Mr Pay performed shows in hedonist and fetish clubs in his leisure time and was also a director of a company selling products connected with bondage and sadomasochism on the internet; photographs of him and semi-naked women and men were available online. Mr Pay was employed as a probation officer. At some point he disclosed to his employer that he belonged to a number of organisations, and the employer was later informed about his activities in detail. Although none of his private activities had an impact on his performance at work, the employer held the view that they were incompatible with his professional duties as a probation officer. Mr Pay was dismissed.

Was the dismissal of Mr Pay and Mr X lawful? Or, to widen our focus, may a person lose her job due to the way she conducts herself in her leisure time, or for reasons connected with her intimate relationships? The point of this article is to address this question by exploring the protection of the right to private life in employment, an admittedly rich and complex subject. My analysis does not examine all aspects of workplace privacy, but explore

To develop my argument, I first examine the decisions of UK courts and tribunals in the cases of X v Y[3] and Pay v Lancashire Probation Service,[4] the facts of which have been discussed above, with a view to identifying the main criterion articulated in judicial reasoning when looking at privacy and dismissal. This criterion is based on a spatial conceptualisation of private life, which implies that activities occurring in a public space cannot constitute elements of the employee's private life. My position is that the spatial conception of the right to private life is erroneous.

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employer', who needs to present a reason for dismissal that may be 'conduct' or 'some other reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'.[6] According to section 98(4) that deals with fairness:

> Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the sue as

life was not one of the traditional civil liberties, protected under common law,[15] where the right to privacy did not enjoy special protection until relatively recently, when the European Convention on Human Rights (ECHR or Convention) was incorporated into domestic law through the Human Rights Act 1998 (HRA or Act). Under the HRA, courts have no power to strike down legislation, deemed to be incompatible with it.[16] Yet according to section 3, courts have a duty to interpret legislation in a way that is compatible with the incorporated rights, insofar as possible.[17] Section 4 provides for the power of courts to issue a declaration of incompatibility, if legislation breaches the HRA.

Article 8 of the ECHR recognises a right to private life. It reads as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Employment law scholars saw the incorporation of the HRA as a glimmer of light in the obscure area of reasonableness in dismissal.[18] While the Act does not create a cause of action between private parties, having in other words no direct horizontal effect,[19] it produces effects on the private sphere in different ways. Under section 3 domestic courts have a duty to interpret national legislation in a manner compatible with the HRA.[20] In addition, section 6(1) states that '[i]t is

[15] For an argument for the constitutional protection of privacy, see E. Barendt, 'Privacy as a Constitutional Right and Value' in P. Birks (ed.), Privacy and Loyalty (Oxford: Clarendon Press, 1997) 12. For the position pre-HRA, see Kaye v Robertson [1991] FSR 62. Post-HRA see Douglas v Hello! [2001] 2 WLR 992. For an analysis, see among others G. Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726.

[16] On this see D. Feldman, 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19 Legal Studies

unlawful for a public authority to act in a way which is incompatible with one or

banned sexual intercourse between two men in public, while a similar activity between a man and a woman, or two women, remained legal. Article 14 of the ECHR prohibits discrimination without containing a free-standing equality clause.[25] The Convention is violated when the alleged discriminatory act is related to the enjoyment of some other substantive right. In the interpretation of this other substantive provision though, the European Court of Human Rights (ECtHR or Court) does not seek to establish a breach; it suffices that the allegedly discriminatory act falls within its ambit.[26]

Was Mr X's right to private life engaged for the purposes of article 14? Mummery LJ's response was negative:

> The applicant's conduct did not take place in his private life nor was it within the scope of application of the right to respect for it. It happened in a place to which the public had, and were permitted to have, access; it was a criminal offence, which is normally a matter of legitimate concern to the public; a criminal offence is not a purely private matter; and it led to a caution for the offence, which was relevant to his employment and should have been disclosed by him to his employer as a matter of legitimate concern to it. The applicant wished to keep the matter private. That does not make it part of his private life or deprive it of its public aspect.[27]
>
> Mr X's dismissal was fair.

A similar argument was advanced when looking at the dismissal of Mr Pay, notwithstanding that he had not engaged in illegal conduct. Exploring section 98(4) of the ERA in the light of article 8 of the ECHR, both the Employment Tribunal and the Employment Appeal Tribunal held that his private life was not in question. Mr Pay's activities 'had been publicised on the website of Roissy of which he was a director and […] he was present in bars and clubs, to which the public was admitted, promoting the interests of Roissy in [Bondage, Domination and Sado-Masochism]'.[28]

Mr Pay's activities were not private, his right to private life had not been breached, and so his dismissal was fair.

[25] It provides that '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.
[26] See, for instance, Inze v Austria, App. No. 8695/79, Judgment of 28 October 1987, [36].
[27] X v Y, [52].
[28] Pay, [36].

SPACE

In X v Y, Brooke LJ opined that '[r]eally live human rights issues may well be lurking in the background of this particular case'.[29] Yet worryingly these questions were not tackled, mainly due to a misconception of privacy, which the present section attempts to expose. The central criterion articulated by courts and tribunals in rejecting the claims of Mr X and Mr Pay was spatial. The applicants' conduct did not occur in private – at home or some other secluded, private location – but in public: in a public lavatory, in clubs, and on the internet. The resulting dismissal, accordingly, did not constitute a violation of private life. Not only did it not breach article 8; it did not even fall within the ambit of the provision for the purposes of article 14 that prohibits discrimination, a construction which in Strasbourg case law frequently leads to an expansive interpretation of other Convention provisions read in co

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It emerges that the spatial element as a determinative factor of the

encapsulate activities that take place in a secluded, inaccessible location. The spatial criterion is flawed, for it fails to capture the subtleties of the distinction between public and private for the purposes of article 8 of the Convention. It is also insufficiently attentive to the complexities of the interaction between work and private life, and leads to incomplete protection of the right to private life in dismissal.

THE VALUE OF PRIVACY

Courts and tribunals relied on a disappointingly narrow spatial criterion when ex91N*'HX2e0R1xxIX72a0R1NIxxIX72a0R1N7*I91729HAn0R1NIxxIX72n0R1qtR'é9x2a0R1N7*7X*2t0HAn0R1NIxxIX72n0Ronrnbyunsaccinsipal in captu n inn the omR1xxIX72a0R1N2 0Ré*NéIH72c0R1NI171Ix2n0R1N**'N9é*x

computer and a telephone line, is another source of concern. Gathering information is easy; disseminating it can be quick and costless.

Privacy is 'contextually dependent'.[44] Its scope may vary and change over time

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tribunals' conceptualisation of privacy in employment, though, was not entirely satisfactory, as it emerged from the previous section, primarily because the content

Before elaborating more on the scope of privacy in the employment context, I ought to make three sets of observations, with a view to illustrating the potential danger posed by the employer's power to interfere with the employee's private life, and to identify several effects of the intrusive conduct. The first set of observations involves the idea of domination, a concern inextricably linked to the character of the employment relation; the second touches upon the value of the protection of privacy for the work/life balance, a common discourse in employment law; and the third relates to employees' interpersonal relations.

DOMINATION

The contract of employment incorporates the obligation of the employee to perform certain duties; the employer has an obligation to remunerate her for the performance of these duties. The economic dependence of the employee on the employer generates an imbalance of power. The employment contract was therefore presented by Kahn-Freund as 'an act of submission', the employment relation as one of 'subordination'.[58] The employer may impose duties unrelated to the performance of contractual obligations – an unfair situation in which inadequate regulation can lead to a relationship that can fairly be described as one of domination. Philip Pettit analysed domination as a relationship with three aspects. A person dominates another if

> '1. they have the capacity to interfere
> 2. on an arbitrary basis
> 3. in certain choices that the other person is in a position to make'.[59]

Pettit's analysis is neither limited to the employment relation nor to infringements of privacy, and yet he provides us with useful insights by claiming that the employer has the capacity to interfere arbitrarily with the employee's freedom, if he can fire him 'as whim inclines him and hardly suffer embarrassment for doing so'.[60]

To be sure, there are different degrees of domination, with no comparison between a 19th century slave and a modern day employee. And still, the idea that the employer may interfere with the worker's liberty and her choices not only within the workplace and during working time, but also outside work, is inimical to a relationship of equals. Abuse of the employer's position and the relation of

pain provoked and the stigma attached to the person dismissed because of her 'unacceptable' preferences in her sex life, her sexual relations and activities, provides an additional reason why privacy should be valued in case of dismissal for reasons that involve sexual intimacy.

Privacy should be cherished for a variety of reasons, which I have attempted to present. It is highly valued for its role in the ex

> to control is control which is the least open to question and argument, it is the kind of control we are most serious about.[76]

Let us again turn to English employment law. Is there such a right to control private information? Prior to the incorporation of the HRA into domestic law, the

performance of contractual duties, making the legality of discipline or dismissal for such behaviour questionable. I should explain, in addition, that the temporal division does not imply that anything that occurs within the workplace or working hours cannot be shielded by the veil of privacy. The division of time is not absolute and the present article does not suggest that the employer can freely dismiss the employee for any activity within the workplace and working time.[81] All that I hope to show is that the temporal element operates as a presumption of privacy against dismissal for breaching the right to control information.

To be sure, the position that a temporal distinction may usefully serve present purposes is hardly groundbreaking, for it has been endorsed both in national and international fora. French law contains a sharp temporal separation between work and life.[82] Jurisprudence of the Cour de Cassation suggests that life at work and personal life constitute two distinct spheres, while at the same time recognising that in certain circumstances there is a degree of interaction. The dominant position is that disciplinary action and dismissal may not be imposed for activities away from work, unless they impede the employee from performing her job or lead to some other serious and identifiable harm to business.[83] The cases Painsecq v Association Fraternite Saint-Pie X,[84] where the Cour de Cassation ruled that termination of employment on the grounds of the applicant's homosexuality was unfair, and Mazurait v AIMT,[85] where dismissal of a medical secretary because she was a tarot reader in her spare time was ruled unfair, both illustrate the point. Article 8 of the Convention is generally interpreted generously. Its material scope was examined in a case of an employee who challenged the imposition of a duty by the employer to change his place of residence and move to a new location.[86] And though such 'mobility clauses' are not generally illegitimate, in the instant case the clause was found to restrict disproportionately the right to private life under the ECHR.

The example of France is not unique. In Germany, in a case similar to Pay, the dismissal of an elementary school teacher who worked as an exotic dancer at a local club, was held to be unlawful, mainly because the distance between the club

to parents or colleagues.[87] An issue of appearance regulation was addressed in

Case law of the ECtHR on dismissal lends support to the view that life after

cases of X v Y and Thlimmenos remind us, providing a further reason why they should be investigated with caution in cases of dismissal.

To summarise my position, I endorsed the approach that presents the right to private life as a right to control information, rather than a right to act in spatial isolation. I further argued that in employment, the legal right to control information on private life might be better safeguarded, when bearing in mind the power of the employer to dominate the employee by imposing on her choices that are unrelated to the contractual relationship of the parties. Imposition of such obligations is illegitimate for it takes advantage of the inequality of power and the

character of the encounter and the participation of a stranger is relevant to the determination of whether his behaviour was an essential element of his most intimate private life. As to the question of the effect on the reputation of the charity that employs someone whose name figures in the Sex Offenders Register, two points ought to be raised. First, we ought to recall that Mr X's behaviour was wrongly criminalised and was later decriminalised; second, we should not overlook that when exploring the impact of sex life on the employer's reputation the threshold is to be set high. Societal prejudice is widespread and the role of human rights law is to protect minorities and vulnerable groups that fall victims of it.

Life after work is valuable, for it is our time to act autonomously, to develop meaningful relationships with others and to engage in activities that we find gratifying, without fear that these may impact on the retention of our job with all its devastating implications. Employers' intrusion can have a damaging effect on our liberty and autonomy: it can threaten enormously our work/life balance, it can harm our relations of love, friendship and trust, as well as all intimate relations that most of us value. Termination of employment because of our life after work can lead to a relationship of domination.

My article questioned the position adopted by courts and tribunals when looking at private life and dismissal. The fear articulated was that the current conception of privacy in dismissal for activities outside the workplace and working hours, was based on a misguided spatial understanding, which pays insufficient attention to the power of the employer to dominate the employee. I therefore suggested that a temporal, rather than a spatial, dist