Protecting individuals accused of misconduct around Israel/Palestine

This briefing note has been written for workplace activists in Higher Education who find themselves accused of making inappropriate public statements around Israel/Palestine. It is written on the assumption that the employee concerned is facing a disciplinary procedure, actually wrote or spoke the words which give rise to the investigation, that there is a individual complainant pressing for action and – judging by the employer's response so far – a real possibility of meaningful disciplinary sanction, including dismissal.

Some practical steps to consider are as follows:

(1) BE REPRESENTED. Under section 10 of the Employment Relations Act 1999, employees and workers have the legal right to be accompanied by a co-worker or union official at a grievance meeting or disciplinary hearing. This means that, in practice, if you are someone who comments regularly on these issues you should make sure that you should be a member of your recognised trade union, pay subs, and participate in union meetings. It is far better to have an established relationship with a union before you get into trouble. At a disciplinary meeting, your representative should, at a minimum, take a fair note of all that is said at the meeting (this note may different considerably from ones produced later by the employer, and may include a much better note of points you raise in your defence). They may also, with any luck, feel confident to speak on your behalf, raise any breach of workplace policies, etc. Having them there with you with make the conversation easier. Therefore, if you are not already member of your recognised union, join it. Section 10, above, only gives you the express right to be represented at disciplinary or grievance hearings, not initial investigations, but in practice almost all employers grant the right to be represented at both. No meeting should take place without written warning in advance, and a fair chance to obtain representation.

(2) BE AWARE OF THE DIFFERENCE BETWEEN DIFFERENT KINDS OF MEETINGS
An initial investigation meeting is not the same as a final disciplinary meeting, although notes are likely to be taken at both. If a disciplinary meeting has found that there is a case to answer, then the notice of the disciplinary meeting should set out the potential sanctions. Where you are informed in advance that the sanctions available at a meeting include dismissal, you should treat this as a genuine possibility. You need to prepare and plan as if your job is on the line.

(3) TAKE STEPS IN ADVANCE OF THE DISCIPLINARY MEETING TO TAKE THE INITIATIVE THERE. If you want the outcome of a meeting to be something definite, whether that is no action taken, or action short of a dismissal (e.g. a warning), then you should put the case for that outcome in advance of the meeting in writing, as well as at it. Give the employer a considered explanation of why you are arguing for that outcome, bring the conversation back to your proposal, and force the employer to engage with it.

(4) CONSIDER BACKING DOWN. In cases where an employee has said certain things e.g. on social media, and where the worst of which they are accused of is causing general offence, i.e. taking a position that *groups* of people might disagree with, rather than *individuals*, there are few cases where the comments are so bad that dismissal would be justified even if the individual apologises. But, if you are going to apologise do it properly: delete the original remarks (if they were made on social media), explain that you understand they were intemperate or likely to cause hurt, make clear that you will not make similar remarks again. Do not give a "politician's apology." And, if you apologise, stick to the apology afterwards.

(5) PREPARE THE BEST ARGUMENTS IN YOUR DEFENCE. Under the general law of unfair dismissal, contained in section 98 Employment Rights Act, and the associated caselaw, an employer is entitled to dismiss a person for behaviour which is misconduct. And conduct which is capable of causing reputation damage to your employer (bringing them into dispute) can potentially be such misconduct. The caselaw on what constitutes misconduct is highly subjective, but, for example in the free speech case of Keable v Hammersmith, the following were accepted as factors pointing to a lesser punishment:

-the speech concerned was made outside the workplace

-the speech concerned was made in a private capacity

-there was no discernible link to the employment

-the speech concerned was not discriminatory, criminal or libellous

-the speech concerned was not insulting or obscene

-the employee had a right to express his opinions in his own time (para 42)

-the employee had not chosen to make his opinions publicly on any scale, rather they had been shared by his critics who created the audience for them (para 45).

In a number of cases, the courts have looked unfavourably on employer arguments that expressing controversial opinions would bring the employer into disrepute. In Smith v Trafford Housing Trust, an employee had

-expressed his views moderately

-to a limited audience of friends

-outside work hours

A judge conclude that he could not envisage how such speech could "sensibly lead any reasonable reader to think the worst of the Trust for having employed him" (para 63).

If the above arguments would assist you in protecting your employment, then you should raise them at an early stage in the disciplinary process.

(6) USE THE EQUALITY ACT. Under the Equality Act, it is unlawful to discriminate against a person on grounds of a protected characteristic. Where an employee raises a complaint of direct discrimination, the employer has no justification defence; you cannot dismiss someone from a workplace because they are a woman, because they are black, etc.

Philosophical beliefs are capable of being a protected characteristic. Whether they are not in an individual case, depends on the circumstances. There is no doubt that being Muslim or Jewish brings you within the protection of the Act. So that, if for example, an employer had a policy of limiting all speech around Israel and Palestine and only investigated the activities of Muslim or anti-Zionist Jewish employees, this would certainly be indirect discrimination against Muslims or Jews and might also be direct discrimination against Muslims or Jews.

The leading case on what constitutes a protected belief is Grainger v Nicholson:

(i) The belief must be genuinely held.

(ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.

(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.

(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 24)

To the best of my knowledge, the Employment Tribunal has never had to consider whether either Zionist or anti-Zionist opinions are protected characteristics for the purposes of the Equality Act. But "belief" as a protected characteristic is understood broadly, and every year the range of philosophical opinions coming within it broadens. The list of opinions which

have been held to constitute protected beliefs include: a belief in man-made climate change, spiritualism, left-wing democratic socialism, a belief in workers' control of industry, ethical veganism, gender-critical feminism, and a belief in participatory democracy. In EU law, from which UK definitions derive, the following have been treated as protected beliefs: support for the Hare Krishna movement, or for Jehovah's Witnesses, pacifism, Communism, etc.

In practice, most employment lawyers assume that where an individual holds anti-Zionist beliefs and has attempted to like their lives in any material extent shaped by them (e.g. attending demonstration, participating in twinning campaigns, buying or wearing symbols associated with the Palestinian struggle), those beliefs come within the Act.

If an Employment Tribunal was considering the fairness of the dismissal of an individual for expressing anti-Zionist opinions, the real question would almost certainly become what employment lawyers call "the 'reason why' question". In other words, is the reason why the employee was dismissed that (a) the employer had, in practice, a policy of sanctioning anti-Zionist speech in relation to which it took a specific, and distinctively harsh policy of disciplining anyone or almost anyone who spoke up in support of Palestine, while allowing other forms of controversial speech to go unpunished, or (b) did the employer sanction this particular speech, because it was uniquely and excessively offensive?

That is a question of fact, which will vary from case to case.

As an employee caught up in this position, the best you can do is to say, at all meetings, including initial investigation that you are being treated differently and unfairly, and to give practical examples of how the employer tolerates other, similar forms of speech.

(7) USE THE LEGAL PROTECTIONS FOR THE FREE SPEECH OF UNIVERSITY EMPLOYEES. Universities are subject to section 43 of the Education (No.2) Act 1986 ("Freedom of speech in universities, polytechnics and colleges.") which provides that Universities must ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual on any ground connected with the beliefs or views of that individual. In summer 2022, this duty was augmented by the Higher Education (Freedom of Speech) Act 2023. That Act imposed duties on higher education providers to protect freedom of the speech for staff and others. Students unions were also placed under a similar duty. The Office for Students was given the power to find that a governing body or students' union had breached its duties to protect freedom of expression.

Universities are under pressure from the government to act, in effect, as absolute free speech zones. Although the boundaries of the new law is yet to be tested in the courts, its

practical effect is to make it much harder for universities to take disciplinary action against staff, limiting their speech. Speech which might, in theory, justify dismissal if made by someone outside HE is much less likely to justify dismissal if made in a university context.

Further, there is in any event a longstanding principle of EU law that the state must take particular action to protect the expression of academic speaking in relation to the area of their own academic expertise. The principle of freedom of expression in relation to academic work has been upheld by bodies as various as the Parliamentary Assembly of the Council of Europe, the UN Committee on Economic, Social and Cultural Rights, and the European Court.

As an employee threatened with disciplinary action, you should draw your employer's attention to these rights early. The situation you want to create is one in which an employer considering disciplinary action knows that the dispute will be lengthy, and costly to them both in terms of cost and staff time. Ideally, you want to be in a situation where, behind the scenes, their lawyers are advising their clients to desist without dismissing you.

Finally, and most important of all (8) DO NOT RELY ON THE LAW. While the law does provided a certain shield to an individual faced with disciplinary action, its protection is limited. The reason for seeding into your employer's head the risk of costly litigation is not because you want to fight the battles there. Employment Tribunal cases are lengthy (at the time of writing, most final cases are not being heard in less than 18 months from the employee submitting a claim), stressful, and any compensation is invariably less than the employee would have been paid had they remained in their employment. The Tribunal is not the worst of all possible courts: it is free to access, and even unsuccessful litigants do not usually have too pay the other side's costs. But, as with all litigation, you face the risk of coming before judges who implement the law in ways which reflect a subtle but pervasive tendency to see the issues through the eyes of the employer. The law exists to uphold rather than challenge property.

The task is rather to put pressure on your employer through conventional tactics of campaigning: through discussing your issue with colleagues, raising it at branch meetings, inviting letters of support or petitions. Make it clear to the employer that any disciplinary action would be seen by most colleagues as wrong, and unjustified, and a partisan silencing of one side of a political debate. There are a very large number of people out there who understand the stakes of justice in the Israel-Palestinian conflict. Make them your allies.

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17 October 2023