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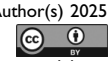

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Revisiting *Redfearn*: The European Convention on Human Rights and the protection of political opinion in the workplace in Great Britain

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Abstract

In *Redfearn v the United Kingdom*, the European Court of Human Rights held that it was incumbent on the United Kingdom to introduce measures to provide for protection from dismissal for employees on the grounds of political opinion or affiliation, regardless of their length of service. This resulted in a small but significant reform in employment law in Great Britain, namely the disapplication of the continuous service requirement for bringing an unfair dismissal claim where an employee is dismissed because of their political opinion or affiliation. In this article I argue that there is a positive obligation upon the UK to go further than what was required under *Redfearn*, namely, to provide judicial safeguards where non-employee workers are dismissed or applicants refused employment on (in either case) political grounds. The article provides an overview of the scope of workplace protection against detrimental treatment on political grounds in the UK. It considers this framework against the UK's obligations as a Member State of the International Labour Organization and the Council of Europe and notes that the issue is becoming more pressing with the development of social media. The article concludes by arguing that the UK should legislate to create gateway claims (or extend existing jurisdictions) for dismissed workers and disappointed applicants who consider that they have been subjected to such detrimental treatment on political grounds. Whilst the article focuses on the UK, its arguments can be extended to other Council of Europe member states which do not already provide such protection.

1. Senior Lecturer, Leeds Beckett University. With thanks to Professor Paul Wragg, Dr Chris Dietz, and Dr Rachel Dunn for their comments on drafts of this article, as well as to the anonymous reviewer. Any mistakes are my own. Thanks also to the editorial board of the European Labour Law Journal and participants of the conference where the paper leading to this article was presented.

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1. Introduction

The 2012 judgment of the European Court of Human Rights in the case of *Redfearn v United Kingdom*[2] led to a small but significant reform in employment law in Great Britain, namely, the disapplication of the continuous service requirement for bringing an unfair dismissal claim where an employee is dismissed because of their political opinions or affiliation.[3] In this article I will argue that the UK's positive obligations under the European Convention on Human Rights to provide judicial safeguards in circumstances where individuals suffer workplace detriments on political grounds likely extend further than was held in *Redfearn.* In particular, I will argue that there is a positive obligation upon the UK to provide judicial safeguards when non-employee workers are dismissed or job applicants refused employment on (in either case) political grounds.[4]

In section 2, I will provide a brief overview of (i) Articles 10 and 11 of the European Convention on Human Rights and (ii) how workers in the UK are (to a limited extent) able to rely on such Articles when bringing claims against their employers or prospective employers. I will explain how such ability depends on the existence of a 'gateway' course of action under domestic law. In section 3, I will discuss the two most plausible gateway claims potentially available to individuals in Great Britain where detrimental treatment on political grounds is at issue, namely, unfair dismissal and philosophical belief discrimination. In section 4, I will discuss the decision in *Redfearn* and the positive obligation which it gave rise to. In section 5, I will briefly consider the concept of positive obligations under the Convention before, in the subsequent two sections, pointing to two considerations which, I will argue, would be likely to significantly influence a future Court in favour of extending the positive obligation established in *Redfearn*. These considerations are the emergence of social media (section 6) and the International Labour Organization Convention 111 (section 7).

The article concludes by arguing that the UK should legislate to create gateway claims for (or extend existing jurisdictions to) dismissed workers and disappointed job applicants who consider that they have been subjected to such detrimental treatment on political grounds.[5]

2. *Redfearn v United Kingdom* (2013) 57 EHRR 2.
3. See Employment Rights Act 1996, s 108(4) which was inserted by the Enterprise and Regulatory Reform Act 2013, s 13.
4. This article focuses on the specific detriments of (i) workers who are dismissed; and (ii) job applicants who are denied employment on political grounds. These represent only a subset of the potential detriments which individuals could suffer at the hands of their employer. For example, a worker could be subject to disciplinary action short of dismissal, denied a promotion, or harassed on political grounds. I offer no view on whether a positive obligation would arise in such contexts.
5. In this article I refer to both the United Kingdom and Great Britain. I refer to the United Kingdom as it is the relevant Council of Europe Member State. However, as will be seen in section 3, the gateway claims available to individuals vary within the United Kingdom and, in particular, political opinion is a protected characteristic in Northern Ireland (but not in Great Britain). The focus of this article is the position in Great Britain.

2. The European Convention on Human Rights and UK domestic law

Article 10(1) of the Convention provides that '[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority […]'[6]

Article 10 is not only concerned with political opinions and the expression thereof,[7] however the European Court of Human Rights has recognised that 'free political debate' is 'at the very core of the concept of a democratic society'[8] and has observed that there is 'little scope' for restrictions on political speech under the Convention.[9] Article 11(1) provides, amongst other things, that everyone has the right to freedom of association with others.[10] The Court has recognised that '[p]olitical parties are a form of association essential to the proper functioning of democracy'.[11] Both Articles 10 and 11 can be restricted in prescribed circumstances, for example for the protection of health or morals or the rights and freedoms of others.[12]

In the UK, section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is therefore possible for workers in the public sector to bring proceedings against their employer for breaches of Articles 10 or 11. This article focuses on individuals who work in the private sector. Unlike those who work for the state, private sector workers cannot directly enforce their Convention rights against their employer and must therefore bring a separate claim (for example, for unfair dismissal).

A private sector worker can therefore only raise human rights arguments where they have a separate gateway claim available to them under domestic law. This is because, under the Human Rights Act, a UK court or tribunal must, when determining a question which has arisen in connection with a Convention right, take into account, amongst other things, decisions of the European Court of Human Rights[13] and, so far as it is possible to do so, read and give effect to legislation in a way which is compatible with Convention rights.[14] Convention rights therefore have indirect horizontal effect, i.e., whilst workers cannot directly enforce such rights against their employer, enforcement will in some cases be achieved indirectly via the court or tribunal's aforementioned obligations to undertake its judicial task with the Convention in mind.[15]

Where no such gateway course of action is available, no human rights recourse is available, unless the individual pursues a claim against the state in the European Court on the basis that the state itself has committed a violation of the relevant Convention right by failing to provide an appropriate legal framework under which the individual's rights could be considered. As will be discussed in section 4, this is what happened in *Redfearn*.

6. European Convention on Human Rights, Article 10 (1).
7. See, for example, *Müller and others v Switzerland* (1991) 13 EHRR 212 [27].
8. *Castells v Spain* (1992) 14 EHRR 445 [43].
9. *Wingrove v United Kingdom* (1997) 24 EHRR 1 [58]; *Morice v France* (2016) 62 EHRR 1 [125].
10. European Convention on Human Rights, Article 11 (1).
11. *Republican Party of Russia v Russia* (2015) 61 EHRR 20 [78].
12. European Convention on Human Rights, Articles 10(2) and 11(2).
13. Human Rights Act 1998, s 2(1)(a).
14. Human Rights Act 1998, s 3(1).
15. See *X v Y* [2004] IRLR 625.

3. The regulation of detrimental treatment on political grounds in Great Britain

The question of whether a gateway claim exists is therefore determinative of a worker's ability to seek redress of an alleged interference with their human rights by their employer. Of course, the existence of a gateway claim does not entail that the worker will succeed where there has been a *prima facie* interference. Most Convention rights which are at issue in the context of the workplace (including Articles 10 and 11) are qualified, rather than absolute, in nature.[16] The court or tribunal might therefore determine that the employer's actions were justified under the Convention. Nevertheless, it is the possibility of such judicial review which provides the mechanism through which the state can protect Convention rights in the workplace by mediating between the interests of worker and employer.[17] As will be seen, where the state fails to provide for the possibility of judicial oversight in cases of interferences with the human rights of workers, the Court might (but will not in all cases) hold that the state has failed to meet its positive obligations under the Convention. Before considering positive obligations, I will set out the extent to which the UK provides protection for workers and job applicants who suffer detrimental treatment on political grounds. It does so, to a limited extent, through its unfair dismissal and anti-discrimination jurisdictions.

3.1 Unfair dismissal

An employee who is dismissed because of their political opinions or affiliation can bring a claim for unfair dismissal.[18] Ordinarily, to be eligible to bring such a claim, the employee must have two years of continuous service.[19] As will be seen, following *Redfearn* this requirement was disapplied where the reason or principal reason for the dismissal is, or relates to, the employee's political opinions or affiliation.[20]

Where the reason for a dismissal is an employee's political opinions or affiliation, such a dismissal is not automatically unfair. The dismissal will be fair where the employer has a potentially fair reason for the dismissal and where the dismissal is reasonable in the circumstances.[21] A dismissal would not normally be reasonable in the circumstances where it involved an unjustified interference with a Convention right[22] and, in general, it is not fair to dismiss an employee because they have engaged in political activities or been a member of a political party.[23] However, it has been observed that, in practice, Employment Tribunals 'frequently […] make decisions in relation to

16. European Convention on Human Rights, Articles 10(2) and 11(2).
17. For discussion of the state as a mediator of human rights, see chapter 2 of Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023).
18. Employment Rights Act 1996, Part X.
19. Employment Rights Act 1996, s 108(1).
20. Employment Rights Act 1996, s 108(4) Note that at the time of the *Redfearn* litigation, the service requirement was one year. Also note that s 108(4) has been interpreted to '[…] not deal with the dismissal of employees who are dismissed because they lack neutrality or who propose to act in a way that threatens their political neutrality' (*Scottish Federation of Housing Associations* v *Jones* [2022] IRLR 822).
21. Employment Rights Act, s 98.
22. *X v Y* [2004] IRLR 625.
23. *Redfearn v Serco Ltd* [2006] IRLR 623 [10]. The position will be different where political neutrality is a pre-requisite for the role (for example in the case of certain civil service roles).

unfair dismissals without any reference to the employee's human rights'[24] and, even where Tribunals do make reference, it is doubtful that their approach to the question of reasonableness sits compatibly with the Convention.[25]

Despite these limitations, the unfair dismissal jurisdiction does provide a forum in which, in theory at least, human rights arguments can be raised. However, such forum is only available to employees who have been dismissed.[26] It is not available to non-employee workers, i.e., those who provide their labour outside of the traditional employment contract, but nevertheless within an economic relationship of subordination and dependency.[27] It is also obviously not available to disappointed job applicants.

3.2 Anti-discrimination legislation

The Equality Act 2010 provides protection against workplace discrimination, harassment, victimisation, and other prohibited conduct in Great Britain.[28] Claims can be brought by workers (including non-employees) and job applicants.[29] There are nine protected characteristics.[30] Whilst political opinion is not a protected characteristic, philosophical belief is.[31] Support for a political party is unlikely, on its own, to amount to a protected philosophical belief.[32] However, a political view (for want of a better umbrella term encompassing opinions and beliefs) will be protected if it

24. Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (OUP 2022) 138.
25. See, for example, Hugh Collins and Virginia Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76(5) MLR 909, 917-921; Virginia Mantouvalou, 'I Lost My Job Over a Facebook Post – Was that Fair? Discipline and Dismissal for Social Media Activity (October 31, 2018). 2019 International Journal of Comparative Labour Law and Industrial Relations, Faculty of Laws University College London Law Research Paper No. 2/2018, Available at SSRN: https://ssrn.com/abstract=3276055 (p 12); Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (OUP 2022) chapter 6.
26. As Philippa Collins puts it, '[a]ny attempt to vindicate an individual's human rights through the use of an unfair dismissal claim is at risk of falling at the first hurdle: gaining access to a tribunal to review their case'. (Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' 47(4) Industrial Law Journal 504, 515).
27. Under the Employment Rights Act 1996, an employee is an individual who works under a contract of employment (s 230 (1)(2)). The definition of 'worker' includes employees but also includes individuals who personally provide services or work to another party where the relationship between the parties is not characteristic of a business-client/customer relationship (s 230(3)). Such individuals are therefore an 'intermediate category of working people' who are neither independent contractors nor employees (*Pimlico Plumbers Ltd and another v Smith* [2018] IRLR 872 [8]).
28. Equality Act 2010, Part 5, Chapter 1. The Equality Act does not apply to workplace discrimination in Northern Ireland (Equality Act 2010, s 217).
29. The Equality Act refers to 'employees' rather than 'workers'. Confusingly, the meaning of 'employee' in the Equality Act encompasses a broader category of individuals than those who work under a contract of employment. Indeed, the meaning of 'employee' under the Equality Act is essentially the same as the meaning of 'worker' under the Employment Rights Act (see *Pimlico* at [15]).
30. These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (Equality Act 2010, s 4).
31. More specifically, philosophical belief falls under the protected characteristic of religion or belief (Equality Act 2010, s 10(2)). Unlike in Great Britain, political opinion is a protected characteristic in Northern Ireland (Fair Employment and Treatment (Northern Ireland) Order 1998/3162). Therefore, where this article notes failures of the UK to provide judicial safeguards in respect of detrimental treatment on political grounds, that charge is based on the UK's failings in respect of Great Britain (i.e. England, Scotland, and Wales).
32. *Grainger PLC v Nicholson* [2010] IRLR 4 [28].

satisfies the five threshold criteria for a philosophical belief set out by Burton J in *Grainger PLC v Nicholson*.[33] The belief must:

(i) be genuinely held;
(ii) be a belief and not an opinion or viewpoint based on the present state of information available;
(iii) be a belief as to a weighty and substantial aspect of human behaviour;
(iv) attain a certain level of cogency, seriousness, cohesion and importance; and
(v) be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

Whilst they are conveniently assembled in *Grainger*, the criteria were not conceived by Burton J. Rather, they are derived from the Convention's Article 9 jurisprudence.[34] For the purpose of this discussion, the most pertinent limitation is the outright exclusion, under *Grainger* (ii) of 'opinion[s] or viewpoint[s] based on the present state of information available'. In articulating this criterion, Burton J cited Elias J in *McClintock v DCA*: '[…] to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes. It is not enough to have an opinion based on some real or perceived logic or based on information or lack of information available.'[35]

This criterion creates an incentive for Claimants to articulate their posited philosophical beliefs in brassbound terms. A Claimant who is alive to the possibility that their belief might be wrong and who is prepared to change their mind in the future may fail to fall within the protection of the Equality Act. This approach to bifurcating beliefs and opinions has been subject to considerable criticism.[36] Putting to one side the difficulties in such a line-drawing exercise, the principle of such dichotomisation is compatible with the Convention. Whereas Article 9 refers to *belief* and makes no reference to *opinion*, Article 10 refers to *opinion* and makes no reference to *belief*. The Employment Appeal Tribunal has, more recently, acknowledged that 'difficulties can arise in seeking to define in general terms the precise distinction between a philosophical belief, on the one hand, and an opinion or viewpoint based on the present information available, on the other'[37] but observed that, 'as a minimum […] a philosophical belief implies the acceptance of a claim […] and – as something that amounts to a protected characteristic – it must be capable of being understood as a characteristic of the individual in question.'[38]

33. *Grainger PLC v Nicholson* [2010] IRLR 4. Note that Mr Nicholson (the Claimant) brought his case under the Employment Equality (Religion or Belief) Regulations 2003, which preceded the Equality Act. However, the case remains authoritative.
34. Article 9(1) of the Convention provides, amongst other things, that 'everyone has the right to freedom of thought, conscience and religion'. In *Harron v Chief Constable of Dorset Police* [2016] IRLR 481 at [33] the EAT held that there was 'no material difference between the domestic approach and that under Article 9' in determining what constitutes a belief qualifying for protection.
35. *McClintock v DCA* [2008] IRLR 29 [45].
36. See, for example, Keith Patten, 'Protected Beliefs Under the Equality Act: Grainger Questioned' (2024) 53(2) Industrial Law Journal 239; and Gwyneth Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40(4) Industrial Law Journal 384.
37. *Mackereth v Department for Work and Pensions* [2022] IRLR 721.
38. *Mackereth v Department for Work and Pensions* [2022] IRLR 721 [77].

In assessing whether the acceptance of a claim is a belief or an opinion, it is likely that tribunals will continue to be interested in the depth of the individual's commitment to such claim. One consequence of this is that case law is unlikely to develop in such a way as to encompass all, or perhaps even most, political views.

4. Redfearn v United Kingdom

I will argue that the legislative scheme as set out above represents a failure by the UK to meet its positive obligations under the Convention to protect workers from unjustified detrimental treatment on political grounds. The development of this argument begins with the positive obligation already established by the Court in *Redfearn v United Kingdom*. Mr Redfearn had been employed as a driver for a private company. His role entailed transporting children and adults with disabilities. Most of his passengers were Asian in origin. In 2004 he was elected as a local councillor for the far-right British National Party and was subsequently dismissed by his employer because, amongst other things, it was concerned that his continued employment would cause anxiety amongst his passengers and their carers, and damage the reputation of the business.

Mr Redfearn brought an unsuccessful claim against his employer for race discrimination. He did not bring a claim for philosophical belief discrimination.[39] Mr Redfearn was not able to bring a claim for unfair dismissal because he lacked the requisite continuous service. The European Court held that this requirement was a violation of Article 11 of the Convention (read in light of Article 10) and that it was incumbent on the UK either to disapply the service requirement for an unfair dismissal claim where the dismissal was on political grounds or to introduce a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation.[40] The UK took the first option.[41]

The judgment of the Court therefore established that there was a positive obligation on the UK to provide judicial safeguards where an employer dismissed an employee on political grounds. It may have been that Mr Redfearn's claim for unfair dismissal would have failed in any event. The decision in *Redfearn* does not entail that he had been unfairly dismissed. Rather, it reflects the failure of the UK to provide a forum (e.g., an Employment Tribunal) through which the state could mediate the competing interests of Mr Redfearn and his employer.[42] The Court did not pass comment on whether there was a broader positive obligation in respect of judicial safeguards, for instance where an employer terminated the engagement of a non-employee worker or refused to hire an applicant on political grounds. This is not surprising. As Vladislava Stoyanova puts it, the Court's primary objective is 'to provide individual rather than constitutional justice'.[43] This is reflected in the requirement that a Claimant before the Court be a victim and the notion that

39. Protection against philosophical belief discrimination had been introduced six months before his dismissal (Employment Equality (Religion or Belief) Regulations 2003/1660 r 1(1)). Hugh Collins and Virginia Mantouvalou suggest, citing Burton J's statement in *Grainger* (at [28]), that a racist political philosophy would not qualify for protection as a protected belief. (Hugh Collins and Virginia Mantouvalou 'Redfearn v UK: Political Association and Dismissal' (2013) 76(5) MLR 909, 911).
40. *Redfearn v United Kingdom* (2013) 57 EHRR 2 [57].
41. See Employment Rights Act 1996, s 108(4) which was inserted by Enterprise and Regulatory Reform Act 2013, s 13.
42. For discussion of the state as a mediator of human rights, see chapter 2 of Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023).
43. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023)183.

human rights justice is centred on the individual.[44] In *Redfearn*, the Court was addressing a case involving a dismissed employee with less than the requisite continuous' service and it gave the UK Government a choice between two options which would address the particular mischief in that case. It would arguably have been an overstep for the Court to articulate broader deficiencies in the UK regulatory framework regarding detrimental treatment on political grounds.

Indeed, the Court has stated that 'it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention'.[45] Stoyanova observes that 'the Court does not directly review national regulatory frameworks. It can only do so indirectly once these frameworks have affected a concrete individual, who in the proceedings before the Court, has a standing as a victim'.[46]

5. Positive obligations under the European Convention on Human Rights

I will argue that, were the Court to hear a case brought against the UK by a dismissed non-employee worker or an unsuccessful job applicant who, in either case, suffered such detrimental treatment on political grounds and who was unable to pursue a claim due to the lack of protection under domestic legislation (see section 3 above), it would be likely to find that the UK was in breach of its positive obligation to provide judicial safeguards.

The textual basis for positive obligations being imposed on Member States lies in Article 1 of the Convention which provides that Member States 'shall secure to everyone within their jurisdiction the rights and freedoms [set out in the Convention]'.[47] The Court has held that the Convention is intended to guarantee rights which are practical and effective, not theoretical or illusory[48] and, as Stoyanova argues, this principle of effectiveness 'has a crucial role for justifying positive obligations and determining their scope'.[49]

Laurens Lavrysen notes that 'not every substantive safeguard that enhances the protection of an individual's human rights will be required under the ECHR'.[50] Stoyanova similarly observes that '[s]tates have discretion as to how to fulfil their positive obligations, which implies that adoption of a national regulatory framework might just be one option at their disposal.'[51] Nevertheless, there are multiple cases (including *Redfearn* itself) in which such a 'regulatory gap' has been held to amount to, or contribute to, a Convention breach by a Member State.[52]

The Court will perhaps be quicker to close such a gap where an existing domestic course of action is in some way exclusionary, as compared with where no course of action exists at all.

44. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023)183.
45. *McCann and Others* (1996) 21 EHRR 97 [153]. See Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 128.
46. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023)183.
47. European Convention on Human Rights, Article 1.
48. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 11.
49. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 11.
50. Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 92.
51. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 172.
52. Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 176–177.

Philippa Collins argues that that '[t]he Convention's broad scope of application gives rise to [a] positive obligation upon member states: to offer safeguards and adjudicative consideration to the human rights of all individuals within their jurisdiction'.[53] She goes on to note that '[t]he core of this obligation is ensuring that, where national labour rights provide an opportunity to challenge a human rights infringement, those rights and their remedies must be widely available'.[54]

Given that such review is already available to employees dismissed on political grounds, it is not difficult to imagine the Court articulating a positive obligation on the UK to provide judicial safeguards in circumstances where a non-employee worker is dismissed. By limiting the jurisdiction to employees, the UK is arguably in violation of the obligation which Collins refers to above.[55] As Collins points out, the Court has heard 'employment-centred complaints raised by a diverse range of applicants. It shows no regard for the employment status of the individual […]'.[56] In respect of job applicants, a new course of action would need to be created to provide protection for them (as clearly the unfair dismissal jurisdiction could not be extended). The Court would therefore need to go further in imposing a positive obligation and consequently it may be more hesitant to do so.

Where a positive obligation is established, how the obligation is met falls within the Member State's margin of appreciation and the Court is usually not prescriptive regarding the precise action which should be taken by the Member State.[57] How the regulatory gap is plugged will therefore usually be a decision for the Member State. *Redfearn* is an exception to this as the Court gave the UK a choice between two different methods to meeting its positive obligation. Lavrysen suggests that '[t]he reason why the Court [in *Redfearn*] was so detailed was probably because the source of the violation was easy to identify: an existing means of protection was cut off by the 1-year qualifying period that did not allow for sufficient exemptions.'[58] In the context of non-employee workers, the Court may be similarly prepared to point the UK in the obvious direction of simply extending the unfair dismissal jurisdiction. In the context of job applicants, given that (per the above) there is no existing jurisdiction which could straightforwardly be extended, the

53. Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (OUP 2022) 60.
54. Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (OUP 2022) 60.
55. Collins has, separately, discussed, in the context of worker status, the 'significant disparity between the scope of protection of unfair dismissal and the universality of ECHR rights'. (Philippa Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' 47(4) Industrial Law Journal 504, 515); Joe Atkinson also argues that 'while the relevant exclusionary rule in Redfearn was the qualifying period for unfair dismissal claims the reasoning applies equally to all rules preventing access to protections of Convention rights at work, including the tests and principles used to determine personal scope' (Joe Atkinson, 'Employment Status and Human Rights: An Emerging Approach' (2023) 86(5) Modern Law Review 1166, 1183).
56. Philippa Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (OUP 2022) 60.
57. Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 98; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 177.
58. Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 101.

Court may grant a wider margin of discretion and simply require that job applicants refused employment on political grounds have recourse to the courts or tribunals.

With the Court's general approach to positive obligations in mind, it can be envisaged that a future Court would extend the positive obligation articulated in *Redfearn* to encompass the dismissal of non-employee workers and, perhaps less obviously, to job applicants. In the next two sections I will argue that two considerations, namely, (i) the emergence of social media; and (ii) the continued criticism of the UK by the ILO Committee of Experts, make such an extension even more foreseeable.

6. The emergence of social media

George Letsas observes that '[t]he idea that the [Convention] is a living instrument that must be interpreted according to present-day conditions has been a central feature of Strasbourg's case law from its very early days'.[59] The Court seldom concerns itself with standards which applied when the Convention was drafted.[60] This can be contrasted with the approach of the United States Supreme Court which does concern itself with the 'original meaning' of constitutional provisions.[61]

That the Convention is a living instrument entails that the positive obligations of states also change over time. As Lavrysen observes, 'it is the task of the state to adequately tackle new threats to human rights which may arise in a changing world, such as the human rights challenges posed by the emergence of the internet'.[62]

In respect of the internet specifically, the Court has recognised that it 'has become one of the principal means by which individuals exercise their right to freedom of expression. It provides essential tools for participation in activities and discussions concerning political issues and issues of general interest.'[63] In the employment context, the Court had held in *Melike v Turkey* that the dismissal of an employee for 'liking' certain Facebook posts was a violation of Article 10.[64]

Prior to the advent of social media, the scope for the political opinions of workers to cause concern for employers was limited. Mr Redfearn's employer only became aware of his candidature following a 2004 newspaper article. Most workers are not politically active to the extent that they run for office and therefore, prior to the advent of social media, any political views expressed outside the workplace would be unlikely to cause any (for example) reputational or workplace harmony difficulties for their employers. Moreover, employers would, in most cases, simply have no means of discovering the political opinions of job applicants. The position today is of course much different. As Virginia Mantouvalou notes:

59. George Letsas, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: https://ssrn.com/abstract=2021836 or http://dx.doi.org/10.2139/ssrn.2021836 (p 2).
60. George Letsas, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: https://ssrn.com/abstract=2021836 or http://dx.doi.org/10.2139/ssrn.2021836 (p 2).
61. See, for example, Randy E. Barnett & Lawrence B. Solum, 'Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition' (2023) 118 Northwestern University Law Review 433; Melissa Murray, 'Children of Men: The Roberts Court's Jurisprudence of Masculinity' (2023) 60 Houston Law Review 799.
62. Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 93.
63. *Sanchez v France* App no 45581/15 (ECtHR, 15 May 2023) [158].
64. *Melike v Turkey* App no 35786/19 (ECtHR, 15 June 2021).

> People can instantly post opinions that they form during heated debates, and engage in lengthy online exchanges which can be accessed by many, and which they may later regret; social media privacy settings are a challenge, with users having limited ability to control whom their posts reach […][65]

Mantouvalou notes that 'many people have lost their job because of their social media activity, and many cases have been brought to courts and tribunals'[66] and argues that '[d]ismissal because of the use of social media makes the employer a moral arbiter on issues of workers' expression, not only within but also outside the workplace'.[67] However, as has been shown, no course of action is available where a non-employee worker is dismissed on political grounds (or a job applicant refused employment) where the views at issue do not amount to protected philosophical beliefs.

Given (i) the Court's acknowledgement of the internet as a vital forum for political expression; and (ii) its lack of concern for the employment status of the individuals participating in such expression, it is difficult to foresee the Court accepting as justified the UK's total failure to provide the possibility of redress to such individuals.

7. The European Court of Human Rights and International Labour Organization Convention 111

Drawing on the Court's case law, Lavrysen observes, amongst other things, that the positive obligation to develop a legal framework (i) only arises where the state is aware or ought to be aware of a potential human rights violation; and (ii) depends on the seriousness of the human rights threat involved.[68] It is submitted that the UK would have difficulty arguing either that it has no knowledge of any potential violation arising from the legislative lacunae discussed above or that such violation is not serious. This is because the UK has been repeatedly criticised by the International Labour Organization for its failure to provide protection against political discrimination.

The UK is a signatory to ILO Discrimination (Employment and Occupation) Convention 1958.[69] Under this Convention, the UK is committed to, amongst other things, pursuing a national policy aimed at eliminating political discrimination in, and access to, employment and occupation. This includes enacting such legislation as may be calculated to secure that objective.[70]

65. Virginia Mantouvalou, 'I Lost My Job Over a Facebook Post – Was that Fair?' Discipline and Dismissal for Social Media Activity (October 31, 2018) 2019 International Journal of Comparative Labour Law and Industrial Relations, Faculty of Laws University College London Law Research Paper No. 2/2018, Available at SSRN: https://ssrn.com/abstract=3276055 (p. 5).
66. Virginia Mantouvalou, 'I Lost My Job Over a Facebook Post – Was that Fair?' Discipline and Dismissal for Social Media Activity (October 31, 2018) 2019 International Journal of Comparative Labour Law and Industrial Relations, Faculty of Laws University College London Law Research Paper No. 2/2018, Available at SSRN: https://ssrn.com/abstract=3276055 (p. 5).
67. Virginia Mantouvalou, 'I Lost My Job Over a Facebook Post – Was that Fair?' Discipline and Dismissal for Social Media Activity (October 31, 2018) 2019 International Journal of Comparative Labour Law and Industrial Relations, Faculty of Laws University College London Law Research Paper No. 2/2018, Available at SSRN: https://ssrn.com/abstract=3276055 (p. 13).
68. Laurens Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights' in Yves Haeck and Eva Brems (eds), *Human Rights and Civil Liberties in the 21st Century* (Springer Netherlands 2013) 92–98.
69. Referred to hereafter as Convention 111.
70. International Labour Organization Discrimination (Employment and Occupation) Convention 1958, Articles 1–3.

The Court would likely have regard to Convention 111 when determining whether to pronounce further positive obligations to which the UK is subject. A feature of the Convention as a living instrument is that the Court will look to common values and emerging consensus in international law amongst Member States.[71] On the question of political discrimination, it seems apparent that there is an established consensus. 43 of the 46 Council of Europe Member States have ratified Convention 111. The three which have not are not members of the ILO.

In *Demir and Baykara v Turkey* the Court stated that:

> [I]n defining the meaning of terms and notions in the text of the Convention, [the Court] can and must take into account elements of international law other than the Convention [and] the interpretation of such elements by competent organs. […] The consensus emerging from specialised international instruments […] may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.[72]

As Tzehainesh Teklè argues:

> [I]nternational law and the corpus of pronouncements of international supervisory bodies are considered as sources that reveal the existence of an international consensus that should be used to interpret the ECHR. This approach is consistent with the 'evolutive' interpretation of the Convention and its nature as a 'living document'.[73]

The Court has, in its jurisprudence, drawn upon ILO Convention 111 in respect of political opinion. It has also referred to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is an ILO supervisory body.[74]

In the decade prior to *Redfearn,* the Committee of Experts repeatedly raised concerns about the UK's compliance with Convention 111. In 2002, it noted the lack of legislation in respect of political opinion discrimination.[75] In 2006, it asked the government to indicate 'what legal remedies [were] available to individuals claiming to have been discriminated against on the grounds of political opinion […], not simply in cases of unfair dismissal but also with regard to access to employment and vocational training'.[76] In 2009, during the development of what would become the Equality Act, the Committee urged the government to include the ground of political opinion

71. George Letsas, The ECHR as a Living Instrument: Its Meaning and its Legitimacy (March 14, 2012). Available at SSRN: https://ssrn.com/abstract=2021836 or http://dx.doi.org/10.2139/ssrn.2021836 (p 12).
72. *Demir and Baykara v Turkey* App no 34503/07 (ECtHR, 12 November 2008) [85]. See Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 91.
73. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 91.
74. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 97.
75. Direct Request (CEACR) - adopted 2002, published 91st ILC session (2003) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom, paragraphs 1 and 2.
76. Direct Request (CEACR) - adopted 2006, published 96th ILC session (2007) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom, paragraph 4.

within the bill.[77] The Committee was clearly not satisfied that the unfair dismissal jurisdiction was sufficient to discharge the UK's obligations under Convention 111.

Following *Redfearn*, the Committee noted (in 2014) that the service requirement had been disapplied in respect of unfair dismissal.[78] Nonetheless, it continued to press the UK in respect of protection against political opinion discrimination. In 2019 it noted the UK's statement that some political beliefs were protected under the Equality Act as philosophical beliefs[79] and, in 2021, the Committee observed that philosophical belief does not cover political opinion (per the discussion in section 3 above) and went on to request that protection against political opinion discrimination be included in the UK's domestic legislation.[80]

It should be noted that the practice of the Court referring to the ILO and CEACR is not firmly established.[81] This may be, in part, a product of applicants and third parties before the Court not referring to the ILO.[82] Of course, the Court is not bound to agree with the pronouncements of CEACR and other supervisory bodies. Indeed, on occasions it has taken a different view.[83] Teklè points out, however, that where a Member State has ratified a relevant ILO Convention, the ECHR 'cannot be applied in a way that would lead to a lower level of protection'.[84] Here, Teklè cites Article 53 of the ECHR, which provides that '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'[85]

It should be noted that Convention 111, as it relates to political opinion, may be narrower in scope than Articles 10 and 11 of the ECHR as they relate to political expression and association. Detrimental treatment of workers on political grounds which might engage the ECHR might encompass non-discriminatory conduct which might fall outside the scope of Convention 111. Whether a future Court had regard to Convention 111 might therefore depend on whether the claim before it involved discriminatory conduct. However, even if the claim did not involve discrimination, the Court may have due regard for ILO Convention 111 as evidence of a consensus amongst Member States of the importance of domestic law providing protection against detrimental treatment on political grounds.

77. Direct Request (CEACR) - adopted 2009, published 99th ILC session (2010) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom.
78. Direct Request (CEACR) - adopted 2014 published 104th ILC session (2015) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom.
79. Direct Request (CEACR) - adopted 2019, published 109th ILC session (2021) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom.
80. Observation (CEACR) - adopted 2021, published 110th ILC session (2022) Discrimination (Employment and Occupation) Convention 1958 (111) – United Kingdom.
81. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 108.
82. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 109.
83. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 110.
84. Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' 49(1) Industrial Law Journal 86, 110.
85. European Convention on Human Rights, Article 53.

8. Conclusion

Given the European Court of Human Right's express concern for political expression and its recognition of the importance of social media to free speech, the UK's failure to provide judicial safeguards for non-employee workers and job applicants subjected to detriments on political grounds would likely be subject to close scrutiny if a relevant case were to be presented to the Court. The UK would need to provide weighty reasons as to why no such protection was afforded, particularly given the criticism from the ILO Committee of Experts. It seems unlikely that the UK would be able to discharge this burden.

The arguments set out above have as their starting point the judgment in *Redfearn*. That decision clearly demonstrates that the Court is concerned about interferences by employers in the political rights of their employees.[86] The conclusions arrived at in this article draw on other sources of authority, including the general approach of the Court to positive obligations, but they are significantly buttressed by *Redfearn*. It should be noted, however, that the Court is not bound by its previous decisions and therefore *Redfearn* is not an invulnerable foundation upon which to build the case for further positive obligations. What the Court has previously pronounced, it can subsequently reject. Indeed, *Redfearn* was decided by a majority, not in unanimity. However, in light of the above discussion - particularly in respect of the emergence of social media and the position of the ILO Committee of Experts - it is difficult to foresee the Court moving away from its central finding in *Redfearn*.[87]

This article has focused on legislative solutions to the lacunae identified. In the context of non-employee workers being unable to bring claims for unfair dismissal, Joe Atkinson has suggested that tribunals should be prepared, in cases which engage Convention rights, to interpret 'employee' to include some non-employee workers.[88] If they did so, no legislation would be required. Absent such developments in the case law, the intervention of parliament is required. The UK should therefore legislate to create gateway claims for dismissed (or extend existing jurisdictions to) non-employee workers and disappointed job applicants who consider that they have been subjected to such detrimental treatment on political grounds.[89] Whilst this article has focused on the UK, its arguments can be extended to other Council of Europe Member States which do not already provide such protection.

86. A concern which is also evident in decisions subsequent to *Redfearn*. See, for example, *Melike v Turkey* App no 35786/19 (ECtHR, 15 June 2021).

87. Marko Bošnjak and Kacper Zajac note that '[a]lthough the Court is not bound by its previous decisions, it generally follows them in most circumstances'. They note that the Court is not an outlier in not adhering to a strict doctrine of *stare decisis* and point to the UK Supreme Court and US Supreme Court which are similarly not bound by their previous decisions. See Marko Bošnjak and Kacper Zajac 'Judicial Activism and Judge-Made Law at the ECtHR' [2023] 23 Human Rights Law Review 1, 7–8.

88. Joe Atkinson, 'Employment Status and Human Rights: An Emerging Approach' (2023) 86(5) Modern Law Review 1166, 1184–1185.

89. Whilst this article has focused on the narrow issue of detrimental treatment on political grounds, there are also compelling arguments for much broader reform to UK employment law to better align with the ECHR and, amongst other things, enable more categories of individuals to seek redress for interferences with their human rights. See, for example, Philippa Collins, 'Square peg *versus* a round hole? The Necessity of a Bill of Rights for Workers' (2020) 11(2) European Labour Law Review 199.

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