



The employer's right to control employees' freedom of speech and expression: the Indian perspective - March 2018

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Former United States Supreme Court Justice Oliver Wendell Holmes Jr once said, 'An employee may have a constitutional right to talk politics, but he has no constitutional right to be employed'.

Recently, a company based in the Middle East sacked an Indian citizen for abusing a journalist and posting anti-religious posts on social media. Instances akin to this, where employers have taken punitive actions against employees for exercising their freedom of speech and expression, have been fairly common globally. Similar issues pertaining to employees exercising their freedom of speech and expression leading to transgressions into employer interests have arisen in India as well.

In India, several fundamental questions pertaining to the extent and manner of controlling employees' rights to speech and expression remain a grey area in the absence of specific legislation governing the subject. The issue becomes murkier due to the complex interplay between constitutional laws, tort law, contract law, employment laws and technology laws. Therefore, the answers to questions as to whether an employer may restrict an employee from expressing his views on a social matter or participating in a political party or propagating a religious belief at a workplace etc, continue to be debatable.

Constitutionality of controlling freedom of speech and expression

Freedom of speech and expression is a fundamental right guaranteed by the Constitution of India. In [Kameshwar Prasad v State of Bihar](#) (1962) and [O.K. Ghosh v E.X. Joseph](#) (1962), the Supreme Court held that merely because a person enters a Government service, the employee does not cease to be 'a citizen of India', nor does it disentitle the employee to claim the freedoms guaranteed to every citizen under the

Indian Constitution. In these cases, the constitutional validity of certain service rules which imposed a blanket ban on government employees from participating in demonstrations were under question. By extending the above principle, the Supreme Court ruled that the service rule prohibiting all forms of demonstration without showing any proximate link with public disorder was unconstitutional and void.

However, like all other fundamental rights, the right to freedom of speech and expression is also subject to reasonable restrictions, including in relation to decency, morality, defamation, etc. Accordingly, various judgments have subsequently held that the State holds the authority to make certain service rules for necessary conduct of employees which may even restrict fundamental rights. Therefore, at present, the law regarding the extent to which the right to free speech and expression may be exercised by government employees depends on the specific facts and circumstances of each case. It may be noted that fundamental rights can be enforced against the State and/or State machineries. To that extent, barring certain exceptions, private employers have the flexibility to control and monitor free speech in the workplace.

Principles of Indian contract law

Indian contract law allows employers to incorporate necessary provisions to protect their proprietary information, trade secrets and other confidential information from unauthorised disclosures. As a means to enforce such protections, employers include provisions (typically in the employment agreements) restricting employees from disclosing confidential/proprietary information and enabling provisions which permit employers to monitor employees' use of technology and communications systems to ensure that employees do not engage in prohibited activities, including unauthorised disclosure of confidential information.

Indian courts have generally adopted a strict stance against breaches of confidentiality and proprietary information, as evidenced by a series of Supreme Court decisions including the judgment on *Mr Diljeet Titus, Advocate v Mr Alfred A. Adebare and Ors.* (2006), wherein the cardinal principle that employers have full and exclusive ownership of information which employees are privy to during the course of employment, was upheld.

Limits of freedom of speech and expression under Indian employment laws

Courts in India have held that in certain scenarios, fundamental rights may be enforced even against private entities if the larger public interest is at stake. Labour and employment laws in India typically adopt a pro-employee approach and seek to protect the interests of workers/employees, as employees are traditionally believed to have lesser bargaining powers. In the context of industrial relationships, some of the most important pieces of legislation that recognise and uphold the right to free speech and expression are the Industrial Disputes Act, 1947 and the Trade Unions Act, 1926, which enable employees (falling under the 'workman' category) to raise employee grievances, form trade unions and participate in lawful strikes and demonstrations.

Although there are no specific labour law provisions governing an employer's right to restrict an employee from behaving in a certain manner or monitoring employee activities at the workplace, legislation, such as the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the 'POSH Act') and the Rights of Persons with Disabilities Act, 2016 impose certain restrictions upon the conduct of individuals (including employees) and forbid them from engaging in certain prohibitory types of conduct (including conduct amounting to 'sexual harassment' and discriminatory behaviour). The ambit of 'sexual harassment' under the POSH Act is broad enough to include all forms of expressions ranging from written communications to gestures. Similarly, the definition of 'workplace' under the POSH Act is wide enough to cover places that an employee may have visited in the course of employment and does not restrict itself to the traditional concept of the workplace. Hence, while employees have a fundamental right to express themselves, in the Indian context, employers are free to lay out conduct which is not acceptable in a business set-up and, to that extent, may monitor employee activities within the parameters of law.

Technological aspects impacting freedom of speech and expression in the workplace

The current legal framework in India is inadequate to regulate employee activities on the internet and/or social media platforms. However, the Information Technology Act, 2000 and allied sub-legislation cover internet-based communications to a limited extent. It is also a well-established legal principle that the fundamental right to privacy as per the Indian Constitution can be lawfully restricted for the prevention of crime, disorder or the protection of other's rights and freedoms.

Video surveillance

By applying common law principles, courts in India have held that in the event of a conflict between the fundamental rights of two parties, the right that advances public morality shall be given precedence. For instance, video surveillance is regulated by the common law principle of 'reasonable expectation of privacy' and courts have opined that employees have a reasonable expectation of non-surveillance in personal spaces, such as bathrooms and locker rooms.

In some situations, courts have upheld the rights of employers in workplace surveillance and held them to be legal as long as they are within reasonable limits and have been implemented for protecting the legitimate interests of employers. That said, in the absence of specific legislation governing the subject, employers should follow certain principles, such as giving notice to employees that they are being monitored; obtaining consent from employees; monitoring the degree of intrusion; having valid justification behind such intrusion; and demarcating clearly between devices under surveillance and those not under surveillance in order to avoid any potential claims of violation of privacy.

Social media usage

In recent years, employees have been using social media platforms to raise complaints about their employers, managers, co-workers, and so on. Such instances could lead to a possible defamation action under the civil and criminal laws in India. The law on defamation provides a remedy to an individual or business where a false statement is made that causes harm to its reputation.

In *Tata Value Homes Ltd v Nityanand Sinha* (2015), a former employee was directed by the Bombay High Court to refrain from posting defamatory content against his employer on social media, as it was found to be done in bad faith with the objective of satisfying his own personal vendetta. The court also directed the employee to remove all defamatory content already posted on social media and observed that the injunction was necessary given that the allegations raised by the employee were false and misleading.

Many times, personal opinions raised by employees on social media platforms have also drawn negative publicity for employers. The possibility of employees disclosing confidential information on social media platforms continues to remain a matter of major concern. Given the sensitivity surrounding certain topics, content posted by individuals may also be considered as offensive to rationalities or strong political ideologies or religious beliefs and may be misunderstood as being the organisational culture of the establishment that the individuals belong to.

Many employers have adopted stringent social media policies and enforced guidelines that restrict the usage of social media and prohibit employees from posting derogatory content, abusive language and other common transgressions. Employees are also prohibited from using company provided devices and network for posting objectionable content on social media platforms, etc. As a matter of caution and to mitigate any exposure to litigation, it is recommended that contracts and policies be clearly laid out so that employees are aware of the restrictions imposed upon them and are aware that they cannot claim a right to privacy with respect to employer-provided devices.

Conclusion

In recent years, the gig economy model has disrupted the erstwhile traditional employment model and is fast changing the rules governing the employer–employee relationship. In many jobs, technology and the potential for employers to monitor its use blurs the line between work and personal activities. Given the outreach of technology, a certain degree of employer control over employee speech has also become inevitable and appropriate.

For example, it is in the legitimate interests of an employer to prohibit its employees from discussing trade secrets and other proprietary and confidential information with persons outside the company. Similarly, an employer should have the right to prohibit bullying and harassing conduct in order to foster a productive work environment and avoid any liabilities upon the employer under anti-discrimination and sexual harassment

laws. Further, the actions of individuals who represent the public face of the company, such as a corporate spokesperson or Chief Executive Officer, who make a derogatory comment/remark could reasonably be interpreted by the public as the opinion of the employer. Given the fact that employees are hired to advance employer interests and not to undermine it, employers can exercise certain rights when an employee's speech or political activity sufficiently alienates co-workers, customers, or political figures.

Outlining company rules and expectations in a comprehensive employee handbook is a critical step in letting employees know what's permitted and what is not. That said, given the risk of litigation and reputational risks associated with implementing such restrictions, employers must be cautious while imposing restrictions and implementing policies that could potentially be viewed by employees as an unauthorised transgression into the employees' freedom of speech and expression. Policies should be clear enough to state that anything intimidating, discriminating or harassing or anything that interferes with workplace productivity shall not be tolerated. It is also important that the guidelines regarding freedom of expression be carefully crafted and uniformly enforced so that all employees are treated equally and fairly. Employers need to be mindful in today's media-oriented world as news of such litigation or employee grievances could cause irreparable reputational risks to the employer. In such matters, prevention is always better than cure.