**Behavioural Ethics Approach to Employment Law and Workplace Norms**

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*The field of behavioural ethics seeks to clarify how people behave when confronted with ethical dilemmas. It has identified and analyzed numerous mechanisms though which people may engage in unethical and illegal behaviour without fully recognizing its implications. In the field of employment law, which focuses on the interaction between employees and employers, the subtle mechanisms which may underlie people’s decisions to behave unethically are especially relevant, but have not been the subject of significant study. The issue examined here is how applying behavioural ethics to employment law can expand the scope of employment law and change its outcomes.To that end, this paper will identify workplace attitudes or activities that can place employees in positions where they may feel pressured to act in a manner contrary to their personal ethical standards. In particular, three contexts in which the behavioural ethics perspective can change current legal approaches are discussed here:workplace bullying; workplace flexibility; and small, daily violations. This article examines not only what the law declares about a certain behaviour, but whether that conduct is appropriate or acceptable beyond its legal ramifications.It demonstrates how employment law is struggling to address this problem and how the paradigms of employment law can change and even benefit when taking behavioural ethics into account.*

1. Introduction

Behavioural ethics focuses on people’s inability to recognize the extent to which self-interest affects their own behaviour.[[1]](#footnote-4) While legal but ethically inappropriate behaviour has been the subject of critical work, particularly in the context of corporations,[[2]](#footnote-5) it has not yet been studied in the context of employment law. Numerous scholars in the field of behavioural ethics claim that because people want to maintain a positive and coherent view of themselves, they fail to recognize that many of their actions are based on self-interest.[[3]](#footnote-6) A related theory, “ethical fading”,[[4]](#footnote-7) emphasizes how people adjust reality to suit their interests, positing that by deceiving themselves, people allow ethical concerns to fade into the background of the decision-making process, thus weakening the potential impact of ethical issues on the decision. In contrast to classical economics, which primarily examines how self-interest affects motivation, behavioural ethics also accounts for the impact that self-interest has on cognitive processes, such as visual perception,[[5]](#footnote-8) reasoning[[6]](#footnote-9) and memory.[[7]](#footnote-10) Finally, behavioural ethics is more concerned with the implicit effects of self-interest than with its effects on explicit choices.[[8]](#footnote-11) The following will delve into some relevant findings of behavioural ethics and explain their relevance to workplace ethics and employment law.

1. Why employment law should focus more on the “good” people?

As already suggested, since people’s interest is to not view themselves in a negative light, they are likely to engage in various biased cognitive process related to reasoning, memory, and vision. Thompson and Loewenstein have shown that people were more likely to remember information that was related to their own position,[[9]](#footnote-13) and the fact that these biases operate without awareness makes it difficult for people to notice. Moore and Loewenstein were among the first to show that self-interest and concern for others affect behaviour through different cognitive systems, and that self-interest is automatic, viscerally compelling, and often unconscious.[[10]](#footnote-14) By comparing people’s private beliefs and public behaviour, Moore demonstrated that people truly believed their own biased judgments, not recognizing any problems in their responses.[[11]](#footnote-15)

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Clearly, social norms can affect the likelihood that people will engage in unethical behaviour. The field of law and economics has incorporated the effects of social norms based on rational choice approaches, taking into account such aspects as reputation, expressive effects, shaming, and social sanctioning. Cooter,[[12]](#footnote-18) for example, has developed an economic theory of how the expressive values of law can shape social norms and individual preferences. In addition, Gino, Ayal and Ariely have shown that the effect of unethical group norms on people’s inclination to engage in dishonest behaviour strongly depends on the salience of the group identity.[[13]](#footnote-19) In a more thorough examination of this psychological mechanism, Gino and Galinsky have studied the effect of psychological closeness on the likelihood that social norms cause people to engage in unethical behaviour.[[14]](#footnote-20) For example, they have shown that the likelihood that an unethical norm will lead to a change in one’s ethical decision-making is highly dependent on the level of psychological closeness of the participant to the unethical individual.

The principles of behavioural ethics can be applied to increase ethicality and compliance with positive social norms in the workplace. In the case of workplace environments, where the same people work closely together every day, the risk of unethical norms influencing behaviour is inevitably exacerbated,[[15]](#footnote-21)especially when considered in the context of some research suggesting that people are more attentive to unethical behaviour of others in order to justify their own ethical missteps, thus maintaining their self-images.[[16]](#footnote-23) The importance of understanding social norms within the workplace becomes clear given the daily interactions and dominance of employers’ regulation norms.[[17]](#footnote-24)

In light of individuals’ limited awareness of their unethical conduct, there is a strong argument to be made that the legal rules governing such behaviour in the employment context need revision.[[18]](#footnote-25) In addition, the lessons of behavioural ethics highlight the need to make some change in the underlying situations individuals face in the workplace, which can shape both explicit and implicit choices. appositeonly it is preferable to shape and limit the ethical biases that determine how people approach dilemmas even before they consciously begin determining how to solve them. The recommended approach is to impel people, ex ante to recognize when they are engaging in bad behaviour rather than focus on assigning responsibility to them, ex post.[[19]](#footnote-28) Making them recognize their unconscious unethical behaviour should help curtail such conduct.[[20]](#footnote-29) Some of the leading scholars in behavioural ethics have observed that classical intervention techniques, such as penalties, are rendered ineffective if ethical decisions are produced without awareness.[[21]](#footnote-30)

In light of this, alternative approaches to changing workplace ethics could be developed, especially for more subtle violations that are beyond the scope of traditional legal sanctions. For example, Bohnet, Bazerman, and Van Geen[[22]](#footnote-31) have shown that when people evaluate others in a between-subjects comparison rather than in a within-subject comparison, negative stereotypes regarding race became less relevant.

Given that people’s unethical behaviour is frequently the result of a limited and distorted view of their own conduct, it is particularly important to focus on legal violations by otherwise good employers in the context of employment lawr. Given the difficulty of determining individuals’ awareness of the unethical nature of their decisions, behavioural ethics suggests considering the aggregate of people’s decisions as proof of wrongdoing. This approach is analogous to the one taken in the area of employment discrimination, where the inability to penetrate people’s minds has, in some cases, led to an aggregated approach to evaluating decision-making.[[23]](#footnote-41) Beginning with *Griggs v. Duke Power Co.*,(1971) the U.S. Supreme Court has recognized that although it is not mandatory for the composition of a company’s workforce to replicate that of the general population, statistical disparities between the two can be used as compelling evidence of employment discrimination under a disparate impact theory. According to this theory, even if it is impossible to prove that the employer intended to treat candidates differently, the fact that the employer used criteria that resulted in discrimination or an unequal outcome toward a class of individuals is sufficient to establish an illegitimate discrimination.[[24]](#footnote-42)

The field of behavioural ethics seeks to define patterns of behaviour in managing these aspects of the relationship between an employee and an employer, providing new insights into the cognitive, situational, and social factors that influence the likelihood of violation by employees. has an effect onBehaviourthe ethical contexts in which they operate. While organizational justice became one of the most studied organizational behaviour topics in the 1990s,[[25]](#footnote-44) and significant advances have been made since then, more work remains to be done to clarify what factors influence ethics within the workplace. For example, while employees’ perceptions about the fairness of the treatment they receive from their organizations have been extensively studied in the context of corporate law and conduct, the implications of the effects of employee evasion of duties on employers has yet to be addressed.[[26]](#footnote-45)

1. How The behavioural approach contributes to employment law

Labour rights, such as that to fair working conditions, are entitlements for those with the status of an employee. which may be based, at least in part, on respect for the dignity of the individual. From a positivist perspective, these labour rights are recognized as human rights,[[27]](#footnote-46) based on a Marxist instrumental approach.[[28]](#footnote-47) Certain labour rights can be perceived as prohibitions against committing grave moral wrongs against employees,[[29]](#footnote-48) which may indeed be considered essential labour rights.

One of the justifications for this approach of protecting employees from moral wrongdoing is the prevailing recognition that there is a power imbalance between employees and employers. The consequent presumption is that employees may be exploited by the employer and thus need the protection of the law.[[30]](#footnote-49) These power gaps in labour relations are also important in terms of compliance with the law. That is, even where the law does apply, enforcement against employers may be difficult, which may render their non-compliance worthwhile for them.[[31]](#footnote-50) This result can be attributed to the unequal relationship between the employer and the employee that produces a work environment in which moral dilemmas may arise.[[32]](#footnote-51)

Offering protection to employees is arguably the moral foundation of the history of labour law.[[33]](#footnote-52) In this context, it may prove enlightening to examine whether and in what way referring to ‘human dignity’ can enhance our understanding of the ethical aspects of labour relations. For that purpose, analyzing labour law through a behavioural perspective can provide a broader normative framework. Currently, labour law focuses on the workplace and on two sets of actors, workers and employers. This has simplified the explanatory power and moral force of labour law.[[34]](#footnote-53) As argued by Herzog, these moral rights are part of meta-ethical discussion,[[35]](#footnote-54) with Herzog positing that organizations should respect basic moral norms because of the potential these norms have to amplify harm and intensify interactions with individuals. According to Herzog, the nature of working relationships often carry moral implications,[[36]](#footnote-55) which can lead to morally wrong decisions.[[37]](#footnote-56) Even when a behaviour is not clearly covered by the law, or in situations where the law provides protection, there are grounds for concern that the employee will underestimate the importance of protecting their moral rights.

existing also fall under the rubric ofnecessarilyWhen an employee faces a moral dilemma in the workplace whereby the employee is expected to engage in conduct inconsistent with his or her moral code, or to agree to a particular objectionable behaviour, the employee is usually expected to remain loyal to the organization and meet organizational expectations notwithstanding their potential objectionability.

There are numerous areas of organizational behaviour in which ethical issues arise. To clarify, consider some examples arising from hiring practices and the effect they have on third parties. Personnel departments engage in a number of diverse practices and a wide range of decision-making processes regarding applicants in the hiring process.[[38]](#footnote-58) There are employer demands that can cause employees in personnel departments to make unethical decisions, sometimes illegal or immoral (or contrary to their consciences).These actions of abuse can be offensive or insulting. Such cases can include those where an employer makes an internal request to consider only applicants under a certain age, despite the fact that such a request constitutes age discrimination. The employee must then make a decision as to whether to accede to the unethical requirements, or to act in accordance with the law and his or her conscience. Also, during hiring, employers can make race and gender requirements in a covert or subliminal manner, thus making it difficult to prove allegations of illegal discrimination against the employer. Nonetheless, these demands place the employee in a position of feeling pressured to engage in a decision-making process which is not only morally questionable to the employees but is also actually contrary to the provisions of law.[[39]](#footnote-59)   
For example, there are numerous examples of unethical conduct in the area of sales, as documented by Murphy and Laksenyak,[[40]](#footnote-61) with the research suggesting that sales practices can have a negative impact on employees’ ethical behaviour. In a study conducted by Ordonzo and others, nearly every sales workplace sets daily goals, which often encourage, if not pressure, employees to engage in questionable conduct just to meet their quotas, thus causing them both reputational and legal damage.[[41]](#footnote-62) Bazerman and Tenbrunsel have suggested a comprehensive set of solutions for policymakers based on insights derived from the behavioural ethics literature.[[42]](#footnote-63)

It is also possible to identify situations in which organizational requirements or culture will adversely affect employees’ behavioural ethics toward third parties. Studies of workplaces’ ethical culture have shown that when an employee is asked to engage in conduct the employee considers immoral or unethical, as a consequence of norms used to benefit the organization, the employee may feel obliged to sacrifice his or her ethical integrity[[43]](#footnote-66) Although this behaviour is aimed at a third party and not between the employer and the employee, the individual employee may be concerned that he or she will face dismissal on disciplinary grounds if the employee fails to acquiesce to the employer’s policy, even though the employer initiated that behaviour, directly or indirectly. Such concern is especially warranted when the third party chooses to sue the employer. It should be noted that courts favour protecting the interest of an injured party who relied on the employer to ensure that employees’ actions were carried out properly during the course of their work and in such a way that would not cause harm.[[44]](#footnote-70) It is our view that the level of the employer’s responsibility must be judged not just according to rigidly imposed legal rules, but also on the basis of behavioural mechanisms in the workplace.

These cases have significance both in terms of compliance with labour law and in terms of enforcement. The employee faces an ethical dilemma when an employer’s managerial prerogative enables the employer to demand a certain behaviour the employee finds objectionable. The employee can, of course, choose to resign from the position, and will then be considered to have resigned voluntarily. However, if the employee decides to oppose the employer’s course of conduct, the employee faces the threat of dismissal.

We do distinguish between minimum standards that labour law seeks to apply to every employer, and additionalstandards that go beyond that minimum. By referring to behavioural ethics, we suggest encouraging adherence to higher standards than the now mandatory minimum behaviour within work relations. Davidov has presented a possible solution which entails adopting open-ended labour standards.[[45]](#footnote-71) He gives fairness and good faith as examples of standards that should be incorporated into labour relations, and we would like to offer ethics as another one.[[46]](#footnote-72) In contrast to more limited legal regulation, the approach of applying good ethical standards assists in a broad range of circumstances, providing a more comprehensive perspective regarding good faith in the workplace. In some sense, the good faith duty can be viewed and evaluated through the behavioural perspective. This mechanism can allow courts to add an important protection in the absence of specific legislation on an issue. Raday refers to this in her review of a German case which protects the right of the employee to act in accordance with his ethical conscience.[[47]](#footnote-73) Weiss and Geck also refer to German law, where the constitutional guarantee of freedom of conscience has played an increasingly important role.[[48]](#footnote-74) Thus, unlike conscientious objections based on religious belief, which are protected by, among others, Israeli[[49]](#footnote-75) and American law,[[50]](#footnote-76) an employee's conscientious objections to employer directives based on ethical considerations are less acceptable. Paz-Fuchs discussed the lack of protection to ethically-based conscientious objection in his article, indicating that courts tend to defend this right only when it is accompanied by a violation of protected constitutional rights.[[51]](#footnote-77)

Employers may impose unethical demands knowing that most employees will not sue due to various barriers, and that employees will not act to enforce their ethical rights, or “self-enforce.”[[52]](#footnote-78) Employers may calculate that even if a claim is filed, the worst consequence they may suffer is being required to pay what they should have paid in the first place. Davidov elaborated on this phenomenon, noting, among other things, that insofar as such calculations and behaviour by employers result in employees enjoy fewer rights, they thereby violate specific legal requirements.[[53]](#footnote-79) Davidov further argues that as long as the power imbalance that characterizes the employment relationship exists, self-enforcement will remain unrealistic for many employees.[[54]](#footnote-80) In effect, employers often have strong incentives for non-compliance while employ­ees usually face various barriers that prevent self-enforcement.

behaviourimprovebehaviourUnderstanding how to minimize the negative consequences employees may suffer if they behave unethically could enhance the likelihood of employees feeling more confident about fighting for their rights. Employees who are pressured to violate the law might be less likely to bring an action in court to protect their employment rights for fear that doing so would expose them to legal jeopardy. In this context, the discussion will focus on three issues: workplace bullying, workplace flexibility and small, daily violations. On this last issue, we will examine the courts’ references to petty violations and the application of the *de minimis* legal principle.

*3.1 Workplace Bullying*

Workplace bullying, also known as “workplace maltreatment,” “workplace abuse,” or “workplace harassment,” creates a hostile workplace environment for the employee, often harming their mental or physical health.[[55]](#footnote-81)   
Although the field of abuse or bullying by the employer is also not fully regulated, this section focuses on workplace bullying within the context of aggressive clients or suppliers, who are, in essence, third parties to work relations. An increase in this problem of workplace bullying in the context of bullying by third parties can be seen in the field of education, with more and more teaching staff complaining about abusive or threatening behaviour from children and their parents.

According to the well-known adage, the customer is always right. The trouble is, customers are people, too, and people come with a variety of biases and exhibiting a range of behaviours, some of which can be objectionable. Should an employer be held liable for customer harassment? In the absence of federal legislation prohibiting generic workplace bullying in the United States, several states are considering legislation that would provide severely bullied employees with a claim for damages if they can prove that they suffered mental or physical harm as a result of the bullying. For example, a bill that was introduced in Massachusetts in 2017 would prohibit all “abusive conduct” against employees, even if it is not based on a protected right.[[56]](#footnote-82) For quite some time, there was no legislation in Israel regarding workplace harassment, with Israeli labour courts left to address the issue on an ad hoc basis.[[57]](#footnote-83) Eventually, the legislature decided to act on this issue, and an Israeli bill for the Prevention of Abuse at Work passed a preliminary reading in the Knesset in July 2015.[[58]](#footnote-84) Under this bill, the managerial prerogative does not give the employer unlimited powers; rather, this prerogative must be exercised in good faith and with consideration of the employee's interest.[[59]](#footnote-85) The explanatory notes to the bill emphasize that workplace bullying is a widespread social phenomenon that harms many workers.[[60]](#footnote-86) Under this approach, discrimination or harassment at the workplace originating from third parties, such as clients, is considered the responsibility of the employer. This legislation still remains in the proposal stage. As a result, while abusive behaviour in the form of sexual harassment is protected by law,[[61]](#footnote-87) also with respect to third parties in the workforce, other abuse does not receive protection. Consequently, not only do employees in Israel still lack protection from bullying in the work environment, but employers are not obligated to enforce appropriate conduct towards the employee nor to compensate an employee who has been the victim of such conduct.

By applying the lessons of behavioural ethics, the paradigms of employment law can be expanded to include imposing a duty on the employer to do everything possible to ensure a safe and protected work environment for employees with respect to threatening or abusive behaviour, whether from within or outside the workplace.

A behavioural ethics approach can justify creating clear ex ante definitions of what can be considered bullying rather than relying on the ability of the employees to recognize when bullying happens and bringing claims to court. Abusive behaviour, while not always hard to define, can have a negative impact on the employee’s work. An employee who feels comfortable and protected in the workplace and receives support from the employer when third parties engage in abusive behaviour can be expected to become more motivated to work, thereby becoming a better employee.[[62]](#footnote-88)

According to the rational choice approach, as well as to the behavioural ethics approach, the fact that there is not clear legal definition of what behaviour constitutes bullying is clearly problematic. In fact, from the perspective of behavioral ethics, this lack of a definition of bullying is especially troublesome, for both the employer and the employee.

One of the classical mechanisms in behavioural ethics suggests that under conditions of ambiguity, people can take advantage of what the resulting moral “wiggle room”[[63]](#footnote-89) to justify behaviour which best serves their self-interests. Thus, employers could engage in bullying behaviour without recognizing their actions as such. Under such circumstances, also the employee becomes uncertain of what boundaries were crossed, and will hesitate to bring such claims to court. As a result, bullying which doesn’t involve particularly conspicuous acts of aggression might be less likely to be challenged in court. Employment law can protect the employee when such behaviour occurs by clarifying and creating ex ante certainty about what actions may and may not be considered bullying. In such a way, the law’s acknowledgement of this issue may raise awareness and thus help minimize the phenomenon.

*3.2 Workplace Flexibility*

The corona pandemic, which continues to have a dramatic impact on many millions, has forced businesses to find solutions enabling them to continue operating. Employers have had to move quickly to a model of remote communication and working from home, in full or in part. Solutions for achieving some degree of occupational flexibility have been the subject of discussion and experimentation throughout the world,[[64]](#footnote-90) and some countries seem to have already responded to the employment challenges arising from a telecommuting model. The move to working from home has a broad spectrum of effects on employees, most of which can be specified, such as the case of work hours, that are well defined in the law. In these cases, the challenge is that of ensuring that the employee actually works according to these rules. This article will review one effect in particular, that of the new external expenses employees incur. Despite the recognized benefits of working from home, both to employers and employees, there remains a genuine concern about employees now having to bear some of the financial burden of the workplace. Employers choosing to move to a work from home model will certainly enjoy savings in real estate expenses and other ongoing overhead expenses involved in managing and maintaining physical offices. Along with this, employees then have to cover costs, such as one-time expenses for setting up a home office, and other periodic expenses for home office maintenance, together with an expectation from employers that employees will be using private assets, including the employee’s personal phone for work purposes.

While most countries have adopted policies about working from home, they have not addressed the issue of reimbursement of expenses to employees,[[65]](#footnote-91) which has been left to regulation through legislation or employment agreements granting employers the right to choose. The different approaches taken in countries usually refer to the definition of work from home and its scope, the employees' availability and the supervision of working hours. It is important to ask to what extent responsibility can be placed on employers to participate, in full or in part, in expenses arising from employees working from home.According to the U.S. Federal Fair Work Act, the employer cannot be compelled to bear those costs, unless not doing so results in the employee not receiving the full wage to which he or she is entitled.[[66]](#footnote-93) However, imposing a duty to refund expenses to employees can be complicated, as can be seen in the state of California, which implements the federal law and requires employers to reimburse their employees for the reasonable and necessary expenses that arise directly from fulfilling their duties.[[67]](#footnote-94) Nonetheless, a California state court, examining the purpose of the law, which is to prevent costs from being pressed on the employee, ruled that that there was no entitlement to a refund in cases of combined employment from home and in the workplace.[[68]](#footnote-95) In that case, the court reasoned that there was no obligation on the employer to allow remote work and no obligation to bear costs for actions that could be carried out from the office.[[69]](#footnote-96)

Sometimes working from home is not a choice, but a necessity for health or other reasons. However, there is currently no legal approach for regulating which party covers the expenses of employees employed from home. A recent example can be found in the Federal Court in Switzerland, which ruled on a case in which an employer, in response to the corona pandemic, chose to continue having employees work from home, even after the closure there had been lifted, in order to save on rental payments. The employee claimed a refund for part of the rent for the employee’s apartment, which also served as a workspace. The court rejected the employer’s argument that there was no legal obligation to cover the employee’s rental costs, and recognized the employee's demand as legitimate, notwithstanding that such payment was not specified by law or employment agreement,[[70]](#footnote-98) with labour and employment laws notably not offering direction on this question.

Here a mandatory requirement for reimbursement might be needed, as behavioural ethics suggest that employees may not be able to negotiate competently about reimbursement for such costs. This issue can be expected to preoccupy labour courts and judicial tribunals around the world in the future. Apparently, the additional cost of these expenses for working from home is relatively marginal. Nonetheless, it is possible that these costs could accumulate and eventually prove substantial. With such uncertainty and inability to estimate the costs in advance, both employers and employees might underestimate the importance of negotiating a fair reimbursement arrangement between them.

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*3.3 Small, daily violations and the de minimis legal principle*

This section examines those situations which employment law struggles to address involving small, everyday violations, as well as the mechanisms governing behavioural capacities, which could serve as warning signs for the purpose of behavioural discussion in employment law. The small, sometimes daily violations of employees’ rights gradually accumulate, and, with time, can profoundly erode the rights of employees. These occurrences raise two interesting legal issues regarding employers’ unethical behaviour towards employees. The difference between small contractual violations, where lack of action may be seen as acceptance, and small violations of employment laws, where acceptance is irrelevant, should be noted. While small daily violations of employee rights could conceivably be treated as contractual violations between two parties, we will focus on these violations in the context of labour law. Even here, because the two parties are an employee and an employer, with the employer presumed to have greater power, a different approach is needed to address the agreements between them and any violations.

Behavioural theories help explain why employees are willing to tolerate behaviour against them, often through repeated minor violations, that does not comply with labour laws.[[71]](#footnote-103) Employees’ acquiescence thereby undermines the ability to enforce labour laws and prevents the law from evolving. Within the employer-employee relationship, issues of smaller violations of employees’ rights are unlikely to be addressed. While some of such violations are not covered by the provisions of law, they are still likely to have a cumulative and significant impact on employees’ conduct. [[72]](#footnote-104) Thus, for example, simply making comments is not considered abuse and the law of discrimination does not address this. These comments may relate to the employee's behaviour, but can be made in an abusive manner that impinges on the employee's character. In addition, there can be employer demands that can cause an employee to make unethical sometimes even illegal or immoral, decisions. Perhaps the most common harm to employees is the lack of enforcement of those areas that labour law regulates, but where actual enforcement is scarce. An outstanding example is that of violations of the requirement for payment for overtime work, which will rarely reach courts when the sums are relatively small.

While there has been considerable research into the protection of employees’ rights in the context of employment law,[[73]](#footnote-105) the assumption is that employees usually avoid litigation,[[74]](#footnote-106) especially for more benign types of legal violations of their rights. For example, employers who mistreat their employees might be penalized only if the violation is so egregious that the employee feels compelled to file a claim against the employer. However, from a behavioural ethics perspective, it might be the case that employers who are guilty of small, daily violations or more benign violations are actually more likely to harm more employees in the long term, especially because people might fail to recognize such smaller repeated violations of employees’ rights.[[75]](#footnote-107) Over time, an accumulation of small violations of rights could come to constitute a gross violation which a traditional employment law approach might fail to recognize if the prolonged pattern is not discovered and responded to effectively.[[76]](#footnote-108)

Applying an ethical perspective, it can be argued that when employers act in a way that creates harm to the employee but that does not necessarily clearly violate employees’ rights because employers assume that seeking protection against abusive behaviour has a cost that employees will be reluctant to bear.[[77]](#footnote-109) Thus, a behavioural approach to labour law helps explain non-compliance with standards which do not rise to the level of legal violations.[[78]](#footnote-110) Moreover, as long as a violation is minor, there is no incentive for the employee to file a lawsuit, nor are courts always willing to addresses minor violations due to a perception that doing so would waste judicial resources. Employment law addresses the complex employer-employee relationship, usually characterized by power imbalances and long-term, yet changing, relationships between employees and employers. Consequently, if a minor legal infraction by the employer is acquiesced to or not objected to by the employee, the employer may enjoy legal protection by virtue of the employee’s acceptance of the questionable conduct.

Although this study deals with violations towards the employee, it is important to note, especially with respect to this issue of small violations, that it can also have an impact on employers. For example, there can be situations where an employee tends to be late to work a few minutes each day or takes slightly longer breaks than allowed. The employer may determine that these violations are too minor to justify termination of the employee, particularly if the employer wants to keep that employee on the workforce. Thus, the employer will not comment on or object to these small infractions, and therefore can be considered as having accepted this otherwise unacceptable conduct by the employee.[[79]](#footnote-111)

Clearly, there are minor ethical violations that employment law does not address, but which this article examines. The focus is on violations against employees, based on the assumption that these are the most common violations. These minor but cumulative violations by employers include lack of payment for break time, requiring an employee to be available for calls beyond working hours, provocative or “harmless” statements that nonetheless do not cross the line of harassment, and an accumulation of mental stress at the workplace. Each of these examples involves minor but abusive conduct, which can have the cumulative effect of infringing on employees’ rights in the workplace. We contend that even these seemingly negligible infractions, especially as they become increasingly common, constitute unethical acts that should invoke the protection of the law for employees within the field of labour law.

As discussed above, small infractions are usually met with no response, which can be interpreted as an acceptance of a certain course of conduct. The employee's lack of response has behavioural significance in the form of consent to the employer's behaviour. While legally, an employee cannot waive his or her rights, rendering tacit consent meaningless, an employee may nevertheless not respond to these minor violations and thus not assert his or her rights. This can be the case when there are small contractual violations or small violations of employment laws. In both cases, the employment relationship between the two parties dictates whether contract or employment law will apply to the case and whether a labour court has legal jurisdiction. Regardless of the context of these small violations, or of whether or not acceptance of them is relevant legally, not only does the law consider them as too minimal to merit employment law protection,[[80]](#footnote-112) but employees are usually likely to consider them as too minor to warrant a reaction, and therefore do not insist upon their rights. In either case, these small erosions of employees’ ethical norms can have the cumulative effect of undermining their basic moral rights.

There are numerous situations, even in employer-employee relations, when the weight of each violation is so small that it does not meet the normative threshold of the serious harm needed to warrant law protection, a situation that the law treats as a *de minimis non-urate lex,*[[81]](#footnote-113) based on the Latin phrase meaning, “the law does not concern itself with trifles”. In such situations, we argue that there is a need to determine how the aggregate of these minor infractions can render the employee morally vulnerable.[[82]](#footnote-114) Harel and Porat are of the opinion that it is ineffective for the law to develop rules to address these minor injuries, and that it may not be effective to conduct legal proceedings in response to them.[[83]](#footnote-115) However, we contend that while Harel and Porat’s argument may indeed be applicable to other private law fields, it should not be rigidly applied to the field of labour relations, where workers’ rights may be in need of greater protection due to the inequality in the balance of power between the parties.

Returning to the foundational *de minimis* legal principle, the law indeed has long chosen not to deal with minor matters, and “it does not tend to engage in minimal infringement of the right.”[[84]](#footnote-116) This principle originates in tort law, but also operates in contract law. The Supreme Court first described the *de minimis* doctrine as applying to “split-second absurdities” that “are not justified by the actualities of working conditions or by the policy of the Fair Labour Standards Act.”[[85]](#footnote-117) The *de minimis* principle has more recently been adopted by U.S. labour courts with respect to minor normative injuries. While there are no bright-line rule as to how much time amounts to *de minimis*, many courts have held that less than ten minutes (per day) of working time is considered *de minimis*. [[86]](#footnote-118)

The United States Department of Labor (DOL) has advised that the *de minimis* rule apply to the aggregate daily time for all activities for which an employee seeks compensation, and not to time spent separately on each discrete activity.[[87]](#footnote-121) For the past 70 years, federal courts have applied the *de minimis* doctrine to excuse the payment of wages to non-exempt employees for small amounts of compensable time if the time was shown to be administratively difficult to record.[[88]](#footnote-122) In 2018, in Troester v. Starbucks Corporation, the California Supreme Court held that California’s wage and hour laws did not fully align with the federal *de minimis* doctrine.[[89]](#footnote-123) In this landmark decision, the California Supreme Court concluded that non-exempt employees must be compensated for off-the-clock work which included small increments of time, such as four to ten minutes per shift. In reaching its conclusion, the court reasoned that California’s wage and hour laws had not adopted the *de minimis* doctrine found in the federal Fair Labour Standards Act (FLSA).[[90]](#footnote-124) The court noted that California law was more protective of employee rights than federal law and required non-exempt employees to be paid for all time worked. Specifically, in Troester, the court concluded that California law required employees to receive compensation for all hours worked or any work beyond eight hours a day. The court ultimately rejected the application of the *de minimis* rule to the plaintiff employee with respect to daily post-closing activities ranging from four to ten minutes each shift. In so holding, the court emphasized that such activities amounted to a number of minutes on each shift and occurred regularly, thus creating a compensable aggregate of time. Notably, according to the Ninth Circuit, the rule in Troester “does not require employers to account for split-second absurdities and might not apply in cases where work is so irregular that it is unreasonable to expect the time to be recorded.”[[91]](#footnote-125) Indeed, this cumulative effect approach has been recognized in research on the subject that has claimed that it was not necessary to recognize or apply the *de minimis* doctrine with regard to overtime pay, based on the argument that employees’ injuries should be measured cumulatively, leading to the conclusion that an accumulation of small divergences can add up to a significant extra hour.[[92]](#footnote-126)

Although the *de minimis* doctrine is not a dominant factor in the overall employer-employee relationship, and its application varies in different jurisdictions, it can nonetheless has repercussions on the relationship between employee and employer. It is found within the framework of protective legislation protecting workers’ rights so that they cannot be conditioned, even voluntarily. Just as the employee may not be considered to have waived these rights, so the law cannot abdicate its protection of them. Furthermore, the rigidity of legislation with respect to *de minimis* elements provides an outstanding example of how conduct is regulated without regard to the parties’ will. behaviour

Conclusion

This paper examined the unique issues involved when good people behave with limited awareness of the full legal and ethical meaning of their actions in the context of employment law. We analyzed how the paradigms of law can change and even benefit when considering ethics, particularly with regard to understanding employment law compliance.[[93]](#footnote-131)

We have focused on three main issues to demonstrate our argument, showing how applying behavioural theories is essential for understanding why employees are willing to tolerate behaviour against them that does not comply with labour laws. Regarding the issue of regulating workplace bullying, behavioural theory was applied to help justify imposing a duty on the employer to exhaust all possible options to ensure a safe and protected work environment for employees. A beheavioural analysis approach to the second issue of work flexibility offered a solution and placed a duty on the employer to cover certain costs. Finally, we discussed the importance of recognizing repeated small legal violations in the context of employment relations, where there are imbalances of powers between the parties. In all these cases, enforcement is paramount, as without it, law will have very little effect on employees’ rights.

1. behaviour*BehaviourBehaviour*behaviour*Behaviour*\*Lecturer and Law Clinic Academic Supervisor, IDC Herzliya; Lecturer Hebrew University of Jerusalem; \*\*Mori Lazarof Professor of Legal Research, Bar-Ilan University Faculty of Law.

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56. S.B. 1013, Massachusetts [↑](#footnote-ref-82)
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66. LabourLabourLabour Fair Labour Standards Act (FLSA), Sec. 207(b)(3)(e): "*'Regular rate' defined as used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include…(2)… other expenses*" [↑](#footnote-ref-93)
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68. *Gattuso v. Harte-Shoppers, Inc*., 42 Cal. 4th 554, 562 (S.C. 2007). [↑](#footnote-ref-95)
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78. See in detail at: Guy Davidov, **A Purposive Approach to Labour Law, p.224 - 230** [↑](#footnote-ref-110)
79. Regarding acceptance by action see: Bayern, S. ., Offer and acceptance in modern contract law: A needles concept, 103(1) Calif. L. Rev. 67 (2015). [↑](#footnote-ref-111)
80. On July 7, 2016, the New Brunswick Court of Appeal in *Attorney General of Canada v Mullin and Workplace Health, Safety and Compensation Commission*, 2016 NBCA 31, restored an original denial of compensation for a claim of gradual onset mental stress issued by WorkSafe NB.See Derek Sankey, *Workplace Stress on Rise*, Calgary Herald (29 Feb. 2012), [http://www.calgaryherald.com/business/workplace+stress+rise/5200301/story.html](http://www.calgaryherald.com/business/workplace+stress+rise/5200301/story.html" \t "_blank). [↑](#footnote-ref-112)
81. Max. L. Veech & Charles R. Moon, *De Mininis Non Curat Lex*, 45 Mich. L. Rev. 537 n. 5 (1947); Anna Funder, *De Minimis Non Curat Lex The Clitoris, Culture and the Law*, 3 Transnat'l. L. & Contemp. Probs. 417 (1993); Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. Pa. L. Rev. 429 (1926-1927). [↑](#footnote-ref-113)
82. Compare with: Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 Notre Dame L. Rev 593, 641–648 n. 2 (2012). [↑](#footnote-ref-114)
83. the general principles in criminal and constitutional law, see Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 Minn. L. Rev. 261 (2009); [↑](#footnote-ref-115)
84. H.C. 3434/96, **Hofnong v. The Knesset's Chairman**, P. D. 50 (3) 57; C.A. 1333/02, **The Regional Committee for Planning and Building, Raanana v. Horwitz**, P. D. 58 (6) 289. [↑](#footnote-ref-116)
85. Since *Mt. Clemens*, federal courts have generally analysed three non-determinative factors to determine whether time is *de minimis*or compensable: (1) the practical difficulty the employer would face in recording the additional time; (2) the total amount of compensable time; and (3) the regularity of the additional work.  *See, e.g.*,*Reich v. New York City Transit Auth*., 45 F.3d 646, 652 (2d Cir. 1995)*; Lindow v. United States*, 738 F.2d 1057, 1062–63 (9th Cir. 1984). [↑](#footnote-ref-117)
86. *Lindow*, Ibid; Anderson *v. Mt. Clements Pottery Co.*, 328 U.S. 680, 692 (1946);*See, e.g.*,*Aguilar v. Mgmt & Training Corp.*, 948 F.3d 1270, 1284 (10th Cir. 2020); *Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 584 (8th Cir. 2018).    [↑](#footnote-ref-118)
87. Codifying at 29 C.F.R. § 785.47, See Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006), <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2006-2>. [↑](#footnote-ref-121)
88. Jens Meyer-Ladewig, *The Principle of "De Minimis Non Curat Praetor" in the Protection System of the European Convention on Human Rights*, 5 Const. L. Rev. 127 (2012); Harris, S.J. Harward, E.D. (Ed.). (1983). Need for a de minimis policy. United States: Atomic Industrial Forum, Inc.; Selin Özden Merhact & Vehbi Umut Erken, *From Anglo-American Law to Continental European Law – De Minimis Rule in Private Law*, 9 Inonu U. L. Rev. 49 N. 2 (2018). [↑](#footnote-ref-122)
89. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (S.C. 2018). [↑](#footnote-ref-123)
90. Fair Labour Standards Act of 1938 (FLSA) (29 U.S.C § 213 (a)(1) (1938)). [↑](#footnote-ref-124)
91. *Rodriguez v. Nike Retail Serv*s., 928 F.3d 810, 818 (9th Cir. 2019). [↑](#footnote-ref-125)
92. Sean L. McLaughlin, *Controlling Smart-Phone Abuse: The Fair Labour Standards Act’s Definition of “Work” in Non-*Exempt Employee Claims for Overtime, 58 Kan. L. Rev. 737 (2010). [↑](#footnote-ref-126)
93. labourLabour*LabourLabour* Chaim Gans "The Concept of the Duty to Obey the Law" **Mishpatim** 17 (1988) 507. [↑](#footnote-ref-131)