

# Human Rights

## Human rights and employment law

by Bob Hepple QC



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A successful young practitioner said to me the other day, ‘There are fashions in law, and the current vogue is for “human rights.”’ Soon – as a result of the incorporation of the European Convention on Human Rights (ECHR) into domestic law – we are likely to have human rights points raised in many criminal cases, and in some civil ones. Employment law will not be immune from this fashion, and we can expect arguments to be framed under both statutory and common law jurisdictions in employment tribunals and the ordinary courts, so as to raise questions under the ECHR.

Is this simply a fashion likely to pass away once the novelty has worn off, or does it represent a shift in the ideological basis of employment law and a new source of principle for the development of the subject? In particular, will the incorporation of the ECHR into UK law increase the real rights of workers in unequal employment relationships, or will it – in the words of Lord McCluskey (H L Deb, 3 November 1997, co. 1266) – simply redraw the law in ‘vague, imprecise and high-sounding statements’? A Canadian commentator (McAdam, *Canadian Labour Law*, para. 3–1240) has reflected that human rights challenges in labour matters under the Canadian Charter have been ‘spectacularly unsuccessful’ but that in the process ‘large sums of time, money, and legal expertise have been expended’. Will conditional fees, or legally-aided public interest litigation in the UK (as

envisaged in the LCD’s consultation paper *Access to Justice with conditional fees*, March 1998) on human rights in employment yield tangible benefits to anyone apart from the lawyers?

### FAILURE OF HUMAN RIGHTS LITIGATION

It is, of course, striking that traditionally, human rights have seemed to disappear from sight when individuals enter the private sphere of the labour market. It is worth remembering that until the early 1970s leading textbooks still acknowledged the power of a master to administer ‘reasonable chastisement’ to an apprentice! In the UK we have now got rid of such abuses and also slavery, servitude and forced or compulsory labour. The ECHR exempts military service from these prohibitions, as the boy soldiers who had joined the army with parental consent at the ages of 15 or 16 and remained bound until they were aged 17 found in 1968, when the European Commission on Human Rights rejected their claim of servitude or forced labour (*W v UK* (1968) YB 562). Human rights lawyers will no doubt cast their eyes over the jobseekers’ regulations, as the new deal on welfare to work results in the denial of benefits to those who refuse work or training. But it is to be noted that the regulations permit a claimant to refuse a job on the grounds that it offends a sincere religious belief or conscientious objection – a recognition of the possible application of art. 9 and 10 of the ECHR. As regards ‘conscientious objections’, British social security tribunals are unlikely to be any more sympathetic than the Commission was to the Dutch claimant whose objection to taking a job was that the only suitable work for him was that of ‘independent social scientist or social critic’ (*Talmon v The Netherlands* [1997] EHRLR 448). Those of us who are happily engaged in that occupation should not look to the ECHR for protection!

One of the most fundamental of all human rights – to equal treatment and respect – entered employment law just

30 years ago in the *Race Relations Act* 1968, three years after racial discrimination in places of public resort had been made unlawful. It was 1975 before sex discrimination in employment and other spheres, was outlawed, and 1996 before a timid Disability Discrimination Act came into force. The European Court of Justice – here echoing the case law of Strasbourg Human Rights Commission and Court – has in the recent *Grant v SW Trains* case (Case 249/96); [1998] IRLR 206) ended any hope of developing gay and lesbian rights through case law. Despite the Labour Party’s manifesto commitment to deal with age discrimination, the Government has now indicated that it favours a voluntary approach: no fundamental right then for those rejected because of stereotypical assumptions about 40 and 50-somethings who are forced through premature selection for redundancy into a life of humiliating poverty and loss of status.

### Religious discrimination

We have no law against religious discrimination in employment apart from in Northern Ireland. Remember the 1981 case of the unfortunate Mr Ahmad, a school teacher of Muslim faith who was bound by his contract to work on Friday afternoons. He wanted 45 minutes off to attend the local mosque for prayers. Lord Denning (*Ahmad v ILEA* [1978] QB 36) said that:

*‘it would do the Muslim community no good to be given preferential treatment ... I see nothing in the European Convention to give Mr Ahmad the right to manifest his religion on Friday afternoon in derogation of his contract of employment.’*

Lord Justice Scarman dissented and said that a 45-minute absence to manifest his religion was not a breach of contract in the light of art. 9 of the ECHR. Mr Ahmad got no joy out of the European Commission on Human Rights which held that there had been no violation of art. 9 because he was contractually bound to work ((1981) 4 EHRR 126). More recently, an employee of Christian faith who was dismissed because she was not

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prepared to agree to a change in her terms of employment requiring her to work on Sundays failed in her application to the European Commission on Human Rights alleging a violation of art. 9. Nor did Sunday working constitute a violation of her right to family life under art. 8 (*Stedman v UK* (1997) 23 EHRR DC 168). While the right to opt out of Sunday working is now guaranteed for shop and betting workers by legislation, the narrow interpretations of the ECHR hold out little hope for other workers who do not wish to work on Sundays, or for workers of other recognised faiths with different Sabbath days.

Although art. 14 of the ECHR contains a wider list of prohibited grounds of discrimination than in UK law – including language, religion, political or other opinion, social origin, association with a national minority, property, birth or status – it will have little immediate impact. This is because art. 14 is not a free standing right; it is derivative and no claims to unequal treatment can be made except in conjunction with one of the specified rights, quite different in this respect from the 14th amendment to the US Constitution (the equal protection of the laws) or the UN Declaration of Human Rights and the International Covenants on Civil and Political and on Social and Economic Rights, which contain independent guarantees of the right to equality.

#### LIMITED RIGHTS ON SUNDAY WORKING

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#### *Freedom of association*

Another human right is freedom of association. This has been singled out since 1919 in the Constitution of the International Labour Organisation (ILO), and was reiterated in the UN Declaration of Human Rights, the ILO Declaration of Philadelphia of 1944 and in key ILO Conventions, as well as in

other international instruments, as one of the most fundamental of all human rights. But it receives only patchy recognition in UK law. The most notorious case was that of the Government Communications Headquarters (GCHQ) workers deprived in 1984, after 40 years, of their right to belong to a trade union. Because the ECHR was not then part of domestic law, the only way that this blatant violation of the freedom to associate could be challenged was by way of judicial review on the grounds of a failure to consult the trade unions on the change of status. This challenge failed because the Law Lords accepted that Mrs Thatcher genuinely feared a threat to national security, and they regarded this as a reason for judicial restraint (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). It was only when the matter reached the European Commission that art. 11(1) of the ECHR came directly into issue, and even this proved incapable of protecting the right to belong to a trade union. The most surprising feature of the decision of the European Commission on Human Rights, in declaring the complaint inadmissible, was the scant attention paid to the distinction which the ILO committees drew between the right to belong to a union and the ‘exercise’ of that right ((1987) 10 EHRR 269). Article 11(2) of the ECHR allows lawful restrictions only on the ‘exercise’ of the right, and does not contemplate a total abolition – a point later recognised by the committee of independent experts under the European Social Charter.

Another example of the incomplete protection of the freedom of association is the *Wilson* and *Palmer* cases where a majority in the House of Lords – through an incredibly narrow and historically inaccurate interpretation of the legislation – held that discrimination against trade unionists who refuse to forego their right to union representation by signing so-called ‘personal’ contracts, is not a violation of the right to belong to or to participate in the activities of a trade union (*Associated Newspapers Ltd v Wilson* [1995] IRLR 298). *Wilson* and *Palmer*’s complaints have now been declared admissible by the European Commission on Human Rights. The UK Government may settle the proceedings and amend the legislation. If the matter goes to court,

the outcome is by no means certain. In a line of cases decided in the 1970s, the court construed art. 11(1) in a narrow way, allowing states a free choice of means used to make it possible for trade union members to protect their interests. So art. 11(1) does not secure any particular treatment of trade unions; neither the right to negotiate nor the right to be consulted. Recently, in *Gustafsson v Sweden* (1996) 22 EHRR 409, the court said that while art. 11(1) does not guarantee a right to engage in collective bargaining, it also does not guarantee the employer’s right to refuse to do so. So the Court of Human Rights in the *Wilson* and *Palmer* cases will have the unenviable task of balancing the employees’ positive right to associate against the employers’ negative freedom not to associate.

#### FAILURE TO MEET OBLIGATIONS

These instances illustrate the point that core human rights such as equality and freedom of association remain incomplete, incoherent and ineffectively enforced, falling short of the UK’s obligations under the International Covenant on Civil and Political Rights and under the Covenant on Social and Economic Rights. Moreover, the illustrations also indicate that the right of individual petition to Strasbourg alleging violation of Convention rights has yielded little of substance to domestic employment law; on the whole, the results have been spectacularly unsuccessful. Exceptions to the general trend are Alison Halford, who recently after 6 years secured £10,000 compensation for telephone tapping at work contrary to her right to private life under art. 8, and the local government officers who recently had their complaint upheld that the restrictions on their political activities violated art. 10.

The question now is whether bringing these rights home will make a difference. I believe it will for two reasons. First, it will mark an important ideological divide from the period of neo-liberal ‘market’ employment law (1979–97) from which we are now emerging, and also from the earlier period of collective laissez-faire, which lasted from 1906–1979 with a brief interlude under the Heath Government’s IRA 1971–74. Secondly, international and European-level human rights will provide a rich source of

principle, not only for statutory interpretation but also for the development of the common law of employment.

### AN IDEOLOGICAL SHIFT

Sandra Fredman has pointed out that: 'an important element in the success of the labour law of the Thatcher years was its ideological power.' (1992) 12 OJLS 24)

The Labour Government has started the process of developing an alternative strategy. This was symbolised by the restoration of the right to belong to a trade union at GCHQ, although significantly, recognition of unions there was tied to a 'no disruption' agreement. Much remains to be done to meet criticisms of British employment law by the ILO Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations. Legislation will be required to prevent discrimination against workers who do not wish to give up collective bargaining, ending the right of employers to dismiss striking employees without those employees having the right to complain of unfair dismissal, and restoring trade union autonomy to discipline members who do not abide by majority decisions. We shall be able to see how far the government is willing to go down this road when it publishes the long-expected white paper on *Fairness at Work*.

The conception of 'human rights' – that is those moral rights which one has simply because one is a human being – is a crucial part of the underpinning of such a strategy. In a globalised market economy, undergoing rapid technological change, direct foreign investment and intensive product market competition, national states have few defences against social dumping or the race to the bottom in labour standards. This is why the Director-General of the ILO has been arguing since 1994 that the liberalisation of trade must be accompanied by respect for fundamental human rights in the workplace, as defined in seven core ILO conventions: freedom of association and collective bargaining (1948, No. 87 and 1949, No. 98) forced labour (1930, No. 29 and 1957, No. 105) non-discrimination (1951, No. 100 and 1958, No. 111) and the minimum age in employment (1973, No. 138).

These seven conventions do not in

themselves provide a unique and comprehensive set of definitions of core labour standards. For example, convention No. 138 provides for a minimum employment age while remaining silent on the possibility of non-exploitative forms of child labour. Nor is it clear why these conventions and not others relevant to social dumping have been selected – such as Convention No. 131 of 1970 (minimum wage-fixing machinery), the numerous conventions on occupational health and safety, and Convention No. 81 of 1947 on labour inspection.

### FEW DEFENCES

The conception of 'human rights' – that is those moral rights which one has simply because one is a human being – is a crucial part of the underpinning of such a strategy. In a globalised market economy, undergoing rapid technological change, direct foreign investment and intensive product market competition, national states have few defences against social dumping or the race to the bottom in labour standards.

The ILO's efforts are now being matched by worldwide campaigns by NGOs for 'social labelling' of products to signify that they have not been produced by child labour or other exploitative forms of work violating the core conventions, and by attempts to get 'social clauses' into trading agreements and the new multilateral agreement on investment. To date these campaigns have been unsuccessful, but they represent a growing international movement for human rights at work.

### British contribution

The British contribution to this development has to take place within the framework of the European Union. One of the striking features of the EU and EC treaties is the absence of substantive protection of fundamental civil and social rights. For this there are both political and ideological reasons. I shall not attempt to unravel the politics of the EU, but ideologically, from 1957 until enlargement in 1973, the ideology of the common market was functionalist based on common economic needs for free

movement of capital, labour, goods and services. Questions of social justice and human rights were separated; social advance would come through changing the economic base. One of the great lessons of the 20th century is that economic determinism is an ideology which simply does not work.

This lesson was only partly absorbed after 1973. We entered a phase of neo-functionalism: a continued emphasis on economic activity, but a growing realisation that economics and politics, economic and social development, cannot be separated. However, while human rights, including social and economic ones, were acknowledged – e.g. in the preamble to the *Single European Act* 1986 – they remained subservient to economic integration.

It was left to the European Court of Justice (ECJ) in Luxembourg to develop some protection of fundamental human rights. At first the court resisted such a development, but from *Stauder v City of Ulm* (Case 29/69) [1969] ECR 419 onwards, it became more receptive to the protection of property rights and the freedom to pursue a trade or profession. Later, following the series of *Defrenne* cases (*Defrenne v Belgium state* (case 80/70) [1971] ECR 445; CNR 8137; *Defrenne v Belge de Navigation Aérienne (SABENA)* (*Defrenne II*) (case 43/75) [1976] ECR 455; CMR 8346; *Defrenne v SA Belge de Navigation Aérienne (SABENA)* (*Defrenne III*) (case 149/177) [1975] ECR 1365; CRM 8500) the right of men and women to equal treatment was categorised as a fundamental right protected as a general principle of EC law.

It has been remarked that the ECJ discovered the protection of human rights as a general principle of EC law so as to prevent national courts from defying EC law. Joe Weiler perceptively comments that:

*'the surface language of the Courts in Stauder is the language of human rights ... The deep structure is all about supremacy. It was an attempt to protect the concept of supremacy threatened because of the apparent (largely theoretical) inadequate protection of human rights in the original treaty systems.'* (*Human Rights in the EC* (1990), p. 580–1)

But whatever the court's motivation, there can be no doubt that the

development of human rights – in particular, but not limited to, equality – has been of profound importance. Think, for example, of *Johnstone v RUC* (Case 222/84) [1986] ECR 1651, where the chief constable was prevented by the court from shielding behind a national security certificate to exclude the jurisdiction to review a decision not to renew female reservists' employment contracts because of the policy of not arming them. The requirement of judicial control under art. 6 of the ECHR was held to be part of the constitutional traditions of the member states, and national law was therefore assessed in the light of the ECHR, even though the convention had not been incorporated into domestic UK law. Moreover, the court has required member states to implement EC rules in a way which respects fundamental human rights, even though the Community measure did not itself embody those rights; nor can a member state derogate from Community rules on grounds of a national policy, where that policy conflicts with fundamental human rights. As soon as legislation enters the field of application of EC law, the ECJ – not the national court – becomes the sole arbiter of whether fundamental rights have been secured.

### Common code

So what we are seeing is the development – in Attorney General Jacobs' words – of a 'common code of fundamental values' in the EU, and these make it almost inevitable that, quite apart from the incorporation of ECHR, domestic law will increasingly be based on the ideological foundation of fundamental human rights. The Treaty of Amsterdam continues this process with its express reference in the preamble to respect for human rights and also to respect for the European Social Charter, with provisions for sanctions against member states who violate such rights. The new art. 13 of the EC Treaty widens the competence of the Community to take action against a variety of forms of discrimination, although this is limited to situations where there is already a basis for Community action – i.e. 'within the scope of application of the Treaty'.

Much cyberspace and printed material has been expended – by myself included – on the debate about the scope of fundamental rights. The ECHR's rights are limited, and in some respects

outdated, with the prospects of amendment made more difficult by the accession of many new member states (now 40) to the Council of Europe. The European Social Charter (1961), although recently revised (1996) and with improved reporting systems, remains an unenforceable 'footnote' to the convention. So it is important to see incorporation not as an end in itself but as a means to an end. Much rights talk is rhetorical and, as we have seen from the ECJ, may really be serving particular interests in a struggle for power. Human rights acquire meanings only in specific social and political contexts. Labour movements in the 19th century sought civil and political rights so as to enable them to use state power against the worst excesses of economic power. Women and ethnic minorities have used the right to equality to challenge patriarchy and institutionalised racism. Many people hope that incorporation will enable the judges to do for them what Parliament, the administration and the judges have not. In this they may be mistaken. Incorporation of the ECHR will enable these and other groups to advance the cause of human rights and, by so doing, to help create a culture of human rights. But they should not expect that enforceable human rights can solve all their problems.

### PUBLIC AUTHORITIES ONLY

This brings me to the second question, that of human rights as a source of legal principle in employment law. We must remind ourselves that the ECHR is concerned only with abuses of human rights by public authorities. The Human Rights Bill will, therefore, entrench a new hierarchy of rights in domestic law between public and private employees. Remedies will be available only against public authorities in their capacity as employers. There will be no direct sanctions against private employers who act in a way which is incompatible with convention rights, such as freedom of expression, the right to private life, or freedom of association. I shall not attempt here to discuss the definition in the Bill of public authorities: there will be elephants and non-elephants and a large number of animals in between which are difficult to classify. In my view, the government was right not to list the authorities covered in a schedule. Although there is a lack of certainty as a

result, the courts will have the opportunity to deal with an expanding number of employers whose functions are of a 'public nature' on a case by case basis.

Despite the limitation to public authorities, incorporation will have a profound effect on private employment as well. First, legislation must be interpreted 'so far as possible' to give effect to the ECHR, and where this cannot be done a court may grant a declaration of incompatibility. Secondly, the courts and tribunals – who are themselves designated as public authorities – are required to act compatibly with convention rights. This means that the common law will be developed in cases between private employers and employees so as to give effect to convention rights.

### Right to private life

Let me take as an example, the right to private life under art. 8. The *Halford* case (1997) EHRLR 540, clearly establishes that the protection afforded by this article applies to the workplace. *Halford's* right to private life was infringed by the interception of her telephone calls, even though these calls had been made from the employer's premises, in the employer's time and using the employer's own internal communications system. This opens up for scrutiny many other modern employment practices, e.g. video surveillance, drug testing, psychometric testing, etc.

At first sight this applies only to employees of public authorities. But might not a common law argument be developed along the following lines? The House of Lords has now endorsed in *Malik v BCCI* [1997] IRLR 462, that it is an implied term of every contract of employment that the employer will not:

*'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

It is clear from *Malik* that it is not necessary to show that the trust-destroying conduct was directly targeted at the employee, nor are the employer's motives relevant. Nor need the employee have known of the trust-destroying conduct at the time. I suggest that since the court must act compatibly with convention rights, the duty of trust and

confidence also embodies a duty to respect the Convention rights of an employee. This may be regarded as horizontal enforcement of the Convention by the backdoor, but it seems to me altogether legitimate and strongly arguable.

### CONCLUSION

My conclusion is that the domestication of the ECHR will give workers an opportunity to win some new rights in areas in which Parliament has failed to legislate, such as the right to private life and freedom of expression, and that the exclusion of rights to collective bargaining and to strike is, at worst, neutral in effect, leaving employers and unions free to pursue their aims by social and political means. Statutory interpretation and the common law will benefit by being redrawn in categories which reflect fundamental social values. The judges will have an opportunity to import into the private employment relationship the public law aims of protecting the dignity and liberty of the individual against the arbitrary or unfair exercise of managerial prerogatives. Looked at this way, the Human Rights Bill could be not simply a fashion but a turning point.

Whatever one's views about this, one


point is beyond question. Kahn-Freund said 21 years ago, that:

*'to enact a Bill of Rights may involve a shifting of the function of law reform from Parliament, the Government and the Law Commission to the Bench and the Bar.'* ([1970] CLJ 240, 270)

The judges will have to take into account decisions of the European Court and European Commission on Human Rights, but will not be bound by them. This means that judges will have the power to develop European standards to the realities of our own labour relations. Ironically, it is only by developing a unique UK case law that the judges can adapt the ECHR in a way which enhances rather than restricts the rights of workers and their unions in unequal employment relationships. Most of the cases dealing with collective issues have come from countries where extensive rights to bargain and to strike already existed. The applicants were complaining of specific restrictions. The UK, in which convention rights now have to be applied, is a country in which there is no statutory system of workers' participation, most employees are not protected by collective bargaining, fewer than 30% are unionised, and at least one-third of the workforce is outside the scope of

employment protection legislation. The courts will need a deep understanding of this social reality and of comparative labour law if they are to 'bring rights home'. This involves a recognition that civil rights, such as freedom of association, are, in the words of Dickson CJ's dissent in *Re Public Service Employee Relations Act* (1987) 38 DLR (4th) 161, SCC, at p. 197:

*'most essential in those circumstances when the individual is liable to be prejudiced by the action of some larger and more powerful entity, like the government or an employer.'*

The task of the courts and tribunals will be to harmonise collective interests and individual rights, so as to support the rights of workers rather than to undermine them. 

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# Private International Law

## Incapacity and contracts - the European dimension

by Dr Volker Lipp



English law as to mental incapacity and the protection of incapable adults in respect of their person and their property has been under review by the Law Commission for England and Wales since 1989, as has the Scottish law by the Scottish Law Commission since 1990,

with broad public participation. However, the international and, in particular, the European dimension of these issues is largely unknown.

### DOMESTIC LAWS

Today there is no common European law of persons, nor are there common rules in the conflict of laws regarding the law of persons. The rules governing capacity, mental disorder and the protection and legal representation of incapable adults and of minors are quite different in Europe, both in the respective domestic laws and in private international law. Law reforms in various European countries have widened the differences in the respective domestic

laws. So may the application of the proper law doctrine to the question of capacity to contract in English law within the field of private international law.

#### LAW REFORM IN EUROPE

Reform of laws relating to the protection of incapable adults has been seen in:

- France (1968)
- Austria (1983)
- UK (1983)
- Belgium (1991)
- Germany (1992)

The English and Scottish Law Commissions put forward further proposals for reform in 1995