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Introduction

By Dr Barbara Havelková

Labour law today is facing some difficult questions: How to achieve social inclusion in an age of austerity? How to combine the rights of workers with the aim of competitiveness in a globalized world? Several of the blog contributions forming this chapter addressed these questions head on, in others, the issues lurk in the background.

It is also important to note the overlap between the human rights issues raised in these labour rights contributions and elsewhere in this anthology. Many themes cut across several chapters, for example, equality rights, freedom of assembly and expression, socio-economic rights, migration and criminal justice. Indeed, many of the posts included in other sections of this anthology could have equally found a home in this chapter – such as contributions on the increase in employment tribunal fees, highlighted in Chapter 1 on ‘Access to Justice’ or recent judicial pronouncements protecting the right to strike as a form of freedom of association, contained in Chapter 7.

This introduction takes a thematic approach to the contributions in this chapter, divided under three headings: The Expansion and Contraction of Labour Law Protection; Uniform or Varied Protection?; and Transnational Regulation and Convergence?

The Expansion and Contraction of Labour Law Protection

In several jurisdictions we have seen development whereby marginalized groups, previously uncovered by the protection of labour rights or human rights, have now been brought into the fold. Max Harris’ post ‘The Regulation of Casual Work and the Problematical Idea of the ‘Zero Hours Contract’ (p 336) looked at the extension of sexual harassment protection to sex-workers in New Zealand. This was accompanied by Meghan Campbell’s review of the landmark Canadian decision of Bedford [2013] 3 SCR 1101 (‘Safety of Sex-Workers Again at the Centre in Canada (Attorney General) v Bedford’ p 338). In this case the Supreme Court struck down several criminal law provisions which compromised the safety of sex workers thus violating the rights to life, liberty and security of the person, guaranteed by Section 7 of the Canadian Charter of Rights.

The interference with the livelihood of the particularly marginalized has also been addressed in South Africa and Pakistan. The South African Constitutional Court recently issued an ‘interim injunction’ to protect street traders from the Johannesburg’s controversial ‘Operation Clean Sweep’, as Brian Ray reported (‘South African Informal Traders Forum and Others v The City of Johannesburg and Others: A Promising Start by the South African Constitutional Court’ p 341). Ravi Nitesh in ‘The Plight of Indo-Pak Fishermen and the Need to Appreciate Economic Rights’ (p 342) highlighted how Pakistan has recently released boats of fishermen arrested for fishing on the wrong side of the Indo-Pakistani border. He urges in his post for the Indian government to respect the fishermen’s right to earn a living and do the same as Pakistan.

Alongside these positive extensions of labour and human rights to workers previously uncovered, including the self-employed, opposite trends exist as well. Closer to home, Mark Freedland criticises ‘Zero Hour Contracts’ as a highly precarious form of employment with dubious coverage by employment rights. (‘The Regulation of Casual Work and the Problematical Idea of the ‘Zero Hours Contract’ p 336) He notes that ‘depending on the precise nature of the arrangement ... access even to such fundamental rights... as freedom of association may be in doubt.’ The rise of ‘Zero Hour Contracts’ can be also seen as an example of the difference in the level of protection afforded to different groups of workers.

Uniform or Varied Protection?

Bob Hepple’s post (‘Women at work – positive obligations for positive results’ p 332) looks at the position of women. He argues that continuing gender gaps have their roots in ‘socio-cultural traditions, structures of employment and in the way we measure economic value’. These structural obstacles to equality can only be overcome by ‘positive action’. According to Hepple, a ‘positive duty’ to advance equality of opportunity, which has been imposed on public authorities by the Equality Act 2010, should be extended to employers. Sheila Wild (‘The UK’s Widening Gender Pay Gap – What Must be Done’ p 333) notes that the gender pay gap has not merely been persistent, but is sadly growing in the UK. Similar to Hepple, she observes that the causes of this are structural, and need to be tackled as such. Positive action to encourage diversity is also suggested for another characteristic specifically protected by equality and antidiscrimination legislation worldwide: ethnicity. The authors of a blog submitted on behalf of the Centre on Dynamics of Ethnicity (‘When does being better qualified provide you with fewer opportunities?’ p 334) observe that despite high educational achievements, members of ethnic minorities in the UK are more likely than whites to be unemployed, less likely to attain higher ranks of management and when employed, are likely to be paid less. The authors argue that a proactive approach to counteract the ‘subtle hostility or open racism’ in the labour market is needed.

While these contributions are concerned with improving the position of discriminated groups, the question must also be asked whether new disadvantaged groups are not currently being created by the legislation itself. The answer by Mark Freedland would be yes, as far as ‘Zero Hour Contracts’ are concerned. Sophie Beesley (‘What will the Flexible Working Regulations 2014 mean for employers and employees?’ p 335), reflecting on the amendments to the Flexible Working Regulations 2014, is more sympathetic to the ‘flexibilization’ of the labour market. She does, however, point out that the main benefits will be reaped by the employers.

Phillip D Grant Jr and Matthew Tyler ask whether particular privileges enjoyed by certain groups of employees should legitimately be maintained ('Vergara Ruling Poses Problems for Separation of Powers and Academic Freedom' p 343). They discuss the recent decision of the California Supreme Court in Vergara striking down the provision of tenure and extra job security for teachers. The right to education of students, more specifically to good quality public education, was seen as prevailing over the special employment rights of teachers in this case.

Transnational Regulation and Convergence?

Finally, two contributors focus on whether transnational systems can support labour rights at home. In the context of the EU as well as under the European Convention on Human Rights (ECHR), the presence of a consensus among the member states is important for the question of whether rights will be protected and what their content will be. Two recent cases suggest that the diversity of national protection in Europe means that the required threshold for consensus is not reached with regard to labour rights.

Menelaos Markakis analyses of the AMS Case C 176/12 case concerning the appointment of trade union representatives in undertakings ('The CJEU's Ruling in AMS and the Horizontal Effect of the Charter' p 340). He notes that there is good news, in that the ECJ confirmed horizontal application of fundamental rights in situations within the scope of EU law. The disappointing news for labour rights, however, is that the guarantee contained in Article 27 was insufficiently specific to be fully effective without EU or national legislation identifying its content. John Hendy's and Michael Ford's analyse the RMT v United Kingdom [2014] ECHR 366 case which saw a challenge to the ban on sympathy strikes in the UK ('RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights' p 337). They note that although secondary action was seen as falling under the protection of Art. 11 ECHR, the European Court of Human Rights applied a wide margin of appreciation to the UK and therefore the interference with the right was seen as justified.

The contributions in this chapter highlight two things: First, the importance of human rights for workers, even if their claim does not succeed (as in AMS), or the right is found to exist but the limitation is seen as justified (as in RMT). Second, the importance of the guarantee of these rights to those who are not in traditional employment relationships, but work under a range of different contracts or are self-employed.

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Women at Work – Positive Obligations for Positive Results

By Bob Hepple | 12th March 2014

The most significant change in recent decades influencing the position of women at work is the transformation of state-managed capitalism into a globally marketised, privatised and deregulated system. This is accompanied by an ideological change from the post-War spirit of social solidarity into a belief in individual choice, personal autonomy and meritocracy. Women are told that they will succeed through individual advancement and by being more career-oriented.

This change has resulted in a new gender gap. The gap in numbers between economically active men and women has been slowly decreasing. But the gap based on inequity in the *quality* of employment has grown. Women who enter the labour market are now generally highly educated but still have a difficult time finding work. When they do, they are generally segregated in poorly-paid, insecure, home-based or informal work. There remain, in many countries, legal restrictions on working in certain jobs, often based on religious or patriarchal assumptions. There are persistent social and cultural pressures on women to combine family responsibilities with paid employment or to remain at home as carers. Unpaid work is not valorised. The employment opportunities and earning potential of women continues to be well below that of men.

The roots of gender inequality lie in the socio-cultural traditions of countries, the structures of employment and the way we measure economic value. What is needed is radical transformation that empowers women to the same degree as men and that restores a spirit of social solidarity. An increasing number of countries have adopted anti-discrimination legislation and policies; the Equal Rights Trust has been working in over 30 countries to promote and advise on such measures. However, giving legal rights to women to make individual complaints against discrimination is not enough, even when the law goes beyond outlawing direct discrimination to include indirect discrimination.

It has long been recognised that 'positive action' can bring about significant changes, including the eradication of practices that disadvantage women like word-of-mouth recruiting, introducing policies that seek to increase the proportion of women by making the criteria for recruitment and promotion more objective and job-related, and allowing for preferential treatment of women where they are under-represented. The ILO Convention on Discrimination (Employment and Occupation) makes it clear that 'special measures' -- 'designed to meet the particular requirements of persons who for reasons such as sex, age, disablement, family or social responsibilities or social or cultural status...shall not be deemed to be discrimination' (Art. 5). This is an exception to the general negative principle of non-discrimination.

What is missing is a *positive duty* on employers to advance equality of opportunity. In some countries (e.g. Britain) legal duties have been imposed on public authorities to implement gender mainstreaming. As the European Commission said in 2008, this 'means mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the planning stage their effects on women and men and by assuming that a transformation of institutions and/or organisations may be necessary.'

The economic crisis has made it extremely difficult to implement such policies. In Britain where, since 2006, there has been a general duty on public authorities to advance equality of opportunity, the duty is interpreted as mainly procedural – to have 'due regard' to the need to advance equal opportunities. Provided the authority follows the correct procedure, cuts in public expenditure, which will have an adverse impact on women, can still be implemented.

The ILO should examine how the equality conventions can better support transformative equality. The younger generation cannot afford to be – or do not wish to be – herded into traditional full-time permanent employment based on the model of a male breadwinner and unpaid dependent partner. 'Familial economic units' (with either shared or single-parenting) need to be provided with policy options that enable them to maximise their utility (for example, properly paid parental leave and the valorisation of unpaid labour). However, we are woefully short of data about the situation inside organisations: who works for what wage or salary.

This plea for an approach of transformative equality links with the question of the role of workers' and employers' representatives. Obviously supporting workers' representatives by law or otherwise is important. The growing feminisation of trade unions also heralds a shift in direction. But trade unions and other workers' representatives cannot do much if the channels open to them are being squeezed by government measures. For example, in Britain, prohibitive fees have been introduced for taking complaints of discrimination to employment tribunals. The Equality and Human Rights Commission, which is supposed to help victims of discrimination, has had its power curtailed and budget cut by 70% from £70 million in 2010 to just over £18 million in 2014. The promise of greater gender equality through the actions of individuals is illusory.

The key to greater gender equality is through democratic participation in affirmative action schemes: to ensure a 'fit' or 'proportionality' between the aims of the scheme and the means used to achieve them and to recognise that restorative justice is a process in which conflicting interests have to be reconciled. There must be dialogue and participation of those whose interests are affected in the *process* of change, and there should be mechanisms to ensure the accountability of those who represent these interests.

Professor Sir Bob Hepple QC FBA is the immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

The UK's Widening Gender Pay Gap – What Must be Done

By Sheila Wild | 6th November 2014

The Geneva-based World Economic Forum's *Global Gender Equality Index 2014* has ranked the United Kingdom 26th out of 142 countries. Last year, the WEF ranked the UK 18th, and with Nordic Countries showing what can be achieved, and Iceland topping the rankings for the sixth consecutive year, questions are being asked about the UK's relatively poor performance. Attention has focused particularly on the UK's widening gender pay gap.



The Global Gender Gap Report 2014 benchmarks national gender gaps of 142 countries on economic, political, education- and health-based criteria. One-hundred and five countries have made progress overall, and only six – including the UK – have regressed relative to their starting point nine years ago, when the Index was first introduced. The report notes that no country has achieved gender equality. The highest ranking countries – Iceland, Finland, Norway, Sweden and Denmark – have closed 80 percent of their gaps, while the lowest ranked – Yemen – has closed a little over half of its gap. The Index is intended to create greater awareness among a global audience of the challenges posed by gender gaps and the opportunities created by reducing them.

The Index's methodology is unique in that it focuses on measuring gaps rather than levels, thus making the Index independent of levels of development and enabling comparisons between an advanced country, like the UK, and a less developed one, such as Mozambique, which is ranked immediately below the UK at 27th. The preamble of the report sets out the way the Index is constructed and is recommended reading. Here we need only note that how the UK calculates the gender pay gap differs from that in the Index. (For a brief explanation of what the UK does, you can go to www.equalpayportal.co.uk.)

The UK ranks 46th on the WEF's Economic Participation Indicator; 32nd on Educational Attainment; 94th on Health and Survival; and 33rd on Political Empowerment. Comparable rankings for Iceland are: 1st, 7th, 128th and 1st. And for Mozambique: 19th, 129th, 104th and 19th. Little attention has been paid to the UK's low ranking on women's political empowerment (it really does matter that there are so few women in Parliament!), but commentators are right to focus on women's place in the economy; whereas on the non-economic indicators the UK has dropped only one or two places, on the Economic Participation Indicator, it has dropped from 35th to 46th. The gender pay gap is pertinent as a measure of labour market inequality. If the gender pay gap is widening, then women's economic opportunities are shrinking.

It isn't enough to open up educational opportunities to women and exhort them to move into male-dominated occupations; it isn't enough to outlaw discrimination at work and to provide a legal entitlement to equal pay. We also need to ensure that economic policies do not put women at a disadvantage, and to do that, we need to understand how women fit into the economy. It is well-

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known that a large percentage of women work part-time, but women also make up the majority of low paid workers, and they dominate the public sector; women make up the majority of employees in central and local government and in the National Health Service.

Women's dominance in the public sector means that efforts to redress economic recession by introducing freezes on public sector pay and below-inflation pay awards for public sector workers will have a disproportionately negative impact on women. And as most of the new jobs being created are in the private sector, and as most are low-paid, women are unlikely to be able to move out of the public sector into a better- paid job in the private sector. Things could get worse. Since the WEF gathered its data, the UK's own Social Mobility Commission has reported that 5 million Britons, 61 percent of them women, are stuck in low paid jobs [Social Mobility Commission, 2014].

The UK economy is gendered, and the labour market is unequal. The ways in which pay is structured are unequal. Downward pressures on pay affect women more than they do men. If we want to close the gender gap, these structural inequalities must be tackled. If we want to climb up the WEF rankings, we must stop weighting the scales against women.

Sheila Wild was formerly Director of Employment Policy at the Equal Opportunities Commission and is the founder of EqualPayPortal, the independent website aimed at equipping people to understand and deal with equal pay issues.

When Does Being Better Qualified Provide you with Fewer Opportunities?

By Centre on Dynamics of Ethnicity | 13th July 2014

The answer: when you're a member of one of the UK's many ethnic minorities.



Figures from the University of Manchester's Centre on Dynamics of Ethnicity indicate that Britain's job market is becoming less equal, despite the rising level of educational attainment among non-white people. So what's going on?

It's no secret that Britain is becoming less white. The most recent census showed that the white ethnic group accounted for 86.0% of the usual resident population in 2011, which was a decrease from 91.3% in 2001 and 94.1% in 1991. Indeed, a study from the University of Leeds predicts that ethnic minorities will make up a fifth of the UK population in less than 40 years' time. While it should follow that there are corresponding increases in employment among ethnic minorities, this doesn't appear to be the case.

According to research from the Cabinet Office, black and Asian ethnic minority workers are more likely to be unemployed than their white peers and are less likely to be found in the higher ranks of management. Those who are employed are more likely to be paid less. Overall, figures from the Centre on Dynamics of Ethnicity show that white ethnic groups are in a more advantaged position in the labour market compared with other ethnic groups, apart from Irish travellers and Gypsies.

These trends are all the more alarming because ethnic minorities are typically better educated than white Britons. Figures show that, between 1991 and 2011, ethnic minority groups experienced greater overall educational improvements than the white group.

At comprehensive school level, Indian, Irish, Chinese, Bangladeshi and black African students did better than white Britons in obtaining five or more GCSEs at grade A* to C. At university level, more than 40% of the UK's Indian, Chinese and Black African groups had degree-level qualifications. This compares to just 26% of white people in the period between 2010 and 2011.

Of course, it used to be that ethnic minorities were educationally disadvantaged. The rapid changes over the past 20 years have been a result of better access to learning opportunities – both in the UK and overseas. Some of these well-educated ethnic minorities have experienced growth in finding professional, clerical and managerial employment. However, they are still facing what University of Manchester researchers say are 'significant barriers to enjoying the levels of social mobility of their white British peers.'

Institutional racism is often to blame. A government-funded study carried out by Business in the Community reported that 'too many' ethnic minorities felt that prestigious jobs – such as those in banking, media, politics and the law – were closed to them. Of the 1,500 people surveyed for the study, more than a quarter ruled out joining the top professions. The report's authors concluded that 'some of the best-paid professions in the UK are still seen as subtly hostile or openly racist towards ethnic minorities.'

Although it's been over a quarter of a century since the introduction of the Race Relations Act, the problems still remain. Government initiatives intended to address inequalities – such as Ethnic Minority Outreach, Specialist Employment Advisers and Partners Outreach for Ethnic Minorities, and the Ethnic Minority Employment Stakeholder – have largely been ineffective. In response, some labour unions have called for the private sector to be forcibly driven into taking positive action to encourage ethnic diversity. The TUC, in particular, wants companies to carry out compulsory ethnic monitoring.

In the meantime, ethnic minorities must continue to rely on sheer determination to find work. Encouragingly, motivation is still high among the UK's minority groups. The Business in the Community study found that ethnic minorities have higher aspirations to succeed than their white counterparts.

The Centre on Dynamics of Ethnicity (CoDE) is a four-year interdisciplinary programme of research concerned with understanding changing ethnic inequalities and identities.

What will the Flexible Working Regulations 2014 Mean for Employers and Employees?

By Sophie Beesley | 29th June 2014

'That which yields is not always weak' (Jacqueline Carey, *Kushiel's Dart*).

From 30 June 2014, changes to the Flexible Working Regulations mean that any employee meeting the minimum service eligibility criteria can request flexible working arrangements. The challenge for employers will be to implement a fair system that allows them to create opportunities for employees and themselves.

Previously, the right to request flexible working was only available to employees with children under 17 (18 for a disabled child) or carers. Requests broadly cover changing working hours, times or location. If agreed, the changes became permanent amendments to the employee's contract. The procedure for deciding requests was set out prescriptively in a mandatory statutory procedure, much criticised, particularly for its complexity and strict timescales.

To help employees improve their work-life balance, following the Children and Families Act 2014, the Flexible Working Regulations 2014 mean that, from 30 June 2014, there will be no requirement to be a parent or carer. Instead, all employees with at least 26 weeks' service (and not having made a request in the previous 12 months) can request flexible working. Note, however, that the Regulations do not give employees the right to work flexibly, only the right to ask for it.

The prescriptive procedural requirements have also been replaced by a more flexible system, which requires only that employers must consider requests in a reasonable manner. However, with flexibility comes uncertainty – what is a *reasonable manner*? Helpfully ACAS has published a Code of Practice and additional guidance to help employers to get it right.

In the short term at least, if numbers of requests increase dramatically, employers may be safer sticking to their current structured procedures to ensure requests are treated fairly. And when requests are agreed, it may well be wise to do so on a trial basis to ensure they can be amended if necessary.

A rush of requests may not be the only challenge employers will face. For example, many requests may be very similar, such as not to work Mondays and/or Fridays or to work at home, potentially causing operational and employee relations issues. Requests may also extend and complicate employers' responsibilities. For example, an employee asking to work through their lunch breaks could breach H&S regulations, and someone working at home will require a remote workplace assessment.

It is not yet clear how employers will be expected to manage competing requests. The Code of Practice suggests first-come-first-served: having approved the first request, the business context changes and the employer should take this into account when considering the second request, and so on. In practice, however, and against a backdrop of potential sex and disability discrimination claims, value judgements may be made, despite the Government's intention not to create tiers of rights of this kind.

Employers will still be restricted to the same eight business reasons for rejecting requests that applied previously: additional cost, impact on quality and/or performance, an inability to meet customer demand or to reorganise work or recruit, insufficient work when the employee wants to work and planned structural changes.

Despite these challenges, looked at in the round, employers should welcome the changes. Research published by the CBI in July 2013 found organisations could save up to 13% of workforce costs through more sophisticated, less rigid working practices. Accommodating requests can also boost loyalty and productivity.

Flexibility is also critical for the future. Research conducted by the Equality and Human Rights Commission (EHRC) calls for a rethink of the traditional 'sole breadwinner men, with stay-at-home wives' way work is generally organised in the UK. Its view is that flexibility is needed to accommodate the needs of a modern workforce. For example, after having children, growing numbers of women need/want to continue working in roles that recognise their experience and abilities. People may also want to work reduced hours when approaching retirement, and growing numbers of young people need to balance work and study. There are also the challenges of caring for an ageing population. The Working Parents & Carers Survey (2011) showed that 20% of men requested flexible working to care for children, compared to 40% wanting to care for a dependent parent or partner. For all these reasons, flexible working may give employers the key to recruiting and keeping the best people.

Sophie Beesley is a barrister at Old Square Chambers specialising in personal injury and employment law.

The Regulation of Casual Work and the Problematical Idea of the 'Zero Hours Contract' By Mark Freedland | 25th March 2014

There has, of late, been considerable public concern in the UK about the use of a kind of employment arrangement known as the 'zero hours contract.' The essence of employment arrangements of this kind is that the worker is offered work as and when the employer or work-user wishes, without the guarantee to the worker of a minimum number of hours of remunerated work in any given period of time. The public concern is that the use of this kind of work arrangement is apparently becoming more and more extensive so that a large proportion of workers find themselves in situations of highly precarious employment.

Moreover, many experts in labour law have a further concern that it is often unclear what employment rights the workers in those situations possess. Depending upon the precise nature of the arrangement in each case, the worker's legal path of access, even to such fundamental human rights at work as that of freedom of association, may be in doubt.

The Government purported to respond to this concern in December 2013 by launching a Consultation, which closed in mid-March 2014, but which will presumably give rise to public and Parliamentary debate when its results have been published. However, the framing of the Consultation Document and the terms in which it was introduced by the Business Secretary Vince Cable suggest that the Government takes the view that the 'zero hours contract' is an established and fully legitimate form of work arrangement, offering valuable flexibility to employers and workers alike, and conferring, generally speaking, adequate employment rights upon workers. It seems to be regarded as sufficient to elicit and address possible issues about the 'exclusivity' of some of those contracts and the 'transparency' of the communication of their terms to the workers involved.

I argue that this approach to 'the zero hours contract' is misconceived and inappropriate in a number of different ways. It understates the problems associated with the rapid growth of the ultra-casual employment arrangements, which are known as zero hours contracts. In particular, it commits a particular error in its legal analysis. The point here is that if, as the Consultation document does, we define a 'zero hours contract' quite simply as 'an employment contract in which the employer does not guarantee the individual any work, and the individual is not obliged to accept any work offered,' we are, in fact, conjuring up an oxymoron. It is a contradiction in terms, a non-existent beast, because we have it on the highest judicial authority that such an arrangement, by definition lacking in mutuality of obligation, certainly cannot constitute a continuing contract of employment (see *Carmichael v National Power plc* [1999] UKHL 47), and it probably cannot constitute a 'worker's contract,' nor indeed any kind of continuing contract at all. In the particular sense in which the Consultation Document uses the terminology, we might say that, just as there is no such thing as a free lunch, there is no such thing as a zero hours contract.

However, putting irony aside, we should be very worried about this way of understanding the factual and legal nature of 'zero hours contracts.' That is because, on that definition of the 'zero hours contract,' a worker working under such an arrangement would typically lack the employment rights of 'employees' and probably also those of 'workers.' I contend that, if we are to accept the notion of 'zero hours contracts' as even a partly legitimate institution, it should be on the footing that such arrangements both attract

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and deserve the character of employment contracts or workers' contracts to which the rights of employees or at least the rights of workers attach. This involves recognising workers' claims to a degree of stability and reciprocity in their work arrangements, which even those engaged in casual work relations ought still to possess.

The achievement of that recognition would involve a full engagement with a whole host of legal and regulatory problems and issues of empirical or statistical assessment of the nature and extent of 'zero hours' employment and casual work more generally; the purpose of this Note is to draw attention to the urgent need for that engagement and to the dangers of being diverted from that engagement by the bland and misleading reassurances offered by Dr Cable's Consultation.

Mark Freedland is an Emeritus Professor of Employment Law at the University of Oxford.

RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights By John Hendy QC and Michael Ford QC | 10th April 2014

In *RMT v United Kingdom* [2014] ECHR 366, the European Court of Human Rights held that the ban on secondary action in the United Kingdom was a justified interference with the right to freedom of association in Article 11 of the ECHR. The RMT contended that its members employed by Hydrex were unable to take effective strike action to maintain their terms of employment, owing to the prohibition on secondary action now found in s.224 of TULRCA 1992.



The Court, first, rejected the argument of the government that Article 11 did not apply at all to secondary action, referring to ILO Convention No.87, Article 6 of the European Social Charter and its earlier decision in *Demir* Application no. 34503/97. Taking secondary action, the Court held, was part of trade union activity covered by Article 11. After deciding, second, that the ban pursued the legitimate aim of seeking to protect the rights and freedoms of others not involved in the dispute, the Court turned to consider the critical issue of whether the ban was justified because it was necessary in a democratic society.

The Court emphasised that the margin of appreciation was wide in the context of industrial and economic policies of the state. However, it noted factors counting in favour of the RMT. One was the practice across European States at the far end of the spectrum, illustrating that the UK was one of a small group of European countries that adopted an outright ban on secondary strikes. Another was the repeated criticisms of the UK's prohibition of sympathy action by the ILO Committee of Experts and by the decisions of the European Committee on Social Rights on the Social Charter. The Court also referred to how a ban on secondary action could in some contexts, such as an out-sourced workforce, severely hamper trade unions' efforts to protect their members.

But having decided that the interference with freedom of association in *Hydrex* was not especially far-reaching, and in light of the breadth of the margin of appreciation in this area, the Court decided that the cogent arguments adduced by the RMT on trade union solidarity and efficacy were not sufficient to persuade it that the ban was disproportionate.

The case is important for its clear recognition that restrictions on industrial action, including sympathy strikes, are protected by Article 11. It leaves open the possibility that, in other circumstances, restrictions (including the ban on secondary action) will not be justifiable under Article 11(2). But it also reflects a trend in recent judgments of the Court, exemplified by, for example, the judgment of the Grand Chamber in *Sindicatul Pastoralul cel Bun v Romania* Application no. 2330/09, of affording States a wide margin of appreciation in relation to what the Court views as sensitive matters of social policy.

It is likely that some commentators will conclude that the judgment represents nothing short of an appeasement by the ECtHR of the UK government's threats to withdraw from European Convention and its repeated attacks on the ECtHR, so evident in the UK stance at the 2013 Committee of Ministers' meeting in Brighton, which led to the Brighton Declaration and the subsequent inclusion of the references to 'margin of appreciation' and 'subsidiarity' in the Preamble to the Convention. Certainly, parts of the judgment could be seen in that way, and there is no doubt that the judges of the ECtHR have been eager to reassure the UK government, British judges and elements of the English media that little or no threat is posed to the autonomy of the British legal system by the ECtHR or the Convention. The official visit by the President and Vice-Presidents of the ECtHR to the British judges last month (with the President giving a lecture at UCL on 'Wither the Margin of Appreciation?') and the recent article by the former President (N Bratza, 'Living Instrument or Dead Letter – the Future of the European Convention on Human rights,' (2014) EHRLR 116) might be thought to be illustrative of their concern to reassure. The cynical commentator might say that the judgment is a demonstration of that reassurance. Whether the trade union movement in the UK or in Europe will view the Court's treatment of the right to strike as reassuring is doubtful.

John Henty QC and Michael Ford QC are barristers at Old Square Chambers in London. They acted for the RMT in this case, instructed by Richard Arthur and Neil Todd of Thompsons.

Safety of Sex-Workers Again at the Centre in Canada (*Attorney General*) v *Bedford*

By Meghan Campbell | 17th January 2014

Earlier this year, I argued that the Ontario Court of Appeal (ONCA) gave a comprehensive and nuanced assessment of Canada's criminal provisions on prostitution. The Supreme Court of Canada in a unanimous decision upheld the ONCA's ruling and struck down these provisions as unconstitutional because they materially increase risk of harm for those who work in the sex trade.



Prostitution is legal in Canada but prior to *Bedford* much of its associated activity was criminalised. The applicants in this case argued that the prohibition against running a brothel, living off the avails of prostitution and communication in public for the

purposes of prostitution violated their constitutional rights to security of the person (sections 210, 212(1)(j) and 213(1)(c) Criminal Code. The Supreme Court agreed with the applicants, as the law prevented prostitutes from implementing safety measures, such as hiring bodyguards, working indoors or properly screening potential clients. This decision is one step further than the ONCA, as the Supreme Court ruled the prohibition on communication was unconstitutional.

Similarly to the ONCA, the Supreme Court relied on the trial judge's evaluation of the factual and social science evidence. The prohibition against brothels meant that sex-workers were forced outdoors and could not use receptionists, perform health checks or have safe-houses. Criminalising living off the avails of prostitution did not allow sex-workers to hire drivers or bodyguards. Prohibiting public communication limits face-to-face screening time and forces sex-workers into back alleys. All these prohibitions were held to materially increase the risk of harm to sex workers.

Under section 7, it is not sufficient that the security interest be engaged, a court must also consider whether the provisions are consistent with the principles of fundamental justice: proportionality and breadth. The Court explains that the law will be unconstitutional if it is grossly disproportionate. Under the equality provisions of the constitution there is no requirement to demonstrate that a certain number of people experience the grossly disproportionate effects; if one person is disproportionately affected, this suffices. Therefore, the applicants do not have to spend time and resources showing that a disproportionate number of sex-workers are negatively affected by the law. Rather, they need only present evidence of their own experience.

The purpose of the prohibition against brothels was to prevent neighbourhood disruption. While the law achieves this aim, it is grossly disproportionate, as it significantly increases the risk of serious harm to sex workers. Similarly, the communication prohibition is meant to prevent the nuisance of street prostitution and remove it from public view. This is also grossly disproportionate, as it removes an essential tool for safety. While the prohibition of living off the avails of prostitution is meant to ensure sex-workers are not exploited, the law is overbroad, as it captures relationships that could increase safety.

The Attorney-General of Canada tried to argue that the laws were only unconstitutional if there was direct causation between the criminal provisions and the harm. However, the Supreme Court only required a sufficient causal connection: a reasonable inference between the evidence and the prejudice. The applicants did not need to definitively prove these measures would increase their safety; it was sufficient that there was the possibility that they could.

The Attorney General also argued that because sex workers had freely chosen an inherently risky profession, they have to live with these risks. The Court rejects this argument. First, Chief Justice McLachlin questions whether sex-workers are 'people who can be said to be truly "choosing" a risky line of business' (Para. 86). Second, the exchange of sex for money is legal, so the key question is whether the law makes this lawful activity more dangerous. Violence from clients 'does not diminish the role of the state in making a prostitute more vulnerable to that violence' (Para. 89).

In light of the reasoning in this judgment, it is surprising that the Court suspended the declaration of invalidity. This means that the Canadian government has one year to introduce new legislation regulating prostitution before the current provisions will be null and void. The Court does not offer any specific guidance on future regulation. However, its repeated emphasis on the safety of sex-workers will hopefully be at the centre as policy-makers discuss the next steps.

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Sex Workers Equally Protected from Sexual Harassment as Other Workers – Says New Zealand Case

By Max Harris | 5th April 2014

In 2003, New Zealand decriminalised sex work and established a system of safeguards for those engaged in such work through the Prostitution Reform Act. Just over a decade later, the first major case has been heard, highlighting some of the benefits of this regime.

The case is called *DML v Montgomery and M & T Enterprises Ltd* [2014] NZHRRT 6. It involved a plaintiff, DML (whose name was suppressed), who alleged that the owner of a brothel at which she worked had sexually harassed her, causing humiliation, loss of dignity and injury to her feelings. The New Zealand Human Rights Review Tribunal (a body that deals mainly with discrimination, harassment and privacy matters) ultimately found in favour of the plaintiff. The Tribunal awarded the plaintiff NZD \$25,000; issued a declaration and a restraining order (to prevent a continuing breach); and ordered that the brothel's management staff undergo training to understand why sexual harassment is unacceptable.

Under s.62 of the New Zealand's Human Rights Act 1993, four elements need to be satisfied for sexual harassment to be proven. There must be: (i) language or visual material or physical behaviour of a sexual nature; (ii) that is unwelcome or offensive to a

person; (iii) that is repeated or of a significant nature; and (iv) that has a detrimental effect.

The defendant claimed that given the brothel context, language that he used – including intrusive questions about the plaintiff's sexual activity, information about his own sexual practices with other sex workers and comments made to the plaintiff about her physical appearance – was not inappropriate. The Tribunal rejected this, saying that '[e]ven in a brothel language with a sexual dimension can be used inappropriately in suggestive, oppressive, or abusive circumstances' (at [106]). It found that language of a sexual nature had been used (and that the plaintiff's evidence was to be preferred to the defendant's).

The second element was subjective and was clearly met in this case. The plaintiff was made to feel uncomfortable, did not want to have the conversations with the defendant that they had and was upset and distressed.

The comments were made repeatedly – the language took 12 forms – meaning that the language was patently of a repeated nature: the third part of the test.

Fourth, there was manifest detriment caused. The plaintiff had to work in a demeaning and hostile work environment, felt scared and degraded, stopped working at the brothel and was already dealing with stress of giving evidence in a trial as a result of childhood sexual abuse when the comments were made. Accordingly, sexual harassment was established. The employer was also found to be vicariously liable for this sexual harassment.

In the course of determining the appropriate remedies in this case (a declaration and restraining order, training order and damages), the Tribunal made important comments about sex work and sexual harassment. 'Sex workers are as much entitled to protection from sexual harassment as those working in other occupations,' the Tribunal said at [146]. It added: 'Sex workers have the same human rights as other workers.'

A debate continues about the merits of decriminalisation of sex work. But this case highlights the concrete protections that the law can provide – when sex work law is reformed – to those in the sex work industry.

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The CJEU's Ruling in AMS and the Horizontal Effect of the Charter

By Menelaos Markakis | 20th January 2014

In its judgment in AMS Case C 176/12 (15 January 2014), the Grand Chamber of the Court of Justice of the European Union ruled on whether the Charter of Fundamental Rights of the European Union can apply in a dispute between private parties, holding that the Charter is applicable 'in all situations governed by European Union law.'

AMS is an association governed by private law. It brought a challenge before the French courts concerning the appointment of a trade union representative. French labour law requires a workplace to have at least 50 employees before a union representative can be appointed. AMS argued that this threshold had not been met. The trade union argued that French labour law, which provided for the exclusion of certain categories of employees from the calculation of staff numbers in an undertaking, was in breach of EU law, and hence the number of AMS employees was well above the threshold.

The impugned French legislation had been adopted in the implementation of the European Parliament and of the Council establishing a general framework for informing and consulting employees. The Directive precludes a national provision that excludes a specific category of employees from the calculation of the staff numbers of an undertaking (see the *Confédération générale du travail and Others* Case C-385/05 judgment). However, according to settled case law, the provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties, even if the Member State concerned has failed to implement the directive correctly.

It is for this reason that the trade union sought to rely on Article 27 of the Charter of Fundamental Rights of the European Union, according to which '[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.' Citing *Åkerberg Fransson* Case C-617/10, the Court held that 'the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law' (Para. 42). Since the impugned French legislation was adopted to implement Directive 2002/14, Article 27 of the Charter was held to be 'applicable' to this case (Para. 43), notwithstanding the fact that this was a dispute between private parties.

However, the Court ruled that 'for this article to be fully effective, it must be given more specific expression in European Union or national law' (Para. 45). 'It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a

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prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees...' (Para. 46).

Consequently, Article 27 of the Charter cannot be invoked in a dispute between individuals in order to disapply the impugned national provision (Para. 51). The Court went on to distinguish AMS from *Kücükdeveci* Case C-555/07, ruling that 'the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such' (Para. 47).

The importance of this Grand Chamber ruling far surpasses the circumstances of this particular case. The Charter was held to be applicable 'in all situations governed by European Union law,' and this might lead to it being applied in a dispute between private parties. The ultimate outcome of each case will surely depend on the content of the EU fundamental right invoked by the parties and on the impugned national legislation in the main proceedings. The ink is barely dry on the judgment, but it seems to me that Professor Peers has rightly argued that 'the old argument that the Charter can never apply to private parties at all ... has surely been rejected by the Court here.'

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South African Informal Traders Forum and Others v The City of Johannesburg and Others: A Promising Start by the South African Constitutional Court

By Brian Ray | 19th February 2014

Departing sharply from its normal procedures, the South African Constitutional Court recently issued what we in the States would call an 'interim injunction' in a case pending before the South Gauteng High Court, called *South African Informal Traders Forum and Others v The City of Johannesburg and Others* ('SAITF') [2014] ZACC 8. The order prohibits municipal authorities in Johannesburg from 'interfering' with the activities of multiple street traders in the city center who are lawfully licensed to trade by the City.

The case involves the City of Johannesburg's 'Operation Clean Sweep' program, a controversial new policy that was instituted in October 2013, under which the police cleared all informal trading operations from large areas of the inner city without distinguishing between licensed and unlicensed traders. The City's actions were plainly illegal and violated not only the trader's constitutional rights, but also the City's own trading by-laws. Even more troubling, the Clean Sweep policy reflects a pattern of blatant disregard for the City's constitutional and statutory obligations to its poorest residents, which are traceable back to at least the unconstitutional mass eviction policy that poor residents successfully challenged in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33, the

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Constitutional Court chastised the City for repeatedly failing to recognize its constitutional and statutory obligations in the housing context and ordered the City to revise its planning and budgeting processes to remedy those defects. As a relatively recent High Court decision enforcing *Blue Moonlight* illustrates, the City has continued to drag its heels with respect to complying with that order. *Blue Moonlight* and several other, more recent, eviction-related cases suggest that the Court is willing to take an active role in enforcing social rights under the right circumstances and that it is beginning to recognize the need to address the underlying patterns of bureaucratic and administrative intransigence, like those in the SAITF case. This is a somewhat surprising development, considering the deeply deferential and largely secondary enforcement approach the Court articulated in *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28, where it reversed two lower court judgments that found the City's pre-paid water policy unconstitutional.

Upon closer inspection, however, there are clear continuities between *Mazibuko* and *Blue Moonlight*. For good reason, reaction to *Mazibuko* has focused on the Court's retreat from any significant interpretive role and insistence that social rights are principally the province of politics. But this emphasis on the disappointing substantive limits the Court described obscures the relatively strong authority the judgment establishes for courts to scrutinize the adequacy of the process the government uses in adopting a policy or reaching a decision. These more recent cases show that, when operating in a role that it can safely characterize as procedural—especially when faced with a policy that either completely ignores or actively infringes upon social rights—the Court has been much more willing to exercise its authority to at least temporarily stop implementation of a challenged policy and, sometimes, even to change it.

The temporary injunction in the SAITF case is another example of this stronger procedural role. It is too soon to tell whether the Court will take a similarly active role in the SAITF case, much less whether it will draw any connection to *Blue Moonlight* and attempt to remedy the underlying issues that connect the two cases.

Nonetheless, it's certainly a promising start.

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The Plight of Indo-Pak Fishermen and the Need to Appreciate Economic Rights

By Ravi Nitesh | 5th September 2014

The recent decision of the Pakistan Government to release 57 boats of arrested Indian fishermen is a welcome move. India should replicate the same. However, hundreds of boats are still lying unused in Pakistan, and the process of confiscating arrested fishermen's boats is still continued on both sides. The real and most effective solution would be to adopt a confidence-building approach, based on respect for the fishermen's right to earn a living. There is a need to work towards ending such confiscation of boats and to start the release of fishermen through sea routes only.



India and Pakistan both border the Arabian Sea; fishermen live along the coast of India and Pakistan and are involved in fishing as their profession. However, there is no clear demarcation in these waters to make a 'visible' border between countries. Even the States of India and Pakistan have not agreed upon, nor signed any final agreement to decide, their water boundary.

Due largely to the absence of any such demarcation, fishermen of both nationalities end up crossing their own coordinates and enter the other country's 'administrative' zone. They then get arrested, along with their boats, for this 'offence.' Sir Creek is one of these disputed points and a hotspot for the arrest of fishermen.

Such arrested fishermen now number the hundreds on both sides of border, and the length of their imprisonment varies from months to years. Recently exchanged lists in July 2014 (as per consular agreement) between the Governments of India and Pakistan state that 237 Indian fishermen are currently in Pakistani jails, and 116 Pakistani fishermen are in Indian jails.

Despite being arrested at sea, these fishermen, if released, are released through land routes at Wagah Border. This is significant, as although they are arrested in their boats, these boats are divested upon their release. It must be understood that boats are the fishermen's livelihood. Further, due to their high cost and the fishermen's limited means, most are not owned; the fishermen have boats on a rental basis, a partnership basis or on loan with high interest. Having their boats removed upon release therefore causes even more severe financial repercussions for them.

Article 73 of the UN Convention on the Law of the Sea clearly states that, though arrest can be made (clause 1), arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security (clause 2). In addition, it holds in clause 3 that coastal state penalties for violation of fisheries laws and regulations in the exclusive economic zone may not include imprisonment in the absence of agreements to the contrary by the States concerned or any other form of corporal punishment.

Authorities in both countries must bear this provision in mind and must understand the plight of these fishermen. If these boats can be handed back to their fishermen upon release, and if this release can be done through the sea route itself, it will be a great step towards appreciating the economic reality of the situation for these fishermen. The recent decision of the Government of Pakistan, in which it agreed to hand back 57 boats belonging to Indian fishermen who were released in May, gives some hope that the rights of these detainees will henceforth be borne in mind. The same should be reflected by India as well. Such goodwill gestures by these governments will certainly help to improve Indo-Pak relations more generally. However, independently of this longer-term advantage, respecting the economic rights of these fishermen will help to improve the lives of those in greatest need.

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Vergara Ruling Poses Problems for Separation of Powers and Academic Freedom

By Phillip D Grant Jr and Matthew Tyler | 11th July 2014

On June 10th, handing down judgment in *Vergara v. California* Case No. BC484642 the California Supreme Court struck down three statutes providing tenure for primary and secondary teachers and extra job security for more experienced teachers.

The suit was filed on behalf of nine public school students by a non-profit organization, Students Matter, which primarily advocates for increasing the amount of private intervention in American public school systems. The plaintiffs believed that California's tenure laws had adversely affected their access to quality public education.

Citing *Serrano v. Priest* 5 Cal.3d 584, *Butt v. State of California* 4 Cal.4th 668 and *Brown v. Board of Education* 347 U.S. 483 (1954), the court held that California's laws led to more under-qualified teachers in classrooms serving poor and minority students and hindered 'meaningful, basically equal educational opportunity' guaranteed by the state's constitution. This, the court held, was the direct result of statutes granting tenure to teachers after two years of employment – which ensures that a teacher cannot be fired without due process – as well as the state's 'first in last out' policy – which requires newly tenured teachers to be fired before older teachers in the event of budget shortages.

In its decision, the Court acknowledges a constitutionally mandated separation of powers, noting that '[i]t is...not this Court's function to consider the wisdom of the Challenged Statutes' and that 'it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes.' The judges' intervention in ensuring equality of education, however, may be seen as interference in a matter best left to the legislature. While the challenged statutes may, in fact, lead to less equal public education, how best to remedy this is typically left to elected representatives; in other words, it is suspect whether or not teacher tenure is a justiciable matter pertinent to the Court.

What is perhaps most disconcerting about the ruling, however, is its lack of deference toward academic freedom, an equally important right for students and faculty. Since its inception in the 1800s, the public provision of education in the U.S. has often

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been justified by its importance in shaping an informed citizenry necessary for checking the power of government. In *Sweezy v. New Hampshire* 354 U.S. 234 (1957), the U.S. Supreme Court, ruling on whether or not a professor could be fired based on the content of his lectures, stated that '[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.' Untenured teachers – who can simply be fired at the end of an academic year by not having their contracts renewed – face more pressure to appease administrators and parents by altering their curricula or teaching styles.

While we may be past the era of McCarthyism that targeted 'subversive' educators at all levels, pervasive pressure from politicians and administrators over school prayer, sexuality, evolution and standardized test-based 'accountability,' among other things, necessitates the continuation of academic freedom at all levels in order to insulate quality education from political tides. As the U.S. Supreme Court ruled in *Tinker v. Des Moines* 393 U.S. 503, 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' A classroom in which students and teachers are both *de jure* and *de facto* allowed to discuss a range of academically appropriate topics creates a 'marketplace of ideas' necessary to a liberal democracy.

Even though this law may not affect the jurisprudence of other jurisdictions outside of California, it epitomizes a shift in public attitudes toward academic freedom. Moreover, given the influence of 'Race to the Top' in nationalizing certain aspects of education policy – and even rewarding states for reforming their tenure laws – it is possible that the preferences expressed in the Vergara ruling could have future influence on public policy, if not jurisprudence.

It is a worthwhile goal to provide equal educational opportunities to children, despite ethnic and socioeconomic background. But these goals must also be weighed against the imperative of academic freedom and a separation of powers.

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