

The Human Rights Act and Labour Law at 20

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In a typically inspiring and thought-provoking piece written in 1998, Keith Ewing presented the then newly enacted Human Rights Act 1998 (HRA) to an audience of labour lawyers through the pages of the *Industrial Law Journal*.¹ Ewing argued that ‘it is far from clear that the HRA will have a decisive impact on the structure of labour law’.² He explained that the HRA/European Convention on Human Rights (ECHR) includes limited social and labour rights, as it primarily protects civil and political rights. He also explained that many of the provisions that can be relevant to the employment relation (such as articles 8-11 ECHR)³ do not contain an absolute protection, but are qualified in the sense that they can be limited if there is a legitimate aim and the restriction is proportionate to the aim pursued, and that the Strasbourg Court has been reluctant to afford wide protection to workers in this context. Finally, Ewing was particularly concerned that article 11, which protects freedom of assembly and association, including the right to form and join trade unions, could have, not just a limited, but a negative effect on collective labour rights because of the jurisprudence of Strasbourg in the ‘closed shop’ cases.⁴ An issue underlying Ewing’s skepticism was the power that judges were conferred by the HRA, which he feared might even be used against workers’ interests.

Was Ewing right to be skeptical about the effects of the HRA on labour law? This chapter revisits the question 20 years on. While we have not witnessed a profound reorientation of UK labour law to reflect human rights values, the HRA has not become ‘a shield for the bearers of private power’ against social regulation either.⁵ In fact the ECHR/HRA has had a broader impact than Ewing originally predicted. There have been certain significant worker-protective developments in legal principles governing areas, such as the contract of employment and human rights, workers’ access to justice, the protection from severe labour exploitation, as well as in collective labour law issues. Ewing was concerned that the ECHR/HRA is ‘unbalanced’⁶ because it does not explicitly protect social rights. However, it is fair to say that it can still serve as a bulwark against arbitrary exercises of employers’ power. For a human rights document to have the ability to affect more deeply the inequality of power of the employment relation, though, the incorporation of social rights would be essential, as Ewing rightly pointed.⁷

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¹ K Ewing, ‘The Human Rights Act and Labour Law’ (1998) 27 *ILJ* 275.

² *Ibid.*, p 276.

³ Article 8 protects the right to private and family life, article 9 protects freedom of thought, conscience and religion, article 10 protects freedom of expression, and article 11 protects freedom of assembly and association, including the right to form and join trade unions.

⁴ See among others, *Young, James and Webster v UK*, App Nos 7601/76, 7806/77, judgment of 13 August 1981.

⁵ K Ewing, ‘The Unbalanced Constitution’, in *Sceptical Essays on Human Rights*, T Campbell, K Ewing and A Tomkins (eds), OUP, 2001, p 103 at 111.

⁶ *Ibid.*

⁷ *Ibid.*, p 116.

ECHR/HRA

The Human Rights Act was enacted in 1998, following what was described as ‘an aggressive campaign for the incorporation into domestic law of the European Convention on Human Rights, a campaign in which the judges joined forces with other activists’.⁸ The Convention itself was drafted in the aftermath of the Second World War in order to respond to the atrocities of the War, and came into force in 1953 under the auspices of the Council of Europe. This was also the period of the Cold War, which explains why the Convention contained primarily civil and political rights, with social and labour rights being protected in the 1961 European Social Charter (ESC). As an implication of this separation for a few decades it was taken for granted that there is a sharp dividing line between civil and social rights in case law that involved labour rights.⁹ This is not the case anymore, as we will see later on.

The UK was the first country to sign the ECHR in 1950, and the British MP and lawyer David Maxwell-Fyfe was one of the main drafters. In 1966, the UK accepted the jurisdiction of the European Court of Human Rights (ECtHR) to hear individual complaints. Everyone within the UK’s jurisdiction could lodge a petition to Strasbourg, having exhausted domestic remedies. Yet when the HRA was enacted that incorporated Convention rights into English law, Ewing said that it marked an ‘unprecedented transfer of political power from the executive and legislature to the judiciary’.¹⁰ How did this transfer of power occur? The key sections of the Act are section 3 that provides that ‘(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’, and section 4 that permits courts to issue a declaration of incompatibility when primary or subordinate legislation cannot be interpreted in a way that is compatible with Convention rights. Section 6 provides: ‘(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ... (3) In this section ‘public authority’ includes – (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature ... (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private’.

At the time that Ewing was writing in 1998, it was unclear whether the HRA would apply equally to public and private sector employers, namely whether it would have full horizontal effect. It was clear that the Act would not provide a direct cause of action against private employers, but the extent to which it would have indirect horizontal effect on the basis of section 3 was open to question. Ewing’s concern was that the civil and political rights that we do find in the ECHR/HRA are primarily addressed to state authorities, while social rights in the employment context are mostly about regulating the conduct of private employers.

However, it was established from early on that Convention rights apply in the private employment relation. The most significant decision on this is *X v Y*,¹¹ which involved the dismissal of a charity employee because his name was included in the sex offenders register

⁸ K Ewing, ‘The Human Rights Act and Parliamentary Democracy’, (1999) 62 MLR 79. On further issues of principle that explain Ewing’s approach to the role of judges in human rights adjudication, see K Ewing, ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’, in *Human Rights and Labour Law*, K Ewing, C Gearty and B Hepple (eds), Mansell, 1994, p 147.

⁹ See V Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’, (2013) 13 *Human Rights Law Review* 529 at 532.

¹⁰ Ewing, as above n 8, p 79. Cf Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act*, CUP, 2005.

¹¹ *X v Y* [2004] EWCA Civ 662 [2004] ICR 1634 (CA).

for the reason that he was caught having consensual sexual intercourse with another man in a public space. The lawfulness of his dismissal had to be assessed under section 98 of the Employment Rights Act 1998 (ERA). Yet the further argument that was raised on the basis of section 3 of the HRA was that the test of fairness in dismissal should be interpreted in light of the HRA. The Court accepted that the ERA had to be interpreted in light of the HRA, according to section 3. In addition, considering whether the dismissal raised issues under article 8 of the ECHR (right to private life) in the private employment relationship, Mummery LJ said:

In many cases it would be difficult to draw, let alone justify, a distinction between public authority and private employers. In the case of such a basic employment right there would normally be no sensible grounds for treating public and private employees differently in respect of unfair dismissal, especially in these times of widespread contracting out by public authorities to private contractors.¹²

The approach of the English courts to the issue of horizontality is in line with principles that we find in ECHR jurisprudence, which imposes a range of positive obligations on state authorities to protect individuals from violations of their rights by other private entities, including employers.¹³ Even though the ECHR was drafted against the backdrop of atrocities committed by state authorities, the Court has developed positive obligations to legislate and enforce the law, which aim to protect human rights in the private sphere.¹⁴ In this context, landmark labour law cases on positive obligations in the employment relation include *Wilson and Palmer v UK*,¹⁵ to which I'll return, and *IB v Greece*¹⁶ that involved the dismissal of an employee who was HIV-positive from his job in the private sector.

Integrated approach to the interpretation of civil and political rights

The rights of the HRA/ECHR are indirectly applicable in the private employment context, as has been clearly established. Are they relevant to the substantive regulation of the employment relation? One of the reasons that triggered Ewing's skepticism about the effect of the HRA on labour law was the fact that Convention rights are traditional civil and political rights, such as freedom of expression and the right to private life, with social rights, such as the right to work and the right to fair and just working conditions, being protected in the ESC, which is not incorporated in English law. UK Governments have persistently resisted the legal protection of social rights through human rights law.¹⁷

Civil and political rights may of course be relevant to the employment relation. Like everyone else, employees have a right to privacy and a right to free speech, and these rights can be

¹² *X v Y*, para 57(4). See further V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912.

¹³ The HRA can also be used to interpret and develop common law principles. See, for instance, Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment', *Industrial Law Journal*, available on advance access <https://doi.org/10.1093/indlaw/dwz001>

¹⁴ See D Spielmann, 'The European Convention on Human Rights – The European Court of Human Rights', in Oliver and Fedtke (eds), *Human Rights and the Private Sphere*, Routledge, 2007, p 427; A Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart, 2004. On this, see also the landmark *Marckx v Belgium* (1979) 2 EHRR 330.

¹⁵ *Wilson, National Union of Journalists and Others v United Kingdom*, ECHR (2002) 35 EHRR 523.

¹⁶ *IB v Greece*, App No 552/10, Judgment of 3 October 2013.

¹⁷ See K Ewing, 'Social Rights and Human Rights: Britain and the Social Charter – The Conservative Legacy', (2000) *European Human Rights Law Review* 91. See also the UK approach to the EU Charter of Fundamental Rights, which contains a long list of social and labour rights.

restricted both by the state and by the employer or other private entities. However, many wrongs that employees suffer in the workplace involve exploitation by the employer. It is primarily through social rights, such as the right to fair and just working conditions, that workers can be protected from these wrongs, but social rights are not explicitly included in the Convention.

The sharp divide between civil and social rights was indeed uncritically endorsed by the Court and the Commission in past case law. For about three decades, the ECtHR was reluctant to examine questions that raised social rights issues when these were brought under Convention provisions. If social rights materials, such as materials of the ILO or the ESC, were brought to their attention in support of a claim under the Convention, the Court and Commission viewed their inclusion in a separate document as a reason to reject the application. When applicants alleged that article 11 (the right to form and join a trade union), for instance, encompasses a right to strike, the claim was rejected.¹⁸ Similarly, the right to consultation and the right of a union to be recognised for the purposes of collective bargaining were not regarded as essential components of article 11.¹⁹ The Commission and Court created what has been called a ‘ceiling effect’;²⁰ the ceiling being, in this context, the ESC and the ILO. Claims that referred to the ESC were ‘being used ingeniously as a source of restraint’ as Ewing rightly observed,²¹ rather than a source of inspiration as to the interpretation of Convention provisions.

However, the case law took an unpredictable turn in Strasbourg with *Wilson and Palmer* in 2002, when the Court adopted what has become known as an ‘integrated approach to interpretation’.²² It was described as an *integrated* approach, because it integrates certain socio-economic rights into a civil and political rights document. This integrated approach characterises the work of the ILO more generally and has also been described as a ‘holistic approach’.²³ Applied to the ECHR, it means that certain social and labour rights are essential elements of the Convention, and should therefore be protected as such. Instead of rejecting claims that could be viewed as grounded on social rights, the Court started to integrate them in the scope of the Convention, in order to make ECHR rights ‘practical and effective’ rather than ‘theoretical and illusory’.²⁴

In the area of labour rights, the adoption of the integrated approach is mainly found in the following fields: first, we have a line of cases that look at collective labour rights under article 11; second, case law that involves access to work and decent working conditions under articles 8 (the right to private life); and third, cases of particularly severe labour exploitation under article 4 (prohibition of slavery, servitude, forced and compulsory labour). In a series of cases, the Court took cognisance of social and labour rights materials of other international bodies that expanded the scope of the Convention. In *Sidabras and Dzijauntas v*

¹⁸ *Schmidt and Dahlstrom v Sweden* A 21; 1 EHRR 637.

¹⁹ *National Union of Belgian Police v Belgium* A 19; 1 EHRR 578.

²⁰ C Scott, ‘Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”’ (1999) 21 *Human Rights Quarterly* 633, at 638–639.

²¹ K Ewing, ‘The Implications of *Wilson and Palmer*’ (2003) 32 *ILJ* 1 at 3.

²² See the discussion in Mantouvalou, above n 9.

²³ V Leary, ‘The Paradox of Workers’ Rights as Human Rights’, in Compa and Diamond (eds), *Human Rights, Labor Rights and International Trade* University of Pennsylvania Press, 1996, 22 at 40.

²⁴ On the principle that rights have to be practical and effective, see *Airey v Ireland*, App No 6289/73, Judgment of 9 October 1979.

Lithuania,²⁵ the Court read a social right, the right to work, in article 8 of the ECHR that protects the right to private life. *Siliadin v France*²⁶ held that lack of criminalisation of extremely harsh working conditions, such as those faced by the applicant migrant domestic worker, amounted to a breach of article 4. In making these findings, the Court relied on materials of the European Committee of Social Rights and the ILO in order to clarify the material scope of the Convention provisions. The adoption of this interpretive technique showed that the Court was open to labour rights. In a significant break with its past stance, the integrated approach brought social and labour rights a step closer.

The integrated approach to interpretation was best analysed by the Court itself in the landmark Grand Chamber case under article 11, *Demir and Baykara v Turkey*.²⁷ I am calling it landmark in this context because of its extensive analysis of the integrated approach, namely the interaction between the ECHR, on the one hand, and the ILO and other relevant international legal materials, on the other. The facts were as follows: 'Tum Bel Sen, a civil servants' trade union, had been recognised for the purposes of collective bargaining and had also concluded collective agreements. Following litigation, Turkish courts found that these agreements should be annulled. This was because civil servants' unions should not have been recognised a right to conclude them in the first place. In examining the complaint, the Court made mention of several ILO and other relevant documents, at which point Turkey raised an objection: how can it be legitimate for the Court to use ILO Conventions, even though Turkey had not signed and ratified some of them? How could the ECtHR impose on it international obligations that Turkey had never agreed to undertake?

The Grand Chamber was clear: 'the Court has never considered the provisions of the Convention as the sole framework of reference'²⁸ for its interpretation. According to the rules of interpretation found in the Vienna Convention on the Law of Treaties, a treaty ought to be interpreted according to its object and purpose. The object and purpose of a document that protects human rights is to make these rights practical and effective, not theoretical and illusory.²⁹ The interpretation of the Convention must also take account of other rules of international law,³⁰ and to read it as a 'living' document in light of 'present-day conditions'.³¹ Several materials can serve to elucidate the content of the Convention, both from other international organisations and from the Council of Europe itself. When taking note of the relevant materials, in addition, the Court stressed, it never distinguishes between documents that the Respondent State has signed and ratified, and those that it has not.³² Not only that, but at times it has paid attention to materials that are not, in any case, legally binding, such as the EU Charter of Fundamental Rights.³³

²⁵ *Sidabras and Dzijauntas v Lithuania*, 42 EHRR (2004) 104. For analysis of the case and discussion of the integrated approach, see V Mantouvalou, 'Work and Private Life: *Sidabras and Dzijauntas v Lithuania*' (2005) 30 *European Law Review* 573.

²⁶ *Siliadin v France*, 43 EHRR (2006) 287. See V Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers', (2006) 35 *Industrial Law Journal* 395; H Cullen, '*Siliadin v France*: Positive Obligations Under Article 4 of the European Convention on Human Rights', (2006) 6 *Human Rights Law Review* 585.

²⁷ *Demir and Baykara v Turkey*, 48 EHRR (2009) 54.

²⁸ *Ibid* at para 65.

²⁹ *Ibid* at para 66.

³⁰ *Ibid* at para 67.

³¹ *Ibid* at para 68.

³² *Ibid* at para 78.

³³ *Ibid* at para 80. For analysis against the background of Strasbourg's methods of interpretation more generally, see G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509 at 521-523.

The *Demir and Baykara* case was celebrated in scholarship by Ewing and Hendy. They described it as ‘epoch-making’ for being a ‘decision in which social and economic rights have been fused permanently with civil and political rights, in a process that is potentially nothing less than a socialization of civil and political rights’.³⁴ They also said that in this decision ‘human rights have established their superiority over economic irrationalism and “competitiveness” in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers’.³⁵

However, it turned out that *Demir and Baykara* did not mark a permanent reorientation for the Court. Materials of the ESC and the ILO were frequently invoked in subsequent case law, and sometimes endorsed by the Court, as it sought to establish a European or international consensus on difficult social and political questions. But it soon became evident that civil and social rights were not permanently fused. In *RMT v UK*,³⁶ the applicants invoked a wealth of international and regional materials in support of their claim that English law violated article 11 of the ECHR because of its blanket ban of secondary industrial action.³⁷ The Court said that these might indeed be relevant, but could not be viewed as decisive because the nature of review in Strasbourg is different to the supervision by the ILO and the ECSR.³⁸

...the Court considers that the negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight for determining whether the operation of the statutory ban on secondary strikes in circumstances such as those complained of in the present case remained within the range of permissible options open to the national authorities under Article 11 of the Convention.

The case *Unite The Union v UK*³⁹ was described as ‘another disappointment in Strasbourg’⁴⁰ for not merging ESC rights with the Convention, but other recent case law on the right to strike was open to the use of ILO materials in order to find a violation of the Convention.⁴¹ At domestic level, the judiciary was still reluctant to rely on materials of the ILO, as it became particularly evident in a case on injunctions for strike action, where these were invoked, described as interesting but then dismissed.⁴²

To conclude, while the evolution of the case law is by no means linear, there is a noticeable change in the pattern when looking at pre-2002 and post-2002 case law. The ECtHR no longer views non-Convention materials as outright outside the scope of the Convention. It takes note of them and discusses them when they are invoked by applicants, and this has led to an opening up of the scope of the ECHR in the area of economic and social rights. This has not made the ECHR a balanced document in its protection of economic liberty, on the

³⁴ K Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’, (2010) 39 ILJ 2 at 47.

³⁵ *Ibid*, pp 47-48.

³⁶ *RMT v UK*, App No 31045/10, Judgment of 8 April 2014.

³⁷ *RMT*, at 57.

³⁸ At 98.

³⁹ *Unite the Union v UK*, App No 65397/13, Admissibility Decision of 3 May 2016.

⁴⁰ K Arabadjieva, ‘Another Disappointment in Strasbourg: *Unite The Union v United Kingdom*’, (2017) 46 ILJ 289.

⁴¹ See *Ognevenko v Russia*, App No 44873/09, judgment of 20 November 2018, and *Association of Academics v Iceland*, App No 2451/16, Admissibility decision of 15 May 2018. See the discussion in T Novitz, ‘Protecting the Right to Strike in the ILO and the European Court of Human Rights: The Significance of Appn No 44873/09 *Ognevenko v Russia*’, UK Labour Law Blog, 8 April 2019, available at <https://wordpress.com/view/uklabourlawblog.com>

⁴² *Metrobus Ltd v UNITE the Union* [2009] EWCA Civ 829.

one hand, and political and social equality, on the other (to use Ewing's terminology).⁴³ However, it has put into question the traditional sharp separation of the two categories of rights that has been strongly supported by consecutive UK governments, and which partly underlies Ewing's scepticism on the HRA.

Structure of Convention rights

The scepticism on the effect of the HRA on labour law that we find in Ewing's 1998 piece was not only limited to the exclusion of social rights from the scope of the Act. It was also due to the fact that many Convention rights are qualified, rather than absolute, which means that they may be restricted by the employer if there is a legitimate aim. The ECtHR applies a test of proportionality when it implements these rights, examining whether the limitation of a right is proportionate to the aim pursued. Despite the fact that many ECHR rights are not absolute, articles 8-11 of the ECHR, have had a significant impact on the employment relationship, either thanks to Strasbourg case law, or, perhaps more rarely, domestic jurisprudence.⁴⁴ The same observation can be made in relation to article 6, the right to a fair trial, which has a different structure to the aforementioned provisions, but is at times construed as a qualified right by the ECtHR when it examines the 'essence of the right' and applies a 'sui generis proportionality test'.⁴⁵ I will illustrate the effect of these provisions on the employment relation through a line of leading cases.

Qualified Rights

In the past, when assessing contractual terms that in effect waive fundamental rights, some decisions in connection with interference with the right to manifest a religion in the workplace under the Convention acknowledged that if an employee could resign and obtain another job, there was no violation of the ECHR since no-one was preventing the employee from manifesting a religion.⁴⁶ This approach suggested a fundamental misunderstanding of the employment relation, which is a relationship of submission and subordination, where the employer offers the terms on a take it or leave it basis and can unilaterally change them, against a background of scarcity of jobs. It is misleading to think that people can easily leave their job and take another job that matches their needs and interests, even if their current employer restricts their human rights. In 2013, however, the Court changed its approach to this matter. In *Eweida v UK*,⁴⁷ a majority in ECtHR held that:

[g]iven the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.

⁴³ Ewing, above n 5.

⁴⁴ See generally H Collins and V Mantouvalou, 'The Employment Contract and Human Rights', in M Freedland (ed) *The Contract of Employment*, OUP, 2016.

⁴⁵ See D Vitkauskas and G Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Council of Europe, 2012, p 9.

⁴⁶ *Stedman v UK*, App No 29107/95, Decision of 9 April 1997. See also G Morris, 'Fundamental Rights: Exclusion by Agreement?', (2001) 30 ILJ 49.

⁴⁷ *Eweida and Others v UK*, App Nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013.

The underlying rationale of this change in the Court's case law was probably that any decision to consent to limitations of rights in the workplace is unlikely to be voluntary, because for reasons of economic necessity the possibility of resignation is rarely a viable alternative.⁴⁸

The reluctance of the Court to accept waivers of Convention rights through the employment contract because of the legal subordination of the employee was reaffirmed and further clarified in *Barbulescu v Romania*.⁴⁹ The case involved the question whether the applicant, a sales engineer, who was dismissed from his job for using his work Yahoo Messenger account for private communications with his partner and brother on his health and sex life, suffered a violation of article 8 rights. Mr Barbulescu had signed internal regulations that prohibited using computers for personal purposes. When his employer found out that he had used his work Messenger account for communications that involved intimate aspects of his private life, he was dismissed. In examining the question of the reasonable expectation of privacy in light of the fact that the applicant had signed up to the internal regulations, the ECtHR said:

an employer's instructions cannot reduce private social life in the workplace to zero. Respect for private life and for the privacy of correspondence continues to exist, even if these may be restricted in so far as necessary.⁵⁰

This remarkable passage suggests that the Court sets limits on the extent to which the employee can agree to a waiver of human rights through the employment contract.

The Court has examined dismissals that engage Convention rights many times in recent years, and has often exhibited an appreciation of the particularities of the employment context.⁵¹ Perhaps the most elaborate case on dismissal that violates Convention rights was the Grand Chamber judgment in *Denisov v Ukraine*.⁵² This examined the question in detail under article 8 of the ECHR, and analysed the reasons that can give rise to a violation of the provision because of a dismissal. The Court said that it may be violated both when someone is dismissed because of his or her private activities, and when the dismissal has a significant impact on the employee's reputation. Cases such as *Eweida*, *Barbulescu* and *Denisov* indicate that the Court is willing to take seriously the character of human rights as inalienable rights, which cannot be taken away unless there is a legitimate reason, and in a manner that is proportionate to the aim pursued.

Against the background of these Strasbourg developments, it may be time to revisit the test of fairness in dismissal in English law.⁵³ In a famous passage from *Turner v East Midland Trains Ltd*, having gone through ECHR case law, Elias LJ said that 'Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship', and went on to suggest that '[i]t may even be that the domestic band of

⁴⁸ R McCrea, 'Religion in the Workplace: *Eweida and Others v UK*', (2014) 77 MLR 277.

⁴⁹ *Barbulescu v Romania*, App No 61496/08, Grand Chamber judgment of 5 September 2017, para 117. Noted by Joe Atkinson, 'Workplace Monitoring and the Right to Private Life at Work', (2018) 81 *Modern Law Review* 688.

⁵⁰ *Barbulescu*, para 80.

⁵¹ *Obst v Germany*, App. No. 425/03; *Schuth v Germany*, App. No. 1620/03. Judgments of 23 September 2010; *IB v Greece*, as above n 16; Cf *Pay v UK*, App. No. 32792/05, Admissibility decision of 16 September 2008. Cf. *Palomo Sanchez v Spain*, App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, Grand Chamber judgment of 12 September 2011. But see also the strong and persuasive dissenting opinion of Tulkens et al.

⁵² *Denisov v Ukraine*, App No 76639/11, Grand Chamber judgment of 25 September 2018.

⁵³ See generally, Hugh Collins, *Justice in Dismissal*, OUP, 1992. H Collins, 'The Protection of Civil Liberties in the Workplace', (2006) 69 MLR 619; V Mantouvalou, 'Human Rights and Unfair Dismissal', as above n 12.

reasonable responses test protects human rights more effectively'.⁵⁴ Given recent developments, particularly cases such as *Denison*, it is questionable whether the test is compatible with ECHR standards. Strasbourg applies a stricter test than the test of reasonableness under section 98 of the Employment Rights Act 1996, which recognises great discretion to managerial prerogative. The Strasbourg Court's approach to workers' rights brings the law closer to the inalienability of moral human rights, namely the fact that human rights cannot be easily taken away through employers' power, without strict scrutiny of the lawfulness of the employer's decision.⁵⁵

In addition to the above cases that reflect the character of human rights as inalienable rights in the workplace, there is also case law that supports the universality of human rights at work, expanding the personal scope of protection of labour legislation. This can be illustrated by the case *Redfearn v United Kingdom*.⁵⁶ In this case the ECtHR held that dismissal for membership of a political party is an interference with the right to freedom of association in Article 11 of the ECHR. Such a dismissal should therefore be unlawful unless in the circumstances of the particular case the dismissal was a proportionate measure taken in pursuit of a legitimate aim pursued by an employer. Mr Redfearn's dismissal had resulted from his active membership of the British National Party (BNP), an extreme right-wing political party, which is notorious for its anti-immigration and anti-European Union positions.⁵⁷ The reason why the claim was brought to Strasbourg was because the dismissal occurred during the qualifying period, when employees have extremely limited protection. The Strasbourg Court ruled that dismissal for political activity during the qualifying period may violate the Convention, and that there should be a test examining the legality of such dismissals.⁵⁸

At domestic level, the HRA has also given rise to cases that challenge arbitrary exclusions from the personal scope of Convention rights. A significant decision on this issue is *Vining*,⁵⁹ a case that involved the exclusion of parks police from unfair dismissal protection and collective redundancy consultation. The argument was made that these exclusions contravened, first, the right to private life (alone and together with the prohibition of discrimination) and second, the right to freedom of association under article 11 (alone and together with the prohibition of discrimination). The Court of Appeal went through Strasbourg case law on unfair dismissal, including *Sidabras*, *IB* and *Martinez v Spain*,⁶⁰ and concluded that not all dismissals engage article 8 of the ECHR. Even though it recognised that economic redundancies may give rise to article 8 issues, it ruled that this did not occur in the instant case. As to the second claim regarding the exclusion from redundancy consultation, the Court said that consultation for collective redundancy should be viewed as an essential component of article 11 of the ECHR. It concluded that the legislation that excludes the police force should be interpreted in a manner that is compatible with article 11 so as not to apply to parks police. In this way, it expanded the personal scope of the protection to cover a category of workers that was excluded. It remains to be seen whether this line of thinking will be used to challenge exclusions in the context of the gig economy,

⁵⁴ *Turner v East Midland Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 505, para 56.

⁵⁵ H Collins and V Mantouvalou, 'Human Rights and the Contract of Employment', in Freedland (ed) *The Contract of Employment*, OUP, 2016, p 188.

⁵⁶ *Redfearn v United Kingdom*, App No 47335/06, Judgment of 6 November 2012.

⁵⁷ British National Party, *Democracy, Culture, Freedom and Identity: General Election Manifesto* (April, 2010) 5; <http://communications.bnp.org.uk/ge2010manifesto.pdf>.

⁵⁸ H Collins and V Mantouvalou, 'Redfearn v UK: Political Association and Dismissal' (2013) 76 MLR 909.

⁵⁹ *Vining & Ors v London Borough of Wandsworth & Anor* [2017] EWCA Civ 1092, [2018] ICR 499.

⁶⁰ *Fernandez Martinez v Spain*, App No 56030/07, Judgment of 12 June 2014.

where workers are sometimes classified as self-employed, with the implication that they are excluded from the enjoyment of certain Convention rights.⁶¹

The right to a fair trial, to which Ewing referred in his 1998 article,⁶² has also played a significant role in the employment context. Even though it does not usually apply in internal disciplinary procedures of the employers,⁶³ it applies when workers claim legal rights. In *Benkharbouche*,⁶⁴ the applicants who were working in foreign embassies in London brought claims of breaches of the law on dismissal, minimum wage and working time, as well as discrimination and harassment. These were barred because of the State Immunity Act 1978. Section 4 of the Act says that there is no immunity for contracts of employment with an individual in the UK, where the work performed by that individual will be ‘wholly or partly’ in the UK. However, section 16(1)(a) provides that ‘section 4 does not apply to proceedings concerning the employment of members of a mission’, namely embassy staff. The UK Supreme Court (UKSC) had to decide whether this complies with article 6 of the ECHR on the right to a fair trial, as well as article 47 of the EU Charter of Fundamental Rights on the right to an effective remedy and a right to a fair trial, given that the case had an EU law element.⁶⁵ It ruled that the provisions of the State Immunity Act 1978 were incompatible with article 6 of the Convention (and article 47 of the EU Charter). This case could potentially help other situations in which legislation prevents access to the courts to protect labour law rights.

Finally, before concluding this section, mention should be made of *UNISON*,⁶⁶ a case of great significance in the employment field that ruled that the fees for bringing claims to employment tribunals were unlawful as a matter of common law and EU law. Even though the UKSC did not decide the case on the basis of article 6 of the ECHR, the provision had a supporting role to common law principles and article 47 of the EU Charter of Fundamental Rights.⁶⁷ Such was the importance of the case that Michael Ford described it as an ‘important triumph of a revitalised rule of law’,⁶⁸ and ‘a powerful normative lens through which to scrutinise the practical realisation of employment and other social rights’.⁶⁹ These cases on

⁶¹ *R (The IWGB) v Central Arbitration Committee* [2018] EWHC 3342 (Admin). Cf *Pastoral Cel Bun v Romania*, App No 2330/09, Grand Chamber judgment of 9 July 2013, which found that an ‘employment relationship’ is necessary for the right to form and join trade unions. For critical analyses, see Joe Atkinson and Hitesh Dhorajiwala, ‘*IWGB v RooFoods*: Status, Rights and Substitution’, (2019) 48 ILJ 278; Alan Bogg, ‘Taken for a Ride: Workers in the Gig Economy’, (2019) LQR 219.

⁶² Ewing, as above n 1, pp 278-279.

⁶³ See A Sanders, ‘Does Article 6 of the European Convention on Human Rights Apply to Disciplinary Procedures in the Workplace?’, (2013) 33 *Oxford Journal of Legal Studies* 791.

⁶⁴ *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant) and Secretary of State for Foreign and Commonwealth Affairs and Libya (Appellants) v Janab (Respondent)* [2017] UKSC 62.

⁶⁵ The Working Time Regulations implement the EU Working Time Directive. For further analysis for the implications of the case in relation to the Charter, see A Young, ‘*Benkharbouche* and the Future of Disapplication’, UK Constitutional Law Blog, 24 October 2017, available at <https://ukconstitutionalaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/>

⁶⁶ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, noted by A Bogg, ‘The Common Law Constitution at Work: *R (on the application of UNISON) v Lord Chancellor*’, (2018) 81 MLR 509. See also M Ford, ‘Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court’, (2018) 47 ILJ 1.

⁶⁷ *UNISON*, paras 108-117.

⁶⁸ Ford, as above n 66, p 44.

⁶⁹ *Ibid.*

access to justice underline the central or supporting value of Convention civil and political rights for the vindication of workers' economic and social rights.⁷⁰

Absolute rights

Another development that needs to be mentioned in this overview has been the case law under one of the absolute (rather than qualified) rights, article 4 of the ECHR that prohibits slavery, servitude, forced and compulsory labour. In his 1998 article, Ewing did not consider the effect of article 4 of the Convention on labour law. This is understandable, as at the time that the ECHR was incorporated in English law, the case law under article 4 was very limited, and the ECtHR and Commission had never found a breach of the provision. However, in 2005, in *Siliadin v France*, the Court ruled that the ill-treatment of a migrant domestic worker should be classified as servitude, and that the ECHR imposes a positive obligation to criminalise severe labour exploitation. This was the first case in which Strasbourg ruled that there was a breach of article 4 of the ECHR, and has been followed by cases involving sex trafficking, and other instances of severe labour exploitation.⁷¹ This line of cases led to the adoption of new legislation in the UK. We first saw the introduction of section 71 of the UK Coroners and Justice Act 2009, entitled 'slavery, servitude, and forced or compulsory labour', and later on the Modern Slavery Act 2015 (MSA), which codified criminal legislation on slavery, servitude, forced and compulsory labour, and human trafficking.⁷² The MSA brings English law in line with the substantive requirement under the ECHR to criminalise, but it is questionable whether it also brings it in line with the procedural obligation to enforce effectively the legislation. At the same time it raises questions on how genuine the Government's commitment to protect workers from severe labour exploitation is, for the reason that it has not taken further steps to remove structural factors that create vulnerability to exploitation, as the example of the treatment of migrant domestic workers shows.⁷³

Collective Labour Law

The third key concern in Ewing's 1998 piece involved collective labour law. As was said earlier, in a line of cases that were decided in the 1970s, 1980s and 1990s, the ECtHR repeatedly ruled that when a right can be classified as social and protected in the ESC or in instruments of the ILO, it ought to be excluded from the ECHR. When applicants alleged that article 11 encompasses a right to strike, for instance, the claim was rejected.⁷⁴ Similarly, the right to consultation and the right of a union to be recognised for the purposes of collective bargaining were not regarded as essential components of article 11.⁷⁵ At the same time as the Court was reluctant to protect trade union rights, it was willing to protect individuals who did not want to be trade union members in the 'closed shop' cases.⁷⁶ The approach of the Court in these cases led Tonia Novitz to argue that the Court shows 'a

⁷⁰ The ECtHR recognised the links between civil and social rights in the context of article 6 early on in its case law. See *Airey v Ireland* A 32; 2 EHRR 305.

⁷¹ *Rantsev v Cyprus and Russia*, App No 25965/04, Judgment of 10 January 2010; *CN v UK*, App No 4239/08, Judgment of 13 November 2012; *Choudhury and Others v Greece*, App No 21885/15, Judgment of 30 March 2017.

⁷² Sexual Offences Act 2003 ss 57-59; Asylum and Immigration (Treatment of Claimants) Act 2004 s 4, as amended by Protection of Freedoms Act 2012 ss 109 and 110, and Coroners and Justice Act 2009 s 71.

⁷³ I analyse the Act and develop the criticisms in V Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On', (2018) 81 MLR 1017.

⁷⁴ *Schmidt and Dahlstrom v Sweden* A 21; 1 EHRR 637.

⁷⁵ *National Union of Belgian Police v Belgium* A 19; 1 EHRR 578.

⁷⁶ *Young, James and Webster*, as above n 4.

greater interest on the defence of individual autonomy than collective solidarity’,⁷⁷ and Lord Wedderburn described the case law as ‘individual and formalistic’.⁷⁸ Ewing said that ‘the contribution of article 11 to date has been disappointing, failing to deliver any meaningful protection for trade union activities, while being used as an instrument for undermining trade union security’,⁷⁹ and that ‘from a trade union point of view, Article 11 was showing a debit balance’.⁸⁰

However, *Wilson and Palmer* introduced a new way of thinking about labour law and human rights in the area of the right to form and join a trade union. The case involved the discriminatory treatment of workers who chose to continue having their working conditions governed by a collective agreement, rather than a personal contract negotiated between the employer and the workers. The fact that UK law permitted employers to treat less favourably these workers who were not prepared to renounce ‘a freedom that was an essential feature of union membership’⁸¹ was found to be in breach of article 11, in a case that Ewing described as representing ‘a significant break with the past’, where the ECtHR went ‘a long way to restore confidence in Article 11 of the Convention’.⁸² *Wilson and Palmer* was ‘the most important labour law decision for at least a generation, and is all the more important for the unusual fact that the trade unions won a considerable victory’.⁸³ Yet Ewing also expressed a word of caution in light of other case law: he said that ‘it may be premature to pop the champagne corks to celebrate judicial defection in the class war’.⁸⁴

After *Wilson*, the most important development was *Demir and Baykara*, which was discussed earlier. Here the Court ruled that the invalidation of a collective agreement that had been concluded between the union and the employer constituted a violation of article 11. As was said above, this case was not only significant for its substantive ruling, but also because of the reasoning by which the ruling was reached, and it was celebrated in labour law scholarship, and particularly by Ewing and Hendy.

However, the stance of Ewing and other labour law scholars changed following *RMT v United Kingdom*.⁸⁵ Here the Court addressed the issue of secondary industrial action, which is banned in English law. The applicant union of transport workers suggested that the ban violated their rights under article 11 of the Convention. The applicants were all members of the union RMT. They were initially employed by a company called Jarvis, and were then transferred to a smaller company, Hydrex. Their terms and conditions were at first kept as they were, according to a legal requirement, but deteriorated later on. Industrial action by Hydrex employees only would not be effective, so RMT sought to organise industrial action at the bigger company, Jarvis, but as English law does not protect secondary action, it was not possible to do this. The Court accepted that secondary action falls within the scope of art 11. It affirmed on the one hand that the right to strike is ‘clearly protected’ under article 11. On this basis, Bogg and Ewing stated that ‘[t]here is now a right to strike, albeit forged in

⁷⁷ T Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003) 238.

⁷⁸ Lord Wedderburn, ‘Freedom of Association or Right to Organise? The Common Law and International Sources’ in Lord Wedderburn (ed) *Employment Rights in Britain and Europe*, Lawrence and Wishart, 1991, p 138 at 144.

⁷⁹ Ewing, above n 1, p 279.

⁸⁰ K Ewing, above n 21, at 4.

⁸¹ *Wilson and Palmer*, para 47.

⁸² Ewing, above n 21, at 5.

⁸³ *Ibid*, p 20.

⁸⁴ Ewing, above n 21, p 21.

⁸⁵ *RMT v United Kingdom* (31045/10) Section IV, ECHR 8 April 2014. See Alan Bogg and Keith Ewing ‘The Implications of the RMT Case’ (2014) 43 *ILJ* 221.

jurisprudence rather than created by statute, and albeit emerging improbably from the Human Rights Act rather than purposefully from a dedicated statute drafted for this purpose'.⁸⁶ However, the Court ruled on the other hand that the ban on secondary industrial action in English law was justified under article 11(2) of the ECHR, as the state enjoys a wide margin of appreciation. *RMT* was therefore heavily criticized by Bogg and Ewing, who suggested that the Court was 'weak, bullied and timid'.⁸⁷

The *RMT* judgment has been followed by further article 11 cases, which have disappointed labour law scholars, to the extent that Ewing and Hendy argued in a recent piece that there is an article 11(3) in the ECHR, which is 'created by and visible only to the judges of the European Court of Human Rights. This provides as follows: "(3) The foregoing provisions of this Article shall not apply to the United Kingdom".⁸⁸ In this piece, the authors placed special attention to the politics of the ECHR, and criticized the Court for 'subordinating justice to politics' in its decisions on UK compliance.⁸⁹

Human Rights Instrumentalism

The above overview of the case law of Strasbourg and domestic courts shows that the Convention has brought about significant improvements in the scope of workers' rights at Council of Europe level, and at times in English law. Certain arbitrary exclusions have been challenged, and some changes have been introduced in the legislative framework that would not have occurred had we not had this human rights document. These changes are significant but also relatively limited. This reality may be explained to a certain degree by the character of the judiciary in the UK that is often criticized for being conservative, the composition of the legislature, and the sensitive task of the Strasbourg Court as a supranational court.⁹⁰

It was noted earlier that as the case law evolved, so did Ewing's approach towards human rights in his academic scholarship. From deep skepticism in the early days, his position changed into increasing enthusiasm with cases such as *Wilson and Palmer* and *Demir and Baykara*, and then deep disappointment following *RMT*. The changes in Ewing's stance towards human rights, in his sole-authored and co-authored work, can be explained. Labour law scholars usually approach these rights instrumentally. When courts are willing to protect workers' rights, scholars endorse them in academic work and support the use of human rights in litigation. When litigation fails, their disenchantment leads to a rejection of this way of framing workers' claims and to scepticism about human rights altogether.

The instrumental approach to the protection of labour rights as human rights is evident in much labour law literature.⁹¹ Its roots lie in the Marxist tradition that approaches the legal system with pragmatism, as Collins explains.⁹² Certain legal rights, such as the right to join

⁸⁶ A Bogg and K Ewing, 'The Implications of the RMT case', (2014) 43 *ILJ* 221 at 222.

⁸⁷ *Ibid*, p 251.

⁸⁸ Ewing and Hendy, 'Article 11(3) of the European Convention on Human Rights', (2017) *European Human Rights Law Review* 356.

⁸⁹ p 375.

⁹⁰ On this latter point, see, for instance, D Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 *Current Legal Problems* 49.

⁹¹ I develop this in V Mantouvalou, 'Are Labour Rights Human Rights?', (2012) 3 *European Labour Law Journal* 151 at 156.

⁹² On the Marxist approach towards legal rights, see the discussion in H Collins, *Marxism and the Law*, OUP, 1982, p 142 ff.

political associations, are useful for the promotion of the interests of the working class in this context, and these are endorsed by Marxian thinkers.⁹³ Bogg also suggested that this approach towards human rights is grounded on a ‘radically empiricist ethos’: ‘the best test of a theory was not its elegance or its cleverness, but whether it worked: did it improve the lives of real people? That was also the metric for evaluating fundamental rights’.⁹⁴ On this analysis, ‘[t]he imperative to present [workers’] claims as human rights comes from the desire to utilise the potentially powerful legal methods of securing advantage to pursue their claims, and also from the perceived need to respond to employers’ willingness to use these arguments and tools themselves’.⁹⁵ This strategic use of human rights law can be powerful and important, but it also carries some dangers. For instance, if a case is lost in courts, it is then harder to question the outcome than if we only had a political decision, which could be challenged through activism. A judicial decision may legitimise the employer’s conduct, making it harder to then challenge it through politics.

That many labour law scholars’ approach towards human rights is instrumental should by no means be viewed as suggesting that it is not grounded on moral principles. One of Ewing’s key concerns, as we know from his work, is the lack of balance in the ECHR/HRA between liberty, on the one hand, and equality, on the other. Liberty in the British constitution is analysed as economic liberty and encapsulated in civil and political rights primarily, and equality, analysed as political and social equality, in social rights. The incorporation of the HRA in English law reasserted this economic liberty and gave it ‘a new legal priority’.⁹⁶ On this basis, no deep transformation of the inequality of economic power could ever be brought about without the incorporation of social rights into domestic law and without a change in the UK’s stance towards the ESC and the findings of the European Committee of Social Rights. On this matter and looking at the bigger picture, Ewing was right. Without the incorporation of social rights in English law, there will be limitations to the arguments that can be brought and to the decisions that can be reached in order to address workers’ submission and subordination.

Yet it is also important to appreciate that human rights are not just legal standards that are implemented by courts. Parliamentary committees, such as the UK Joint Committee on Human Rights, also consider domestic human rights issues that are not only limited in the ECHR/HRA.⁹⁷ Even more importantly perhaps, human rights are normative standards that exist outside the law and irrespective of whether litigation and other mechanisms are a successful strategy.⁹⁸ They are grounded on values such as dignity, equality and freedom, and have great moral force. Human rights theory itself can offer an important critical focus, a list of moral standards against which legislation, including human rights law, can be assessed, on the basis of which it can be criticized, and towards which it should develop. When the approach of courts disappoints, there should be calls for change, both at domestic level and at European level, so that the case law of courts and the legislation reflect these moral

⁹³ Ibid.

⁹⁴ Bogg, p 316.

⁹⁵ C Fenwick and T Novitz, ‘Conclusion: Regulating to Protect Workers’ Human Rights’ in Fenwick and Novitz (eds.), *Human Rights at Work: Perspectives on Law and Regulation*, Hart Publishing, 2010, pp 587–588.

⁹⁶ Ewing, above n 5, p 116.

⁹⁷ See A Kavanagh, ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’, in M Hunt, HJ Hooper and P Yowell (eds) *Parliaments and Human Rights – Redressing the Democratic Deficit*, Hart, 2015, p 115.

⁹⁸ On three different approaches to labour rights as human rights, see Mantouvalou, above n 91. On human rights as normative foundations of labour law, see Joe Atkinson, ‘Human Rights as Foundations for Labour Law’, in H Collins, G Lester, V Mantouvalou (eds) *Philosophical Foundations of Labour Law*, OUP, 2018.

standards. This is an important task for labour law scholarship, and I hope that this is one with which labour lawyers will continue to engage.