

A Thorogood Special Briefing

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Chapter 1

Introduction

European employment law is as old as the EU itself, in that the Treaty of Rome, 1957, included a requirement for equal pay between men and women. This was an extraordinary intervention, given that we did not in the UK begin to consider legislating for equal pay until the late 1960s. The driver for the Treaty provision was that of preventing member states competing on an “un-level” playing field, i.e. that those countries that permitted low pay for women were able to trade more cheaply. This remains a key driver of EU law in a situation where there is a direct link between labour costs and employment law costs, and therefore the ability to compete with manufacturers and service providers across the Union.

It is always important to set the legal rules for employment within this economic and multi-national environment. Employment law becomes very important for all member states in the context of it affecting all cross-border activities and where the policy intention is clearly to ensure fair competition.

The Four Freedoms of the EU are:

- Freedom of movement for individuals and businesses.
- Freedom of trade, with the removal of all direct and indirect barriers.
- Freedom of capital, so as to allow cross-border investment.
- Freedom to provide services, with barriers, whether they be legal, financial or of any sort removed.

The Four Freedoms underpin EU policy making and law, and the strength of the underpinning philosophy should not be underestimated. We have had controversies in the UK about “British jobs for British workers”. We have also had complaints about the numbers of Polish and other workers in the UK. However, we need to remember the numbers of UK nationals freely living and working in other parts of the EU who should also have unobstructed access to labour markets and employment. The “British jobs” etc. mantra can only be achieved by the British workers having the skills and aptitudes required for the work and cannot be achieved through obstructing the employment of other EU nationals. Essentially, the EU is one labour market!

All of these Freedoms impact on employment relations and employment law. They require the removal of barriers, say, to recruitment, training and qualifications so that EU citizens can move to work in other member states. Businesses, including self-employed people, must also be able to move to other states and come to the UK from other states.

The aims of this report

The aims are fairly simple. They are to:

- Explain the origins, aims and approach of EU law to workplace issues.
- Identify the key characteristics of EU employment law.
- Consider the different approach of EU law to traditional UK employment law.
- Explore the major areas of EU employment law.
- Assess the practical impact on employing organisations and HRM practices.
- Respond to common queries and issues.

UK employment law

This is just a reminder of the features of our law – its content, procedures and remedies. These are the matters that we take for granted as being “the way things are done”. It is the impact of EU employment law on these traditions that is so important to understand.

Employment law does not have a long history in the UK. It grew out of the twin sources of first, the law of master and servant and, second, legislation applying to various (typically) low-skilled occupations such as labouring and farm work. Another influence was the law that applied to professions and skilled activities, whereby the professions were largely self-regulating and autonomous. Employment law, as a distinct area of law, began to emerge in the 19th century with some protective legislation for those working in dangerous industries and with restrictive legislation applying to trade unions.

In this respect it is important to note that trade unions, their members and trade union funds and activities have only recently been in receipt of some protections in law in the UK, and that even today workers have no express right to withdraw labour and those who do run many risks. This is in marked contrast with other EU states, where going on strike is generally protected through the constitution and individuals are rarely penalised.

At the heart of our employment law is the ***contract of employment***. The law has always applied the notion of “freedom of contract” and the idea that contracts are, indeed, negotiated much as a commercial contract would be. Relevant features of employment contract law are:

- There are virtually no limitations on the type of employment contract an employer can offer. There is no requirement, for example, to establish a short term need before offering a fixed term contract; no requirement that part-time numbers are limited or minimum hours offered and no ban on zero-hours and similar contract forms.
- There are relatively few requirements as to the terms that must be provided (the National Minimum Wage (NMW) and paid holidays being key exceptions).
- There is considerable legal weight attached to the form and content of a written contract of employment. Such a contract normally overrides all other sources of terms, excluding legislation, but including collective agreements, oral agreements, company practices, etc. It is not surprising therefore that such importance is attached to the form and wording of the contract and to the other documents that are typically part of it, such as disciplinary rules.
- The notion of “agreement” is taken seriously, especially when changes to terms are contemplated.
- Over the years the courts have added important implied terms to the terms that have been expressed by the parties. Of considerable importance is the implied term of “trust and confidence” that, essentially, cements the employer/employee relationship and requires supportive conduct that emphasises the interdependence of the employment relationship. The duties of fidelity, professional care and responsiveness to lawful orders are imposed on the employee and the employer must pay the agreed wages, provide a safe working environment and indemnify the employee against loss. Outside the common law system (i.e. also in most parts of the EU) the contract of employment is of lower significance, set against legislation/codes and collective agreements.

The other key areas of “traditional” UK employment law are:

- **Anti-discrimination law.** Now a massive area of law and recently subject to a major piece of legislation – the Equality Act, 2010. The UK developed law applying to race very early (1968) and to disability and gender re-assignment in advance of most EU member states. In terms of the awareness of and enforcement of law, sources of advice and support, the UK is one of the leading nations in the EU. However, some of the protections available outside the UK, such as for political beliefs, family background and education have only very recently begun to be recognised in the UK. The law is still largely rooted in the employment contract and its terms, especially for the purposes of equal pay legislation.
- **Health and safety law.** This is long established in the UK, but originally based on specific industries and activities, with a strong link to the common law notion of taking “reasonable care” for workers. This is an area of law that has had to make significant adjustments to the different approach of EU health and safety law that is based on risk management rather than “reasonableness”.
- **Protective rights** have developed in UK law rather spasmodically. There has long been protection of earnings (Wages Act jurisdiction), which first emerged in 1833, rights to information about terms of work, notice periods and payment rights during lay-offs etc. The key rights of redundancy payments and unfair dismissal emerged in 1965 and 1971, respectively. They require payment of compensation and the law does not generally intervene to question the need for redundancy, though unfair dismissal law does require dismissals to be handled well and for the employer to have grounds.

It is to be noted that UK law has only rarely questioned employers about “why” they took a particular decision (to relocate, use agency temps rather than directly employed staff, to dismiss rather than re-deploy etc.).

Importantly, also, aside from the situation of large-scale redundancies, they do not need to notify anyone or seek approval. Again this is in contrast with most other EU states.

- **Family-friendly rights** have been an emerging feature of UK employment law, with increasingly supportive maternity, paternity and other rights encouraging the better balancing of family life and work.

- **Trade unions and collective action** has been both tightly regulated and treated in a distinctive manner in the UK. Trade unions are controlled, much as companies are. Industrial action has to follow prescribed procedures, collective agreements are not normally legally binding and those involved in strike action remain at risk of job loss, especially where the action they took was “unofficial”. Trade union membership, in an EU comparison, remains relatively high in the UK, but the ability of trade unions to influence decision making appears to get progressively weaker.
- **Enforcement of rights** is complex in the UK. Statutory rights are enforced through Employment Tribunals which are specialist courts that contain lay members. This is a situation shared with most other EU member states. However, contract rights still generally have to be enforced through the ordinary civil courts, as do compensation claims under health and safety laws and challenges to decision-making by public bodies.
- **Government responsibility for employment law** has become increasingly fragmented. We have no discrete Ministry of Labour or the like and responsibilities are shared between the Department for Work and Pensions and the Department for Business, Innovation and Skills, with many smaller units and quangos playing important roles.

A summary

Traditional UK employment law is:

- Dominated by the contract of employment.
- Dependent on the notion of “freedom of contract”, in such a way that “opting out” and other forms of discretion are important features.
- Characterised by contract law being very legalistically applied, often using norms from commercial law.
- Hugely influenced by anti-discrimination law.
- Has employment rights, especially the major ones, reserved for employees only.
- Subject to legislation and case-law that, broadly, question how decisions are made and implemented, not why or whether they are needed at all.

- Relatively non-interventionist, leaving the UK to develop its “flexible labour market” whereby employers can determine the ways of working that suit their needs, with little role for external bodies to question/monitor employers.

What areas of HRM practice are most affected by EU employment law?

To an extent, the answer to this question is dependent on the role of law more generally and as a driver of organisational policy and practice change. Many employers, when asked, will report that law plays a major (and often a negative) role, and reserve most of their harshest criticisms for EU law. Law adds to costs, it is argued, and the aim should be for less law and less “red tape”. However, much law simply formalises good practice, although it is accepted that some areas of law are so complex that compliance is difficult.

At the heart of many of the complaints is the sense that EU employment law is alien to our established practices and norms and is being “imposed” upon us. So, we have to recognise the strong feelings that the EU generally – and employment law in particular – can give rise to.

Turning to the question itself, it is clear that some areas of practice have been impacted on by EU law more than others. This is because there are some areas that the EU is not competent to legislate on, as they are reserved for national law. Included here are:

- Pay and its setting (aside from equal pay).
- Job security in terms of “ordinary” dismissals.
- Industrial action.
- Social security provisions, in terms of qualification, payments and their rate.

Despite this, most areas of HRM practice are affected to a greater or lesser extent. These include:

- Recruitment and selection practices, including recruitment from other parts of the EU.
- Secondments/deployments to and from other parts of the EU.

- The terms of work of part-time workers and fixed term/fixed task employees and, in 2011, temporary agency working (but not all flexible work patterns).
- Business changes and restructuring.
- Internal communication systems.
- Staff management and career management.
- Provision of occupational benefits, including holidays, maternity benefits and some “family friendly” matters.
- Health and safety/well being, including working hours and on-call/standby working.

Overall, this is a wide agenda that is affected. However, it is not just a matter of the rules from the EU that impact but also the way in which they do and the type of demands made on employers. There is also the question of “soft law” measures, such as Opinions and Recommendations (See Chapter 3). Do employers also have to comply with them and what happens if they don’t? Let us now turn to some frequently asked questions on EU employment law.

Frequently asked questions (FAQ)

This book refers to EU employment law, but isn’t it EC employment law?

The answer is “Yes”. Employment law is technically still part of the European Community (EC) provisions, but for reasons of convenience, EU is used in this book.

Why does it matter that I know about EU employment law? Surely the UK government will bring in British laws to implement it?

It matters because the nature of law is different and even if the government has the prime responsibility for complying with EU law, some employers can still be liable if the UK government fails to act correctly. The UK government does not act as a “shield” for employers, so it is important to be aware of the demands of EU law. Individual claimants can rely on EU law when pursuing claims in UK courts and tribunals and it must be borne in mind that EU law always “trumps” UK law (see Chapter 3 in particular). Employers in the public sector need to be

especially mindful, as sometimes the law affects them before private sector employers.

Doesn't EU law recognise that we in the UK have a different legal system?

To an extent, but the EU is about establishing a “level playing field” across member states. However, it does recognise, through subsidiarity, that we may transpose EU law in a way that is consistent with our laws and legal traditions. We must always, though, meet the policy objectives of the EU law in question.

I have heard EU law described as “superior” to ours’. What does this mean?

It means that where the EU has competence to legislate on an aspect of employment relations, the UK courts have to recognise that if there is a clash of, say, scope of law, definitions, etc., between UK legislation and EU legislation, then the rules from the EU take precedence. Specific EU provisions cannot be ignored, replaced or otherwise changed unless EU law provides for this.

How different is EU law from our law?

It is different not just in terms of the priorities of law but in how law is presented. In general, EU law clearly defines the problem it is trying to solve by legislating. (For example, poor working conditions for, say, part-timers, problems for people with disabilities in getting a job, problems in the rejection of those with qualifications different from those in the state in which they are applying for work, agency temps being exploited through low pay and insecurity etc.) It aims to improve the situation by providing individual rights that can be enforced in national courts. Put simply, the detail of legislation is preceded by a clear statement of its aims, and it then explains how a situation will be improved. UK law generally fails to explain itself in terms of aims and objectives. EU law puts this “up front”.

Where are cases on EU law heard?

Generally they are heard within the member state's courts and tribunals. In the UK it is normally in an ET. This is because EU law is part of national law. Cases are only referred by UK courts to the ECJ when they raise an important issue of law. The UK court does not have to be a superior court (the **Coleman** case

on disability rights for carers was actually referred by an ET). The ECJ acts as the “guardian” of EU law but it is *not* an appeal court for litigants.

Is the European Convention on Human Rights part of EU law?

The answer is “No”, although there are some similarities. The ECHR was developed almost immediately after the Second World War by the Council of Europe. This has a membership well beyond the EU and the ECHR deals primarily with basic freedoms (of expression, to life, of family life, to a fair trial and protection from degrading and inhumane treatment etc.). The European Court of Human Rights is based in Strasbourg and, unlike the ECJ, individual litigants can have access to it. The EU has a Charter of Fundamental Rights which is now a part of the Lisbon Treaty. It covers slightly different topics and is more aspirational in nature.

Do I need to speak or understand French?

The simple answer is “No”. However, as a proposed law is often first drafted in French and cases in the ECJ are sometimes only reported in French, it helps if you understand French.

The company I work for is Japanese owned. Isn't it immune from EU employment law?

No: all enterprises that operate within the EU are covered by the law.

Where do I find out more about the law?

This book contains useful sources but to keep up to speed the www.euractiv.com website is handy, along with the main website www.europa.eu. All documents from the EU are downloadable free, as there is no copyright claimed for EU materials.