

Issues in employment law

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Several major issues of employment law remain unresolved. Much may depend on the wider economic climate

The last three Parliaments saw a trend towards more employment protection measures. However, UK employment law still has lower levels of employment protection and more labour market flexibility relative to other EU Member States, such as France. Industrial relation law has preserved the basic restrictions on industrial action introduced by previous Conservative governments, while adding measures to support collective bargaining which are contained mainly in the *Employment Relations Act 1999*. A range of measures have increased rights and protections for working parents and carers. Several major issues of employment law remained unresolved.

EQUALITY ACT 2010

The *Equality Act* is mostly intended to harmonise anti-discrimination law and much of it replicates pre-existing provisions which were repealed, although a number of changes were made. Various of these changes were opposed by the Conservatives, the most notable being the socio-economic equality duty on public sector organisations, and proposals to compel larger organisations to publish information about gender pay differences in their workforce. There were also extensive debates about whether caste should be added as a protected characteristic, a matter which is subject to ongoing review.

MANDATORY RETIREMENT

At present, under the *Employment Equality (Age) Regulations 2006*, employers are within their rights to lay down mandatory retirement ages in contracts of employment. Under age

discrimination legislation which came into force in 2006, compulsory retirement ages are unlawful unless they can be objectively justified. However, this is subject to a national default retirement age of 65 which allows mandatory retirement for those over this age (or the employer's normal retirement age) as long as employees are given the opportunity to exercise their right to request working beyond retirement age. This part of the regulations was recently subject to an unsuccessful legal challenge on judicial review on the question of whether it complies with EU law.

At present, employers can enforce objectively justified mandatory retirement ages

The decision to have a national default retirement age was due to be reviewed in 2011. The Labour Government subsequently announced that the review would take place in 2010, though this was not completed by the end of the last Parliament. A *Survey of Employers' Policies, Practices and Preferences relating to age* was commissioned.

It is important to stress that the "retirement age" and the "pension age" are not synonymous. The retirement age is the age at which one can be required to leave work. The pension age is that age at which one can start to draw an unreduced pension.

EU PREGNANT WORKERS DIRECTIVE

Proposals at an early stage at EU level for changes to the EU Pregnant Workers' Directive

have concerns from business. The UK currently offers new mothers a comparatively generous one year's statutory leave but at relatively low rates of pay. Business concerns have focussed on a proposal to require 18 weeks at full pay.

WORKING TIME DIRECTIVE

Workers may agree with their employers to "opt out" of the 48 hour limit on the working week imposed under the *Working Time Directive*. Following a review, the European Commission made proposals to reform the facility to opt out. The European Parliament voted to abolish it entirely. The matter was subject to qualified majority voting (QMV) in the Council of Ministers where negotiations encountered ongoing deadlock, with the UK trying to retain the opt-out and a number of other countries trying to have it phased out. This deadlock was broken in June 2008 when a common position was reached retaining the opt-out. However, on 17 December 2008 the European Parliament voted again to abolish it. The matter then went to the final conciliation stage involving the Commission, Parliament and Council. This conciliation failed to reach agreement and so the proposals fell. Following the 2009 EP elections the Commission has revisited these proposals.

Concerns arise in relation to the health and social care sector and, particularly, the position of doctors. Since August 2004, junior doctors have been gradually brought within the provisions of the directive. The European Court of Justice has ruled that all time spent by doctors on call at a "health centre" counts as working time. Accordingly, abolition of the opt-out could result in health service staffing problems in the UK as well as other EU Member States. These

judgments are referred to as "SIMAP" and "Jaeger". EU Commission proposals are likely to focus on this issue with a view to tackling the effects of these judgments on health service employment which has had impacts across the EU.

The abolition of the working time opt-out could bring issues in the NHS at a time when funding will be stretched

FUTURE TRENDS

The wider economic climate will influence the direction of employment law debate. Cuts in the public sector, where more than half of the workforce is unionised, could bring industrial relations issues to the fore. There may also be further advances in "family friendly" employment rights, either as a result of EU or domestic legislation.