Cambridge Law Journal, **59(1)**, March 2000, pp. 168–200
Printed in Great Britain

HUMAN RIGHTS: IMPLICATIONS FOR LABOUR LAW

STEPHANIE PALMER*

THE Human Rights Act of 1998 has been described as "bringing rights home". Although the Act only partially incorporates the European Convention on Human Rights, the influence of this legislation is potentially wide ranging. Not only will individuals be able to argue their rights under the Convention in any Court or Tribunal but it is also likely to transform the way in which legislation is drafted and politics is conducted. The Lord Chancellor claims that it will raise awareness of the human rights implications of all legislation and effectively promote a rights culture.[1] The rhetoric leads to high expectations but to what extent will these changes transform the relationship between workers and their employers in both the public and private spheres? The question is whether these rights will really make a difference to labour law.

The Act is an attempt to graft a rights-based system on to British law. Human rights guarantees have a central place in modern Western democracies but they do not avoid the interpretative difficulties confronting decision-makers who must assign a meaning to constitutional rights. Rights are capable of being given a wide range of interpretations, not least because such charters are formulated at a high level of abstraction. In some ways this elasticity is an advantage, allowing flexibility in decision-making and adaptation to novel circumstances, yet there are times when consequential choices need to be made. As the guarantees enshrined in the European Convention on Human Rights are broad and open-textured, this may lead to some uncertainty when these general rights are applied in specific contexts or indeed when they clash with one another. No broadly stated rights can be interpreted in a void and in this case the courts will draw upon the Strasbourg jurisprudence as well as on the traditions in other jurisdictions. The courts are required to have regard to the jurisprudence of the

* Girton College, Cambridge. This paper was originally presented to the SPTL Conference (Labour Law section) at Manchester in September 1998. I would like to thank the Arts and Research Humanities Board for supporting my research. Bob Hepple made helpful comments on an earlier draft and I have also benefited from conversations with Keith Ewing. The usual disclaimers apply.

[1] HL Deb. vol. 583 col. 1228 (3 November 1997).

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

European Court of Human Rights, the Commission and the decisions of the Committee of Ministers; but they are not bound by it.[2] If the Human Rights Act is to influence the future direction of labour law, the UK courts must develop their own standards of protection under the broad guidance of the principles laid down by the Strasbourg case-law.

One likelihood is that the Human Rights Act will lead to an increasing infiltration of norms of public law into private law: a trend that has been in evidence for some time.[3] Such a development could have important ramifications for labour law. Although there are recognised human or fundamental rights in the employment context (for example, the principle of equal treatment in employment, data protection and the new Public Interest Disclosure Act 1998), they remain piecemeal and isolated. According to one commentator "what is missing is a unifying conception of the right of the individual to the protection of his or her personal dignity and autonomy in relation to employment."[4] The Human Rights Act enables the courts to go some way towards developing the idea of employees' fundamental rights.

The extent to which the judges are willing to seize the opportunity to "constitutionalise" the employment relationship is unclear. Overall the Convention has had little impact in domestic labour law. Perhaps this fact should not surprise us: unlike the Council of Europe's Social Charter of 1961, the Convention is limited to civil and political rights and does not directly tackle social and economic injustices.[5] There has been a right of individual petition to Strasbourg for many years, but the few claims concerning labour law issues from the UK have been largely unsuccessful.[6] The limited influence of the Convention in this context has been in stark contrast to the development of European Community law. In spite of the absence of a specific clause protecting fundamental civil and social rights in the EC Treaties, it has been the European Court of Justice that has developed some protection of fundamental rights. More recently, Articles 6(1) and

[2] Human Rights Act, s. 2. See comments by K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79, 85–86.

[3] See D. Oliver, "Common Values in Public and Private Law and the Public/Private Divide" [1997] P.L. 630; P. Davies and M. Freedland, "The Impact of Public Law on Labour Law" (1997) 26 I.L.J. 311.

[4] S. Deakin, "The Utility of 'Rights Talk': Employees' Personal Rights" in *Understanding Human Rights*, edited by Gearty & Tomkins (Mansell, London 1996) pp. 357–379 at p. 357.

[5] Note that the First Protocol includes the right to education, the only social and economic right in the ECHR.

[6] See *e.g.*, *Ahmad* v. *UK* (1981) 4 E.H.R.R. 126, *Stedman* v. *UK* (1997) 23 E.H.R.R. 168 and *Council for Civil Service* v. *UK* (1988) 10 E.H.R.R. 269.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

(2) of the Treaty of European Union recognises fundamental rights as a general principle of law.[7]

Introducing a human rights dimension into domestic law will require decision-makers to address questions from a very different perspective. In this way, the Human Rights legislation could lead to a greater emphasis on protecting the dignity and liberty of the individual. This will depend on a number of factors—in particular on whether or not there is third party applicability of human rights, or *Drittwirkung* (as it is called in the German jurisprudence) and on the willingness of the judiciary to import the broad aims of the Convention into the employment relationship itself.

Some commentators believe that relying on the judiciary to enforce human rights gives cause for concern.[8] During the 1980s, Article 11 of the European Convention on Human Rights was used to undermine legislation supporting the "closed shop".[9] These industrial relations cases have led to a deep scepticism about general rights and, in particular, about the civil and political rights enshrined in the ECHR.[10] Yet this view may not take into account the wider strategic advantages offered by the Human Rights Act and by the addition of a human rights dimension to the employment relationship. The influence of the Act cannot be predicted with any accuracy but it paves the way for a new discourse of rights and suggests possibilities that cannot be ignored.

This paper will analyse the relevant provisions of the Human Rights Act, and then highlight some of the Convention rights together with the Strasbourg jurisprudence.

Scope of the Human Rights Act 1998

Section 1 of the Act stipulates that some of the rights contained in the European Convention on Human Rights are to be given legal effect in domestic law. Articles 2–12 and 14 of the ECHR; 1–3 of

[7] The European Community can specifically draw upon fundamental social rights such as those in the European Social Charter 1961 and the Community Charter of the Fundamental Social Rights of Workers 1989 (accepted by the UK in 1997). See Articles 136–150 E.C. Treaty. Article 136 expressly refers to the E.S.C. 1961 and the 1989 Community Social Charter. See C. Barnard, "The United Kingdom, the 'Social Chapter' and the Amsterdam Treaty" (1997) I.L.J. 275; B. Hepple, "The Impact on Labour Law" in B.S. Markesinis (ed.) *The Impact of the Human Rights Bill on English Law* (Clarendon Press, Oxford 1998) pp. 77–78.

[8] See J. Griffith, "Who will Referee the Refs?" *The Times Literary Supplement* (25 September 1998) pp. 13–14. There will be no specialist court dealing with human rights issues. There is likely to be more debate about judicial appointments especially as there is a lack of transparency in the appointment process.

[9] See *Young James & Webster* v. *UK* (1982) 4 E.H.R.R. 38. The closed shop trade union cases have exposed the tension between the collective governance framework and the individual rights perspective. See also K. Syrett, "'Immunity', 'Privilege', and 'Right': British Trade Unions and the Language of Labour Law Reform" (1998) 25 Journal of Law and Society 388.

[10] See K. Ewing, "The Human Rights Act and Labour Law" [1998] I.L.J. 275. Ewing argues that the overall impact of the Human Rights Act on labour law may be very limited.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

the First Protocol; and 1–2 of the Sixth Protocol are the protected rights following the enactment of the Human Rights legislation. Article 1, which directs states to secure for everyone within their jurisdiction the protected rights and freedoms, is a logical omission from a domestic statute as it is an inter-state obligation. The exclusion of Article 13 (everyone whose rights are violated shall have an effective remedy) is more controversial. During the House of Commons Committee Stage the Home Secretary Mr Jack Straw explained that the inclusion of Article 13 was unnecessary and undesirable. He stated that it "would either cause confusion or prompt the courts to act in ways not intended by the Bill—for example, by creating remedies beyond those available in clause 8".[11]

It seems likely that in the vast majority of cases this omission will not affect the interpretation of the protected rights, especially given the assurance by the Lord Chancellor that the courts can take into account the Strasbourg jurisprudence on Article 13 where it is relevant.[12] Nevertheless, it would have been preferable if this Article had been included as a Convention right under the Act.

The Human Rights Act introduces two mechanisms for incorporating Convention rights into domestic law. The first, contained in sections 3–5, concerns the interpretation of legislation. "So far as it is possible to do so", primary and subordinate legislation must be read and given effect in a way that is compatible with the Convention.[13] This requirement will influence all employment law regardless of whether it is in the public or private sphere.[14] In circumstances where this is not possible, the High Court and superior courts may declare a provision of primary legislation incompatible with a Convention guarantee.[15] Even if courts determine that legislation is contrary to the Convention, they must still treat it as valid.[16] The manner of incorporation was designed to preserve the doctrine of Parliamentary Supremacy, but the Human Rights Act also provides for a 'fast-track' procedure for amending any offending legislation.[17]

The second mechanism designed to give effect to Convention rights is set out in section 6 of the Act. Section 6(1) makes it unlawful for a public authority to act in a way that is incompatible with the rights set out in the Convention. There is a proviso in section 6(2): the requirement to comply with Convention rights does

[11] HC Deb. vol. 312 col. 981 (20 May 1998).
[12] HL Deb. vol. 583 col. 475 (18 November 1997). Note Human Rights Act 1998, s. 2.
[13] Human Rights Act 1998, s. 3.
[14] See G. Morris, "The Human Rights Act and the Public/Private Divide in Employment Law" (1998) 27 I.L.J. 293, 294.
[15] Human Rights Act 1998, s. 4.
[16] Human Rights Act 1998, s. 4(a).
[17] Human Rights Act 1998, s. 10.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

not apply if primary legislation compels the authority to act incompatibly. The question of whether a body is a public authority is pivotal as the Human Rights Act creates new direct remedies for any breach of section 6(1). The Act does not define the term but states that a public authority includes a court or tribunal and "any person certain of whose functions are functions of a public nature, but does not include either Houses of Parliament or a person exercising functions in connection with proceedings in Parliament".[18] The Lord Chancellor has stated that this term is to be interpreted broadly to provide as much protection as possible.[19]

According to the Home Secretary, Mr. Jack Straw, the concept of a "public function" underlies the distinction set out in section 6.[20] The effect of section 6(3) will be to create three categories of public authority.[21] The first comprises those bodies obviously public in nature such as government departments, local authorities, the police and immigration officials. If these bodies breach a Convention right in respect of a public or private act, they will be acting unlawfully and a remedy can be sought under the Human Rights Act. The second category contains quasi-public bodies that perform a mixture of private and public functions. Public functions exercised by these bodies will fall within the definition of public authority under section 6 while functions of a private nature, such as commercial activity, will be excluded. During the Parliamentary debates, the Lord Chancellor gave Railtrack as an illustration of a public authority with "mixed" public and private functions.[22] He explained that Railtrack is a public authority when exercising its public function as the safety regulatory authority but acts privately in its role as a commercial property developer. The third category concerns organisations with no public function. They fall entirely outside the scope of section 6.

The public/private divide in the Act will leave room for many legal arguments and inevitably lead to some uncertainty.[23] The Home Secretary suggested that the courts would draw upon the standards developed in judicial review when determining the

[18] Human Rights Act 1998, s. 6(3) (a) and (b). The House of Lords when acting in a judicial capacity would be considered a public authority for the purposes of section 6(3). See Human Rights Act 1998, s. 6(4).

[19] HL Deb. vol. 582, col 1232 (3 November 1997). There is no list of public authorities. See *Rights Brought Home: The Human Rights Bill* Cm. 3782 (1997) at para. 2.2.

[20] HC Deb. vol. 314, col. 409 (17 June 1998).

[21] *Ibid.* cols 410–411. See also the comments of the Lord Chancellor. HL Deb. vol. 583 cols. 810–811.

[22] HL Deb vol. 583, col. 811 (24 November, 1997).

[23] See N. Bamforth, (1999) "Public Authorities, Private Bodies and the Human Rights Act" 58 C.L.J. 159. Compare also the jurisprudence of the European Court of Justice *e.g.* case C-188/89 *Foster* v. *British Gas plc* [1990] E.C.R. I—3313.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

concept of "functions of a public nature".[24] These standards will provide a valuable point at which to start the analysis. However, the "public function" concept is not the only test that domestic courts use to determine whether judicial review is appropriate. The jurisprudence relating to judicial review has produced variable tests and produced uncertainty about the boundary between the public and private spheres.[25] The limitations on the concept of "public function" established in public law will not always be appropriate for the purposes of section 6 of the Human Rights Act. It is highly likely that a "public authority" pursuant to section 6 will extend to bodies that are not subject to judicial review.

In the employment context, it is well established that domestic public law would usually preclude the use of judicial review to challenge a public authority where that authority is acting in its private capacity as an employer.[26] After the Human Rights Act comes into force, employees of obvious public authorities will have a cause of action under the Act if their Convention rights are breached. It is unclear from the Human Rights Act itself whether or not the employment function of the mixed bodies should be considered public or private. It seems likely that the employment function could be considered a private act of these hybrid or mixed bodies and, as a consequence, these employees will only be able to protect their Convention rights indirectly. This is the view of the Lord Chancellor who stated: "In relation to employment matters,.... I do not see a distinction between a private security company which has a contracted-out prison in its portfolio and one which does not. There is no reason to make the first company liable under Clause 6 in respect of its private acts and the second one not liable simply because the first company is also responsible for the management of a prison. As far as acts of a private nature are concerned, the two private security companies are indistinguishable".[27] It is also possible that distinctions may be drawn between different types of employees. For example, an "ordinary" employment dispute by an employee of a "mixed" body may not be able to rely on section 6 of the Human Rights Act as the dispute would fall on the private law side of the public/private

[24] HC Deb. vol. 314 col. 409 (17 June 1998).

[25] See *e.g. R.* v. *Panel on Take-Overs and Mergers, ex p. Datafin* [1987] Q.B. 815; *R.* v. *Chief Rabbi of the United Hebrew Congregation, ex p. Wachmann* [1992] 1 W.L.R. 1036; *R.* v. *Disciplinary Committee of the Jockey Club, ex p. Massingberd-Mundy* [1993] 2 All E.R. 207; *R.* v. *Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 W.L.R. 909; *R.* v. *Football Association, ex p. Football League* [1993] 2 All E.R. 833. See also N. Bamforth *op. cit.* n. 23 above and G.S. Morris, *op. cit.* n. 14 above.

[26] *R.* v. *East Berkshire Health Authority, ex p. Walsh* [1985] Q.B. 152; *R.* v. *BBC, ex p. Lavelle* [1983] I.C.R. 99 and *R.* v. *Derbyshire County Council, ex p. Noble* [1990] I.C.R. 808

[27] HL Debs. vol. 583 col. 812 (24 November 1997). See also K. Ewing, "The Human Rights Act and Labour Law" (1998) I.L.J. 275, at 285–286.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

equation. Yet, an employment dispute that raises issues concerning the public function of the hybrid body could be considered public.[28]

The existence of a contractual relationship does not automatically preclude judicial review. In some circumstances, the requisite "public" element in the employment relationship has been satisfied and the courts have recognised that judicial review is appropriate.[29] Relying upon a few examples, Gillian Morris persuasively argues that the principle for determining "publicness" may be wider in employment cases that raise human rights issues.[30] First she suggests that a Convention breach such as freedom of expression or privacy will affect not only the aggrieved complainant but also the wider workforce. This more generalised impact of the Convention breach could satisfy the "public element" requirement.[31] Second she argues that "the mere fact that a body which has been entrusted with the performance of a public function acts in a way which infringes a Convention right itself affords the necessary 'public' element to make it a proper matter for review".[32]

The public/private divide set up by the Act is a complex one. The distinction between employees of a public authority and those employed by a quasi-public authority with mixed functions, such as the management of a contracted-out prison, is an uncomfortable one. If only employees of manifestly public authorities can bring an action and secure a remedy under the Act, governments may be tempted to avoid their human rights obligations through a policy of privatisation. Such action, however, may result in a violation of the European Convention itself.

The Strasbourg jurisprudence has adopted a rather different approach to the public/private boundary than that favoured in domestic law, supplying another difficulty with adopting the "public function" test, as advocated by the Home Secretary. One example of a different way of conceiving the public/private distinction is provided by the litigation emanating from independent schools. It has not been possible to challenge by way of judicial review the actions of independent schools, for example in expelling students, because of the private law contractual rules that regulate the

[28] See for example, *R.* v. *Crown Prosecution Service, ex p. Hogg* [1994] 6 Admin. L.R. 778 and see B. Hepple, *op. cit.* n. 7 above pp. 79–80.

[29] *McLaren* v. *The Home Office* [1990] I.R.L.R. 338 and *Council for the Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374. See also *R.* v. *Home Secretary, ex p. Benwell* [1985] Q.B. 554.

[30] (1998) I.L.J 293 at 302.

[31] *Ibid.* She is relying on the comments of Woolf L.J. (as he then was) in *McLaren* v. *The Home Office* [1990] I.R.L.R. 338.

[32] *Ibid.*

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

relationship.[33] In *Costello-Roberts* v. *UK*, the European Court of Human Rights found the United Kingdom government to be in breach of human rights concerning the administration of discipline in privately funded schools given that the First Protocol Article 2 of the Convention guarantees a right to education for all school pupils.[34] It can be concluded from this decision that the State remains responsible for any Convention breach even if its obligations have been delegated to the private sphere.[35]

The employment context itself provides another example of a contrast between domestic law and the Strasbourg jurisprudence.[36] In the *Swedish Engine Drivers' Union* v. *Sweden*, concerning an alleged violation of Article 11, the Swedish government tried to distinguish between the State as "holder of public power" and the "State as employer".[37] Convention rights would be triggered in the former but not in the latter context. They submitted that in matters concerning work and employment "the Convention cannot impose upon the State obligations that are not incumbent upon private employers." The European Court of Human Rights did not accept this submission: "The Convention nowhere makes an express distinction between the functions of a contracting state as holder of public power and its responsibilities as employer ... Article 11 is accordingly binding upon the 'State as employer', whether the latter's relations with its employees are governed by public or private law."[38] The limitations on the concept of "public" in traditional judicial review cases will not always be consistent with the Strasbourg jurisprudence. Given the complex public/private divide in the Human Rights Act, the courts will have to choose whether to follow the Strasbourg approach or the more limited approach in the domestic law. Adopting the latter approach is likely to lead to a petition to the European Court of Human Rights.

There is one anomaly that should be mentioned in relation to the jurisprudence of the Strasbourg organs. The Strasbourg case-law unequivocally confirms that the Convention rights of public servants are protected. The State acting as an employer cannot impose conditions or restrictions upon employees that interfere with

[33] See *R.* v. *Fernhill Manor School, ex p. Brown* (1993) 5 Admin. L.R. 159, 175. This section draws upon S. Palmer, "The Human Rights Act 1998: Bringing Rights Home" (1999) 1 Cambridge Yearbook of European Law 125.
[34] (1993) 19 E.H.R.R. 112, para 27. N. Bamforth, *op. cit.* n. 23 above.
[35] See also the discussion of the positive obligation on the member states to secure Convention rights at pp. 179–181 below.
[36] See *Scuderi* v. *Italy* (1993) A 265–A (civil servant) and *Darnell* v. *United Kingdom* (1993) A 272 (health service employee).
[37] [1979–80] 1 E.H.R.R. 617 paras. 36 and 37.
[38] *Ibid.* at para. 37. G.S. Morris, *op. cit.* n. 14 above at pp. 305–306.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

a Convention guarantee without justification. If an employee is dismissed, suspended or reprimanded for any activity which is protected by the Convention, he or she will be able to argue that a Convention right has been violated. However in relation to access to civil service employment, the Strasbourg jurisprudence has consistently held that the European Convention provides no protection.

In two decisions in 1986, *Kosiek* v. *Germany*[39] and *Glasenapp* v. *Germany*[40], the European Court addressed this issue. These cases concerned the refusal of the German government to confer permanent civil service status on the applicants who held probationary teaching posts because of their political views: Mrs. Glasenapp had expressed views sympathetic to the political left while Mr. Kosiek's stated views were to the far political right. Both applicants claimed that their right to freedom of expression as guaranteed by Article 10 had been violated. In finding the actions of the German government acceptable under Article 10, the Court stated that the European Convention on Human Rights does not guarantee access to the civil service appointments. In the view of the majority, the government authorities took account of the applicants' opinions, attitudes and activities only to the extent necessary to determine whether they "possessed one of the necessary personal qualifications for the post in question."[41] Some members of the Court expressed unease with an International Court examining the arrangements for selection and access to the civil service. The International Labour Organization conducted an inquiry into these cases and concluded that the Federal Republic of Germany had violated its obligations under the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111).[42] The Court reached the opposite conclusion in *Vogt* v. *Germany*,[43] which concerned the dismissal of a teacher on the ground of engaging in activities organised by the German Communist Party. The Court distinguished *Glasenapp* and *Kosiek* on the ground that these decisions concerned access to the civil service. In contrast, Mrs. Vogt had been employed as a teacher for seven years before dismissal. The issue before the European Court was not therefore a refusal to appoint a person as a civil servant. Nevertheless the distinction is rather peculiar. In *Vogt*, the Court was concerned that this teacher would be deprived of the opportunity to work as a

[39] (1987) 9 E.H.R.R. 328.
[40] (1987) 9 E.H.R.R. 25.
[41] *Kosiek*, para. 39 and *Glasenapp*, para. 53.
[42] Gomien, Harris and Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe, Strasbourg 1996), p. 298.
[43] (1996) 21 E.H.R.R. 205. See p. 193 below for further discussion.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

teacher, a post for which she has trained and "acquired skills and experience".[44] Yet surely the same argument could be applied to an individual denied access to a teaching post in the public sphere. The Convention does not specifically protect access to the civil service but neither does it stipulate that civil servants cannot be dismissed without regard to Convention guarantees.[45] It is to be hoped that the European Court and the domestic courts can be persuaded to abandon this false distinction which leads to such a restrictive understanding of Convention rights.

Another issue arising from section 6 of the Act is whether the Human Rights Act has any application to private law relations between individuals. The Human Rights Act falls short of providing a cause of action against private individuals for violating Convention rights. The debates in Parliament clearly illustrate that the government does not intend the Human Rights Act to have direct horizontal effect. Yet it does seem very likely that the Human Rights Act will have indirect horizontal effect.[46] In some circumstances individuals will be able to rely on Convention rights indirectly in proceedings against private parties. The principle of third party effect will play a pivotal role in determining the extent of protection against encroachment of fundamental rights in the private sphere.

An important indicator of this possible indirect effect can be located in section 6 of the Human Rights Act itself. Courts and Tribunals are included within the section 6(3) definition of public authorities. The duty on public authorities to act compatibly with the Convention is imposed regardless of whether all the parties to legal proceedings are private individuals or entities.[47] There are implications for both the interpretation of legislation and for the development of the common law. The interpretative obligation in section 3 provides that both primary and secondary legislation are to be read and given effect "so far as it is possible" in a manner which is compatible with the Convention rights. The Home Secretary has stated that the courts should not distort the meaning of legislation to find compatibility, but since language is a flexible tool there is considerable room for judicial manoeuvre.[48]

[44] Vogt, para. 60.

[45] The same conclusion is reached by G. Morris, "The European Convention on Human Rights and Employment: To Which Acts Does it Apply?" [1999] 5 E.H.R.L.R. 496, 499–500.

[46] HL Deb. vol. 585 col. 840 (5 February 1998) (Lord Irvine of Lairg).

[47] H.R.W. Wade, "The United Kingdom's Bill of Rights" in *Constitutional Reform in the United Kingdom: Practice and Principles* (Cambridge Centre for Public Law, Hart Publishing, Oxford 1998). See also M. Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] P.L. 423 and N. Bamforth, *op. cit.* n. 23 above.

[48] HC Deb. vol. 313 col. 422 (3 June 1998). It may be helpful to draw an analogy with EU law. In Case C-168/95 *Criminal Proceedings against Luciano Arcaro* [1996] E.C.R. I-4705 it was held that where a Directive covers the same field as domestic law, a court should not distort the meaning of the legislation.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

The Human Rights Act does not specifically address the position of the common law and its compatibility with the Convention but it seems highly likely that the courts will utilise Convention rights as a device for the future development of the common law. This approach is hardly novel, as it is not solely dependent upon the Human Rights Act. The Convention has been influencing the development of the common law, directly and indirectly, for a number of years.[49] During the past few years, the Courts have developed imaginative and even bold techniques in order to develop the common law consistently with the Convention. For example, the courts have been willing to construe the domestic law in line with the Convention, even when the action is between private parties such as the defamation case of *Rantzen* v. *Mirror Group Newspapers*.[50] In *Middlebrook Mushrooms* v. *TGWU*[51] the court considered free speech in deciding how to exercise their discretion in relation to injunctive relief during an industrial dispute between a union and the private company. The duty on the courts to act in conformity with Convention rights imposed by section 6(3), as well as the past practice of the courts, suggests that this trend will continue.[52]

The Lord Chancellor confirmed this interpretation of section 6 during the House of Lords Committee stage: "it is right as a matter of principle for the courts to have the duty of acting compatibly with the [C]onvention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals".[53] Yet the Lord Chancellor has also asserted that the courts will continue their traditional approach of incremental common law development. In his view, the Human Rights Act would neither legitimate the creation of new causes of action, nor the grant of new remedies for Convention infringements unless the common law itself enables such development.[54] He claims that the courts are not to act as legislators but there may be a fine line between the creation of new causes of action and the incremental development of new common law rights and remedies.

A second consideration, which strongly suggests the indirect horizontal effect of the Human Rights Act, flows from the case-law

[49] See *e.g. Derbyshire County Council* v. *Times Newspapers Ltd.* [1992] Q.B. 770 (Court of Appeal). The House of Lords came to the same conclusion, although their Lordships did not consider that it was necessary to base their judgement on the Convention. See also *A.G.* v. *Guardian Newspapers* [1987] 1 W.L.R. 1248 (per Lord Templeman).

[50] [1993] 4 All E.R. 975.

[51] [1993] I.C.R. 612.

[52] Section 6(3) appears to go further in ensuring horizontal effect than either the Canadian or South African approaches. See M. Hunt, *op. cit.* n. 47 above, p. 441.

[53] HL Deb. vol. 583 col. 783 (24 November 1997). Compare what he said in HL Deb. vol. 585 col. 840 (5 February 1998).

[54] HL Deb. vol. 583 col. 785 (24 November 1997).

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

of the European Commission and Court of Human Rights. There are a number of decisions where states have been held responsible for a violation of an individual's Convention rights by non-state actors. In some circumstances, the Strasbourg institutions have recognised that certain of the Convention articles require member States to take positive action to protect individuals against Convention rights violations by other private actors.[55] This is highly relevant as section 2 of the Human Rights Act states that courts and tribunals must "take into account" such Strasbourg case law if it is relevant to the proceedings.[56]

Marckx v. *Belgium* is the source of the Court's jurisprudence of positive state action.[57] In that case, the Court stated that the State's duty not to interfere with the right to "respect family life" in Article 8 imposed positive obligations, requiring an enactment of legislation in order to safeguard the individual's Convention rights. In later cases, the Court established that this positive obligation may even include a requirement to protect an individual against infringement of his or her Convention rights by other private parties. In *Young, James and Webster* v. *UK*,[58] the European Court of Human Rights found the UK to be in breach of Article 11 (freedom of association) by allowing "closed shop agreements" whereby employers were entitled to dismiss employees who refused to join a trade union. These decisions are significant because the State can be held responsible at Strasbourg for failing to control the conduct of private employers.[59] The victim's claim would be that the government has failed in its obligation to provide a remedy for the breach of a protected Convention right in the private sector.[60]

The ambit of this positive obligation remains uncertain. It may well operate in cases where there is a clear power imbalance: labour relations or a private contractual relationship may be sufficiently

[55] Articles 2, 3, 5, 8 and 11.

[56] There is no duty imposed on the domestic courts to follow these decisions but the individual petition to Strasbourg remains. Note the omission of Articles 1 and 13 discussed above. See discussion of N. Bamforth, [1999] C.L.J. 159, 167–168.

[57] (1979) 2 E.H.R.R. 330. D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London 1995) 19–22.

[58] (1982) 4 E.H.R.R. 38.

[59] See also *X & Y* v. *Netherlands* (1986) 8 E.H.R.R. 235; *Plattform "Artzte fur das Leben"* v. *Austria* (1988) 13 E.H.R.R. 204; *Mrs.* W v. *UK* (1983) 32 D. R. 190 and *McCann* v. *UK* (1996) 21 E.H.R.R. 97 (right to life in Article 2 gives rise to positive obligation upon the state); *Guerra* v. *Italy* (1998) 4 B.H.R.C. 63 (toxic emissions from a chemical factory imposed a positive obligation on the state to ensure effective respect for private and family life under Article 8); *A* v. *UK* (1998) 5 B.H.R.C. 137 (violation of Article 3 for failing to provide adequate legal safeguards for children punished by their parents).

[60] Jacobs and White, *European Convention on Human Rights*, 2nd ed, (Clarendon Press, Oxford 1996) pp. 18–19. See Alkema, "Third-Party Applicability or 'Drittwirkung' of the European Convention on Human Rights" in F. Matscher & H. Petzold (eds.) *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, 1998).

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

unequal to trigger the need for positive state action.[61] A good example is the Article 8 protection of private life. Under UK law there is no general common law right to privacy.[62] It would not be surprising if invasive workplace surveillance violates Article 8 and thus potentially the UK could be challenged in Strasbourg for failing to protect the privacy rights of employees in the private sector.[63] If so, the Convention could impose a positive duty on the government to legislate for both public and private employees.

What significance do these decisions have at the domestic level? The Human Rights Act primarily targets public authorities but there is an increasing recognition that the State and other public entities do not hold a monopoly on power, rather it is dispersed throughout society. In the words of Sir William Wade: "[i]t would be a poor sort of 'incorporation' which exempted private individuals and bodies from respecting the fundamental rights of their fellow-citizens and drove them back to Strasbourg with all its cost in time and money—the very evil which 'incorporation' is supposed to remedy."[64] One can only speculate but it is likely that the courts will use the principle of *Drittwirkung* and the Strasbourg jurisprudence to realise the potential of the common law. The courts are already developing the common law in a dynamic manner to deal with new and often difficult circumstances.[65] The horizontal indirect effect of the Human Rights Act will permit the infiltration of Convention standards through the interpretation of statutes and the future development of the common law even in proceedings between private parties. The courts should protect an individual's Convention rights against interference by other persons unless UK incompatible legislation makes it impossible to do so. This argument is persuasive to the extent that it illustrates the horizontal effect of the Convention. Nevertheless the scope of this positive duty remains unclear. It may be problematic to impose liability on an individual in the domestic courts where it would be impossible to do so in Strasbourg where only the State can be a party.[66] However, it would be desirable for the domestic courts to

[61] See Alkema, *ibid.*; Craig and Oliver, "The Right to Privacy in the Public Workplace: Should the Private Sector be Concerned?" (1998) 27 I.L.J. 49, at 52. Such a power inequality can be discerned in the recent decision of *Guerra* v. *Italy* (1998) 4 B.H.R.C. 63.

[62] See *Kaye* (1990) 18 F.S.R. 62. But see the comments of Laws J. in *Hellewell* v. *Chief Constable of Derbyshire* [1995] 1 W.L.R. 804 at 807.

[63] Compare with *Halford* v. *UK* (1997) 25 E.H.R.R.523 (concerned an employee and telephone tapping in the public sector).

[64] Sir W. Wade, *op. cit.* n. 40 above, at pp. 62–64. See also A. Clapham, "The Privatisation of Human Rights" [1995] E.H.R.L.R. 20.

[65] See *e.g. R.* v. *R. (Rape: Marital Exemption)* [1992] 1 A.C. 599; *Airedale NHS Trust* v. *Bland* [1993] A.C. 789.

[66] Grosz, Beatson and Duffy, *Human Rights: the 1998 Act and the European Convention* (Sweet & Maxwell, London, 2000), pp 4–51.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

develop the law and, in particular "private acts" in a manner consistent with the Strasbourg jurisprudence.[67] A failure to do so will result in applicants seeking a remedy in Strasbourg. It would not be surprising if existing causes of actions metamorphosed over time due to the influence of the Convention.

One common law development that could be significant for labour law concerns the limitations on managerial prerogatives by the implied duty of trust and confidence. Bob Hepple suggests that in the UK, a common law argument could be developed following the House of Lords decision in *Malik* v. *BCCI*.[68] In that case, the House of Lords "endorsed" the view that there is an implied term of every employment contract that the employer will not: "without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". He suggests "that since the court must act compatibly with Convention rights, the duty of trust and confidence also embodies a duty to respect the Convention rights of an employee."[69]

A number of problems still remain. Section 7 provides that proceedings may only be instituted against a public authority. Remedies, according to section 8, are solely available in relation to unlawful acts of public authorities. The public/private distinction constructed by the Act makes it possible that different standards could be created for similar categories of individuals. As outlined above, the effect of section 6(3)(c) is to include within the scope of the Act, hybrid or mixed bodies "some of whose functions only are of a public nature". One example the Lord Chancellor gave during the Committee stage in the House of Lords concerned doctors who treated both NHS and private patients.[70] If a doctor published confidential information about the illnesses and private life of a NHS and a private patient, each patient would have to use a different legal route in order to seek a remedy. The former would be able to base a claim directly under the Human Rights Act, whereas the latter would have to rely upon section 6(1), the duty of the court to act compatibly with the Convention rights.[71] Perhaps the legal route would ultimately be the same in these two cases.[72] But what if a case arose where there was neither a relevant statutory provision nor common law upon which to base a claim

[67] G.S. Morris, (1998) 27 I.L.J. 293 at 307.
[68] [1997] I.R.L.R. 462.
[69] Hepple, "Human Rights and Employment Law", *Amicus Curiae* (8 June 1998) pp. 19–23, at p. 22. Note the problem of contracting out of convention rights. See discussion at p. 194 below.
[70] HL Deb vol. 583, col. 811 (24 November 1997).
[71] Sir William Wade, *op. cit.* n. 47 above, at p. 63.
[72] This is the conclusion reached by Sir William Wade, *ibid.*

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

for breach of a Convention right. If, for example, a public sector employee was refused employment as a consequence of his or her religious or political beliefs, it may be possible to sue directly to enforce the relevant Convention right. A private sector employee would be left without a remedy as there is no general cause of action at common law for refusal of employment upon which a Convention based claim could be developed.[73] Of course, it is possible that neither aspiring employees could claim any remedy. This example depends on the willingness of the domestic courts to allow Convention rights to be engaged in cases concerning access to the public service.[74]

There are two further controversial features of the Human Rights Act which are relevant to the employment law context. Section 7 states that a person who claims that a public authority has acted unlawfully under the Act may bring proceedings in the appropriate court. It also stipulates that only a victim of such an unlawful act may sue. This requirement effectively limits public interest litigation by organisations such as the Equal Opportunities Commission, although a third party or human rights organisation will not be prevented from supporting the litigation. This limitation is at odds with the more generous principles of standing developed by courts for judicial review.[75] The second controversial feature concerns the government's decision not to establish a Human Rights Commission. The presence of a Commission that acts as a permanent watchdog has been influential in raising awareness of rights in other countries that have adopted a bill of rights. The Institute of Public Policy Research has argued that without a Commission, public bodies covered by the Act are less likely to adopt good practices, or even be aware of their new obligations.[76] More litigation is likely if these bodies fail to adapt their policies and behaviour.

One procedural mechanism that could enhance greater awareness of human rights issues and bring broader perspectives to the attention of the court is the amicus brief. The reception of such briefs, expanded submissions to the court that set out social and economic information, could be a vital way of presenting courts with a wider range of perspectives and views. Stephen Sedley suggests that it can help escape "the pressures, which cannot be

[73] K. Ewing, "The Human Rights Act and Labour Law" (1998) I.L.J. 275, 286–287.

[74] See above pp. 175–177.

[75] See *Equal Opportunities Commission* v. *Secretary of State for Employment* [1994] 1 W.L.R. 404, *R.* v. *H.M. Inspector of Pollution ex p. Greenpeace Ltd.* (No. 2) [1994] 4 All E.R. 329 and *R.* v. *Secretary of State for Foreign Affairs, ex p. World Development Movement Ltd.* [1995] 1 W.L.R. 386.

[76] S. Spencer and I. Bynoe, *A Human Rights Commission: The Options for Britain and Northern Ireland* (Institute of Public Policy Research, London 1998).

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

wholly resisted, towards omnicompetent adjudication ...". He adds that, "[t]here are no guarantees that better educated courts will get everything right, but to be sent ... on a voyage without modern navigational aids and supplies is to experience the worst of both worlds, the old and the new".[77]

The European Convention on Human Rights

The "rights and freedoms" in the Convention are found in Articles 2–12. The Convention guarantees of interest to employment lawyers that will be discussed in this paper are Article 8 (respect for private life), Article 9 (right to freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of association). Article 6 (right to a fair hearing) may also be of considerable importance in cases concerning the length of time for hearings to take place and restricting employee access to Tribunals.[78] The Article 6 guarantees apply to proceedings that are determinative of "civil rights and obligations".[79] The Strasbourg jurisprudence, however, has drawn some subtle distinctions in the area of employment so that it is not easy to determine which employment issues could amount to a civil right.[80] For example, in *Balfour* v. *United Kingdom* a former diplomat was unable to rely on Article 6 to challenge the use of public interest immunity certificates that excluded documents relevant to his unfair dismissal claim.[81] The European Court relied on the judgement in *Neigel* v. *France* that "disputes relating to the recruitment, careers and termination of service of civil servants are as a general rule outside the scope of Article 6(1)."[82] Yet the Court failed to consider the *Vogt* case where dismissal from civil service employment could be considered a civil right in the context of Article 10 of the Convention. The attempt to distinguish between 'civil' and 'public' rights leads to considerable uncertainty. It would make more sense to extend the Article 6 protections to all public and private employees, especially as many employment rights are shared across the public and private sectors.[83]

Article 4(2) provides that no one "shall be required to perform forced or compulsory labour". This Article is likely to be relevant in the context of welfare legislation, especially programmes such as

[77] S. Sedley, "What's to be Done about Human Rights?" (1995) 17 London Review of Books 13, 15.
[78] *Stedman* v. *UK* (1997) 23 E.H.R.R. 168 (Commission decision).
[79] See *Kosiek* v. *Germany* (1986) 9 E.H.R.R. 328 and *Neigel* v. *France* (unreported) [1997] E.H.R.L.R. 424.
[80] For a detailed discussion of these issues see G. Morris, *op. cit.* n. 45 above, at pp. 507–511
[81] App. No. 30976/96.
[82] [1997] E.H.R.L.R. 424, at para. 43.
[83] G. Morris, *op. cit.* n. 45 above, at p. 511.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

"Welfare to Work".[84] In addition, Article 14 (right to non-discrimination) is relevant but it is not a free standing right. It is an ancillary protection to those provided by each of the other individual Articles in the Convention. As a consequence, Article 14 protects against discrimination in the enjoyment of those rights and not against discrimination as the sole basis of the complaint. However Article 14 can be violated if a restriction that is permissible under another Article is imposed in a discriminatory fashion.[85] The Council of Europe is currently considering a new protocol to the ECHR that would introduce a free standing right to equality.[86]

The structure of each Article and the approach of the court when considering claims under Articles 8–11 are broadly similar. The guaranteed right is set out in the first paragraph but the right is not expressed in absolute terms. The second paragraph sets out the criteria upon which a State may legitimately interfere with the enjoyment of that right. These criteria vary in each Article. The Court initially considers whether the right protected in the first paragraph of the Article has been infringed. If so, it will assess whether the infringement was "prescribed by law" or "in accordance with the law".[87] The State must be able to show some specific legal rule, which authorises the interfering act, that it is attempting to justify. Compliance with domestic law does not necessarily satisfy this lawfulness standard.[88] Second, the State must identify at least one of the objectives set out in the second paragraph to justify the interference with the Convention right. Finally, the Court must be satisfied that the interference was "necessary in a democratic society", a phrase described as "heavy with uncertainty".[89]

The Court has developed a number of principles when reviewing whether an infringement of a protected right is necessary in a democratic society. First, the burden is upon the State to demonstrate a "pressing social need" that the right should be interfered with on the basis of an identified and legitimate public interest. The Court will consider a number of factors including the importance of the protected right, the significance of the right to a properly functioning democracy and whether or not there is a

[84] See Hepple, *op. cit.* n. 7 above, at pp. 64–66.
[85] See *Belgium Linguistics Case (No. 2)* (1968) 1 E.H.R.R. 252; *Schuler-Zgraggen* v. *Switzerland* (1995) 21 E.H.R.R. 404 (Article 14 was used successfully to challenge discriminatory or stereotypical assumptions). See also S. Fredman, "Equality Issues" in B.S. Markesinis (ed.) *The Impact of the Human Rights Bill on English Law* (Clarendon Press, Oxford 1998) 111.
[86] See Draft Protocol No. 12 ECHR.
[87] In Article 8(2) the relevant criteria is whether the State pursued a "legitimate aim".
[88] See *Malone* v. *UK* (1985) 7 E.H.R.R. 14.
[89] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 at p. 291.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

European consensus among the national laws of the parties to the Convention.

Second, the State has some margin of appreciation. The Court uses this doctrine as an interpretative tool to determine where to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all states regardless of cultural variations. The Court considers the role of the Convention in protecting human rights as subsidiary to the roles of domestic legal systems that have the prime responsibility for protecting human rights.[90] This doctrine has been criticised for allowing too great a diversity of human rights protection in the member states of the Council of Europe. For example, Lord Lester has stated that: "it will become the source of a pernicious 'variable geometry' of human rights, eroding the '*acquis*' of existing jurisprudence and giving undue deference to local conditions, traditions, and practices".[91] Given the supranational status of this doctrine, it would seem unnecessary for British Courts to give a margin of appreciation, as used by the Strasbourg organs, when assessing the actions of a public authority.[92] If so, it should follow that the Strasbourg precedents which turn on the margin of appreciation and impose only the minimum obligation on the State could be further supplemented and decided differently by a national legal institution. The courts could develop other limiting devices which accord deference where necessary but it would be inappropriate for the courts to use the margin of appreciation standard as developed by the European Court of Human Rights in an international law context.[93]

The final principle that the Court has developed is a test of proportionality: the method employed to restrict the protected right must be proportionate to the legitimate aim pursued. This test enables a court or Tribunal to assess the "fit" of the measures taken with the aim advanced. Potentially such a test will provide a more critical assessment of any restriction. In judicial review cases, a proportionality test will go beyond the deferential Wednesbury unreasonableness ground. Although there is already a judicial

[90] *Handyside* v. *UK* (1976) 1 E.H.R.R. 737 at 753. See "The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice" (1998) 19 Human Rights L.J. 1–36.

[91] Lord Lester of Herne Hill Q.C., "The European Convention on Human Rights in the New Architecture of Europe: General Report", *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe, 1995), 227 at p. 237.

[92] Sir J. Laws, "The Limitations of Human Rights" [1998] P.L. 254, 258.

[93] See R. Singh, M. Hunt and M. Demetriou, "Is There a Role for the 'Margin of Appreciation' in National Law after the Human Rights Act?" [1999] 1 E.H.R.L.R. 15.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

modification of the Wednesbury test in human rights cases,[94] this process must be accelerated if the Human Rights Act is effectively to safeguard fundamental rights.

I will now turn to examine the Articles separately and to look at the possible application of Convention rights in the employment context.

Right to Private Life (Article 8)

Article 8 has been a dynamically interpreted provision of the Convention. It is perhaps the most likely Article to serve as a residual guarantee of liberty.[95] David Feldman has pointed out that "privacy-related rights have extended beyond their original concern—threats to private space, especially the home—to encompass personal security, self-fulfilment and identity, sexual mores and even some business activities".[96] In *Niemietz* v. *Germany*, the Court said:

> ...it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.[97]

Yet the expansion of values incorporated in "private life" leads to some uncertainty and even unpredictability: it becomes difficult to assess the limits of the right.

Article 8(1) protects the right "to respect" for the four protected interests, namely "private and family life, home and correspondence". What sort of issues in the workplace could be encompassed within Article 8? The fundamental interest of an individual to determine his or her personal identity may raise issues concerning mode of dress or appearance. (Such a claim may also fall under freedom of expression.) In *Sutter* v. *Switzerland*,[98] a student who was required to undergo a period of military service each year, refused to have his hair cut short. In fact, he received a prison sentence for refusing to have his hair clipped "so as not to touch the collar". The Commission considered that these restrictions did indeed constitute an interference with the applicant's

[94] See *R.* v. *Ministry of Defence, ex p. Smith* [1996] Q.B. 517.
[95] D. Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights" [1997] E.H.R.L.R. 265.
[96] *Ibid.*, at p. 273.
[97] (1992) Series A 251–B Para. 29.
[98] (1979) 16 D.R. 166.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

right to respect for his private life—it adversely affected the way that he expressed his personality—but it was justified under paragraph 2 as necessary for the protection of health and for the prevention of accidents.

Cases concerning choice about appearance in the workplace have not met with great success in the UK. The Tribunal decision of *Boychuk* v. *Symons*[99] where an employee was dismissed after failing to refrain from wearing a badge with the message "Lesbians Ignite", has been criticised for failing to take into account the civil liberties implications of the case.[100] Tribunals and courts will no longer be able to ignore the human rights implications in reaching their decisions. For example in unfair dismissal cases, the law has offered only limited protection for employees because of the wide discretion left to employers by the "band of reasonableness test".[101] Courts and tribunals overseeing statutory employment law have in the past been greatly influenced by the doctrine of managerial prerogative. The Human Rights Act will require the employer to justify any restrictions on private life. No doubt an employer will argue that such requirements are reasonable, have a legitimate business purpose, and could be justified for the smooth running of a business, or "for the protection of the rights and freedoms of others". Under the relevant domestic law, the reasonableness of the employer's conduct may well be subject to greater scrutiny. Issues of proportionality should also become relevant. Even when an employer's conduct was considered "reasonable", if a Convention protected right is at issue, then a severe sanction such as dismissal may be found to be disproportionate.[102] The new legislation may make it harder to get rid of perceived troublemakers or those who challenge the status quo.

The European Court has clearly stated that secret surveillance will infringe upon the private life of an individual.[103] "Home" and "correspondence", two of the other nominated interests in Article 8 are also relevant to the workplace. For example, the idea of "home" has been expanded to cover some business premises.[104] The notion of "correspondence" has been extended to keep pace with modern technology.[105] The recent phenomena in employment practices of video surveillance, drug testing, intercepting employees

[99] [1977] I.R.L.R. 395 (EAT).
[100] Clayton and Pitt, "Dress Codes and Freedom of Expression" [1997] E.H.R.L.R. 54 at p.60.
[101] See S. Deakin, *op. cit.* n. 4 above, at p. 365 quoting from *Iceland Frozen Foods Ltd.* v. *Jones* [1983] I.C.R. 17.
[102] Note also *Cass. Soc., 12 Janvier 1999, arrêt n° 162* (concerning an employee who was required to transfer his home for employment purposes).
[103] *Malone* v. *UK* (1985) 7 E.H.R.R. 14 and *Halford* v. *UK* (1997) 25 E.H.R.R. 523.
[104] *Niemietz* v. *Germany* (1993) 16 E.H.R.R. 97.
[105] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above, at p. 320.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

e-mail and monitoring use of the internet might all be in breach of Article 8.[106] The decision of *Halford* v. *UK* confirms that Article 8 is very relevant to these practices. The European Court held that telephone calls made by Miss Halford, a former senior police officer, from both business premises and her home, could be covered under the notion of "private life" and "correspondence". The facts in this case are particularly outrageous as Miss Halford had been given no warning that her telephone calls might be intercepted and she had a telephone designated for her private use. At the time of the violation, Miss Halford was pursuing a sex discrimination claim against her employers, the Merseyside Police Authority, and she had received an assurance from her employers that she could make calls relating to her case. The European Court was unimpressed by the fact that the interceptions were for use in the forthcoming discrimination proceedings. This decision establishes that public sector employees have a privacy right and after the enactment of the Human Rights Act, they will be able to enforce this right in the domestic courts. There are also likely to be implications in the private sphere especially in light of the Lord Chancellor's acknowledgement that "regardless of incorporation, the judges are very likely to develop a common law right of privacy themselves".[107] Other human rights issues that could be raised under Article 8 concern medical or genetic tests. Could an employee be lawfully dismissed for carrying the HIV virus or be required to submit to an Aids test?[108] The Act should ensure that uninformed prejudice will no longer be sufficient to justify a dismissal. In *X* v. *Commission of the European Communities*,[109] the European Court of Justice relied on Article 8 of the Convention to find that an applicant's Community rights had been infringed when a "covert Aids" test was carried out.[110] Such action could only be justified on the grounds of "the protection of health of others" if the evidence shows that there is a risk of transmitting the virus to others.

Work-place discrimination on the basis of sexual orientation is likely to be considered again by the courts. There is no difficulty in bringing a sexual orientation case within the scope of "private life": any interference with the choice of sexual conduct will fall under

[106] Note also the effect of The Data Protection Act 1998 that comes into force in March 2000. Although this Act is based upon the EU Data Protection Directive, the Government has explicitly stated that the legislation draws upon Article 8 of the Convention. See Data Protection Cm. 3725 (1997) paras 1.6–1.7.

[107] HL Deb. vol. 582 col. 1230 (3 November 1997).

[108] The European Court has held that the deportation of an individual with AIDS/HIV to a country where he would receive no medical care is a violation of Article 3. See *D* v. *United Kingdom* (1997) 24 E.H.R.R. 423.

[109] Case C-404/92P [1995] I.R.L.R. 320, ECJ.

[110] See Watts, "The Legal Protection of HIV-Positive Health Care Workers" [1998] E.H.R.L.R. 302.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

the private life branch of Article 8(1). In Strasbourg, the Commission and the Court have also tended to give a very broad interpretation to the Article 8(2) justifications; in effect the main screening function is performed at this stage. There is no legislation in the UK prohibiting sexual orientation discrimination in employment. Individuals dismissed on the basis of their homosexuality have not had any success in the domestic courts.[111] In Strasbourg, until recently, there has been mixed success for those claiming sexual orientation discrimination. In a landmark decision the European Court has been willing to limit criminalisation of homosexuality.[112] Yet in other areas of discrimination, for example in housing or immigration, appeals to Strasbourg have been unsuccessful.[113] The margin of appreciation has been an important feature of cases relating to private morality and the Court has been fairly criticised for "being rather too tender towards the claims of States to institutionalise dominant moralities".[114]

The recent decision of the European Court of Human Rights in *Smith* and *Grady* v. *United Kingdom* concerned the issue of sexual orientation discrimination and the armed forces.[115] Four individuals with exemplary service records brought test cases challenging the legality of their discharge under the policy of discharging from the armed forces anyone of homosexual orientation. In the domestic courts, the MOD policy was not considered irrational in spite of a heightened Wednesbury test.[116] In Strasbourg, the Government accepted that there had been an interference with the applicants right to respect for private life, pursuant to Article 8. The Government attempted to justify the interference by claiming a change of policy would affect the morale of service personnel as well as the fighting power and operational effectiveness of the armed forces.

The European Court found that the investigation of the applicants was of an exceptionally intrusive nature, the discharges had a profound effect on their careers and prospects and that the absolute character of the policy was quite striking. The Court concluded that the interference with private life could not be justified even after taking into account the margin of appreciation.

[111] *Saunders* v. *Scottish National Camps Association* [1980] I.R.L.R. 174, (EAT). See also *Grant* v. *SouthWest Trains*, Case C-249/96. The ECJ held that the Article 141 (then Article 119) and the Equal pay Directive did not require an employer to provide the same free travel benefits to the partner of a same sex couple.

[112] *Dudgeon* v. *UK* (1982) 4 E.H.R.R. 149.

[113] See *e.g. X and Y* v. *UK* (1983) 5 E.H.R.R. 601. See the House of Lords recent decision of *Fitzpatrick* v. *Sterling Housing Association Ltd.* (1999) 7 B.H.R.C. 200.

[114] D. Feldman, (1997), *op. cit.* n. 95 above, at p. 273.

[115] App. Nos. 33985/96 and 33986/96.

[116] See *R.* v. *Ministry of Defence, ex p. Smith* [1996] Q.B. 517.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

The Court found no concrete evidence to suggest that a change of policy would affect the morale or the efficacy of the armed forces. Rather they concluded that such views were based on "stereotypical expressions of hostility" and to general unease about the presence of homosexual colleagues. According to the Court, these "negative attitudes" could not amount to sufficient justification for the interference with a Convention right. The Court pointed out that British armed forces had served abroad with allied forces that did not discriminate against homosexuals. It was reported that the British soldiers were robustly indifferent to their presence in these armed forces. As in the landmark *Dudgeon* decision, the European Court noted the growing European consensus on this point. This decision is likely to have an effect beyond the armed forces.

Certainly, victims of sexual orientation discrimination should now be better placed to challenge any dismissal. After the Human Rights Act comes into force it is likely that individuals will be able to challenge directly any public authorities that discriminate on grounds of sexual orientation. There may also be indirect benefits. The uncertainty and threat of litigation may persuade some public authorities to change their policies without litigation.[117] Moreover it is possible that Article 14 in conjunction with Article 8 could have a significant influence.[118] Discrimination on the grounds of sexual orientation has not yet been included in the "suspect classification" list of Article 14 by the European Court but there is increasing pressure on the courts to address this injustice. As in the *Smith* case, if the European Court finds a violation of a Convention guarantee, the Court does not find it necessary to consider Article 14. However, the Convention is a "living instrument" and the general trend towards greater toleration of the private sexual preference of individuals will continue to be reflected in the case-law.

Freedom of Religion, Thought and Conscience (Article 9)

In spite of the potential for this article to promote religious toleration, a key concept in modern multi-ethnic Europe, Article 9 which protects the "right to freedom of thought, conscience and religion" has not been interpreted by the Commission or the European Court to impose substantial burdens on the State.[119] The Strasbourg jurisprudence indicates that the protection for religious belief is unqualified while the right to practice is subject to

[117] R. Wintemute "Lesbian and Gay Britons, the Two Europes, and the Bill of Rights Debate" (1997) 6 E.H.R.L.R. 466.

[118] See *Sutherland* v. *UK* (1997) 24 E.H.R.R. (CD) 22. The applicant argued that Articles 14 and 8 had been violated. The Commission declared the application admissible.

[119] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above at p. 370.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

restrictions. While the Strasbourg organs have been prepared to accept that Article 9 covers many beliefs, it does not protect "each and every act which is motivated or influenced by religion or belief."[120] There have been a number of challenges to UK law by members of minority religions but all have been unsuccessful.[121] However, in *Chauhan* v. *UK*,[122] where an employee was forced to join a trade union contrary to his religious beliefs, a friendly settlement was reached, involving the payment of substantial compensation by the British government.

Apart from Northern Ireland, there is no law against religious discrimination in employment. In 1978, in the case of *Ahmad* v. *ILEA*, a practising Muslim school-teacher wanted 45 minutes off on Fridays to attend his local mosque for prayers.[123] The majority found no violation of Article 9 in spite of a powerful dissenting judgment by Lord Scarman who had argued that an absence for religious purposes should not constitute a breach of contract for employment purposes. The majority thought that Article 9 gave Mr. Ahmad no right to derogate from his employment contract. An appeal to Strasbourg was unsuccessful on the basis that he was contractually bound to work.[124] Nor was there any violation of Article 14 in conjunction with Article 9. The Commission observed that Mr. Ahmad was neither treated "individually or as a member of his religious community ... less favourably than individuals or groups of individuals placed in comparable situations."[125] The Commission seems to have assumed that only members of other minority groups were in a comparable situation. This leads to the uncomfortable result that similarly situated minority groups are compared and found to be treated equally, even though equally unfairly. It is difficult to see, then, how any minority group can prove "less favourable treatment" in the UK.[126]

The working week in the United Kingdom has traditionally been based around Sunday as the day of rest and the Christian holy day. It can hardly be claimed the organisation of our working week is neutral when it makes it impossible for Muslims and Jewish employees to organise their work in accordance with their religious tenets.[127] Even Christians seem to find it difficult to rely successfully

[120] *Arrowsmith* v. *UK* (1978) 19 D.R. 5.
[121] See S. Poulter, "The Rights of Ethnic, Religious and Linguistic Minorities" [1997] 3 E.H.R.L.R. 254.
[122] (1990) 65 D.R. 41, 45.
[123] [1978] Q.B. 36.
[124] *Ahmad* v. *UK* (1981) 4 E.H.R.R. 126.
[125] *Ibid.*, para. 27.
[126] S. Fredman, "Equality Issues" in B. Makesinis (ed.), *The Impact of the Human Rights Bill on English Law* (Clarendon Press, Oxford 1998).
[127] Poulter, *Ethnicity, Law and Human Rights* (Clarendon Press, Oxford 1998) at p. 34.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

on Article 9. Louise Stedman was dismissed after refusing to sign a new contract requiring her to work on Sundays which she considered should be devoted to non-commercial, family and religious activities.[128] The Commission found that her refusal to work on Sunday, even though motivated by religious convictions, did not give rise to the protection of Article 9 (or Articles 6, 8 or 14). The Commission, rather conveniently, redefined the issue: "she was dismissed for failing to agree to work certain hours rather than for her religious beliefs."[129] She was, after all, free to resign. There is no recognition here of the unequal bargaining power in an employment relationship.[130] This case does confirm that Article 9 applies to the actions of private companies as well as to those employees directly employed by the State. Yet the protection of Article 9, according to the Strasbourg organs, is so narrow, that it seems only a blatant discrimination or outrageous behaviour will be covered.

Freedom of Expression (Article 10)

The European Court of Human Rights has on many occasions emphasised the important role of free speech rights in a democracy. Expression is interpreted very broadly to cover not only words, pictures and images but also actions intended to express an idea or to present information.[131] Under the Convention all expression, whatever its content, falls under Article 10(1). Freedom of expression is not absolute: interference with the right must be justified under Article 10(2).

The scope of freedom of expression is wide and it includes the workplace. Although we have seen that Convention rights do not extend to access to the civil service.[132] In *Vogt* v. *Germany*[133] a school-teacher was dismissed because of her political activity as a member of the Communist Party, which was considered to conflict with her duty of political loyalty. The European Court of Human Rights found this to be a violation of Article 10. It was influenced by the fact that she did not seek to impose her views on her pupils nor could it be shown that she was a security risk.

More recently the restrictions on participation in political activities imposed on local government workers by the Local Government and Housing Act 1989 and Regulations thereunder

[128] (1997) 23 E.H.R.R. (CD) 168.
[129] *Ibid.* p. 169.
[130] In Case C84/94 *UK* v. *Council* [1996] I.R.L.R. 30, the ECJ struck down a proviso in the Working Time Directive which stipulated Sundays as the day of rest.
[131] Harris, O'Boyle and Warbrick, op cit n. 57 above.
[132] See above, at pp. 175–177.
[133] (1996) 21 E.H.R.R. 205. Compare *Kosiek* v. *Germany* (1986) 9 E.H.R.R. 328 and *Glasenapp* v. *Germany* (1986) 9 E.H.R.R. 25.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

have been challenged. The European Court of Human Rights in *Ahmad* v. *UK* concluded that these restrictions did not violate Articles 10 and 11 of the Convention.[134] Nor was there any violation of Article 3 of Protocol No. 1, that States must hold "free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". The purpose of the legislation was to strengthen the tradition of political neutrality among certain local government officers by prohibiting their participation in specified activities. Officers holding such a restricted post could belong to a political party but could not hold an office if that involved participating in party management. Such individuals are also prohibited from speaking publicly or publishing any written or artistic work that seeks support for a political party. These restrictions were introduced because of the increasing politicisation of local government and the State argued that they were essential to the proper functioning of the democratic system of local government. It was agreed that there had been an interference with the right of freedom of expression. The applicants unsuccessfully argued that the provisions were too vague and hence the interference was not prescribed by law. The Court accepted that the interference pursued a legitimate aim within the meaning of Article 10(2), namely the protection of council members and the electorate to effective political democracy at the local level. The argument in *Vogt*, that restrictions on public servants' freedom of expression could be justified only in circumstances where there was a threat to the stability of the constitutional order, was rejected. The Court concluded that the interference was necessary in a democratic society as there was a pressing social need—to strengthen the tradition of political neutrality—and given the State's margin of appreciation, the interference was proportionate to the legitimate aim. The dissenting judgments referred favourably to the conclusion of the Canadian Supreme Court that "public servants cannot be silent members of society and that as a general rule all members of society should be permitted to participate in public discussion of public issues".[135] The decision of the European Court, in stark contrast to that of the Commission, has been criticised for its "broad brush approach" to the issue of proportionality.[136] The Human Rights Act will permit such restrictions, such as those imposed on the police, to be

[134] [1999] I.R.L.R. 188.
[135] *Ibid.*
[136] G. Morris, "The Political Activities of Local Government Workers and the European Convention of Human Rights" [1999] P.L. 211, 215–216.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

tested in the domestic courts without the application of a wide "margin of appreciation".

Considerations of freedom of expression means that it should become more difficult for employers to dismiss employees who express controversial views at work or whose dress or personal appearance is not to their employers taste.[137] On the other hand, in *Morissens* v. *Belgium*,[138] a teacher was suspended without pay after a TV appearance in which she claimed that there was discrimination in the educational system and in particular that she was not promoted to head-teacher because of her sexual orientation. The Commission held that the dismissal was not a violation of Article 10. The applicant had attacked the reputation of her superiors without providing any proof in two television broadcasts and at press interviews. Any restrictions on her freedom of expression had been necessary for the protection of the reputation of those whom she had accused of discrimination. The Commission accepted that the nature of some employment involves a degree of restriction on freedom of expression. In addition the manner and mode of expression may also be relevant.

Employers may be tempted to restrict Convention rights by contractual agreement. In *Rommelfanger* v. *Germany*,[139] the Commission stressed that domestic courts are under a duty to protect the Convention rights of individuals. In some circumstances such restrictions may be justified but unreasonable contractual terms which inhibit the effective exercise of Convention rights should not be tolerated.

Would whistle-blowers have their freedom of expression protected by Article 10? Issues such as whether a matter of public concern is raised and the manner of exposure could be important.[140] But again, it may be that the interference with speech can be justified under 10(2) on the basis of the protection of reputation or an injunction issued "for preventing the disclosure of information received in confidence".[141] There is an increasing tendency in the United Kingdom for the contracts of public and private sector workers to contain confidentiality clauses.[142] Such clauses effectively prohibit employees from discussing matters of importance arising from their employment.

[137] *Stevens* v. *UK* (1986) 46 D. R. 247.
[138] (1988) 56 D. R. 127.
[139] (1989) 62 D.R. 151. (Doctor employed by Catholic hospital dismissed for making statements on abortion.)
[140] Bowers and Lewis, "Whistleblowing: Freedom of Expression in the Workplace" [1996] E.H.R.L.R. 637.
[141] Note Human Rights Act, s. 12 concerning injunctions and freedom of expression.
[142] But see Public Interest Disclosure Act 1998, s. 43J.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

Recent legislation in the United Kingdom provides special protection in law for individuals who breach confidentiality. Some whistle-blowers can now rely on the Public Interest Disclosure Act 1998 rather than solely on the Human Rights Act.[143] The new legal protection does not introduce a general right for all whistle-blowers: disclosures are limited to six categories and specific procedures for disclosure. Under the new legislation disclosures qualifying for protection include: information which a worker reasonably believes shows that a criminal offence has been committed; that a person has or will fail to comply with a legal obligation; that the health and safety of any individual is likely to be endangered or that damage to the environment is likely.[144] The Act also provides protection for the worker against unfair dismissal[145] or any other detriment as a result of making a protected disclosure.[146] This legislation must be interpreted in such a way that is consistent with the ECHR according to the Human Rights Act. Even if disclosures fall outside the new domestic legislative protection of whistle-blowers, it may still be possible to rely on Article 10 to justify the breach of confidence. The circumstances surrounding the disclosure as well as the significance of the information will be the crucial issues in these confidentiality cases.

The domestic courts will be required to give full weight to freedom of expression issues but the justifications in Article 10(2) are very broad. Art 10(2) further limits the scope of free expression by emphasising the duties and responsibilities inherent in the exercise of this freedom. Weight is likely to be placed on the employees' duties of fidelity and confidence.[147] Importantly, the European Court has not directly addressed the issue of whether States can limit freedom of expression in order to protect private commercial interests.[148] It is also worth noting that section 12 of the Human Rights Act restricts the granting of injunctions that might affect freedom of expression. This section was included as a response to the press who feared that injunctions on the basis of privacy may be sought frequently but it could also influence the granting of injunctions to prevent the release of confidential information.

[143] Public Interest Disclosure Act inserts Part 1VA into the Employment Rights Act 1996.
[144] Employment Rights Act 1996, s. 43B.
[145] *Ibid.*, s. 103A.
[146] *Ibid.*, s. 47B.
[147] Bowers and Lewis, *op. cit.* n. 140 above.
[148] See Jacobs and White, *European Convention on Human Rights* (Clarendon Press, Oxford 1996) p. 235. See *Jacubowski* v. *Germany* (1995) 19 E.H.R.R. 64.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

Freedom of Association (Article 11)

Article 11 states that "Everyone has the right to ... freedom of association with others, including the right to form and join trade unions for the protection of his interests". This protection for trade unions would appear to be the most important article in the ECHR for labour law but the Strasbourg jurisprudence on Article 11 has been "disappointing" and effectively "used as an instrument for undermining trade union security".[149] The domestic courts should develop their own jurisprudence drawing upon the economic and social rights established in the Council of Europe's Social Charter and the ILO. Some judgments of the European Court and Commission have referred to these Conventions which deal specifically with labour law issues.[150] In addition the courts should refer to the Social Charter as evidence of the extent to which a practice has become accepted in the Member States of the Council of Europe.

Article 11 contains a positive obligation upon the State to secure the enjoyment of these rights and freedoms contained within it.[151] According to the European Court, "the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the state must both permit and make possible".[152] In addition, under domestic laws trade unions must be able "to strive for the protection of their members' interests".[153]

Although this Article specifically protects the right to form and join trade unions it does not guarantee any particular treatment of trade unions or their members. While the European Court of Human Rights has held that the words "for the protection of his interests" denotes a right to be heard, each State is afforded a free choice of the means used to safeguard the right.[154] In effect the right to be heard has been heavily restricted. Thus the union has a right to be heard during collective bargaining but no right to have a collective agreement concluded.[155] In *The National Union of Belgian Police* v. *Belgium*[156] it was decided that this Article did not guarantee any right of union consultation.

[149] Ewing, *op. cit.* n. 10 above, at p. 279.
[150] The European Court referred to the Social Charter in *Dahlstrom* v. *Sweden* (1976) 1 E.H.R.R. 632, 644 para. 36. The Commission took into account articles 3 and 5 of the ILO Convention No. 87 in *Cheall* v. *UK* (1985) 42 D.R. 178. But it failed to refer to the ILO Conventions in *Council of Civil Service Unions* v. *UK* (1987) 50 D.R. 228.
[151] *Plattform "Arzte fur das Leben"* v. *Austria* (1985) 44 D.R. 65, 72.
[152] *National Union of Belgian Police* v. *Belgium* Series (1975) 1 E.H.R.R. 578.
[153] *Ibid.*
[154] *Swedish Engine Drivers' Union* v. *Sweden* (1975) 1 E.H.R.R. 617.
[155] *Ibid.*
[156] (1975) 1 E.H.R.R. 578.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

It is not clear from the Article 11 case law whether the right to strike is a positive right that a state is required to secure in order to facilitate trade union action.[157] In *Schmidt and Dahlstrom* v. *Sweden,* the European Court acknowledged that "a right to strike represents without any doubt one of the most important of these means" but did not consider that it was the only means of guaranteeing effective enjoyment of trade union freedom.[158] Given the importance of the power to strike in industrial relations and the firm protection given to this right under the European Social Charter, a strong argument can be made that it should be a right protected under Article 11.[159]

While no trade union has successfully relied upon the Article 11 guarantee, individuals have succeeded in using the "negative" aspect of Article 11 to establish a right of "non association".[160] In *Young, James and Webster* v. *UK*, the applicants were threatened with dismissal from British Rail following their refusal, based on personal conviction, to join the unions with which British Rail had concluded closed shop agreements.[161] In practice, there was no alternative open to the applicants as to which union they could join. The European Court found that this agreement violated their right not to join a trade union as a dismissal threat was "a most serious form of compulsion" which strikes at the very substance of the right to freedom of association. The European Court distinguished this decision in *Sibson* v. *United Kingdom*.[162] There was no breach of Article 11, where an employee was offered a transfer to a nearby site by his employer, in accordance with the terms of his contract, after having resigned from his union. The employer's decision had been the result of pressure from the applicant's former trade union. The Court rejected the applicant's case because he was not threatened with loss of his livelihood and he did not have a strong reason for refusing to join any union.

In the closed shop cases the European Court has emphasised the individual rather than the collective right aspect of freedom of association. In effect, the opponents of collective labour rights were able to use Article 11 to undermine legislation supporting the institution of the closed shop. In the *Young, James and Webster* case the recently elected Conservative government was unwilling to justify the closed shop arrangement. Yet such a justification may be

[157] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above, at p. 429.
[158] (1975) 1 E.H.R.R. 637.
[159] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above, at p. 430.
[160] Ewing, *op. cit.* n. 10 above, at p. 280
[161] (1981) 4 E.H.R.R. 38.
[162] (1993) 17 E.H.R.R. 193.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

difficult.[163] In *Sigurjonsson* v. *Iceland* the Court found that a legal requirement that a taxi licence holder be a member of an association was a breach of Article 11.[164] According to the government, this arrangement facilitated the administration of the taxi service and was in the public interest. Under Article 11(2), the Court found that this was "relevant but not sufficient". There was no pressing social need as the objective could have been achieved without this level of compulsion. Again the Court expressed concern at the severe consequences of not being a member of the association, in effect, a loss of livelihood. The decision of *Gustaffson* v. *Sweden*[165] provides some hope for the future of collective bargaining. The European Court found that although there is no general right to engage in collective bargaining under article 11(1), it does not guarantee the employer's right to refuse to do so.

In the 1980s, the workers at GCHQ, deprived of their right to belong to a trade union, unsuccessfully sought redress from Strasbourg.[166] Article 11 is qualified in paragraph 2 by a clause which gives a state the power to impose lawful restrictions on members of the armed forces, the police, and those engaged in the administration of the state—a phrase interpreted to include GCHQ personnel. The Commission found that the complaint was manifestly ill-founded and inadmissible. It is regrettable that such an important Article 11 case was not heard by the European Court itself. This decision reflects the deference shown to States by the Strasbourg institutions in the field of trade union rights and national security.[167]

It seems that Article 11 is satisfied if trade unions may be formed and memberships recognised. Any arguments concerning the actual effectiveness of a union in protecting its members' interests have not been accepted. The priority of the European Court of Human Rights has been the rights of individual workers rather than their collective interest expressed through a trade union. There is no obligation upon the state to guarantee a certain level of protection. That decision is left up to each individual state. The efficacy of Article 11 in challenging anti-union discrimination by employers will again be tested in Strasbourg.[168] It concerns discrimination against trade unionists who refused to give up their

[163] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above, at p. 427.
[164] (1993) 16 E.H.R.R. 462.
[165] (1996) 22 E.H.R.R. 409.
[166] *Council for Civil Service* v. *UK* (1988) 10 E.H.R.R. 269.
[167] Harris, O'Boyle and Warbrick, *op. cit.* n. 57 above, at p. 431.
[168] *Wilson and Palmer* v. *UK* Applications Nos. 30668, 30671, 30678/96.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

right to union representation by signing "personal contracts" offering them enhanced terms and conditions of employment. The House of Lords found no violation of domestic law.[169]

Conclusion

Although limited to civil and political rights, the Human Rights Act has the potential to influence the future of labour law. First, the development of common law can be based on fundamental human rights principles. Statutory interpretation of employment legislation can also be grounded on this potentially richer and more principled approach. Second, the new legislation may hasten the development of a common law of privacy and provide greater protection for expression of political and religious views in the employment context. Third, it changes the criteria against which the propriety of restrictions in the employment relationship should be judged. It is likely that in judicial review cases the more rigorous proportionality standard rather than the Wednesbury unreasonableness test will be used. The domestic courts should not apply the "margin of appreciation" as developed by the Strasbourg jurisprudence. Finally, the effective application of human rights in the private sphere is likely since the Convention case-law, the debates in Parliament and the Act itself strongly suggest that the Convention rights will have an indirect effect. The domestic courts must take the opportunity to develop their own human rights standards.

After examining the many disappointing decisions of the Strasbourg organs, especially in relation to the protection of trade union activities, access to the civil service and accommodation of the religious practices of workers, perhaps the pessimism of some commentators is understandable. Yet the ECHR is a "living instrument" and can be responsive to change in society. The Human Rights Act creates an opportunity for a different approach: a chance to reframe debates and to challenge the status quo. Specific social legislation is still desirable and in fact necessary, but Convention rights could underpin rather than replace such specifically tailored legislation.[170] The attitude of the judges is the pivotal issue. The rights in the ECHR contain no fixed meaning and it is up to the judiciary to exploit the open-textured quality of these statements of rights. Whether or not our domestic courts take

[169] *Associated Newspapers Ltd.* v. *Wilson* [1995] 2 A.C. 454.
[170] See comments by K. Ewing, (1998) I.L.J. 275, 291.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press

this opportunity to develop case-law for the protection of employees cannot as yet be answered, but in the long-term the Human Rights Act is likely to have a profound effect on our legal culture.

https://doi.org/10.1017/S0008197300000064 Published online by Cambridge University Press