JOBS AND JUSTICE

COMMENTARY AND PROPOSALS TO ENHANCE EMPLOYMENT RIGHTS AND STRENGTHEN THE BRITISH ECONOMY THROUGH BREXIT AND BEYOND

'Productivity is a gift for raising living standards, perhaps the greatest gift… As Olympic athletes have shown, marginal improvements accumulated over time can deliver world-beating performance. Applying those marginal gains… to the population of UK companies could significantly improve UK living standards, even if those are harder to measure than gold medals.'

- Andrew Haldane, Chief Economist, Bank of England, 20 March 2017

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Foreword

Employment policy cuts to the heart of Britain's prosperity in two crucial ways:

1) Wages constitute half of the UK's GDP; for example in July, August and September 2017, UK employees took home £252,605 million, which equates to 49.5% of the UK's total economic output for the period[1].
2) Job satisfaction is the most important statistically measured factor affecting rates of life satisfaction.

The Conservative Party rallying cry "A Country that Works for Everyone"[2] puts work at the centre of the party's vision. Employment policy sets the rules of the game for employees and employers, and the Prime Minister confirmed her focus on employment policy by commissioning the Taylor Review of Modern Working Practices, published in July 2017[3] and to which the department for Business, Energy and Industrial Strategy responded in February 2018[4].

There are, however, other important complexities to consider. Employment policy is an important bulwark against discrimination and can promote equality and diversity in a pervasive and transformative way. In addition, changes to the employment market like the evolution of a "gig economy" have challenged the status quo, with cases like *Uber v Aslam* [2017][5] demonstrating problems with implementation and enforcement. These problems are not new; since at least 2004, the European Commission has agreed the Working Time Directive is outdated for working environments of the 21st century[6]. The Conservative Party has an important opportunity to continue to lead on these issues with an inspiring vision and convincing solutions, which require careful thought, planning and action.

This paper is an evolution from Tristan Honeyborne's LLM thesis. It represents a thoughtful, well-informed and forward-looking contribution to the development of Party and Government policy on employment.

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Chair of the Executive Committee
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The Society of Conservative Lawyers is an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members hold a range of different views within those parameters and the views expressed in this paper are not necessarily held by all members of the Society or by the Conservative Party.

[1] The UK's total GDP was £510,296m for the period (*ONS*, 2018) <link> and total employee compensation was £252,605m (*ONS*, 2018) <link>

[2] See Theresa May, 'A Country that Works for Everyone' (*Conservatives,* 2018) <link>

[3] 'Good Work: The Taylor Review of Modern Working Practices' (*BEIS,* 2017) <link>

[4] 'Good Work: A Response to the Taylor Review of Working Practices' (*BEIS,* 2018) <link>

[5] UKEAT/0056/17/DA

[6] 'Public Consultation on the Review of the Working Time Directive' (*European Commission* 2014) <link> p.4

Introduction

Contemporary background

The Taylor Review (the "Review"), commissioned by Theresa May and published in July 2017, was the largest government review of UK working practices undertaken in the 21st century. It produced 53 recommendations, centred around modern working conditions and the "gig" economy. 32 of these were legal in character, either recommending change to UK employment law or mechanisms for enforcing the law[7]. The Review laid bare the scale and quality of work required to implement good employment policy: co-operation was recommended between at least eight government departments in addition to all local and regional authorities[8].

The focus of the Review was right: job satisfaction is the most important statistically measured factor affecting rates of life satisfaction. There is a statistical correlation between the two at 0.40[9], which means that in a group of employees which represent the population as a whole, someone with higher job satisfaction will 70% of the time have higher life satisfaction than someone with lower job satisfaction.

The government's response to the Review, "Good Work" (the "Response"), was released on 7 February 2018, endorsing all but a few of the Taylor Review's recommendations[10]. This paper does not set out to explain or evaluate each recommendation in turn, but it is important to acknowledge that a significant number of these recommendations have already been undermined, or at least delayed, by events:

- Shortly after publication of the Review, the legal definition of "worker" was appealed to the Supreme Court in the *Pimlico Plumbers* case and judgment is expected in the coming months[11]. Recommendations 1 – 8 of the Review commit the government to insert the legal definition of "worker" into an Act of Parliament and provide better mechanisms for workers to enforce their employment rights, but the definition of "worker" is currently under consideration by the Supreme Court and it may take some time before the lower courts, including the Court of Appeal and Employment Appeals Tribunal ("EAT"), will clarify the test enough to create the kind of certainty required for it to be inserted into statute.

At a Glance: "Worker" Status

For tax and some other purposes, a wage-earner is either classed as "employed" or "self-employed". However, there is an additional category of "worker" which includes *all* employed people and *some* self-employed people. It is a concept created by EU law and workers are entitled to certain rights like sick pay, maternity pay and paid annual leave, even if they are self-employed. The seminal UK judgement on the worker definition is *Byrne Bros (Formwork) Ltd v Baird & Ors* [2001] UKEAT 542/01/1809. The statutory basis of worker status is found in the Employment Rights Act 1996 s.230(3)(b) and the Working Time Regulations 1998, regulation 2.

- It remains unclear who is entitled to holiday pay under applicable law and how it is to be calculated. Two recent cases: *Kocur v Royal Mail and Anor*[12] and *King v The Sash Windows Workshop Limited*[13] have continued a controversial line of cases some lawyers now affectionately refer to as the "holiday pay saga"[14], as various UK courts and the Court of Justice of the European Union (hereafter, the "European Court of Justice" or "ECJ") have battled to establish when holiday pay must be paid and how it must be calculated. In *Kocur* the Employment Appeal Tribunal ("EAT") held that agency workers cannot be compensated for receiving 2 days' less leave than fully employed staff by a higher rate of pay, and in

[7] 'Good Work: The Taylor Review of Modern Working Practices' (*BEIS,* 2017) <link> pp. 68 - 75

[8] The government departments include HMRC, BEIS, MHCLG, DWP, CH and the MOJ. Ibid. see pp. 74 & 75.

[9] Bowling, N. A., Eschleman, K. J., & Wang, Q. 2010, 'A meta-analytic examination of the relationship between job satisfaction and subjective well-being' *Journal of Occupational and Organizational Psychology*, 83: 915-934

[10] 'Good Work: A Response to the Taylor Review of Working Practices' (*BEIS,* 2018) <link>

[11] Permission to appeal the Pimlico Plumbers case was granted on 9 August 2017 (Supreme Court 2017) <link>

[12] UKEAT/0181/17

[13] C-214/16

[14] See, for example, Mark Hammerton and Ruth Bonino, 'UK – Another Day Trip in the Holiday Pay Saga (*Clyde & Co*, 2015) <link>

King the Court of Justice of the European Union (usually known and referred to hereafter as the "ECJ") held that an employee should be able to claim unpaid holiday going back many years, despite recent emergency legislation limiting back-claims to 2 years[15]. The revival of this problem threatens to undermine Recommendations 10 and 19 of the Review, which would make HMRC the primary enforcement mechanism for the payment of holiday pay and make workers' rights clearer to workers themselves by publishing guidelines: how can HMRC reach the right conclusions, or the government publish clear guidance, when the courts are themselves undecided?

Since the introduction of the Working Time Directive[16] (the "Directive"), the courts have been between a rock and a hard place when interpreting EU-derived employment rights.

At a Glance: The Working Time Directive

The Directive introduced the right to paid annual leave and certain limitations on working time, for example limiting the working week to 48 hours and providing for rest breaks. It is implemented through the Working Time Regulations 1998. The UK negotiated a single, specific opt-out from the 48-hour working week, although each worker must still consent to opt-out of the 48-hour limit or else their employer is in breach of the law.

The UK voted against the Directive, but even though on social issues (the "Social Chapter") EU law requires unanimous agreement amongst member states, the EU argued it is a health and safety measure and therefore subject to a lower threshold. The UK challenged this in the European Courts and lost (*United Kingdom v Council* [1996] C-84/94).

On the one hand, the ECJ has consistently wrong-footed the UK courts. On the other hand, the judiciary have often had the blame for poor European Union decisions and legislation laid at their doors by commentators[17]. For example, in *Bamsey* [2004][18], Auld LJ speaking for the Court of Appeal held that holiday pay should not incorporate additional payments to incorporate overtime worked in the following terms:

'The clear purpose of the Directive, as I have said more than once, is to encourage a climate of protection for the working environment and health of workers… But I do not see upon what basis it can be said that it requires member states, in its implementation, to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn, and did earn, while at work.'[19]

Eight years later, after a ground-breaking decision of the ECJ in *Williams*[20], that position was reversed, which the EAT acknowledged in *Bear Scotland*. By leaving the EU without providing adequate guidance on interpreting residual EU law, Parliament risks deepening these problems, as clause 6 of the draft EU Withdrawal Bill (the "Bill") provides that UK courts should have regard to ECJ jurisprudence where appropriate (or "relevant"; the government has recently accepted an amendment proposing this change) but is ominously silent on when it is appropriate for UK courts to do so, or the extent to which EU law should be followed if it is relevant[21]. This paper argues that Parliament has the opportunity to improve the clarity and quality of employment law by incorporating clear guidelines into the Bill on when and how to have regard to ECJ decisions when resolving UK cases.

The UK also has a strong history of establishing and promoting employment rights which go well beyond the minimum standards prescribed by EU law. Pay was one area specifically excluded from EU competencies by Article 137 TFEU, as amended by the Lisbon Treaty[22], but the National Living Wage is expected to increase average

[15] The Wages (Limitation) Regulations 2014

[16] 2003/88/EC

[17] See, for example, Adam Marshal, 'Tribunal pay ruling may be unbearable for businesses' (*British Chambers of* Commerce, 2014) <link>

[18] *Bamsey and others v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359

[19] Ibid. at paragraph [35]

[20] *British Airways plc v Williams* [2011] C-155/10

[21] European Union (Withdrawal) Bill 2017-19 (*Parliament*, 2018) <link>

[22] See the Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C 115/01, Article 137 (ex 118): *'The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'*

earnings by £3.75 billion by 2020[23]. The introduction of Modern Slavery Statements last year indicates a continuation of this commitment, and targets the livelihoods of those at the very bottom of the ladder in terms of employment standards and opportunities. The introduction of shared parental leave also marks a step forward for reproductive rights, enabling parents to have greater freedom to share the responsibilities of parenthood.

Roadmap

This paper will begin with a broad outline of the history to the employment law problems we currently face, because it is crucial to understanding their context before we can move on to consider substantive proposals. Equally it is also dangerous to rush into critique of substantive proposals, or make any, before understanding some important policymaking considerations: these will be considered in the second section. The third and fourth sections will consider a range of policy options within and outside the European legal framework. The type of Brexit the government negotiates will determine the flexibility with which the current law can be amended, as we shall see.

In the conclusion, I will focus on two important issues to this area of government policy. First, I will argue that, when evaluating policy proposals, there are two principles which the government and Parliament should use as their basic empirical metrics for decision-making. Second, I will make a case that Parliament should provide guidance to the courts on how to interpret and use European Union case law after the UK leaves the European Union, because judges will have to make politically important decisions on the extent to which ECJ decisions should be mirrored in the evolution of our own law.

Pause for Thought: Facts and Figures on the Reach and Impact of Employment Law

- **32.21m** – the number of wage-earners in the UK, each working under a contract regulated by employment law.
- **88,476** – the number of employment tribunal claims in 2016/17.
- **£36,853 and £6,026** – the mean average amounts awarded for successful claims in the employment tribunal in 2016/17 for racial discrimination and sexual orientation respectively. These are the highest and lowest averages by type of claim – unfair dismissal and disability discrimination sit somewhere in the middle, for example.
- **A 1,300% economic return** – The Advisory, Conciliation and Arbitration Service ("ACAS"), estimates that for every £1 it spends supporting and advising employees and businesses on their employment rights, a £13 economic benefit is conferred on the UK economy. ACAS is a government-funded public body which promotes employment standards and facilitates dispute resolution.

See ONS data at <link>, employment tribunal statistics at <link> and more on ACAS at <link>

[23] 'The effects of the National Living Wage' (*Office for Budget Responsibility*, 2015) <link>

Problems past and present

EU-UK Legal Friction and the Failure of Subsidiarity

With one prominent legal magazine reporting that 82% of UK based lawyers voted Remain in the 2016 referendum, it will not come as a surprise that the majority of the profession see more costs than benefits stemming from Britain's exit from the European Union[24]. However, that does not mean the ECJ has caused no headaches for UK judges. There is also a risk of overlooking important social and economic gains which legal reform can bring to the UK outside the EU. There are two narratives this paper will begin with: first, a good example of the kind of legal problems EU membership has caused in the field of employment rights, and secondly look at the important failure of subsidiarity, which in a number of areas has caused the ECJ to reach into and develop national laws in a way not originally envisaged and which creates considerable international criticism and friction[25].

Lady Hale, the new President of the Supreme Court, sat on the Court of Appeal case of *Evans*[26] in 2003 and expressed concern at one trajectory of EU law. The issue was holiday pay. The claimant's basic pay was £10,000 a year, but he received 25% commission on sales made by him, enhancing his income by approximately £52,000 more per year in additional payments. The claimant argued that, under Article 7 of the Directive, his holiday pay should incorporate his commission earnings rather than just basic pay. However, there was an important complication: since there was considerable time lag between making a sale and the business receiving income, the claimant would receive his commission around nine months after the sales to which it related. Under s.221(2) and (3) of the Employment Rights Act 1996 ("ERA") wages that vary over time must be calculated using a 12-week rolling period. Lady Hale remarked:

'The concept of averaging over 12 weeks is difficult to fit with the concept of success fees relating to a completely different period'[27]

The court decided this outcome would have been curious and unpredictable, and therefore unanimously decided that Article 7 of the Working Time Directive (the "Directive") could not require commission payments to be incorporated into holiday pay, because it would create arbitrary results. In another holiday pay case of the same year, the Court of Appeal interpreted Article 7(1) as expressly permitting member states to prescribe their own methods for how holiday pay should be calculated[28]. However, in *Stringer and others v HMRC* [2009][29] the ECJ has since held that commission payments must be incorporated into holiday pay, irrespective of any arbitrary results of the kind which concerned the Court of Appeal in *Evans.* In other words, the ECJ disagreed with the now-President of the Supreme Court on the interpretation of EU law, and through the mechanism of direct effect the ECJ's decision was adopted by the lower courts without the issue being reconsidered by the higher UK judicial authorities. The ECJ's decision did not clearly follow from the text of the Directive, and it failed to consider the arbitrary results that may be unavoidable by interpreting it in this way[30].

The ECJ has since recommended that 12-month rather than 12-week rolling averages are used to calculate holiday pay[31] and in the Response the government announced it would be enshrine this change in law[32]. This solution is imperfect, however. In seasonal industries like tourism it is not fair to pay holiday based on a 12-month rolling average, when workers may work more overtime and earn far more in some seasons than others, because

[24] 'Revealed: A quarter of managing partners voted for Brexit' (*The Lawyer* 19 January 2018) <link>

[25] See, for example, Roland Flamini, 'Judicial Reach: The Ever-Expanding European Court of Justice' (*World Affairs* November/December 2012) <link>

[26] *Evans v Malley Organisation Ltd t/a First Business Support* [2003] EWCA Civ 1834, ICR 432

[27] Ibid. at paragraph [43]

[28] Auld LJ in *Bamsey and others v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359 at paragraph [36]

[29] C-350/05

[30] See the ECJ's decision and rationale in *British Airways plc v Williams* [2011] C-155/10

[31] Opinion of Advocate General Bot *Lock v British Gas Trading Ltd and Others* [2014] C-539/12 at paragraph [48]

[32] It is referred to as a 52 week "reference period" in 'Good Work: A Response to the Taylor Review of Working Practices' (*BEIS,* 2018) <link> p. 16

their holiday pay will not reflect the money they would have earnt during their leave. It also fails to deal with the fact that a long time lag can be attached to commission payments, for legitimate and unavoidable reasons. For example, it may take months for the revenue from a sale to feed into a company's cash flow and therefore a company may not be in a position to pay commission without a significant time lag – and should the holiday pay calculation take into account when a worker becomes entitled to receive a commission, or simply when they are paid for it? The variety of policy across the European Union on these kinds of issue suggests that the "right" answer is far from clear. For instance, Germany uses a 13-week rolling average[33] to calculate holiday pay whilst Hungary uses a six-month rolling average[34].

The holiday pay debate, now frequently described as the "holiday pay saga" by legal commentators[35], sits in the wider context of the failure of subsidiarity to provide domestic courts sufficient discretion and flexibility to apply European Union law in a consistent and balanced way to their particular country. Subsidiarity is the legal principle enshrined in Article 5(3) of the Treaty on European Union ("TEU"), part of the Lisbon Treaty, namely that the EU should only intervene on a policy when its objectives cannot be sufficiently achieved by the Member States, but can be better achieved at Union level, '*by reason of the scale and effects of the proposed action*'. The purpose of including a reference to the principle in the EU Treaties is also to ensure that powers are exercised as close to the citizen as possible, in accordance with the proximity principle referred to in Article 10(3) TEU[36]. Subsidiarity has been a significant area of contention and concern for some time and those arguments will not be restated here. However, it is useful to note the ECJ has been particularly reticent to apply the principle of subsidiarity in this area, stating on holiday pay: '*the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations*'[37]. As a result, Parliament's attempts to specify how courts should calculate 'a week's pay' in s.234 of the ERA has been overridden by ECJ case law[38]. The primary legislation has not yet been updated to reflect this. The calculation of a week's pay is also relevant to other rights, including shared parental leave[39], sick leave[40] and the calculation of compensation for unfair dismissal[41]. A good example of the confusion this creates is restaurant tips, which cannot be taken into account for minimum wage purposes[42] or under s.234 ERA but must be included in the holiday pay calculation[43].

The uncertainty and burden imposed by the ECJ in this area is clear. As a KPMG director has put it: '*Holiday pay is a minefield for employers… If businesses do not now consider strategies for addressing this issue it could prove very costly*'[44]. The ECJ judgments on holiday pay indicate that little or no consideration was given to uncertainty or costs burdens on employers[45].

Further Reading: Subsidiarity

If you are interested by this introduction to the principle of subsidiarity, the following online resources may be useful:

- The government published a paper including a historical account and analysis of subsidiarity, accessible at <link>, pages 17 – 33
- For a critical analysis of subsidiarity, see G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63
- Prof. Catherine Barnard, a highly respected Cambridge EU law specialist, wrote a blog post on subsidiarity in the context of David Cameron's negotiated EU deal at this <link>

[33] 'Employment and employee benefits in Germany: an Overview' (*Practical Law*, 2017) <link>

[34] Dr. Nóra Óváry-Papp in 'How Much Holiday Pay? One EU Directive, many different interpretations…' (*Multilaw*, 2014) <link>

[35] See, for example, Mark Hammerton and Ruth Bonino, 'UK – Another Day Trip in the Holiday Pay Saga (*Clyde & Co*, 2015) <link>

[36] See 'The Principle of Subsidiarity' (*European Parliament*, 2018) <link>

[37] Case C-282/10 *Dominguez v CICOA* [2012] ECR I-000 at paragraph [16]

[38] *Bear Scotland Ltd v Fulton and another* [2014] UKEAT 0047_13_0411

[39] Employment Rights Act 1996, s.56(1), (2)

[40] Employment Rights Act 1996, s.61(1), (2)

[41] Employment Rights Act 1996 s.119, s. 123

[42] 'The National Minimum Wage: A Code of Best Practice on Service Charges, Tips, Gratuities and Cover Charges (*BEIS*, 2009) <link>

[43] Shivali Chaudhry, 'How changes to employment law could affect your hospitality business' (*BigHospitality*, 2015) <link>

[44] 'Holiday Pay "minefield"' (*Pay and Benefits Magazine* 24 June 2014) <link>

[45] See, for example, *British Airways plc v Williams* [2011] C-155/10

At a Glance: *Bear Scotland*

In *British Airways v Williams* [2011] C-155/10, the ECJ held that the Working Time Directive must be interpreted '*as meaning that an airline pilot is entitled, during his annual leave, not only to the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of his tasks* [on the facts this was a £2.73 per hour supplement to his salary calculated on how long pilots spend away from their bases] *which he is required to carry out under his contract of employment… second, to all the elements relating to his personal and professional status as an airline pilot'*. In *Bear Scotland v Fulton* [2014] UKEAT 0047_13_0411, the EAT held that the ratio of the *Williams* case applied to all workers, not just airline pilots, and was capable of being interpreted into existing statutory provisions by way of indirect effect under the Marleasing Principle. The question in *Bear Scotland* was whether employees who regularly worked overtime were entitled to receive holiday pay calculated to imclude their average overtime, in addition to their basic salaries – and the EAT held they were.

Progress and Failure under the Working Time Directive

The UK's sophisticated and successful employment tribunal system pre-dated the Directive, taking its current form with reform under the Employment Rights Act.

The UK minimum wage regime evolved separately from EU law; the Directive explicitly excludes wage-setting from its remit[46]. The UK also negotiated an opt-out from the 48-hour working week limit which the Directive applies to other member states. Therefore, perhaps the biggest impact of the Directive on the UK was the implementation of the holiday pay regime, since there was previously no right to paid holiday. The effects of this will now be examined in more detail.

In 1998, 671,000 full-time UK employees said they had fewer than 12 days' annual leave, or 6% of the workforce. About 15% had fewer than 20 days annual leave[47]. This has since fallen to 3% and 5% respectively[48]. These statistics were presented in a 2014 report by BEIS and it also report noted that there had been a significant increase in contractual paid holiday above the 20 days and 5.6 weeks minimums prescribed by statute, perhaps indicating that the trend was cultural and not caused by the Directive. This was attributed to positive changes to industry practices, collective bargaining and cultural change rather than the Directive itself, although the Directive no doubt had a positive effect: i.e. other factors in addition to the Directive, but the Directive provides legal redress and minimum standards for a large number of workers. In 2016/17 alone, UK employment tribunals heard 30,281 working time claims[49].

There was significant scope for abuse within the old system for holiday pay prior to *Lock*[50] and *Bear Scotland*[51]. Holiday pay could be artificially reduced by, for example, favouring overtime over standard hours working arrangements[52]. However, poor working standards continue to be a high-profile political issue for companies

[46] Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C 115/01, Article 137 (ex 118)

[47] 'The Impact of the Working Time Regulations on the UK Labour Market: A Review of Evidence' (*Department for Business, Industry and Skills*, 2014) <link> p. 47

[48] Ibid. p. 47

[49] 'Employment Tribunal Claims and Awards: Latest Statistics' (*Practical Law* undated) <link>

[50] *Lock and another v British Gas Trading Limited* [2014] C-539/12

[51] *Bear Scotland Ltd v Fulton and another* [2014] UKEAT 0047_13_0411

[52] See *Spence v City of Sunderland Council (unreported)* [1999] EAT case No.: 1255/98: 30.07.99

like Sports Direct and Amazon[53], and proliferate certain industries like construction[54]. A less well-known example went before the Supreme Court in 2011, where oil rig workers based in Aberdeen argued they were unable to make holiday plans around their families because their employer gave little notice of designated leave periods, and employers are able to designate when workers must take their leave[55]. The Supreme Court found for the employer on the basis the Directive guarantees a minimum period of leave but not a minimum quality of leave[56].

It is also worth noting that the government has brought forward initiatives on Modern Slavery[57], the National Living Wage and is committed to bringing forward legislation to protect pregnant women at work within the next 12 months, which go well beyond the scope of the Directive and perhaps do more to help those in need[58]. Working standards continue to be consistently poor in Eastern Europe, despite the Directive, although they are improving over time[59]. Finally, the government consultation in 2014 concluded:

'The issues most commonly cited by business groups in relation to the [Directive] generally do not relate to the core provisions of the Directive, but instead centre around the rulings of the [ECJ] made after the Directive was adopted. These appear to have increased employer costs significantly, with the possibility of more impacts from the most recent judgments around holiday pay'[60]

Taking a Comparative Approach

The UK's approach to capitalism has tended to sit at a crossroads between the free market approach favoured in America and the social democrat model pursued on the continent. It is no different with employment policy, and this has taken many forms, including the UK's difficult relationship with the Directive and taking advantage of the opt-out negotiated for Article 6(b), which enables workers to opt-out of the maximum 48 hours working week. Bob Hepple noted in 2013 that the UK coalition government walked a difficult employment law tightrope, attempting to balance social liberalism and market fundamentalism, couching its policy in the language of 'fairness'[61]. The issue of workers' rights traverses a number of delicate dimensions: Thatcherism and Labour's Third Way, collective bargaining vs legislation, bureaucracy and welfare rights.

With this in mind, this paper can look at different approaches considered in other Western democracies. In Portugal, the non-payment of holiday pay is a criminal offence, and although this may strengthen the incentive for employers to comply it also means that inconsistent or unclear law poses a particular danger for societies which value the rule of law. This difficulty has been remarked on in relation to the Directive by Lord Templeman in *Duke v GEC Reliance Systems Ltd* [1998], *'the respondent could not reasonably have been expected to reduce to precision the opaque language which constitutes both the strength and difficulty of some community legislation'*[62].

Additionally, countries including Portugal and Germany have, for a number of decades, included overtime and commission in the calculation of holiday pay[63]. Spain's High Court only recognised that overtime and commission must be incorporated into holiday pay after the ECJ's decision in *Williams*. Austria incorporates overtime into holiday pay, but only if that overtime is worked regularly. Most member states calculate an employee's remuneration according to a rolling average of what the

[53] Dan Warburton and Alan Selby, 'Amazon in new workers shame as drivers complain of harsh conditions and gruelling hours' (*The Mirror*, 16 December 2017) <link>

[54] 'Bryne Bros coughs up £250k of accrued holiday pay' (*The Construction Index*, 18 January 2018) <link>

[55] *Russell and others v Transocean International Resources Limited and others (Scotland)* [2011] UKSC 57

[56] Ibid. at paragraph [36]

[57] 'Modern Slavery' (*Home Office* 2017) <link>

[58] For the government's commitment to review pregnancy at work legislation, see Theresa May's response to an oral question by Maria Miller at Prime Minister's Questions on 7 March 2018 (*Hansard,* 2018) <link>

[59] See 'Impact of the Crisis on Working Conditions in Europe' (*European Observatory on Working Life,* 2013) <link>

[60] 'The Impact of the Working Time Regulations on the UK labour market: A review of evidence' (*BIS*, 2014) <link> p. 73

[61] Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government', *Industrial Law Journal* (2013) 42 (3): 203-223 <link>

[62] *Duke v GEC Reliance Systems Ltd* [1988] A.C. 618

[63] 'How Much Holiday Pay? One EU Directive, many different interpretations…' (*Multilaw*, 2014) <link>

employee earned in the preceding 3 months, 12 weeks or 13 weeks.

Switzerland is not subject to the Directive, and has no bilateral treaties with the EU on employment matters[64]. However, Swiss employees are entitled to at least four weeks' annual leave (five weeks for those over 20 years old)[65] and Article 329*d* 1 of the Civil Code prescribes that *'The employer must pay the employee the full salary due for the holiday entitlement and fair compensation for any lost benefits in kind'*[66]. This brings the Swiss position very close to Article 7 compliance, because it has been interpreted to include overtime and commission. The Swiss system is the most flexible system in Europe, with Swiss courts using a relatively broad degree of discretion to ensure workers receive fair compensation. This paper suggests the Swiss position is best on the issue of holiday pay, by providing a clear methodology but also useful discretion for cases where it produces unfair results: the Swiss courts first assess holiday pay using a reference period but, if they consider the period would produce inadequate results, they can take into account individual circumstances to conclude how much a worker ought to be paid. The Swiss system also permits employers to withhold holiday pay if the leave is used to work a second job, which preserves the status of holiday as a period for rest and recuperation[67]. On the one hand, a Swiss approach could introduce some uncertainty for workers and employers in marginal cases. On the other, the UK government could provide legislation and guidance to provide clarity on when a difference calculation would be fair. This could be an interesting synthesis of a common law and statute-based approach.

The crossroads between the continental and Anglo-Saxon traditions, which the UK is used to when it comes to workers rights, is something which lawyers are in practice quite familiar with: Lord Neuberger, for example, has said that 'English lawyers, like industrious bees, fashioned equity in the Court of Chancery from the best of two different legal traditions [common law, and civil law] and created something unique'[68]. Lord Neuberger has suggested that by combining the best elements of the common law and civil law systems, English lawyers have been able to incorporate the best of both into our own law. In other words, the world-beating reputation of English law is built by taking inspiration from the best parts of other systems from around the world. In his own words:

'We continue to draw from many sources, Commonwealth, European, the United States, and in doing so we are not, as Lord Cooke of Thorndon put it, "submitting" to such influences. We are enriching our law from them, just as English law has – to its great strength – always done'[69]

Additional Information: Employment Rights Outside Europe

The United States has had a national minimum wage since 1938; a legacy from F. D. Roosevelt's "New Deal" in the Great Depression. However, at $7.25 the rate is currently low and many states have introduced minimum wage rates above this federal minimum. However, the US lacks a number of rights like the right to annual leave, and does not recognise unfair dismissal, although the Civil Rights Act 1964 introduced important and far-reaching anti-discrimination provisions.

Japan's system of employment rights is more similar to the UK, but minimum wages are stipulated on an industry-by-industry basis and employers with 50 employees or more are required to ensure that people with disabilities make up at least 2% of their workforce.

[64] 'Bilateral Agreements Switzerland-EU' (*Federal Department of Foreign Affairs, Swiss Confederation* undated) <link>

[65] 'Duty of Welfare' (*Swiss Employment Law: Information on Employment Law and Contract of Employment in Switzerland* 2016) <link>

[66] The Swiss Civil Code (Part Five: The Code of Obligations), Article 329*d* 1

[67] Christian Gersbach, 'Swiss Employment Law' (*CMS von Erlach Henrici Ltd.*, 2012 <link>

[68] Lord Neuberger, 'Developing Equity – A View from the Court of Appeal' (Chancery Bar Association, 2012) <link> pp. 3

[69] Ibid. p. 4

Methodological Challenges and Common Pitfalls

Employment policy and law-making are frequently the subject of debate, and in this debate there are a number of common but important methodological and analytical mistakes which there is a tendency of commentators to make. This section will highlight three of them, so that these considerations may be addressed more effectively in future.

The Strata of Employment Policymaking and Flexicurity

Employment policy can be implemented on at least five different levels[70]:

1. Supranational (for example International Labour Organisation ("ILO") agreements and European Directives). ILO agreements, for example, provide important basic working standards in CETA, the new trade agreement between Canada and the EU.
2. National (for example political campaigns and legislation like the National Living Wage).
3. Industry, or cross-industry level, governed by collective agreements, for example by trade associations like the Investment Association (for the asset management industry).
4. At an "enterprise" level, governed through local agreements (which may or may not be legally binding, for instance the pre-conditions attached to merger approvals which might stipulate a commitment on job creation).
5. At the individual level, through employment contracts.

Each have different advantages and disadvantages, and they can take very different forms. It is important to bear each in mind when devising policy, and lawyers in particular may be vulnerable to forget that legislation and contracts can be relatively blunt instruments. These mechanisms do not fully represent the policy options available to address specific challenges. This can be seen by looking at European employment policies before the EU. Countries differed markedly in their approaches: France preferred national legislation to set social welfare standards, whereas Denmark, Sweden, Germany and the Netherlands encouraged and relied upon a higher degree of collective action at industry or enterprise levels[71].

Within social theory, one question whether stronger employment regulations trade labour market flexibility for job security, a view common in the 1990s, or whether stronger regulations can go hand-in-hand with better job prospects [72]. In the 2000s, this ideal was termed "flexicurity", which postulated that employment flexibility and security are not in a zero-sum game. Per the EU's Directorate-General for Employment, Social Affairs and Equal Opportunities:

'Flexicurity aims at ensuring that EU citizens can enjoy a high level [of] employment security, that is the possibility to easily find a job at every stage of active life and have a good prospect for career development in a quickly changing economic environment'[73]

More recently, in 2013, the Commission published an 82-page econometrics study on the subject which concluded that there is scant empirical evidence for flexicurity in the data available from the Great Recession, particularly in Italy, Spain and southern Europe[74]. However, the Review and Response proceed on the assumption that more regulation can walk hand in hand with improved economic outcomes, and when looking at regulations on a case-by-case basis it is hard to disagree. What is difficult for the court system, however, is to interpret regulations in a way which enhance workers' rights whilst minimising the economic risks associated with that interpretation. Courts are not designed to hear argument on complex economic analysis, and often judges will not be familiar with the wider range of applicable laws, remedies and regulations. The parties in a case may also fail to make the most important and persuasive points. Therefore on

[70] Dominque Anxo and Jacqueline O'Reilly, 'Working time regimes and transitions in comparative perspective' (Edward Elgar 2000) <link>

[71] 'Working time and work-life balance in a life course perspective' (Eurofound 2012) <link>

[72] R. J. Muffels, 'Flexibility and Employment Secutrity in Europe: Setting the Scene' in R. J. Muffels (ed.), *Flexibility and Employment Security in Europe* (Edward Elgar 2008)

[73] 'Employment in Europe' (*Directorate-General for Employment, Social Affairs and Equal Opportunities, European Commission*, 2007) <link>

[74] 'Flexicurity in Europe' (*Directorate-General for Employment, Social Affairs and Inclusion, European Commission* 2013) <link>

matters that involve flexicurity, or considering the economics effects of a public policy decision, it is better for governments and other state actors to undertake the analysis necessary to reach the right conclusion.

There are two additional complicating factors, which are relevant for the European Union legal order. First, due to legal and linguistic diversity across the Union, complex tests at ECJ level tend to create uncertainty in national courts[75]. This is particularly so where each member state has developed its own specific regime, as they were invited to do by the wording of Article 7(1). Secondly, intuition has been increasingly utilised by the ECJ in respect of Article 34 TFEU and this appears to be a trend which is seeping into other areas of its jurisprudence as well[76]. The author of this paper has explored the Article 34 point in further detail elsewhere[77]. In short, when devising its tests the ECJ can at times rely on its own intuitions and/or prejudices and this is particularly so with empirically challenging problems, of which the calculation of holiday pay should be included.

Oversimplification and "Straw Men"

These are common problems for public debate and discourse, but they apply here as everywhere else and risk damaging the quality of discussion on these important questions. Laura Pidcock, Shadow Minister for Labour, recently provided a good example of the sort of reasoning on these issues which should be avoided when she said:

'My deepest fear post the European Union is a hard-right Conservative government that will be presiding over workers' rights and working conditions'[78]

Prima facie, this would appear to be a strong argument for remaining subject to the ECJ, if we accept the premise that the government would in the absence of ECJ protection make inroads into workers' rights. Unfortunately, commentators have a tendency to take a view on the substantive law of the present regime with one eye on the importance of workers' rights in general, clouding the quality of analysis. The two are analytically separate. Laura Pidcock's words fail to acknowledge important limitations of the European system, and fail to engage with the massive progress made by successive Conservative governments on areas of workers' rights untouched by European Union law. They also fail to put forward a positive vision of what workers' right *should* look like under a Labour government, and so this important policy area has and can be quickly reduced to political scaremongering.

An equally unsatisfying argument which appears in some of the academic literature is a tendency to praise current EU membership and/or the current EU holiday pay regime by comparing the position now to that of the early 1990s, when there was no right to annual leave or paid annual leave in UK law. For example, a recent TUC research paper concluded:

'The gains UK workers achieve as a result of our membership of the EU include improved access to paid annual holidays… Given these benefits we conclude that EU membership continues to deliver wide-ranging protections to UK workers'[79]

However, just because the Directive *introduced* these rights two decades ago is a poor indicator of whether the Directive is *necessary* to sustain these rights. On the contrary, the UK government has subsequently introduced protections which exceed the minimum requirements of the Directive. Since 2007, workers have been entitled to 5.6 weeks' annual leave rather than the 20 days prescribed by the Directive, to include the eight national holidays each year[80]. To formulate good social policy, it is important to overcome political prejudice and bias, or else the lives and livelihoods of all those in work can suffer.

[75] *Trevor C Hartley*, Constitutional Problems of the European Union *(Hart*, 1999) pp. 65-70

[76] Daniel Wilsher, 'Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market', *European Law Review* (2008) 33(1), 3-22, p.9 onwards

[77] Tristan Honeyborne, 'Selling Arrangements; Keck; and the Free Movement of Goods' (*Academia* 2014) <link>

[78] Laura Pidcock, Shadow Minister for Labour, on BBC Question Time, 8 March 2018

[79] 'UK employment rights and the EU' (*Trade Union Congress,* undated) <link>

[80] See the Working Time (Amendment) Regulations 2007, SI 2007/2079 s.2

The Concept of "political"

A linked issue is what is meant when we discuss how the courts are or should be political. Judges are often criticised for being over-politicised and that is particularly the case with the ECJ, who are regularly accused of pushing the European Commission's agenda[81]. UK judges will be forced, one way or another, to take their own stance when the UK departs the European Union: either by refusing to follow some of the more inventive decisions of the ECJ, or accepting it as a legitimate arbiter of EU-derived law which remains on the UK statute books. To help understand the nature of this challenge, it is important to recognise that the word "political" has at least six commonly used meanings, which ought to be separated and defined for the purposes of a proper analysis. In the first three meanings, the judiciary are undoubtedly political, but in a way which is uncontroversial:

1. In the most general sense, "political" can mean merely *'Part of the political system'*, which makes judges political insofar as they are instruments for enforcing law.
2. In a more specific sense, "political" can mean *'Decisions mak*[ing] *a difference to the allocation of power, liberty, and resources in society'*. Judges do this every day, whether determining obligations under a contract or allocating the custody of children.
3. Politics also has a social dimension, of the type Aristotle was interested in when he said *'man is a political animal'*[82]. We are by nature social creatures; *'Involved directly in political interaction with others'*. The legal profession, like all others, has its own distinct social structure.

When critics like Lord Sumption[83], however, speak of over-politicisation of the judiciary, they tend to have the following meanings in mind:

4. Political can also mean taking a view on the ideological spectrum: *'Biased towards one side or another in a partisan dispute'*[84]. Bias can be acceptable for politicians, but it is not acceptable for the judicial branch of government.
5. Political can also more generally refer to what motivates us: *'Consciously motivated by ideological or moral beliefs'*[85]. This is also acceptable for politicians, and although morality and ideology underpin the common law, it is generally thought that judges should be reluctant to apply their own moral standards of beliefs to the law. Lord Neuberger has also discussed an "unconscious bias" to which the judiciary are susceptible and this also might be included in this meaning[86], although unconscious bias is probably undesirable in politicians as well.
6. Finally, political can mean the sort of self-centred ambition which sceptics attribute to many politicians: *'Motivated by ambition or the desire to stay in office'*[87]. Ambition for its own sake is criticised in politicians and judges alike.

Type (6) is clearly not acceptable, whether for politicians or judges. The problem with (4) and (5) is that, when they are engaged, judges must be careful not to make decisions which are controversial or rely on an ideology which a large number of people would find unacceptable. Otherwise they are straying into dangerous politicisation, where they are making decisions that should properly fall to an elected body like Parliament. Decisions like how to decide when ECJ rulings should be taken into account must by their very nature involve type (4) and (5) judgement and therefore this paper argues that, particularly because public opinion is divided on the role of the ECJ in the future, Parliament has a duty to provide the courts with guidance on these kinds of issues where possible.

[81] See, for example, Benjamin Werner, 'Why is the Court of Justice of the European Union accepted?' (*Institute for Intercultural and International Studies, University of Berman* 2015) <link> pp. 1, 16 & 17

[82] Aristotle, *Politics* translated by H. Rackham (Harvard University Press 1944) Book 1 section 1253a

[83] Lord Sumption, 'The Limits of Law' (*Supreme Court*, 20 November 2013) <link>

[84] See Professor Jeremy Waldron, *The Law: Theory and Practice in British Politics* (Routledge 1990) p. 120-122

[85] Ibid. p. 120-122

[86] Lord Neuberger, 'Fairness in the courts: the best we can do' (*Supreme Court*, 2015) <link> p. 7

[87] Ibid. p. 120-122

Solutions within the existing legal framework

Supplementing the Taylor Review

There are two ways that Parliament may restrict its ability to amend UK employment law after Brexit. The first would be to accept the Directive in full, with the case law of the ECJ (whether or not handed down by an intermediary like the EFTA court). For example, Norway is subject to the Directive by way of the EFTA court and in practice the EFTA court follows the decisions of the ECJ[88,89]. This could well involve remaining a member of the single market in its entirety. A second option is the one endorsed by Theresa May in her recent Mansion House speech, which is now spoken of as "managed divergence" – maintaining EU law in its current form, *perhaps* mirroring future EU legal developments, but diverging on a case-by-case basis subject to adjudication by an arbitration panel, where divergence will only be permitted without negative consequences where they do not provide the UK with an unfair competitive advantage[90]. Managed divergence will require careful negotiation to work effectively; one significant issue could be if the EU seeks to penalize the UK for its contentious opt-out from the 48-hour working week, which is currently permissible for the UK under the Directive and has long been thought to provide the UK economy with a competitive advantage[91].

The Review proceeded under the unspoken assumption that the EU legal framework will not change in the short to medium term and this section will consider additional changes which might be made in this spirit, under the legal structure of the Directive. This section will consider additional changes which might be made under the legal structure of the Directive. Since the Directive focusses largely on outcomes, rather than processes, most proposals in this area are process-driven and focus on improving transparency, enforceability and efficiency rather than looking to amend the underlying substantive law.

1. Create consistency in the way "a week's pay" is calculated

As noted above, as a result of the holiday pay case law, holiday pay is now calculated in a very different way to a number of other statutory rights. It is arbitrary and therefore unjust that commission and overtime is taken into account when calculating a holiday entitlements, but excluded when calculating a successful claimant's quantum in unfair dismissal claims (where s.234 ERA still applies)[92]. Interestingly this is not the case for all other statutory entitlements: payments in respect of shared parental leave are already calculated using a worker's total Class I NIC taxable income and thereby indirectly include commission, overtime and other payments[93]. This paper recommends that all statutory entitlements to pay should be calculated using the same mechanism, so long as it is reasonably possible to do so. Looking at national insurance contributions is a useful way to establish a person's total income for this purpose.

2. Consider the availability of criminal prosecution and sanctions

The Review proposed that HMRC should be empowered to enforce rights like sick leave and holiday pay in addition to their powers to investigate and enforce the minimum wage and maternity pay[94]. This would be a welcome change, so long as HMRC is sufficiently resourced and organised to perform this expanded function. In addition, it would be useful if criminal sanctions were made available against employers for particularly flagrant breaches of legislation which were either done with intent or caused unusual hardship for victims. Non-payment of the minimum wage is a criminal offence, and it would make sense for similar sanctions to apply to other important rights which the HMRC is to be given the power

[88] Agreement on the European Economic Area [1994] OJ L 1, Main Part, Part V 'Horizontal Provisions Relevant to the Four Freedoms' Chapter 1 Article 67 (1)

[89] 'Introduction to the EFTA Court' (*EFTA*, undated) <link>

[90] Theresa May, 'Our Future Partnership' (*The Spectator,* 2 March 2018) <link>

[91] 'Britain keeps working hours opt-out' (*The Guardian,* 2 June 2006) <link>

[92] 'How Tribunals Calculate Compensation' (*Steen & Co. Employment Solicitors* undated) <link>

[93] See 'Statutory Maternity Pay: manually calculate your employee's payments' (*HM Revenue & Customs* 2018) <link>

[94] 'Good Work: The Taylor Review of Modern Working Practices' (*BEIS,* 2017) <link> p. 59

and responsibility to pursue. As discussed above, non-payment of holiday pay has been a criminal offence in Portugal for some time.

3. Create a statutory regime to protect the self-employed

The self-employed made up 15.1% of the UK labour force in 2017, some 4.8 million people, up from 12% in 2001[95]. Many self-employed people do not benefit from the protections of the Directive, although these statistics do not indicate the number of self-employed people who do qualify as "workers" under the current legislation. Self-employment is difficult to regulate, and by imposing statutory restrictions many people and businesses would complain that their right to work as they wish had been disrupted. However, changes are possible which might not unduly burden this growing sector of the economy, which has millions of low earners who are currently vulnerable to exploitation. One recommendation of the Review which the government did not accept, and one which proved politically contentious in the Autumn 2017 budget, was to move national insurance contributions closer to parity as between the employed and self-employed [96]; national insurance contributions are currently more than twice as high for a worker who is an employee on a salary of £15,000 if employer contributions are factored in[97]. This paper suggests that this reform may be more politically palatable if it is combined with a move to strengthen rights for the self-employed, by for example offering a reduced rate of national insurance contributions if the self-employed take at least 5.6 weeks' holiday a year and providing a scheme for the self-employed to claim statutory sick pay if they become unwell. These reforms would have three important benefits: (i) improving social security protections for the self-employed, (ii) providing incentives and resources for the self-employed to have safer and better-quality working patterns and (iii) making an important inroad toward equal tax treatment of the employed and self-employed. Some employers, like those in the construction industry, have sought to dilute employment protection and make tax savings by framing employment as self-employment and this change would dilute the financial incetives to do this. Tax savings under the current system can amount to millions of pounds[98].

4. Provide workers a statutory right to choose when to take their annual leave

As discussed above in the case of *Russell v Transoceanic International Resources Ltd*[99], the Directive does not prevent employers from requiring annual leave to be taken in specified periods. Currently, the only requirement is for the employer to provide oral or written notice of at least the period of leave – so an employee being required to take two days' leave might be asked to do this on only two days' notice. EU law already recognises that the quality of rest matters when it comes to maternity leave. In *Merino Gomez v Continental Industrias deal Caucho SA* [2005][100] on the accumulation of maternity pay the court indicated that relaxation and leisure were at the heart of annual leave, '*It is significant… that the [D]irective also embodies the rule that a worker must normally be entitled to actual rest*'. The UK has an opportunity to enhance annual leave and employment standards by introducing a requirement for businesses to accept leave requests unless it is reasonable not to, and providing sufficient notice for workers to make arrangements to actually rest during their leave – whether that is to manage family life or go on holiday.

5. Reform the employment tribunal system

The recent decision of the Supreme Court in *Unison v Lord Chancellor* [2017][101] has compelled the government to revisit its employment tribunal fees policy. Although not yet clear what approach the government will take, some comments can be made on what kind of developments would be positive. First, employment tribunal fees were introduced to help create a user-pays principle, and reduce the cost of justice on the state. Instead of charging irrecoverable fees at the outset of an action, this paper suggests the UK should move towards a model where wrongdoer employers are required to contribute to the cost of hearing cases. This would fit neatly with the Review's proposals to improve the recovery of tribunal

[95] 'Trends in self-employment in the UK' (*ONS,* 2018) <link>

[96] 'Good Work: A Response to the Taylor Review of Working Practices' (*BEIS,* 2018) <link> p. 64 & 65

[97] Tom West, 'Should self-employed workers pay more National Insurance?' (*Crunch*, 2017) <link>

[98] Jill Insley, ''Self-employment' switch saves construction industry millions in tax' (*The Guardian*, 3 December 2012) <link>

[99] *Russell and others v Transocean International Resources Limited and others (Scotland)* [2011] UKSC 57

[100] Case C-342/01 *Merino Gomez v Continental Industrias deal Caucho SA* [2004] ECR I-2605

[101] UKSC 51

awards, and provide the state with its own cost incentive to pursue companies which fail to pay. The removal of tribunal fees has already driven an encouraging rise in the number of cases being heard by the tribunal[102].

Options with full legislative freedom

Alternative Proposals for Reform

So long as the UK remains subject to European Union employment law, it will remain exposed to the following criticism made by Mummery LJ in *NHS Leeds v Larner* [2012], a case focused on the effects of long term sick leave on annual leave:

'The surfacing of new angles on Article 7 in the ascending levels of decision in this case and the steady succession of references to the Court of Justice for rulings on its interpretation make me nervous about offering judicial guidance, which may not be of much enduring use or value in practice. Any guidance given may become outdated in quite a short time. The best that the court can do in the circumstances is to share, in its judgments, its current understanding of the law on aspects of annual leave that can be gained from the judgments… from the excellent arguments on this appeal and from reading and re-reading the key passages in the authorities cited and discussed in argument'[103]

This section explores options available if the UK has full freedom of action after Brexit, and will proceeds on the assumption there are no restrictions imposed by foreign policy considerations on what the UK can and cannot do in relation to employment rights in its own domestic agenda.

1. Distinguish between small and large employers

One area of difference between employment law and other policy areas is that employment law makes no distinction between small and large employers. Research indicates that small businesses suffer a relatively larger burden from employment regulation than their larger peers. For example, smaller businesses tend to have fewer formal employment arrangements and they are anxious about litigation[104]. Smaller businesses are already excepted from a number of obligations by their larger

[102] 'A return to justice: thanks to UNISON' (*UNISON,* 7 February 2018) <link>

[103] *NHS Leeds v Larner* [2012] EWCA Civ 1034 at paragraph [77]

[104] E Jordan, A P Thomas, K W Kitching, R A Blackburn, *Employment Regulation. Part A: Employer Perceptions and the Impact of Employment Regulation* (*BIS*, Employment Relations Research Series No 123, 2013) p. iii

competitors, for example Small Business Rate Relief[105]. This relief was more than doubled in April 2016, saving 600,000 small businesses an average of £6,000 and demonstrating the government's priority for relieving financial burdens from SMEs[106]. Smaller businesses are also not subject to VAT, until their turnover reaches £83,000 in a twelve-month period[107]. Workers' rights may be more important than tax incentives, but some rights are more fundamental than others and this creates a political issue of type (5), because certain ideological judgments are then necessary about the place of SMEs in the economy, the value of certain holiday rights, and their costs. By failing to directly address the issue the ECJ has not been able to avoid making decisions with type (5) repercussions. When drafting law, omission of important factors can cause a myriad of problems. The status of SMEs as engines of the UK economy has become a political touchstone[108], and the ECJ's failure to allow member states to shape holiday pay arrangements for small employers is a reason that politicians like Priti Patel advocated to leave the EU:

'Just think of how much more success our economy could have if we had the power to reduce the burden of red tape and replace pointless EU rules with sensible domestic regulation…. If we vote to leave, those opportunities arise. But a vote to remain will be a green light to further centralisation and harmonisation'[109]

There is no evidence to indicate that the ECJ had SME-focused empirical analyses to hand or took into account these considerations before handing down its holiday pay judgments. The UK government's EHRC helpline, which dealt with 40,000 requests for advice a year from small businesses, has been cut as part of the government's deficit reduction measures[110]. Holiday pay requirements that substantially increase red tape without meaningful democratic oversight may undermine the policies of the UK's elected government. Perhaps this element of the regime can be improved in the future. It is important to recognise this paper is only analysing EU "red tape" in the context of employment policy and for a full view it would be wise to consider other areas of EU intervention as well.

Distinguishing between SMEs and larger businesses is nothing new for the Conservative Party. The 1979 manifesto included the following commitment: 'We shall amend laws such as the Employment Protection Act where they damage smaller businesses-and larger ones too-and actually prevent the creation of jobs'[111]. This attitude continues to this day; for example, Modern Slavery Statements are only required for businesses with more than £36m annual turnover[112]. In practice this policy could mean imposing a fee for companies to defend an employment tribunal claim, which fees scaled based on the turnover of the company – to represent the fact that larger companies will have larger human resource functions and should generally be better placed to avoid claims. Another option could be to widen the scope of the '*reasonably practicable defence'* contained in s.2(1) of the Health and Safety at Work Act 1974 to include employment rights. This defence, in the health and safety context, has been challenged and upheld at EU level, and such a provision might provide the flexibility which smaller businesses in particular require[113]. If this defence was made available by statute to the calculation of holiday pay, businesses could avoid liability by demonstrating they had taken all reasonable steps to calculate pay correctly and this might favour SMEs who have less resources available[114].

2. Distinguish between lower and higher earners

In addition to developing a system which treats different kinds of employers differently, changes could be

[105] See Matthew Ward and Chris Rose, 'Small Businesses and the UK Economy' *Economic Policy and Statistics* (2014) House of Commons Library ref. SN/EP/6078 p. 4

[106] 'Chancellor 'more than doubles' small business rate relief' (*ITV News live blog,* 1:09pm 16 March 2016) <link>

[107] 'VAT Registration' (*HM Government* 16 April 2016) <link>

[108] For example, see 'The Plan for Growth' (*Department for Business, Innovation and Skills* and *HM Treasury,* 2011) <link>

[109] Emma Clark, 'Brexit would boost UK economy by £4.3bn claims Patel' (*Belfast Telegraph,* 18 May 2016) <link>

[110] Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government', *Industrial Law Journal* (2013) 42 (3): 203-223 <link> p. 6

[111] <https://www.margaretthatcher.org/document/110858> accessed on 18 February 2018

[112] 'Transparency in Supply Chains etc. A practical guide' (*Home Office*, 2017) <link> p. 5

[113] See Case C-127-05 *European Commission v United Kingdom* (2007) ECR I-04619

[114] Rachel Moore, (ed.), *Encyclopaedia of Health and Safety at Work Law and Practice* (Moore, Walters Kluwer (UK) Ltd. 2016) at paragraph G2-011

introduced to treat different kinds of workers differently. One of the arguments put forward in the pending *Pimlico Plumbers*[115] case is that it is bizarre to conclude someone had not been given enough holiday pay when their annual income significantly exceeds £100,000 p.a.. The right to holiday pay was introduced to ensure workers take their holiday, but with an income over £100,000 a worker has more choice and bargaining power on the terms and conditions of employment. If some employment rights, like the right to paid holiday, are removed for workers earning over a high amount like additional rate taxpayers or those earning over £100,000 a year this might send an important signal that employment rights are there to protect those who truly need them.

3. Reintroduce Rolled-Up Holiday Pay

The Review considered rolled-up holiday pay, an old idea that employers should be able to roll payments holiday into a worker's remuneration rather than making payments specifically when workers take their holiday, but perhaps due to ECJ rulings on the issue the Response concluded reform here is not anticipated[116]. The ECJ decided that rolling up pay was not a permissible way of paying holiday in the mid-2000s and for workers the issue had been put to one side since then[117]. However, the issue remains alive in relation to agency workers, who are not "workers" within the scope of the Directive: *Kocur v Angard* [2018][118] at paragraphs [27] and [28]. In *Kocur*, the EAT held that rolled-up holiday pay is acceptable for agency workers so long as it is calculated in a transparent way. Rolled-up holiday pay can have huge benefits, such as when casual workers contracted for only a few hours' a week, or part-time workers, may not necessarily want or need to take paid leave and would prefer instead to receive a higher rate of pay per hour. With the number of people in flexible and part-time employment on the rise, the odd restriction on rolled-up holiday pay looks increasingly out of date.

Conclusion

A Risk and an Opportunity

Employment policy can be costly: the holiday pay decision in *Stringer*[119] alone is estimated to have cost the UK economy £100m[120] per year. This could be shortly subject to a one-off, upward revision, because the ECJ in *King v The Sash Window Workshop Ltd*[121] recently held that workers must be able to claim for unpaid or underpaid holiday even if it predates statutory limitation periods, which on the facts went back to 1999. Similarly, the number of affected parties could hardly be larger: in June 2016, there are 31.05 million people in work in the United Kingdom, of which 26.69 million are employees and 4.70 million are self-employed[122]. In cases affected by the "holiday pay saga" the effects may be very significant for some: in *Lock*[123], annual remuneration was comprised of 60% commission and the decision amounted to an approximate 5% annual salary increase[124]. The decision is likely to have increased the pay packet of every worker who receives commission or overtime. It could also undermine salary arrangements in a less obvious way: it has the effect of inflating public-sector wages, which were subject to a pay rise cap of 1% until at least 2018[125]. Per a 2014 UK government study of the Directive, businesses' largest concern with the Directive, by some way, is the ambiguous and shifting case law[126]. If the UK commits to follow ECJ jurisprudence in this area after Brexit, it is difficult to see this problem going away, although clear

[115] *Pimlico Plumbers Ltd and another v Smith* UKSC 2017/0053

[116] 'Good Work: A Response to the Taylor Review of Working Practices' (*BEIS,* 2018) <link> p.34

[117] *Caulfield v Hanson Clay Products Ltd* [2006] [ECJ case ref]

[118] UKEAT/0181/17

[119] Joined Cases C-350/06 and C-520/06 *Gerhard Schultz-Hoff v Deutsche Rentenversicherung Bund and Stringer and Others v Her Majesty's Revenue and Customs* [2009] I-00179 (CJEU)

[120] 'The Impact of the Working Time Regulations on the UK Labour Market: A Review of Evidence' (*Department for Business, Industry and Skills*, 2014) <link> p. 65

[121] [2017] C-214/6

[122] 'UK Labour Market: June 2016' *Office for National Statistics* 15 June 2016 <link>

[123] *Lock and Others v British Gas Trading Limited and others* [2015] I.R.L.R. 438 (ET)

[124] There is an entitlement to 20 days, or 4 weeks, of annual leave under the Directive. If we assume 4 weeks = 1 month, then 60% divided by 12 equals 5%

[125] Holly Watt, 'Public sector workers 'should not necessarily expect 1% pay rise' (The Guardian, 25 August 2015) <link>

[126] 'The Impact of the Working Time Regulations on the UK Labour Market: A Review of Evidence' (*Department for Business, Industry and Skills*, 2014) <link> p. 66

guidance and communication from BEIS and other government departments could help ameliorate uncertainty. This could also be affected by EU initiatives to reform the Directive, in which event the UK will need to be careful to have a say in how the reform is directed. The EU has seriously been considering reform in this area for several years. In 2014-15 the Commission ran a public consultation, intended to provide:

'a comprehensive review of the Working Time Directive. The objective is to analyse what changes to the current legal framework would possibly be needed to arrive at working time rules which best meet the needs of workers, businesses, public services and consumers across the EU'[127]

According to an online poll conducted by *Pay and Benefits* magazine, in response to the question *'Is holiday pay a financial burden for your organisation?'*, 38% of respondents replied *'Yes, it is a big burden'*, 19% *'Yes, it is a moderate burden'* and 44% *'No'*[128]. This straw poll's methodology was not reliable, and perhaps the real question for policymakers should be the extent to which holiday pay is a damaging *administrative* burden, but there is good evidence that a large proportion of UK employers believe that holiday pay has a significant effect on the economy.

Principles for Future Policy Development

The Review concluded with seven specific working themes, summarised as follows:

1. The *quality* and *number* of jobs in the economy should be prioritised equally.
2. Digital platforms provide opportunities, but their users must be safeguarded.
3. The law should encourage good practice and be widely understood.
4. Good corporate governance is generally better than government regulation.
5. Lifelong learning is increasingly important in the workforce.
6. Health in the workplace should be approached more proactively.
7. Strategic, sector-by-sector plans can ensure workers are not just paid at the minimum wage, but above it[129].

These are useful principles for developing future policy, however, there is a risk to taking them in isolation, or the challenge of balancing their benefits against costs. For example, proactive approaches to health in the workplace are often less legally transparent or enforceable than a negative, traditional rules-based system. It is easier to write and enforce a law which specifies minimum levels of personal protective equipment ("PPE") than one which requires health and safety officers to engage proactively and responsibly; a good place to look for an example of a more proactive approach is the Senior Management Regime rules for responsibility in the financial services industry, where because *'The guidance is exactly that; guidance… It is not hard to predict that this will provide fertile ground for disagreement, and ultimately litigation'*[130]. Similarly, there may be a trade-off between the quality of jobs the economy can create and the level of pay available for them. Robust empirical tests, and careful value judgments, are required to decide how best to balance these competing priorities.

If it proves too complicated to employ these tests, or politically difficult to trade off these objectives against each other, this paper suggests the following simpler, clearer metrics for evaluating policy proposals:

1. A policy must enhance economic wealth, and
2. A policy must enhance, clarify, or improve the enforceability of employment rights.

For any policy to be endorsed, it must either satisfy (1) or (2) or both, and not do detriment to the other metric. Such a test would satisfy current political constraints, because there is little appetite to sacrifice employment rights for economic growth or vice-versa. It would also provide a structure for cost-benefit analysis of a kind frequently used by the civil service for evaluating investment options in other departments. Take the Review's principal (4), for example. Metrics (1) and (2) provide a useful mechanism to decide when corporate governance is an improvement on government regulation. In some ways, the Review's principles go beyond mere employment policy – for example principle

[127] Ibid., p.1

[128] 'Holiday Pay: The Cost of Holiday' (*Pay & Benefits Magazine*, 30 June 2015) <link>

[129] Matthew Taylor et. al., 'Good Work: the Taylor Review of Modern Working Practices' (*BEIS,* 2017) <link> pp. 110 & 111

[130] Corker Binning, 'One Year On – A Review of the Senior Managers Regime' (*Lexology,* 2017) <link>

(3)'s objective to protect consumer rights. It should be stressed the two metrics proposed by this paper are appropriate only for the formulation of employment policy and not wider issues concerning consumer rights or the stability of the financial sector.

Across the board, the UK has been consistently improving its performance in these areas over time. For example, as the coalition government concluded in 2014:

'The available data suggests that the UK has an excellent workplace health and safety record, which has been improving consistently over time... the number and rate of workplace injuries has been broadly declining over the last twenty years. Given the long-term steady decline in workplace fatalities, it seems unlikely that this can be attributed to the impact of the introduction of the [Directive] in 1998, although an effect cannot be ruled out. It seems more likely that the decline can be attributed to increased awareness of health and safety at work, as well as changes in the composition of the labour market, with fewer workers exposed to physical risks'[131]

However, there is certainly more to be done, and as perspectives of health and safety are expanding to include other factors like mental health and increasingly looking at measures of life satisfaction more generally, it will be important to maintain the momentum already built into the next decade.

The EU (Withdrawal) Bill and Judicial Guidance

Clause 6(2) of the draft European Union (Withdrawal) Bill (the "Bill") provides that:

'A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so'[132]

As already noted, the UK may commit to retain some or all EU-derived legislation and remain influenced by ECJ decisions in that regard. However, if full legislative freedom is obtained in this area, or if the UK will have a degree of flexibility when applying or modifying EU rules, clause 6(2) will prove pivotal in how UK courts and tribunals apply future ECJ decisions to UK employment law.

Clause 6(2), and in particular the undefined term "appropriate", would create uncertainties and create challenges for courts and tribunals on employment law issues in particular. The "holiday pay saga" is continuing, as is tension in other areas of the Directive, and there is no clear or obvious answer when it is "appropriate" to follow the ECJ and when it is not, or when "relevant" decisions ought to be followed. This paper therefore recommends that a list of factors is drawn up and, either as part of the Bill or complementary to it over the coming years, is implemented to provide courts and parties with greater clarity on when it will be appropriate to be influenced by ECJ decisions and the test the courts ought to apply.

It is submitted this list should include at least the following principles:

1. A preference for literal, rather than purposive, legal interpretations. It is a tradition of the English legal system that laws are construed narrowly, to retain their clarity, and it is Parliament's role to expand or modify them if they are unclear. UK courts have historically attempted to take this position with regards to the directive, for example Auld LJ in *Bamsey*[133].
2. A preference for analytical reasoning, which does not engage in types (4) – (6) "political" decision-making. This could, amongst other things, change the way subsidiarity is viewed in the UK court system.
3. A preference for the status quo, unless persuasive arguments are put forward, so that if the ECJ makes peculiar or surprising decisions the UK courts and tribunals will not be encouraged to follow them.

Concluding thoughts

Employment law and policy should be clear, transparent and fair to safeguard employees and enable good and well managed companies to comply without fear of arbitrary or unpredictable costs or risks.

[131] 'The Impact of the Working Time Regulations on the UK Labour Market: A Review of Evidence' (*Department for Business, Industry and Skills*, 2014) <link> p. 66

[132] European Union (Withdrawal) Bill, Clause 6.2 <link>

[133] Auld LJ in *Bamsey and others v Albon Engineering and Manufacturing plc* [2004] EWCA Civ 359 at paragraph [36]

The Review is an important statement of intent. It usefully identifies a number of reforms which have the potential to improve the system, including:

- Stronger incentives for companies to pay employment tribunal awards, where results have been poor for some time[134].
- Expanding HMRC's role, to empower it to require firms to provide holiday pay, sick leave and other benefits. This change has been recommended for some time[135].

Employment law is an important tool for improving the UK's historically poor productivity, but it can only be part of the picture. Most employment laws, like the Directive, apply across all sectors, but productivity itself is very varied across different parts of the economy; for example, manufacturing productivity is currently at around 2007 levels but in the services industry it has increased by more than 10%[136]. Although some aspects of employment law are likely to have a disproportionate impact on some sectors over others, it can be difficult to see a link between the two in the statistics.

One further question, which there is enough material on to merit a paper on its own, is the status and relevant of trade unions and other collective arrangements to working conditions and rights. On the one hand, trade union membership by its nature only provides strong protection to their members, and sectors of the economy which are not fertile for unionisation will inevitably lag behind if unions are given too much responsibility. For example, employees in businesses with fewer than 50 employees are approximately 50% less likely to be union members than those with 50 or above[137]. 13.9% of private sector employees are unionised, but 54.8% of public sector employees are[138]. On the other hand, unions have played an important role in challenging employment policy, like leading the way in the challenge on employment tribunal fees. The very nature of unions makes them partisan: they are the Labour party's largest donors[139] and with this kind of partisanship it is difficult to see how members supporting other political parties do not feel left behind or left out. Perhaps the way forward is to enable the creation of "public benefit" unions, whose role is to enforce employment rights on their members' behalves and help with transparency on rights in the labour market whilst not engaging in less relevant and potentially damaging political activism. In other works, staying with political types (1) – (3) and generally not verging into (3) – (6).

[134] 'Payment of Tribunal Awards' (*BEIS,* 2013) <link>

[135] Tristan Honeyborne, 'Limiting the Limitless: What remuneration, if any, should be excluded when calculating the entitlement of a worker to holiday pay?' (*Academia*, 2016) <link> pp. 59 & 60

[136] 'Statistical Bulletin: Labour productivity, UK: July to September 2017' (ONS, 5 January 2018) <link>

[137] 'Trade Union Membership 2015: Statistical Bulletin' (*BIS,* 2015) <link>

[138] 'Trade Union Membership 2015: Statistical Bulletin' (*Department for Business, industry & Skills* 2015) <link> p. 3

[139] 'Donations and loans reported every quarter by political parties' (*The Electoral Commission*, 2018) <link>