

Ninth Meeting of European Labour Court Judges

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THE ROLE OF LABOUR COURT JUDGES IN THE IMPLEMENTATION OF SOCIAL POLICIES

Questionnaire

**General Reporter: Judge Stephen Adler, President
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1 Labour Court Judges and Social Policy

a) In what areas do judgments of your or other courts in your country pertain to social policy by either implementing or creating policies?

Possible areas:	Yes	No
- freedom of association	☐	☐
- collective bargaining	☐	☐
- strikes	☐	☐
- prevention of collective conflicts	☐	☐
- equality at the work place	☐	☐
- the definition of "employee"	☐	☐
- the definition of who is the "employer" of people performing certain types of work	☐	☐
- the application of labour law to irregular, disguised, or ambiguous working relationships	☐	☐
- education or occupational training	☐	☐
- freedom of occupation and non-competition clauses	☐	☐
- work safety	☐	☐
- protection of vulnerable groups (such as unskilled people, foreign workers, disabled people, etc).	☐	☐
- other (please describe)		

It is important to recognise that the UK labour court system (ETs and EAT) is mainly confined to applying statutory provisions to individual employment disputes. Collective areas

are, with the limited exception of collective redundancy rights and the CAC (see below) dealt with in the ordinary civil courts.

Thus, of the possible areas listed, freedom of association (with one exception – see (c) below) collective bargaining, strikes, prevention of collective conflicts, freedom of occupation and non-competition clauses and work safety are the province of the civil courts. These concepts are largely developed through judge-made (common law) law, subject to the statutory definition of trade disputes which must be interpreted by the Judges when dealing with attempts to restrain strike or other industrial action.

The statutory regime operated by our LCs covers equality at the work place, the definition of “employee”, “employer”, and the application of labour law to ambiguous working relationships. The opportunity for creating policies is limited; our task is to implement policies laid down by Parliament by statute, subject to EC labour law.

Education or occupational training is not an area covered by LCs.

b) What has been, in general, the contribution of the labour courts in your country to the development of social policy? (Please see under (c) before answering this.)

There is limited scope for a contribution by LC judges to the development of social policy, which is determined by Parliament and the EEC. Occasionally, in construing a statutory provision, the court will point out to the legislature anomalies and problems to be corrected by the legislature and not the court.

c) Relating specifically to freedom of association, what has been the labour courts' role in developing and/or implementing your country's social policy?

As indicated under (a) above, this aspect arises mainly in civil litigation; not before LCs. Further, collective agreements are almost never legally enforceable in the UK as between union and employer. Their terms will only be enforceable at the suit of individual employees where those terms are incorporated, expressly or impliedly or by common usage, into their contracts of employment made with their employer.

The exception is the statutory right of employees to belong to a trade union and take part in its activities. Action short of dismissal or dismissal by reason of union membership / activities is outlawed by statute and protection for those victimised in this way is through the LC. Again, the role of LC is to interpret and apply the statutory protection to the facts of individual's cases; not to create social policy.

d) Describe briefly some labour court judgments which have implemented or determined social policy; if possible, relating to freedom of association, including the protection or encouragement of trade unions and collective agreements.

See above. In addition, independent trade unions may seek compulsory recognition from employers through the machinery of the Central Arbitration Committee (CAC), whose powers derive from TULR (C) Act 1992 as inserted by *Employment Relations Act 1999*. The CAC is the only labour court in the UK charged with regulating collective arrangements.

e) Have there been instances in which labour court decisions relating to social policy have been incorporated into statutes, changed by statutes, or adopted

by the general courts?

- (i) Following observations by LC statutory provisions have been altered. This particularly follows a relevant ECJ decision on the effect of the EC law, then translated into domestic statutory reform.
- (ii) Legislation is occasionally passed specifically to reverse a court decision on the interpretation of a statutory provision. An example occurred to me when in practise at the bar. The Court of Appeal decision in *ABP v Palmer; Association Newspapers Ltd v Wilson* [1994] ICR 97, on the meaning of action short of dismissal for trade union activities was effectively reversed by statute, involving an amendment to the Trade Union Reform and Employment Rights Bill, then going through Parliament, before the appeal in those cases reached the Judicial Committee of the House of Lords [1995] ICR 406.
- (iii) The implied term of mutual trust and confidence, developed by the LCs in the context of constructive dismissal in unfair dismissal cases, has been adopted by the House of Lords in *Malik v BCCI* [1997] IRLR 462 as giving a potential right to “stigma” damages. The LC interpretation of the statutory compensation provisions for unfair dismissal has also been considered by the House of Lords in the common law damages claim *Johnson v Unisys Ltd* [2001] IRLR 279.

f) Is there a connection between social policy and social justice in labour court judgments? Please explain.

This question is not understood.

In the UK it is for Parliament to reflect social policy and justice in the legislation which LC implements. It is not for the judges to impose their own values where they conflict.

2 Labour Court Judges and Access to Justice

- a) What has been the contribution of the labour courts in your country to effectively ensuring the appearance before the judge on truly equal terms for all parties involved? To what extent is this contribution related to aspects such as cost (for instance, exemption from certain court costs for the financially weaker party); the possibility for workers to receive professional assistance by a lawyer or to be represented by other experts (for free?); the possibility for trade unions to appear in court (on their own behalf, as representatives of their members, and under what conditions if any); and the burden of proof?**

Parties, particularly applicants (claimants) frequently appear unrepresented in ETs. Whilst the adversarial system applies, ET chairmen are skilled in assisting unrepresented litigants to present their cases effectively and to the point.

Until now costs can only be awarded in exceptional cases, where a party has acted frivolously, vexatiously, abusively (in the conduct of the proceedings) or otherwise unreasonably. However, the current Employment Bill now passing through Parliament envisages costs following the event and greater costs penalties to unsuccessful parties. There is no legal aid available for representation before ETs and very limited scope in EAT.

Parties may be represented by anyone; trade union officials, lawyers, self-styled “Employment Consultants” or by a friend.

There is some pro bono representation. Before the ET by the Free Representation Unit (FRU) and at the EAT under the ELAAS scheme, which provides barristers and solicitor advocates to represent appellants free of charge at Preliminary Hearings where the respondent is not present, at which the question is whether the appeal discloses an arguable point or points of law which ought to proceed to a full appeal hearing with both parties present.

- b) In what manner and to what extent is the labour court able to reconcile careful analysis leading to well-founded and impartial rulings, with the need, strongly felt in the area of labour law and social protection, for a rapid delivery of judgements? (This may include a discussion of issues such as the use of new technologies; “out-sourcing” of certain tasks (formerly) performed by judges; shortening of deadlines; oral procedures.)**

It is to be hoped that all judgments are impartial! ET chairmen are encouraged to deliver oral judgments at the end of the hearing whenever possible. Most EAT judgments are similarly given orally; only the difficult ones are reserved. There is no outsourcing. Each LC judge or chairman is solely responsible for producing the judgment in the case.

- c) Do you consider, in this regard, that the requirement of an efficient labour court raises the question for the judge to also develop personal managerial qualities?**

Increasingly the ET chairmen are being required to “case manage” in order to ensure the efficient and expeditious disposal of cases. This is in line with the Woolf reforms to the civil justice system, focusing on proportionality in judicial proceedings, leading to the new CPR – Civil Procedure Rules.

3 Labour Court Status and Social Policies

- a) Is the role of your court, or other courts in your country, limited to the implementation of social policy set in statutes? Or do your court’s judgments include judge-made law regarding social policy?**

The UK labour courts are creatures of statute. Their jurisdiction is confined to implementing social policy set in statutes. We are discouraged, by higher courts, from seeking to create social policy through judge-made law.

- b) In your opinion, should labour courts adopt a role of “judicial activism”, especially relating to judge-made social policy?**

Not under the present system, which relies on the precedent principle.

4 The Judge's Personal Condition and Social Policy

- a) What is the role of individual judges' personal values, philosophy and outlook on life in their judgments? What is their role (personal influence) in deciding social policy issues?**

With one or two notable exceptions judges leave their own social and personal values out of account in interpreting the statutory provisions. The principle of impartial and unprejudiced decision-making is paramount.

- b) How do judges learn about social problems, social issues at the workplace and social values? In other words, how are judges trained to deal with social policy?**

Through the experience of lay members with whom we sit. There is no judicial training on social policy in the UK.

- c) Is this adequate in your view, and how should they be trained?**

I do not believe this is a relevant subject for training in view of the UK approach to judging.

5 Lay Judges, Professional Judges and Social Policy

In case your labour courts have professional and lay judges:

- a) What is the role of lay judges (public representatives) in implementing and making social policy and deciding issues relating to social policy?**

The lay members of ET and EAT play an important role in deciding cases as a matter of industrial practice and common sense. They, like the judges, do not decide social policy.

- b) What is the lay judges' contribution to the judgement itself, if any? (Would they be able to overrule the professional judge, for example?)**

The lay members can and do overrule the professional judge/chairman. At the EAT, where only questions of law are considered, majority decisions by the lay members rarely survive an appeal to C.A.!

- c) Are the perspectives and ideas of lay judges on social policy different than those of the professional judges?**

The strength of our system is that although the judge and each lay member may have different perspectives, usually a consensus is reached, drawing on all of the collective experience and outlooks.

- d) Are there any patterns in the way lay judges decide on matters relating to social policy? For example, do lay judges representative of labour usually vote to implement social rights while lay judges representative of management vote to oppose them?**

Absolutely not. The lay members are not delegates but judges. The instances of divided decisions are rare. Indeed, a trade union member will often be harder on an unmeritorious employee than his employer-side colleague and vice-versa in the case of an employer who has failed to follow good industrial relations practice.