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Social Exclusion – Pathways or Roadblocks? An Analysis of Advisory Agencies

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(Heading) **Summary**

This article investigates the work of advisory agencies in a region of the UK and how these agencies aid individuals in accessing their employment rights. Organisations, including the Department of Constitutional Affairs, have identified the intrinsic link between access to justice and the role of not-for-profit and trades unions advice agencies, and how workers in particular require assistance to enforce and secure their employment rights. An empirical study was undertaken to establish the roles performed by these agencies in the areas of employment and European Union rights, and the factors which may influence the agencies' opportunities to advise in these dynamic areas. The article concludes that the advisers and the agencies provide a valuable service for workers in ensuring workers have access to their employment rights; they are however restricted due to lack of funding and opportunities for research. This ultimately results in many workers being excluded from important employment protections and therefore a mechanism to ensure access is required to facilitate inclusion in rights' protection.

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(Heading) 1 - Introduction

It is a fact that many workers in the UK do not have an awareness of many protective employment laws (Meager et al. 2002) and hence require and receive assistance in the pursuit of rights through various advisory agencies.¹ Without organisations providing accessible legal advice which is timely and correct, individuals do not have access to justice. Civil justice enables individuals to the protection they are afforded without incurring costs which may dissuade actions, and is required to be available both geographically and judiciously. Individuals require the means to source advice, and have these rights exercised by competent and informed advocates. Such assistance is provided through various advice agencies including Citizens Advice Bureaux (CABx), Law Centres and trades unions which enable advice and representation to be provided, especially for workers without available funds to pursue their rights through retained lawyers. This article presents empirical evidence from four case study organisations which offer advice to workers in a region of the UK. These organisations were identified by workers in a wider study (Marson 2002; 2004a) as being agencies which would be sourced for advice on European Union (EU) employment matters and were free to access (not for profit) or available on a subscription basis. The research project identified that workers need assistance in accessing their rights (due to their acknowledged lack of awareness of many employment rights), that they place great faith in their advisers, and the advisers play an important role in informing the workers of their rights and supporting them to litigation (Marson 2002). Evidence was gathered from advisers who were selected from the same region as the respondent workers so as to gain an insight of the actual advice which workers receive, rather than a hypothetical or 'best practice' view which may not truly reflect the experience of the workers.

This study was not undertaken to question the effectiveness of trades unions, CABx, the Trades Union Congress (TUC) and the Equal Opportunities Commission (EOC) which each help to advance the rights of workers. Rather the use of advisory agencies in the same locale as the workers will demonstrate how an identifiable group of workers are advised and how effective the advice agencies are in protecting rights. These advice agencies are a major component in the civil justice process and their impact and effectiveness for workers wishing to assert EU law rights is vital for access to justice and requires investigation. EU employment laws were focused upon due to the potential problem of having two sources of protection and legislation (EU and domestic) and because many employment laws are derived or influenced by the UK's membership of the EU.

Article 10 EC of the Treaty² instructs to the Member States their obligation to fulfil the provisions of EU law and, as many EU employment laws originate in the form of Directives, it further requires the Member State to completely implement those provisions, and to do so by the prescribed date (as required under Article 249 EC). The UK is just one Member State which has often failed in this respect, resulting in many workers being denied their rights and enabling the employers in the Member State to obtain an advantage against companies in other Member States which do follow those obligations. A mechanism to ensure the Member State fulfils its obligation and provides access to these rights for workers is for the workers to obtain awareness of their rights and enable these to be enforced in the domestic courts. This is the gap which advisers can fulfil and this article considers how advisers are able to offer this assistance to their clients. This research project was undertaken because the expansion of the EU in 2004 will result in EU laws being even more the responsibility of the Member States; the EU Commission, already overworked, will struggle to continue as the 'Guardian of the Treaty' under this expansion; and the responsibility for enforcing EU rights throughout the EU will rest on those workers and their advisers in their domestic State.³

(Heading) 2 - Research Gap

The term social exclusion is broad and encompasses many social, political and economic elements. In the context of this article it is considered in terms of the welfare of workers, and in particular their access to employment rights. Many employment rights are drafted to create a bare minimum of protection for workers who are often vulnerable due to their skills level; many do not possess the ability to transfer to different employers or between various markets; and the UK Government has a history of strategically repealing protective legislative measures,⁴ and employers have had the ability to exploit their workforce in the 'enterprise economy' (Cave 1994). Research published by Hills, Le Grand and Piachaud (2002) demonstrated the correlation between the neglect of welfare rights at work and labour market inequalities and injustice.

Previous research in the broader examination of social exclusion has included theoretical and conceptual exercises (Singh and Zammit 2004); there have been studies from an international perspective (Hepple 2002); from a European-wide and EU perspective (Meehan 1997, Cook 1997); State-wide studies in the UK (Walker and Walker 1997); studies have also investigated how exclusion has been evidenced on a regional basis (Meegan 2004, Parkinson 1998) and these have led to responses on the issue of exclusion from the UK Government and the EU (Carmichael 2001, Madsen and Munch-Madsen 2001).

This research was conducted because much of the previous research into workers accessing their rights and the influence of advisory agencies was hypothetical or involved large advisory bodies such as the EOC or TUC (Leonard 1986, Gregory 1993). Whilst that was important it did not research the practical

interaction between a group of workers and the advisers in the same locality who would provide the access to employment rights from both a domestic and EU basis, therefore this gap would provide an interesting study as to the role and effect which advisory agencies played in accessing EU rights. The research for this article was qualitatively based and sought to consider in depth the impact which these advisers had for access to rights of the group of workers to this study. As such, the scope of the study is limited to a region of the UK. This is to facilitate a comparison of the advice given and to assess the access to justice of the workers to identify possible limitations to their access of employment rights, and to highlight which advisory agency may provide the most effective access to justice.

(Heading) **3 - Access to Justice**

Access to Justice is considered here as the ability a worker has to obtain the rights which they are afforded under the law. Workers can often be denied such access because of some failure by the State (as found in the transposition of EU laws including the Transfer of Undertakings (Protection of Employment) Regulations 1981⁵ (TUPE) and the Working Time Directive),⁶ or denial of rights by employers, which requires the worker to take action to avail themselves of their rights. Genn (1999) studied access to justice in terms of why people begin legal actions, their decision to seek legal action and broader issues of the mechanisms of dispute resolution, and Meager et al. (2002) have recently considered the knowledge of rights of workers and how this impacts on their accessing employment rights. Meager's work and a more recent study (Marson 2002; 2004a) have discovered that many workers are unaware of important employment rights and as such are largely dependent upon advice provided by various advisory agencies. These advisers are therefore a key link between the worker and their employment law rights, and this requires the advisers to have the skills, resources and availability to fully assist the worker. Consequently the advisory agencies require funding, resources, availability to clients, access to materials and the expertise which will enable them to provide access to justice for the clients. The necessity of not for profit advice agencies has been identified by the Lord Chancellor's Department⁷ which noted "It is no good a person having rights in theory, if they: do not know what those rights are; do not know how to exercise them; or have no idea where to turn for advice if they need expert help enforcing their rights. Without those things, legal rights and justice are illusory."⁸ How these agencies affect the access to justice of a group of workers in the UK will demonstrate their effectiveness and where deficiencies may exist.

(Heading) **4 - Methodology**

A local Citizens Advice Bureau (CAB), the Law Centre in the region and trades unions (Amalgamated Electricians and Engineers Union (AEEU) and the Transport and General Workers (TGWU) Union) identified by the respondent workers involved in the wider study to this research project were included in the

study. Each agency provided respondents who had responsibility for advising clients or members in EU / employment issues and interviews were conducted over two week periods. The respondents were questioned through the use of an in-person, semi-structured interview research instrument. These interviews involved questions regarding the knowledge, training and scope of the advice, preparation and presentation of cases of clients. Face-to-face interviews were used as a qualitative study was required to access complex issues and enable the advisers to provide comprehensive responses. This research project was concerned, in this aspect, with advice to workers and the issues these advisers considered relevant in their ability to provide guidance. The respondents stated that they helped people in the local area either on an advice-only basis or through to representation in tribunals, and they were inclusive of any member of the local community or member of the specific trade union.

The interview questions were designed to provide data which would enable consideration as to whether advisory agencies provide access to, and enforcement of, EU employment laws; the knowledge the advisers had of employment laws and the issues to which workers would seek advice; the knowledge of the rights which workers had when seeking advice; the advisers' use and access to information to ascertain if they used the most relevant and timely information (given the dynamic nature of this form of law); whether the advisers had access to expert legal help or resources (important for non-legally qualified advisers in complex areas of law or issues of enforcement); the funding procedures of the agencies and how this affected access to rights; the availability of training and research time for advisers; and finally the agencies' representation of clients at tribunals.

The mechanism for access to justice is important and hence led to an investigation of those sources of advice and information which would be used by most workers. To this end various bodies were identified as being examples of where workers knew where advice would be available – costs and worker perceptions had been identified in the wider study as an issue, consequently only those advisory bodies which were financially accessible by most workers were included.⁹ All the respondents were from advisory bodies and all were identified as the respondent to whom workers who sought advice with an EU / employment basis would be referred. The respondents were not lawyers but were trained advisers. A response rate of 57%¹⁰ was achieved which enabled the majority of advisory agencies noted by the respondent workers to be included in the study. The agencies included were restricted to those which the workers stated they were aware of so as to establish the impact which advisers had for actual workers in a region of the UK, and to identify the state of advice available to a specific group of workers.

(Heading) 5 - Data Analysis

The responses from the adviser respondents were tabulated and analysed to identify the major themes which affected the provision of advice in the case study region in the UK. The evidence provided was taken from the advisers' perspective, which often included the policies of their various organisations, as this would provide substantiation of how workers would be advised and the practical issues involved in advice for these advisers. This impact began with consideration of the effectiveness of the agencies in assisting clients through their particular employment problem.

(Heading) **5.1 - Effectiveness of Advisory Agencies in Advice**

Effectiveness is a subjective term but is used in this article to address the issue of the advisory agencies providing an holistic, in-depth and reliable service to those workers who seek advice. Previous research has identified the ability to recognise the significant problem experienced by the client and give access to the realistic remedies available (Sefton et al. 1998) as judging effectiveness of advisory agencies. This has been limited in this research to the knowledge of the advisers at the agency who would be providing advice to a client with an employment-based problem; their sources of information or resources they have for ensuring they are aware of the latest developments in the law; their funding; the time available for research; and the availability of expert legal help or referrals which may be required if the worker's claim extends beyond the skills of the adviser or agency.

(Sub-Heading) **5.2 - Knowledge of Advisers**

It is essential that those who offer advice and assistance to workers on claims concerning employment rights should have full knowledge and appreciation of those issues and details of the laws and policies which make up these rights. This is because many individual workers, including those evidenced in the wider research project from which this article derived, did not demonstrate an understanding of their rights or how to advance those rights even when they are aware. The adviser then is a crucial link between the available right and its pursuit or application for workers' protection. The advisers' knowledge of employment laws is an important aspect of this research because, in order to be proactive, the advisers need to be aware of the laws, where these laws are contained, and to have the availability to obtain guidance themselves if this would assist the worker.

Knowledge of laws has been identified as an increasing problem for agencies due to the widening range of laws and regulations, combined with some opinions that it is now impossible for the advisers to keep abreast of the developments in all branches of the law and the specialisation required.¹¹ In terms of the knowledge of the advisers they each demonstrated an awareness of employment laws at a general level¹² and were aware of basic contractual rights, rights relating to working time, minimum wage, discrimination and dismissals. When

they were questioned of their awareness of more complex rights¹³ there was a limitation of the expertise available from the agencies and distinctions were evident between them. The CAB was a generalist bureau and recognised its limitations in advising clients in areas of EU employment matters. The respondent outlined the general areas of employment which they could advise, but if the matter extended beyond this general perspective the agency had a policy of referring the client to the local Law Centre which was equipped to handle more complex cases. The Law Centre itself did offer advice in more complicated areas but was restricted due to lack of opportunities for research, representation at tribunals, and the resources available. At the trades unions the respondents did not have the same problems of resources and funding, however a lack of available time for research into the area was a major factor in the expertise which could be offered. The quantity and depth of the employment laws, both domestically and EU-inspired, coupled with an overall lack of available advisers resulted that often the advisers could not offer expertise in many potentially complex areas of EU employment law.

(Sub-Heading) **5.3 - Awareness of Clients**

The awareness of their rights of the workers who visited advisory agencies for assistance was investigated to assess the level of practical and legal help the worker would need from the advisers. If the worker clients do not possess a depth of awareness of their rights then they are in a position of weakness and are even further dependent upon the advisory agencies to protect them. Many of the workers who sought help did not have a depth of knowledge as may have been expected. In each of the advisers' evidence, the workers had a rudimentary awareness that they had a problem; examples included the workers' entitlement to annual leave, holiday pay, and the minimum wage; but they did not have an awareness in any detail about specific rights which were being denied. The respondent at the Law Centre made the point about workers having only a very 'sketchy' knowledge of their rights but it was probably most succinctly summarised by the TGWU respondent who highlighted an example of a typical conversation with a worker about their rights:

(Indent) "In relation to the law, people don't normally approach us to say 'I've heard there's a Working Time Directive what does it mean?' They would normally come to me and say 'I've been working 52 hours a bloody week and my employer says I can't work it now – what's going on?'... Not many people come to us and say 'what's the law on this, that or the other' though. Normally that would arise from being sat chatting to them." (Endent)

Having gained evidence from advisers stating that there was a distinct lack of awareness of employment rights from workers, the issue of the source of the rights and whether they were domestic or from the EU was investigated. This author considered them important as the remedies for breaches and the use of EU rights necessitated an understanding of where these rights originated.

Predictably, the respondents stated that in general workers did not have any awareness that laws such as the Working Time Regulations [1998] or those involving equal pay were either based on EU law (or at least heavily influenced by it):

(Indent) “In relation to European law I would say 90% of people that I come into contact with don’t realise it’s come from Europe – lay members I’m on about – they think it’s a British law (TGWU respondent).” (Endent)

The respondents noted that many workers would only consider that they should seek further advice if they had initially spoken to the trade union’s conduit at the workplace (usually the shop steward) or if they had been informed about a problem following consultation with a CAB:

(Indent “I would say that generally speaking... they don’t have any knowledge of the law... Erm... obviously if they’re shop stewards or activists they would have some knowledge... yes... but... with the exception of activists and shop stewards generally speaking... unless people have been to the Citizens Advice and have been given some kind of advice you understand what I mean... But generally speaking, most people don’t have any understanding.” (AEEU respondent). (Endent)

When questioned about the lack of clients’ awareness the respondents all found that this was largely due to the nature of workers being unconcerned with exercising their rights as this was a job for someone else or an advice agency. The respondents at the CAB and Law Centre each made the point of lack of general awareness, but that this was less of a problem for workers who were members of a trade union. The TGWU respondent stated that his union offered significant help for workers and that upon initial membership they were provided with an information pack which informed the worker of the help and free legal advice which was available to them. It could be inferred therefore that trade union members should be better informed of their rights than other workers, and that even if they were not, at least they had the availability of expert legal assistance if they required this. Each of the respondents made the point that, in their experience, if all workers were in trade unions then the individualistic nature of current employment law may be changed to a more collectivist position where workers could receive the rights they were entitled to, rather than having to attempt to seek this information out only when they experienced a problem.

(Sub-Heading) **5.4 - Sources of Information**

The advisers’ access to resources to assist them in their preparation or research for advising a worker is crucial in ensuring the advisers are up to date with the latest developments in the law and are in a strong position to offer the worker the best advice and protection. Further, proactive research into the primary sources of law available would enable the adviser to utilise all the relevant sources of

information and allow for differences between EU and UK law to be identified, and if appropriate challenged. As would be expected from diverse and separately funded bodies to be those which provided assistance with this research project, the sources of law used was dependent upon the area of expertise the body had, to whom they gave advice, what level of funding was available, and the level of expertise they provided in that area.

The advisers were questioned as to their use of EU law in their advice as EU law forms a significant part of domestic employment law. The advisers in this research stated that when they researched an issue for a client they predominately referred to domestic Acts or Regulations in the first instance and, whilst recognising it may be governed by an EU law 'parent', rarely used the EU law itself. This is often due to the lack of expertise in EU law from these non-legally qualified advisers and use of information systems which the advisers placed great faith in. The advisers were therefore more concerned with providing advice on UK law which could be relied upon in tribunals rather than considering the EU dimension which may require interpretation¹⁴ or may involve a damages action¹⁵ which went beyond their skills.¹⁶ It is also the case that these advisers had an awareness of enforcement mechanisms to access EU laws and knew about Direct Effect and particularly the lack of Horizontal Direct Effect. They had an appreciation therefore that without financial backing from a trade union there was probably little reason to use a non-transposed or misapplied Directive in any advice as Indirect Effect was a difficult, opaque and uncertain method of interpretation¹⁷ (Stein et al 1976) and with no possibility of using HDE it resulted in only a State Liability option – which is very rarely used due to its expense and complexity.

The CAB was, of its own recognition, a generalist Bureau which provided assistance for local people on many issues, including employment law, but due to the limits of its funding the service provided 'information-based'¹⁸ advice and very limited case-work. As such they received much of their information from the National Association of Citizens Advice Bureaux (NACAB) 'Information System' which consisted of a monthly up-dated CD ROM with the relevant laws and forms available. Whilst they could give advice on basic employment law issues they accepted that they were by no means experts. They had, however, on the recommendation of the respondent, established close links with the local Law Centre which had a greater expertise in employment issues and which was available to offer advice to the CAB and provide seminars on new or changing areas of law, and the CAB could always refer the client to the Law Centre if this was deemed necessary. This was an important source of information but the respondent did make the following comment about the advice they received from NACAB:

(Indent) "We're kept up to date by monthly up-dates on things coming in... We now get a monthly CD which is obviously completely up-to-date... erm... so you refer to that and it does have the latest rulings in there." (Endent)

This may be acceptable for such advice centres giving very basic advice, but it did appear to be an area of possible concern for this author. The respondent accepted without question that the information contained in the CD to be “obviously completely up-to-date” and hence he was unlikely to question anything contained in it, or omitted from it, or to do any further research on the issues contained. This could have the potential that ambiguities in the law, advances in the case law, or problems with complex areas such as EU law may not be specifically outlined or investigated by these advisers and so inhibit the protection and importantly the advancement of workers’ rights.

The Law Centre, as noted above, being more specialised in employment law, had access to a wider range of materials and was also much more focused on specific employment laws than CABx would have been. The respondent stated that in conjunction with providing training courses to CABx he attended courses to up-date his skills, the Law Centre subscribed to various reports and journals such as Industrial Relations Law Reports and Legal Action, and he attempted to keep informed through books and discussions with colleagues. There was no mention of being able to personally offer representation in legal cases to advance his level of understanding and the information used was generally secondary in nature which resulted in it being published elsewhere before being used by the respondent. The respondent also specifically stated that the Law Centre was unable to subscribe to ‘European Court of Justice (ECJ) Employment Watch’ which would have been a very valuable resource in awareness of advance issues which were being heard at the EU level and would then have implications for UK workers. Rarely did the adviser proactively use primary EU laws in his advice and there was no evidence of these being used by other advisers in the Law Centre. This again had implications for the quality of advice being given on controversial areas of EU law.

The trade unions on the other hand did not have the funding restrictions of the previous respondents’ organisations and hence should have had far greater access to advice materials. Each of the trade unions questioned had at their disposal a law department and retained solicitors who could be contacted to provide extra information if this was deemed necessary by the respondent. The trade unions evidently had access to the most comprehensive sources of information, but it was not so evident if they used these sources proactively. A possible reason could be that which was noted in research by Kempston and Bryson (1994) who identified that advisers and advisory agencies may suffer from ‘information overload’ with too much information to be absorbed in too little time, and the pressure of constant up-dates in legislation and case-law (exacerbated in EU employment law) resulting in advisers not using the law immediately and intending to use it at a later date (corroborated by Coombs and Sedgwick 1998). Expert advice, relevant information sources and opportunities for advisers’ own research are critical in this area to ensure an effective service is offered to clients.

(Sub-Heading) 5.5 - Availability of Expert Legal Advice

To recap, the advisers in this research project were not legally qualified individuals but rather former trade union officials / shop stewards, people interested in legal or social issues, or those people who wanted to offer their services free of charge to assist the local community. Despite the highly professional nature of the work they performed, and the dedication they evidently demonstrated in their work, they were not lawyers and so would ultimately need the assistance of a lawyer for the more specialised work of advice in the potentially complex areas of employment law (including the EU dimension), or for representing workers at various tribunals and courts at which they had rights of audience.

The availability of legal departments was relevant as each of the advice agencies had some level of legal help to call on if they had an issue to discuss or if they felt the level of help required was greater than they could personally offer. This in theory provides an excellent level of protection for the advisers and their clients who would be interested in advancing their own rights and/or those rights of workers throughout the workplace or country. However, accessing this resource may in reality be more difficult than perhaps anticipated for a number of reasons. Whilst the respondents spoke in detail about the advice given to clients of the availability of the advisers or the free legal help service, the evidence from wider research did not appear to correspond with what the workers knew of the help available.

The CAB and Law Centre did not have their own legal department available to find information to assist a client. Sometimes these organisations had solicitors volunteering to work there who could provide a greater expertise in some areas, and they also had a list of solicitors who provided *pro bono* work, but they ultimately were alone in advising clients. The lack of expert assistance was a finding by Millar (1999) who noted the problem of a lack of qualified solicitors working at many not-for-profit advice agencies. The Law Centre respondent stated that the main predicament he felt was that many clients did not have claims which were financially worthwhile for solicitors to become involved with, and they were therefore left at the Law Centre for assistance. He furthered that the Law Centre itself was often too busy to devote the time to pursue the case on behalf of the client and so could only offer advice and supervise the client preparing and presenting their own case. This aspect of the advisory service often left clients feeling overwhelmed, or they did not have the necessary skills to successfully argue their case and so lost at a tribunal or failed to pursue a claim. With more complex claims the problem still existed that the *pro bono* solicitors would often be involved in commercial firms and so could not take claims based on EU matters (as in situations requiring a State Liability action), for example, just because there was an interesting point of law at stake. In comparison, the

trade unions did have access to their own legal departments and provided this level of advice and accessibility to the workers.

It would appear that trade union members would have access to expert legal advice on many issues as a consequence of their trade union membership, and this resource being available to the advisers themselves would assist greatly in the quality of advice being given and is probably reflected in expensive cases, such as those dealing with EU law, funded by trade unions which change UK laws to fulfil EU obligations.¹⁹ However, it also needs to be considered the inherent problem with the availability of the expert legal advice and how members and advisers use this.

The CAB and the Law Centre do not have the same access to the expert help or sources of information as trade unions and hence workers going there for advice involving complex issues such as problems with enforcing EU law rights and the misapplication of an EU Directive (for instance) would probably be informed of the UK law itself rather than a critique of the UK law and the EU Directive 'parent'. It is questionable whether the adviser here would have the knowledge of the area to be able to establish this potential breach, and importantly, probably would not have the funds available to pursue the matter anyway. Even if this was recognised, without the legal assistance necessary to pursue such a claim, solicitors contacted may not find there to be sufficient remuneration involved to be able to take this claim against the employer or State. Millar (1999) discussed the problem of advisers referring to solicitors. Millar found that when questioned, the advisers stated they had the confidence to appreciate when to refer a client to a solicitor, however concerns were noted by solicitors in Millar's work that advisers at some agencies were unable to recognise legal solutions for their clients and when to refer.

The trade unions do have the resources to pursue such matters, they stated²⁰ that they would be prepared to fund EU / employment issues on behalf of their member, and it would be a good advertisement for the union. However, the adviser must also have the awareness of the law to be able to recognise this obstacle, identify that there may be a problem with the UK Act transposing the EU law, and be able to refer this matter to their legal department for further advice and consultation. The main issue for the client workers is that the adviser respondents were not sufficiently aware of the EU Directives and as such this means that many of the workers who have their rights limited through UK transposition legislation may not have this identified by their adviser at the trades unions. This lack of initial identification may lead to breaches being missed and hence not referred to the legal department for advice and guidance. It is therefore of relevance whether the adviser has the ability to research and investigate these laws, whether they have the knowledge of complex legal issues, and if they would be prepared, and have the ability, to use this knowledge to advance workers' rights.

(Sub-Heading) 5.6 - Research / Training for Advisers

With the evidence that many of the respondent advisers do not generally use EU and UK laws in conjunction when preparing their advice to clients, one of the possibilities is that they do not have the time to devote to researching these areas. The issues of training and research available and provided to advisers was studied because of its fundamental nature in the dynamic area of employment law and the changes due to ever increasing use of EU Directives and the case law of the ECJ. To be able to offer the most up to date advice, the advisers must have the opportunity to study the way the law has been changed and further, the adviser must have the time to devote to the law. This point is fundamental due to the history of the UK's (incorrect) implementation and transposition of Directives as demonstrated in situations such as the Maternity and Parental Leave Regulations 1999.²¹ If the advisers do not have the time to perform their own research, they are dependent upon another body to provide the knowledge of the law, which is a slower process and tends to limit the advisers from developing a critical perspective on employment law.

Training was something that all the respondents had been exposed to during their tenure. However, the extent and structure of this training differed and in some situations the training was piecemeal or *ad hoc* and dependent upon some legal issue which the specific legal department or senior staff decided was relevant. The CAB respondent noted the limitation of the training offered to its advisers which consisted solely of a basic training course covering the general issues which clients seek advice for, and how the volunteer advisers should deal with these. When the respondent was questioned about on-going training and keeping skills up to date he stated that this was available, and internally advertised, but was undertaken only at the discretion of the adviser, and senior management could not attempt to force advisers train in areas of skills shortages. This appeared to be a major limitation as the CAB could not structure the expertise which it had at its disposal and the training which was available may not be used or may depend upon the popularity of certain courses. This, however, was due to the use of volunteers and the lack of pressure which management could exert on people who offered their time and skills for free. The respondent had already noted the stress felt by volunteers at that organisation and the recent Local Authority funding cuts had placed him in a position where he felt he was being abused and had considered leaving. The TGWU respondent also noted the requirement of training, and how it was beneficial to performing the job of advice, but this training was again piecemeal and not structured formally into his role:

(Indent "It's part of your job – you're supposed to do it. The idea of going on a formalised training course – forget it!" (Endent)

Beyond the issue of training, the respondents were asked about the research which they performed to individually keep aware of developments in the law. An

individual's opportunity to conduct and manage the research they perform is crucial in advice work involving EU law. Once again, similarities were evident in each of the responses provided but in this situation the advisers did not have the opportunity to conduct their research in their working time and had to do so, if they felt so inclined, after they had finished work. The CAB respondent first began to explain the nature of his research which consisted of reading national and local papers which had information about rights or new laws, but interestingly stated that this was not a problem as any new developments in the law would be provided through the NACAB system. The nature of the advice given by a CAB would mean that the client would probably not expect a high level of expertise in employment law matters, but it is also true that simply reading newspapers may be insufficient to offer detailed advice or constitute effective research. At the AEEU trade union the respondent also noted that he was not given the time during working hours to perform research which could aid in his advice work.

This point was corroborated by the TGWU respondent who stated research was only available in his own personal time and this required advisers to be interested in their work more as a vocation rather than simply a 'forty hour a week' job. Finally on this point the respondent at the Law Centre emphasised the hardship of allowing people to research during their working hours and they certainly could not attend training courses to further their knowledge and understanding. The CAB and Law Centre simply did not have sufficient numbers of staff to facilitate research and training days and the advisers present were already overworked with the 'day to day' advisory service being provided.

Despite these problems of expressly making time available for research the respondents did outline the structure they had in place to ensure they were made aware of advances in the law or had access to expert help. The respondent at the Law Centre commented that research did actually happen as part of his advice work on a particular issue or if the issue was anticipated to be a major area of advice given in the near future. Such an example was given of the changes to pension rights when several cases were being referred to the ECJ and the law was regularly being revised. The respondent said that it was his job at this time to keep up to date and then provide internal briefings so all staff were made aware of these changes. The trade union respondents also noted their research limitations but the TGWU respondent stated that his union had begun having regular up-dates through seminars or booklets from their legal department based in London, and these resources were also added to with lawyers available to offer expertise in EU law whenever an adviser at the union needed it.

Ultimately, the lack of research time was a significant problem for any worker seeking help on an employment based matter from these respondents. The information advisers had was likely to be the established UK statutes and case law rather than those cases pending at the ECJ or controversies between EU and UK laws which they could have used themselves to advance the law and fully utilise the EU materials available. This reactive approach often leads to

advice being given which is not based on the newest developments but rather standard resources which could be misleading²² or out of date. The Government has demonstrated an awareness of the need for research and information for advisers to ensure individuals are correctly advised. In response to the acknowledged lack of resources and research opportunities it created an investment programme of £3.5 million to develop new IT systems in CABx.²³ With this new system the advisers can directly access information in the interview room with clients to aid their research which it is hoped will improve access to rights.

(Sub-Heading) **5.7 - Issue of Funding to Advice**

The issue of funding in the research considered the funding of the organisations and whether the relevant advisory organisation would fund a client in the pursuit of their legal rights. Funding is important in relation to the pursuit of rights because workers generally require access to expert advice and the possibility of the advisory agency providing the resources to take the issue to a court or tribunal, which can be both financially and personally expensive. Without access these workers can be excluded from legal protection, and funding was a key element in both the advisers' ability to offer assistance and the workers pursuit of their rights.

Funding of the organisations was deliberated because it was felt that the available funds of the advisory bodies was a relevant consideration in the practical assistance each could provide to workers who sought their help. Quite clearly the organisations differed in their funding; the CAB and the Law Centre were funded mainly from the public sector or donations, whilst the trades unions received funds from subscriptions by members. With the CAB and Law Centre being publicly funded they stated that they did not have the time or necessary funds to prepare all clients' cases themselves or to present at the tribunal. This point was further emphasised by the CAB respondent who informed this author of the recent cost cutting exercise by the local council which had refocused money for the regional advice centres and in the process saved itself £200,000 in just one area of advice (welfare rights). The respondent was concerned with this as he felt many previous clients would be displaced and not have access to the specialised help they required. This point was echoed by the respondent at the Law Centre as to the reason why the centre did not advertise its services or provide the representation skills which clients often need in actions against their employer. 'Advice UK' has been one pressure group to highlight the problem of funding experienced by CABx and Law Centres, and in a communication²⁴ with the Department of Constitutional Affairs it stated its concern over the lack of inflationary increases in funding which may result in agencies handing back their contracts for advice work – a situation which has been demonstrated by many solicitors' firms refusing to honour their franchise contracts (under Community Legal Services agreements) as no longer cost effective. Without such contracts a further level of expertise in EU employment matters is lost.

The trades unions did have funds and were in a much stronger position to offer the legal assistance and the presentation of the clients' cases. This was not just restricted to claims against an employer or advice from a legally qualified solicitor, but explicitly they would fund a claim against the Government in a State Liability claim or a case which may progress to the ECJ in EU law matters. The trades unions did have the funds and expertise to assist members, whether the case was a matter of personal injury or claims based on EU law against an employer, but the AEEU respondent stipulated that such funding would only occur if it was considered by the legal department that the case was a sufficiently important one based on a point of law.

One of the most relevant issues to be raised by all the respondents was the limitation of funds of the clients who sought assistance and how this one factor would limit the access to employment rights of those affected workers. The TGWU respondent expressed this point in the following:

(Indent) "The biggest problem you've got in the first place is that thousands of people are not in trade unions... Number one they haven't got the money, they haven't got the resources... erm... whilst people seem to get legal aid for anything... irrespective of their assets or income, workers tend not to... it's a ludicrous situation." (Endent)

All the respondents stated that they felt there was a genuine concern with workers receiving good quality advice and being in a position to access all the employment protections available, and further that the solution to this lay in trade union membership. The trades unions predictably felt that their members benefited from membership, even if the workers did not think so directly. This was due to their increasingly close cooperation with employers and behind the scenes negotiation over rights and pay (following the model proposed by Cave (1994) in his influential work concerning managerial and union relations). The CAB and Law Centre corroborated this point and considered membership as essential for protection and advancement of rights. Without this the worker has limited funds and limited access to the most up to date information on rights, which the trade unions have but the not-for-profit advisory bodies cannot comparably provide.

(Sub-Heading) **5.8 - Representation at Tribunals**

The respondent advisers were questioned as to their ability to provide representation at tribunals and courts when clients had decided to proceed with legal action against the employer as this would certainly impact on their ability to facilitate access to justice. This point stems from previous research (such as Leonard 1986)²⁵ which demonstrated the disadvantage clients faced when they attended court to represent themselves and the results of studies regarding the

prospect of being successful in a case where the client was unrepresented and the employer had retained expert legal assistance.

In this study, representation was relevant to the workers' ability to access their rights and was linked closely with funding as the advisory agency was generally limited by its funding with regards research, investigation and analysis of legal cases and whether there were sufficient staff to allow time away from other duties to assist a client at tribunal. The respondent agencies at the CAB and Law Centre each provided evidence that representation of clients at tribunals was rare because of the time and financial restraints which they were under. This coupled with reductions in funding, greater targets to meet under the various quality bodies (such as the Community Legal Service Quality Mark scheme),²⁶ and the lack of appropriately qualified staff resulted in the client having to fill out many forms themselves (under the guidance of the agency staff) and further to personally present this evidence to a tribunal. Given the nature of public speaking and the inability some clients have to express themselves clearly or a limitation in their powers of oratory, and the intimidation clients feel when going to litigation, each appeared to have a negative effect of these workers' ability to access their rights if it required court action. If the worker is still in the employment of the respondent whilst the claim is waiting to be heard, then they often feel alienated, and a recurring theme of many respondents (such as those found by Gregory 1993) to claims made against their employer was that whilst the claim was being processed and heard, victimisation of the worker was prevalent and there were few examples of employers acting positively towards those claimants (Hepple and Coussey 1999). This feeling of a deterioration of relations can also extend from a mere awkward feeling, to open hostility and treatment which would satisfy a breach of employment laws protecting those who instigate claims. Indeed this situation was discovered in Gregory's (1989) research, where those people who brought cases and stated that their employment relations suffered actually noted in the majority of cases that their conditions of employment also were adversely affected; 20 respondents stated they had left their job as a direct result of the case, and most respondents said they felt stress in bringing the claim – more stress indeed than they expected. This problem was not only restricted to immediate supervisors but has also been found to extend to management, and in Leonard's (1987) finding, especially with management. This conflict between the worker and management often resulted in the worker being dismissed or being placed in a situation where they felt their position was untenable and therefore they had to leave.

The trades unions by comparison were not so restricted and provided evidence of their ability to represent their clients in any legal action against the employer, although in the case of the TGWU they had changed their policy recently. This change resulted in all representation being handled by retained legal professionals who would have experience in that area and would provide a sense of objectivity to the proceedings and enable the client to have confidence in the case. This had specifically happened due to some workers' discontent with

tribunal decisions which led them to bring actions against the union for negligence. The trades unions had the resources to provide representation for members and appeared to have the ability to protect workers to a far greater extent than those not-for-profit agencies such as CABx and Law Centres. A problem that has emerged is that in the wider research project which looked at workers and advisers (Marson 2002), less than half of the respondent workers were members of a trade union (43%)²⁷ and the distribution of the membership was highly skewed to those older workers and those from the public and manufacturing sectors. This left the younger workers who may not have the personal skills to ably represent themselves, and may be in sectors with high concentrations of temporary staff who may not be given their full rights, to seek advice from the CABx and Law Centres with the consequent problems and limitations in funding which could affect their pursuit of rights. Research by the Policy Studies Institute has discovered the problem of representation in asserting rights, and particularly when an adviser was unable to represent the client at a tribunal this had a direct negative correlation with the numbers of clients who did continue and present their claims personally (Kempston and Bryson 1994). Clients therefore require representation skills, especially in areas of EU employment rights, and without these find enforcement problematic.

(Heading) 6 - Implications for Workers' Access to Rights

This research is linked to the principle of access to justice as the UK has a history of non-transposition or incorrect application of social policy based EU laws.²⁸ This results in the laws not being directly available to the workers through domestic legislation and requires a use of the available enforcement mechanisms under EU law (Direct Effect, Indirect Effect and State Liability).²⁹ To be able to enforce EU rights in this way requires a knowledge of the mechanisms and laws of the EU by the advisers and the necessary funds, time and ability to perform research which are corollary with enforcing rights (Hepple and Coussey 1999).³⁰

Access to justice, in terms of EU laws, fundamentally requires that the rights and obligations from the laws are made accessible to those parties to whom the law has decreed, because without such remedies, the law is tainted and of a 'second class' quality (Szyszczak 1996). Through evidence collected from this wider research project, it is considered that workers in the UK are often disinterested or unaware of their employment rights until they have a problem, unless these are made clear in the press or by their employer (such as Minimum Wage and rights as to Working Time). The workers are unclear about the distinction between rights derived from the EU or UK, which makes the EU irrelevant to many workers (see Prechal 1997) and therefore the EU Commission's work regarding increasing awareness³¹ has not been evidenced in this research. The workers also stated that much of their information regarding their employment rights came from the employer and as found by Blackburn and Hart (2002) the employers' level of understanding of the various employment rights that are available may not be complete which compounds the workers' lack of awareness.

This requires the advice available to workers to be proactive, the advisers to be competent in their advice, and where possible to have the latest information with a critical eye on the transposing legislation of EU provisions. Without this, potential breaches of EU law are not raised as quickly as they could unless trades unions or advisory bodies advertise potential breaches and request evidence from the workers. It appears from the research that many of the advisers do not have an in-depth knowledge of EU laws largely because either these are complex, or those advisers who were aware of the laws were also aware of the concept of enforcement mechanisms and that to enforce these rights went beyond their skills and/or resources or those of their clients. The respondents in this research each stated, when questioned about the possibility of their using undecided controversial issues to clarify or challenge existing UK law which may be in breach of EU law, that they would often wish to refer this to a higher level. The CAB respondent stated that with this situation he would refer the matter to the Law Centre. The Law Centre respondent stated that if he recognised this situation he may advise the client to pursue the matter but would outline the realities of such an action of costs, difficulty, and the potential of limited success. The trades unions respondents stated that they had the resources and would pursue the matter (through court cases), but that it would be for someone above them in the organisation to approve this decision. It would be the respondent's job to refer the matter to the legal department of the union and then a barrister would usually be involved in making the decision of deciding to proceed or not.

It is indeed true that many of the challenges to the UK's adoption of EU law have been taken and funded by trades unions and the Trades Unions Congress, but this research was interested in how these advisers assisted workers in a particular area of the UK. These advisers stated they would have no hesitation in referring such potential breaches to their legal departments but, fundamentally, previous responses to the time available for the advisers' research and their use of EU law primary materials demonstrate that it is very unlikely that these advisers would identify a potential breach in the law so as to refer the matter to their experts in the legal department. It is ultimately the responsibility of the adviser recognising the existence of a breach or potential breach (from advice given to them or better still their own research) and then proactively advising affected workers who may advance the law by taking an action so the matter can be resolved. Given the lack of use of primary EU law materials by these respondents it would appear that this may not readily occur. The respondents access the laws governing EU obligations through the transposed UK Act which consequently results in those being used reactively. Without a proactive approach, laws can potentially take several years to be clarified and given their full effect,³² and throughout this time workers are being left without access to their rights.

(Heading) 7 – Pathways Out of Social Exclusion

With any consideration of workers' access to EU based employment laws comes an assessment of the approach taken by the workers themselves and their advisers in the pursuit of these rights. The UK, as with many Member States, frequently fails to give complete and timely access to EU derived laws because of, *inter alia*, misinterpretation or intransigence. What is required given the results of this study is an approach which enables greater access and involvement in ensuring workers have the protections guaranteed from membership of the EU. In the first instance is the workers themselves and how they may better avail themselves of their rights. It is they who suffer when barriers are created to these laws and it is they who must take responsibility to limit the adverse effects of denial of rights. A major factor in ensuring access to rights as evidenced through Cave (1994) and the respondents to this study is through membership of a trade union. Trade union membership is an increasingly important source of worker protection, not only for the advocacy and representation skills which they provide unions can keep workers informed of new laws and ensure workers are protected. The evidence from this study demonstrates that whilst many workers would be reluctant to instigate a claim to enforce their rights, particularly if they were unsure of the outcome and especially if it may be time consuming and expensive, the members of trade unions felt more able to initiate a claim.³³ Many factors may be relevant to such an outcome but features such as the support and pastoral care provided by trades unions; financial help; and legal assistance and support that exists to workers in unions as opposed to those who feel they are bringing a claim themselves would each be pertinent.³⁴

However, over the last 20 years trade union membership has declined as those workers who traditionally would be members of a trade union (manufacturing based workers) have declined, replaced by those in service sector industries. Trade unions also have to improve their image which is still of the militant tendency associated with the 1970/80's and they have to search for members themselves – their involvement in cases assisting access to EU employment laws is helping this cause. A further element in trades unions helping workers is through educating the workforce as to new laws and developments in legislation and case law. Empowering workers is a useful concept in the short term but the practical consequences are important as many workers will not have the motivation to study the law, there are clearly going to be literacy differences between different groups of workers, and employers will continue to be able to exercise their managerial prerogative (Storey 1983) knowing that as long as they are within the bare minimum required by UK law their workers are unlikely to enforce rights against them. Therefore the problem of adviser quality and application of EU law needs to be re-evaluated, along with the issue of accessibility of EU law in the domestic courts.

This article has included an evaluation of advisory agencies' role in the access to EU employment rights of workers due to their significant responsibility in this

process. Importantly in this study is the longer term consequences which result from the advice the clients receive from these respondent agencies. Evidence from the advisers demonstrate that some simply use the material their organisation provides without challenging the law (the UK's transposition of the EU 'parent') or without reviewing the most up to date case law (because of the lack of time or resources). A worker will generally ask for information only once; therefore if they are informed of their rights based on an incorrect transposition under domestic law, for example, then the worker may be denied a right which they were entitled to, or the opportunity to put right an incorrect transposition or interpretation through a challenge in the courts may be lost. An example occurred in 1995 when the issue of the period of continuous employment to qualify for rights under unfair dismissal legislation was raised in the courts (*Biggs v Somerset County Council* [1995] ICR 811). Mrs Biggs was one such employee who brought an action following the ruling in *R v Secretary of State for Social Security, ex parte EOC* (Case C-9/91) [1992] ECR I-4927, [1992] 3 CMLR 233. (*EOC* [1992]) which held the differing qualification periods imposed under the Employment Protection (Consolidation) Act [1978] (EPCA)³⁵ between full-time and part-time workers was indirect sex discrimination against female workers. Mrs Biggs, who had been dismissed in 1976, brought a claim because the previous legislation (EPCA) required five years continuous employment for part-time workers which Mrs Biggs did not have. Following *EOC* [1992] and the clarification that the law should have equalised the qualifying provision to two years for both full-time and part-time employees Mrs Biggs now did qualify for protection and hence instigated her claim. The court, whilst accepting her right to claim, did however refuse to proceed with the action as it instructed her that she was time-barred as the other relevant qualification (that claims had to be lodged within 3 months of dismissal) was still applicable and it was 'reasonably practicable' for her to have brought the claim. This demonstration of not knowing the law or having an adviser who can challenge the UK laws in light of EU obligations demonstrates the problem of denial of rights for, in this instance, nearly 20 years, for all affected workers!

Among the other practical problems discovered was the need for checks and systems to ensure advisers in the advisory agencies did use the most up to date materials and used these in providing advice to workers. The system of Quality Marks was used in the free advisory agencies to this study but this still did not provide the access to the most detailed, or latest developments, of EU based laws and would leave workers without an adequate remedy to their employment problem. Advisers did not have the most in-depth awareness or knowledge of EU based laws, and this was often because they did not use the EU primary materials. This was in part because of the inherent problems in the current enforcement mechanisms and as such the extension of HDE could alleviate this problem. It would enable advisers to use EU law with the confidence that the EU Directive could be successfully used and recognised in tribunals without the need of an expensive public law action (a State Liability claim) or litigator with

experience in EU issues (in Indirect Effect claims) along with the problems of the discretion of the judge (see Marson 2004b).

Further, there are policy decisions which could assist workers in access to justice and enable the preceding problems to be reduced. Clearly, if the Government correctly and fully incorporated EU provisions on time, many of the problems for workers and advisers would be reduced and rights would be transparent and accessible in Employment Tribunals. The Government has this power but, while working with the EU more than the previous Conservative Government, examples have been provided of breaches continuing. If this cannot be achieved then the Government and Local Authorities could provide greater funding (or simplify the funding sources and mechanisms) to the advisory agencies to assist them in helping clients, having the time to research and train to maintain standards, and enable sufficient advisers to be recruited and the appropriate sources of law subscribed to. Standards have been established to identify levels and standards of advice but more attention is needed to providing the advisory agencies with the appropriate tools in order to offer the correct advice and assist workers in accessing their rights.

(Heading) **8 - Conclusion**

The aim and scope of this article was to analyse the role that advisory agencies played in ensuring workers had access to their EU employment rights. Hypothetical studies had been previously undertaken but the practical access and availability of access to rights through advisory agencies required examination as workers need advice and assistance in enforcing rights. The title of this article derived from the Department of Constitutional Affairs which noted the pathways to rights out of social exclusion. This pathway was dependent upon not-for-profit agencies (in particular) providing advice and representation to clients to access rights. The focus of EU based or inspired employment laws in this article is important as many workers are denied significant employment rights. This analysis of access was based on the advisers' level of training, expertise, membership restrictions and appreciation of the concepts of legal rights, their basis, and possible awareness of challenge when a problem was identified. The advisory agencies in this research project are clearly effective in the advice they supply and at the level (general or specialist) which they are providing the advice at. In a specific consideration of EU employment law however, their effectiveness is limited to those laws which have been successfully transposed into UK law or the law has been changed through case law. When the EU law is in need of analysis or the law has not been transposed correctly or on time then the CAB and Law Centre are limited in the service they can provide. The trades unions do have the resources at least to provide more effective access, but this itself is limited to the research time they have available and their own use of their legal departments.

Knowledge, training and the advice given by the respondents has been considered and it has been ultimately discovered that these respondents have demonstrated that they have little time for research into employment law, some, such as at the Law Centre, do not have the access to the most applicable sources of information, and the advisers noted the practical problems of bringing claims. The advisers were thus unable to be proactive in their advice or pursuit of EU laws. The trades unions also had problems in proactively advising members because of their limited research time and that while they had a legal department the lack of research opportunities resulted in their inability to identify potential breaches of EU law. It appears that whilst the Government recognises potential problems with workers accessing their rights, the pathway as noted by the Department of Constitutional Affairs still has many hazards. Not-for-profit advisers require more assistance to direct workers safely to their destination of employment protection. Full implementation of EU rights and increased funding would provide a highway out of social exclusion.

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¹ Usually not-for-profit organisations employing non-legally qualified advisers.

² "Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

³ Craig (2000) studied the role of the Commission and the resulting need for individuals to assist in ensuring compliance. He reviewed the role of the Commission, after the fall of the Santer Commission, and how the Commission can be reformed to ensure an improved service delivery. This investigation was relevant to issues of access to justice because it was found that the Commission's role as 'guardian' of the Treaties was increasingly unrealistic. The EU Treaties have increased the area of competence of EU law, the European Court of Justice (ECJ) has an ever increasing case-load to handle, the EU is expanding, and as a result individuals in the Member States, along with their advisers, have to assist in ensuring EU laws are correctly transposed and are accessible in the Member State.

⁴ See various governmental white papers such as 'Building Businesses... Not Barriers' (May 1986); 'Encouraging Enterprise: A Progress Report on Deregulation' (May 1987); and 'Releasing Enterprise' (November 1988).

⁵ The UK Government failed to implement Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses through the implementing legislation, TUPE. It was the subject of Article 169 (now Article 226 EC) proceedings, due to its exclusion of undertakings 'not in the nature of a commercial venture'. The UK failed to give complete effect to this Directive and the ECJ in *Dr Sophie Redmond Stichting* [1992] IRLR 366 established that the Directive was to apply to 'non-commercial ventures'. This amendment was made some 14 years after the deadline for implementation. The 'nature of a commercial undertaking' stipulation was removed on 30th August 1993 to simply cover 'undertakings' in Regulation 2 (1) by s. 33 (1) of the Trade Union Reform and Employment Rights Act 1993.

⁶ *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union* (BECTU) [2001] 3 CMLR 7, [2001] IRLR 559. This case involved the 13 week qualification period included in the Working Time Regulations [1998] which was found to be an incorrect transposition of the Directive and led Advocate-General Tizzano to state that "...workers whose contract of employment is less than 13 weeks – and many BECTU members have such contracts – could never, or only rarely, acquire any entitlement to leave" (para. 35). The protective law was transposed in 1998 but it took until the end of June 2001 for a revised version of the right to be outlined, even before the law would take effect. Throughout this time the affected workers could not gain access to this right and employers, in the private sector where the majority of such employment takes place, could lawfully apply the UK version of the law and save themselves money whilst waiting for the process of a recognition that the law was wrong. Further, this matter would remain unresolved until a worker who was affected issued a claim based on that law, arguing the difference between the EU and UK law at the High Court, having this issue (potentially) considered by the ECJ, awaiting its judgment, and then having the legislation changed before the rights took effect.

⁷ Now the Department for Constitutional Affairs.

⁸ Lord Chancellor's Department Report: *Legal and Advice Services: A Pathway Out of Social Exclusion*. (2001) www.lcd.gov.uk/laid/socex/index.htm.

⁹ Hence solicitors firms were excluded as the workers were unaware of this form of financially accessible advice.

¹⁰ Four in-depth case studies were performed.

¹¹ The sheer breadth and depth of the law and its dynamic nature makes continual awareness increasingly problematic for the not-for-profit sector - Human Rights Law Consultancy.

¹² Using the Community Legal Service's 'General and Information' level of advice in its Quality Mark scheme.

¹³ Such as issues being decided by the ECJ of where differences between the UK and EU 'parent' Act may require clarification.

¹⁴ Such as with Indirect Effect which is a method of statutory interpretation.

¹⁵ When the case involves a claim of State Liability which is in essence a tort action against the State for damages incurred due to the non-implementation or incorrect transposition of the EU 'parent' law.

¹⁶ Enforcing EU rights through Indirect Effect or State Liability is very complex and potentially expensive (in time and money) and these claims were not available to the not-for-profit advisory services of the CAB or Law Centre in this study.

¹⁷ Discrepancies have been found in the interpretation of EU law through transposing legislation as evidenced in cases such as Case 29/69 *Stauder v City of ULM* [1969] ECR 419 and Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671.

¹⁸ The CAB had been awarded the CLS Quality Mark for Information which provided for a guarantee of quality of advice but this was only in information and not expertise in the area or representation at tribunals.

¹⁹ Examples include cases such as *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union* (BECTU) [2001] 3 CMLR 7, [2001] IRLR 559 and footnote 21 below.

²⁰ **Issue of Funding to Advice** section.

²¹ Parental Leave has been the subject of complaints regarding its transposition and is a further example of the inadequacies of the current enforcement mechanisms and the slow process of enabling access to justice. In this issue the Trades Union Congress (TUC) assisted in correcting UK law to correspond more closely with its EU law 'parent' in the TUC's case against the UK on the matter of parental leave. The UK Government transposed the EU Parental Leave Directive (Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996 L 145/4) by the Maternity and Parental Leave Regulations [1999] but placed a stipulation that the rights granted would only apply to parents of children born or adopted after 15/12/99 (the date by which the EU Directive had to be implemented). The TUC argued that the Directive should apply to all parents regardless of the date of birth of their children and hence were against the provisions contained in the Directive. Interestingly the TUC applied for an interim order allowing the excluded parents to avail themselves of the UK regulations until the matter had been decided by the ECJ. The High Court indicated that the TUC's arguments appeared to be correct but that it wanted the matter resolved by the ECJ instead of issuing an interim injunction.

²² *Biggs v Somerset County Council* [1995] ICR 811.

²³ Department of Trade and Industry 'Modern Markets: Confident Consumers' Cm 4410, London, Her Majesty's Stationary Office.

²⁴ Press release 1st April 2003 – www.fiac.org.uk.

²⁵ Leonard's (1986) research demonstrates the problems faced by claimants and the minefield which faces the worker from lodging the claim until the case is heard in the tribunal. Overall the findings from the data were not particularly positive for workers, of the 40% of respondents to the research who took their claim to the tribunal only about a quarter actually won their case (only 11% of the cases originally filed). A further relevant finding was that those who were unrepresented were the most likely to withdraw claims, whilst at the opposite end of the spectrum those with assistance by lawyers had the highest success rates and were least likely to withdraw their cases. There was also a point raised about the success of those who had trade union representation with findings which were less than encouraging in that these claimants fared poorly, relatively few settled their claims, and, whilst over half proceeded to a hearing, only 19% won the case.

²⁶ The Community Legal Service established a system in April 2000 whereby advisory services could provide quality information, advice and a legal service to the public through a network of co-

ordinated funding of these resources. To ensure transparency for clients and to ensure standards, a system of Quality Marks were created to identify the level of expertise available at the advisory service and to demonstrate the standard of advice. The three levels of advice are Information; General Help (including case work); and Specialist Help. The Information Mark will provide written and oral advice and, rather than diagnosing a client's issue, it will direct (signpost) the client to the most appropriate source of advice. General Help involves diagnosing the client's issue, explaining their options and assisting with form-filling. The Help with case work involves the service taking the case for the client to various tribunals and administrative inquiries and representing them in welfare, housing, employment and other such claims. The Specialist Quality Mark provides advice and assistance on more complex matters on specific legal areas and can include advice being provided by qualified lawyers.

²⁷ 111 of the 257 worker respondents.

²⁸ Many EU laws, especially in employment and social policy, derive from Directives which give discretion to the Member State on the 'method and form' which these implementing (transposing) pieces of legislation take. This national interpretation can lead to differences between the EU law and the domestic law which is opaque and can serve to deny these rights until identified and clarified in the courts.

²⁹ See Marson 2004b for a critique of the available enforcement mechanisms.

³⁰ The authors produce evidence that all those involved in employment law require a good awareness of EU law because of its structure and implications for access to worker protection, particularly in equality matters: "The equal pay legislation is extremely complex. It requires awareness of European Law. Because of the inadequacies of the legislation the tribunals and courts have interpreted it to be effective in tackling discrimination but so doing has meant that the legislation cannot be taken to mean what it says. What the words mean now require detailed awareness of the case law. The Courts have not only put words in to the legislation but have also required words to be ignored... The legislation is now so complex that a well-meaning employer cannot use the legislation as a guide and can fall short of the law" (p. 79).

³¹ The Annual Report of the European Commission in 1997 stated that the Community had initiated strategies to make men and women more aware of their legal rights via a network of legal experts and the supporting of conferences on subject areas of interest (pp. 12-13).

³² As with the problem in the Working Time Regulations [1998] which had to be changed following *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] 3 CMLR 7, [2001] IRLR 559 in removing the 13 week period for qualification to access the rights under the Regulations. This is further demonstrated in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations which transposed the EC Directive on Fixed Term Work (1999/70/EC). These provisions were set to be transposed by 10th July 2002 but the Government admitted it would be late with this and did not transpose until 1st October 2002.

³³ The wider project studied workers' awareness of various EU employment laws and further considered their willingness to enforce their rights against their employer and, hypothetically, against the State in a State Liability action. It was discovered that very few of the workers in the case study organisations would bring claims against their employer and even fewer would use State Liability as an action to gain access to their EU employment rights. The evidence gathered was cross tabulated with the evidence on trade union membership to ascertain if the members who were supported by trade unions would be more likely to initiate a claim than non-member workers. Whilst the evidence documented that most of the workers would not bring a claim (221 respondents), those workers who would bring an action (36 respondents) were all members of a trade union. Trade union membership was also relevant when these workers were questioned as to whether they would bring a claim against the Government in a damages action if they could not access their rights. Again, the findings were that the majority of workers would not bring such a claim (233 respondents) but of those who stated they would bring a claim (24 respondents) all were members of trade unions.

³⁴ "... if the person is not in a trade union they are going to struggle to get advice on their rights. So unless the person's got a fair bit of money it's going to be quite difficult really... they really

need a trade union to take it on. I would probably leave it to people who have got the resources.”
(Evidence from Law Centre respondent).

³⁵ Now contained in the Employment Rights Act [1996].