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awareness, advice and enforcement.**

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JAMES MARSON*

THE LIMITATIONS TO WORKERS ACCESSING EU RIGHTS:
AWARENESS, ADVICE AND ENFORCEMENT

ABSTRACT: This article investigates the United Kingdom's membership of the European Union (EU). This examination considers how the EU has provided greater protective employment rights for workers, through provisions in the Treaty and various Directives, than had been achieved through the UK's own legislative programme. However, these rights are often inaccessible due to governmental intransigence and a lack of awareness by workers of many employment rights. An empirical study was conducted from the perspective of workers and their not-for-profit advisers to consider the consequences of these barriers and to offer potential solutions to the problems.

KEY WORDS: Access to Justice; Empirical Research; Employment Law; Enforcement Mechanisms; European Union.

INTRODUCTION

Workers in the United Kingdom (UK) have been subject to various controls and obligations to their employer since they first began selling their labour (and these

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obligations (often implied in contracts) have been identified and highlighted by the courts in many cases).¹ Whilst there were also rights and benefits for them as workers² (outlined and developed through the common law)³ these have been extended through specific statutory control over the last forty years.⁴ More recently, these rights have been extended and applied throughout the European Union (EU) under the guise of social policy and health and safety measures. It has been the case in the UK since its accession to the Union that the EU has played an increasing role in the inspiration or compulsion of employment protections to workers and has led to many important advances, for example in

¹ Examples include mutual trust and confidence (*Donovan v Invicta Airways Ltd* [1970] 1 Lloyd's Rep 486 and *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20); fidelity (faithful service) (*Hivac Ltd v Park Royal Scientific Instruments Co* [1946] 1 All ER 350); duty to disclose the misdeeds of others (*Sybron Corporation v Rochem Ltd* [1983] 2 All ER 707); cooperation (*Secretary of State for Employment v ASLEF (No. 2)* [1972] 2 QB 455 CA); duty to use reasonable skill and judgement (*Janata Bank v Ahmed* [1981] IRLR 457); duty to obey lawful orders (*Pepper v Webb* [1969] 2 All ER 216); and the duty to adapt to new working conditions (*Cresswell v Board of Inland Revenue* [1984] IRLR 190; [1984] 2 All ER 713).

² Statutory rights to minimum notice periods developed since 1963 and now contained in Employment Rights Act 1996 s.86; statutory protections against unfair dismissals since 1971. Obligations have been imposed on employers such as the duty to pay wages (*Devonald v Rosser & Sons* [1906] 2 KB 728); the duty to pay a fair proportion of wages if industrial action is accepted by an employer (*Royle v Trafford Metropolitan Borough Council* [1984] IRLR 184); an obligation to maintain the health and safety of their workers (*MacWilliams v Sir William Arrol & Co Ltd* [1962] 1 All ER 623); and the obligation of mutual trust and confidence must also be upheld by the employer to the employee (*Isle of Wight Tourist Board v Coombes* [1976] IRLR 413).

³ The common law has been instrumental in the protection of employment rights as evidenced in *supra* at n. 1 and in cases such as *Nagle v Feilden* [1966] 2 QB 633 where a protection based on sex discrimination was developed some 10 years prior to the enactment of the Sex Discrimination Act 1975.

⁴ The protection afforded under legislation is broad but includes, among others, protection against discrimination based on sex (Equal Pay Act 1970, Sex Discrimination Act 1975, Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002), Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, the Employment Equality (Sexual Orientation) Regulations 2003; discrimination based on race (Race Relations Act 1976); discrimination based on a worker's disability (Disability Discrimination Act 1995); the regulation of working hours (Working Time Regulations 1998); rights for a minimum wage (The National Minimum Wage Act 1998); procedures in cases of dismissals (Employment Rights Act 1996); the accrual of rights following a business transfer (Transfer of Undertakings (Protection of Employment) Regulations 1981); protection of workers' safety at work (the Health and Safety at Work etc. Act 1974); and maternity and parental rights (the Maternity and Parental Leave etc. Regulations [1999], Paternity and Adoption Leave Regulations 2002).

areas including parental leave,⁵ working time,⁶ and rights for part-timers.⁷ Many of the employment rights enjoyed by workers in the UK have derived specifically from EU legislative provisions and the EU is the body which appears to be proactive in seeking to protect workers' health, and their safety at work, whilst also ensuring the 'social' dimension of the Union (beyond a Community) is achieved. The EU as a consequence has been the source of many of the important rights under which workers can now gain protection. Even beyond the laws specially outlined above, the EU through the European Court of Justice (ECJ) has amended and changed UK laws to workers' benefit (as can be witnessed through cases including *R v Secretary of State for Employment ex parte Equal Opportunities Commission*⁸ and *R v Secretary of State for Employment ex parte Seymour-Smith and Perez*).⁹ Therefore, even if the actual law itself has not derived through an EU Treaty Article, Regulation or Directive, it may still be subject to control through enforcement mechanisms designed to protect citizens of the EU. As the Member State has an obligation to transpose the effects of a Directive,¹⁰ and because many protective employment rights derive from Directives, then the State has an obligation to ensure that those laws are given their full and complete effect by the prescribed deadline.

⁵ Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

⁶ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time.

⁷ Council Directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC.

⁸ [1994] 1 All ER 910 HL.

⁹ [1999] IRLR 253 ECJ.

¹⁰ Article 249 EC and Article 10 EC provide that where Community measures have been adopted in the form of Directives, Member States are obliged to implement the provisions of the Directives within the appropriate time limit.

The context of this article is to identify how EU employment laws affect a specific group of workers in the UK and the issues surrounding their accessibility. In reviewing the literature much research had been conducted theoretically on how the EU has impacted on the obligations and rights for workers. This has included many texts and studies considering access to EU rights through the enforcement mechanisms available (including the doctrines of Horizontal Direct Effect (HDE), Indirect Effect and State Liability). This research was interesting and relevant but it did not consider the issue of access to rights in the abstract. It was considered by this author that identifying how the EU had affected an actual group of workers and what implications these laws had for them could extend and concretise this theoretical work. It would also enable the limitations of EU rights to be identified and allow potential solutions to be considered. This investigation derived from conversations with workers, as there was little evidence of an awareness of how the EU affected their rights or the role it played in ensuring the relevant Member State had guaranteed that EU laws were respected and followed in the State's jurisdiction. As there had been a movement with domestic enforcement mechanisms to draft citizens to assist in being watchdogs and assisting the Commission in its role as guardian, this lack of awareness would seriously impinge on this mechanism of control and result, as is witnessed, in laws being denied to workers and there being a lengthy time lag in ensuring these laws were followed in the Member State and thereby being given to workers.

The article contains empirical evidence from workers' (257 completed questionnaires) from the four major industry sectors in a region of the UK, and from non-legally qualified advisers¹¹ in the same geographical location, to identify the access to EU laws which these individuals have. The EU based laws considered in this research provided a 'floor of rights' which no Member State should fall below in the protection of workers. The UK's historic inactivity in providing the full extent of EU law rights in the area of social policy has often been to deny this 'floor of rights' to the workers whom need the protection most. This denial has often been extenuated by workers and their advisers being unaware of the rights they have from the EU (Marson 2002);¹² workers being unaware of the sources of help and advice available (Meager et al 2002);¹³ the lack of harmony in protection of EU rights throughout the Union;¹⁴ the problems inherent in judicial review of accessing justice in light of EU obligations;¹⁵ and fundamentally, the enforcement mechanisms to ensure Member States comply with EU law being slow, cumbersome, daunting and expensive.¹⁶

¹¹ Employed at not-for-profit organisations.

¹² Marson, J. (2002) '*The Necessity for Horizontal Direct Effect of Directives in Accessing EC Employment Laws – An Empirical Perspective*' Paper Presented to Departmental Seminar, University of Sheffield, September 2002.

¹³ Meager, N., Tyers, C., Perryman, S., Rick, J., and Willison, R. (2002) *Awareness, Knowledge and Exercise of Individual Employment Rights* Employment Relations Research Series No. 15.

¹⁴ Convery, J. (1997) 'State Liability in the UK after Brasserie du Pecheur' *Common Market Law Review*, Vol. 34, No. 3, June, pp. 603-634.

¹⁵ Emiliou, N. (1996) 'State Liability Under Community Law: Shedding More Light on the Francovich Principle?' *European Law Review*, Vol. 21, October, pp. 399-411.

¹⁶ See Prechal, S. (1997) "EC Requirements for an Effective Remedy" in Lonbay, J. and Biondi, A. (1997) "Remedies for Breach of EC Law" John Wiley and Sons, Chichester, New York, Brisbane, Toronto, Singapore; and Steiner, J. (1993) "From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law" *European Law Review*, February, pp. 3-22. Sweet and Maxwell, London, for an effective review of the problems inherent in enforcement of EU rights.

Access to justice is an important issue in workers' rights due to this external source of protection and because Member States regularly fail to give complete effect to these laws, particularly Directives, to workers. Various studies have been undertaken to assess the implications for the Member States on rights and obligations under EU law with much of the previous work dealing with theoretical implications of how such laws can and are enforced in the relevant Member State (Tridimas 2001)¹⁷ and their possible implementation (Hepple and Coussey 1999).¹⁸

The argument advanced in this article concludes that the empirical data demonstrate that the workers in the study have limited awareness of their employment rights. This places a focus on the source of advice and representation to the workers, which is undertaken by advisers. The advisers were discovered not to use EU laws proactively, mainly because of the problems of the existing enforcement mechanisms which are expensive and inaccessible. Therefore this empirical evidence leads to the proposition that EU laws would increase in relevance to workers and advisers, and offer the protection they intended, if Directives (the most common method of establishing employment laws from the EU) could be enforced horizontally.¹⁹

¹⁷ Tridimas, T. (2001) 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' *Common Market Law Review*, Vol. 38, pp. 301-332.

¹⁸ Hepple, B., and Coussey, M. (1999) *Independent Review of the Enforcement of UK Anti-Discrimination Legislation* Centre for Public Law in association with The Judge Institute of Management Studies. URL: <http://www.law.cam.ac.uk/ccpr/antidisc.html>.

¹⁹ Directives which are enforced in domestic courts have traditionally only been enforced in the vertical direction (against the State or an Emanation of the State). Horizontal Direct Effect of Directives would enable the claimant to use the Directive's provisions against an individual or organisation in the private sector (such as a private sector employer) following non-implementation or incorrect transposition. The ECJ has traditionally, explicitly, denied such a form of Direct Effect (*Dori (Faccini) v Recreb Srl* (Case C-91/92) [1994] ECR I-3325) but its view may

NECESSITY FOR THE STUDY

This research is important as the practical problems faced by workers²⁰ in accessing EU based employment laws has been largely ignored beyond the recent work by Meager et al. (2002). This study addresses a number of points raised in the literature regarding the limitations to research in the access of EU rights. No study has been made holistically of the role of advisers, employers and advisory agencies in the access to EU law rights and the level of awareness held by workers and their advisers. This was specifically noted by the Annual Report of the European Commission in 1997²¹ which 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). Investigation into whether this has been successfully achieved for UK workers in terms of their awareness of rights, source of advice and rights, and the knowledge of their advisers is required. Previous research (Leighton 1990;²² Blackburn and Hart 2002)²³ has focused on the impact of EU

be changing in light of more recent decisions – see Dougan (2000) for an excellent account of this form of ‘disguised’ Direct Effect.

²⁰ The term ‘worker’ is used in its broadest sense. Evidently, differing rights exist for workers under a contract of service (employees) (unfair dismissal and redundancy and so on) than for those employed under a contract for services (independent contractors) but some rights assist all workers – discrimination laws is one such example and unless specially stated the term ‘worker’ refers to all workers.

²¹ Commission of the European Communities. (1997) *Equal Opportunities for Women and Men in the European Union: Annual Report 1996* Employment and Social Affairs, Office for Official Publications of the European Communities, Luxembourg.

²² Leighton, P. (1990) ‘European Law: Its Impact on UK Employers’ Institute of Manpower Studies, Paper No. 156, University of Sussex, Brighton.

²³ Blackburn, R. and Hart, M. (2002) *Small Firms’ Awareness and Knowledge of Individual Employment Rights* Employment Relations Research Series No. 14.

law on employers so a view from the opposite end of that spectrum is necessary. This article develops an holistic approach to the issue of access to employment rights by presenting empirical evidence from workers and advisers to consider where access to justice was being limited and how the barriers present could be removed. Further it uses empirical evidence to demonstrate the shortcomings of the current access to, and enforcement of, EU law. This material is developed which concurs with the theoretical based work of Barmes (1996);²⁴ Curtin (1990);²⁵ Dougan (2000);²⁶ Fitzpatrick (1997);²⁷ Kristov et al. (1986);²⁸ and Ruffert (1997)²⁹ among others as to the need for an alternative to the current enforcement mechanisms available.

METHOD

The empirical research was conducted through the research tools of self-administered questionnaires to the workers and a series of semi-structured interviews with the advisers. These had the objectives of reviewing a group of workers' access to rights which derive from EU laws (particularly Directives) and

²⁴ Barmes, E. (1996) 'Public Law, EC Law and the Qualifying Period for Unfair Dismissal' *Industrial Law Journal*, Volume 25, pp. 59-63.

²⁵ Curtin, D. (1990) 'Directives: The Effectiveness of Judicial Protection of Individual Rights' *Common Market Law Review*, Vol. 27, pp. 709-739.

²⁶ Dougan, M. (2000) 'The 'Disguised' Vertical Direct Effect of Directives?' *Cambridge Law Journal*, 59, 3, pp. 586-612.

²⁷ Fitzpatrick, B. (1997) 'Straining the definition of health and safety?' *Industrial Law Journal* Vol. 26, No.2, June, pp. 115-135.

²⁸ Krislov, S., Ehlermann, C-D., and Weiler, J. (1986) 'The Political Organs and the Decision-Making Process in the United States and the European Community' in Cappelletti, M., Seconbe, M., and Weiler, J. (Eds.). (1986) *Integration Through Law, Volume 1: Methods, Tools and Institutions, Book 2: Political Organs, Integration Techniques and Judicial Process* Berlin, Walter de Gruyter.

²⁹ Ruffert, M. (1997) 'Rights and Remedies in European Community Law: A Comparative View' *Common Market Law Review*, Vol. 34, No. 2, April, pp. 307-336.

to this end how such access can be made. Further, it intended to discover the level of awareness of the rights which workers in a sample of the UK's industrial sectors have, and their confidence in advice being given to them. It sought to gain insights into the knowledge, training, and nature of advice and litigation skills of those identified as providing advice to affected workers. Finally, it aimed to justify why effective enforcement mechanisms are essential to ensure EU law protects workers and how this could be achieved by a re-examination of the issue of HDE.

The research in this study was interested in identifying how the EU had affected an actual group of workers and the implications of these which could extend the previous theoretical work. As there had been a movement towards domestic enforcement mechanisms to enable citizens to become the 'watchdogs' and assist the EU Commission in its role as guardian of the Treaty, lack of awareness would seriously impinge on this mechanism of control. Four case study organisations were chosen from the region in the UK which provided the worker respondents to the study. These organisations included representatives from the retail, manufacturing, service and public sectors. The research tool included a question as to the awareness of the workers of sources of information and advice, and this list led to the choice of seven not-for-profit advisory agencies being invited to participate in the research project. Those agencies were Citizens Advice Bureaux, Law Centres, and the trades unions to which the workers were members – including the General and Municipal Boilermakers Union and UNISON.

RESPONSE RATE

The contacts at the various case organisations were informed of the aims of the research, the author's intention for the work and its output, and how the workers at their organisations would be questioned. 320 questionnaires were distributed at the case organisations with 257 responses which were spread thus:

| Case Organisation | Number of Respondents | Response Rate (%) |
|-------------------|-----------------------|-------------------|
| Retail | 64 | 80 |
| Manufacturing | 75 | 93.7 |
| Service | 51 | 63.7 |
| Public | 67 | 83.7 |
| Totals | 257 | 80.31 |

The response rate was high due to the commitment of the contacts at each organisation with whom the author had communicated, and the nature of the questionnaire which was based on close-ended questionnaires. The contacts at the organisations, who were employed in a management capacity at varying levels of authority, were interested in the research project and hence were keen in distributing and ensuring as many questionnaires as possible were completed.

Four case organisations were included in the in-depth qualitative study of advisory agencies who would provide advice to the workers in the study. The organisations which participated in the research were: **Citizens Advice Bureau; Law Centre; Amalgamated Engineering and Electrical Union (AEEU);**and the **Transport and General Workers Union (TGWU)**. The advisers were interviewed regarding their advice to clients / members; their use of EU laws in

their advice; their opportunity to use expert legal assistance and their own research time to keep up to date; and finally their ability to finance a challenge to UK law (potentially in breach of EU law). The response rate for the interviews with advisers was 57% (four positive responses out of seven contacted organisations) and provided an indication of the level of advice available to workers in the region.

EVIDENCE FROM WORKERS³⁰

The workers were contacted by means of a self-administered questionnaire which investigated their awareness of rights; their membership of trades unions; and their willingness to bring actions against the employer and the State.

AWARENESS OF RIGHTS

The workers' awareness of various EU inspired or EU based employment rights was examined as awareness ensured the workers had the information, at the very least, to recognise that they may have an entitlement to protection under the law which would allow further enquiry and advice. The recent developments or creation of rights in Working Time,³¹ Parental Leave³² and Minimum Wage³³

³⁰ This group of respondents were noted as workers because, whilst the research included both employees and independent contractors, the workers themselves were sometimes (expectedly) unaware of the actual definition of the contract which they worked under and therefore the workers were not separated into different categories.

³¹ Working Time Regulations [1998].

³² Maternity and Parental Leave etc. Regulations [1999].

³³ National Minimum Wage Act [1998].

made these obvious areas for examination, and the changes or extensions to the laws of Equal Pay and Sex Discrimination³⁴ from the UK or ECJ made these rights visible and hence applicable to the study. These rights offered fundamental protection to workers from all sectors of the economy and therefore the workers were questioned as to whether they would consider themselves aware of the right and the protection which followed.

It was discovered in the research that there was a general lack of awareness of many important rights as demonstrated in Equal Pay (45%) (117);³⁵ Sex Discrimination (35%) (90); and Parental Leave where only 30% (78) of all respondents stated they were aware that they had any rights or protections available to them. This was further made problematic when considered by the characteristics of the respondents. In the service sector organisation only 10% (5) of respondents gave a positive response to their awareness of Equal Pay while at the public sector 73% (49) of workers considered themselves aware. Parental Leave was a further area which produced a general lack of awareness with the service sector producing 8% (4) awareness and the manufacturing sector a mere 7% (5). Once again, in contrast with the public sector (73%) (49) it appeared there was an overall lack of awareness of a relatively new and important right which affected the lives of working families. Conversely, the rights of Working Time and Minimum Wage both produced high responses of awareness from all the sectors with 88% (227) and 99% (254) respectively. These rights affecting many workers in the study, along with the media coverage,

³⁴ Such as the Sex Discrimination (Gender Reassignment) Regulations [1999] and Council Directive 97/81/EC outlined *supra* at n. 7.

³⁵ Figures without % marks are the actual number of respondents.

may have had an impact on these figures but they were impressive and may suggest future strategies for wider dissemination.

With overall rates of less than 50% awareness of many of these employment laws, the workers were vulnerable in accessing their EU based rights. The evidence presented in this section derived from the total percentages and figures when all the workers' responses were tabulated. When viewed by the industry sector interesting trends emerge which demonstrate the problems these workers have in accessing their rights. Table 1 outlines the findings from the workers on their individual employment rights and demonstrates that the public sector workers have the highest percentage of those identifying themselves as aware of the rights of Equal Pay, Sex Discrimination, Dismissal and Parental Leave. It further demonstrates that those with the lowest responses of awareness occurred in the service sector case organisation. The overall awareness of workers highlights areas where workers need assistance in exercising their employment rights and this continues by identifying if the workers are aware of any distinction between UK based and EU inspired laws as this may have implications for enforcing their rights or seeking assistance.

Table 1: Are you Aware that you have Employment Rights in the Following Areas?

| Responses | Retail Organisation | Manufacturing Organisation | Service Sector Organisation | Public Sector Organisation | Total |
|---------------------------------|---------------------|----------------------------|-----------------------------|----------------------------|------------|
| Equal Pay | | | | | |
| Yes | 20 (31) | 43 (57) | 5 (10) | 49 (73) | 117 |
| No | 44 (69) | 32 (43) | 46 (90) | 18 (27) | 140 |
| Sex Discrimination | | | | | |
| Yes | 23 (36) | 22 (29) | 5 (10) | 40 (60) | 90 |
| No | 41 (64) | 53 (71) | 46 (90) | 27 (40) | 167 |
| Dismissals | | | | | |
| Yes | 12 (19) | 45 (60) | 10 (20) | 47 (70) | 114 |
| No | 52 (81) | 30 (40) | 41 (80) | 20 (30) | 143 |
| Working Time Regulations | | | | | |
| Yes | 50 (78) | 73 (97) | 51 (100) | 53 (79) | 227 |
| No | 14 (22) | 2 (3) | 0 (0) | 14 (21) | 30 |
| Parental Leave | | | | | |
| Yes | 20 (31) | 5 (7) | 4 (8) | 49 (73) | 78 |
| No | 44 (69) | 70 (93) | 47 (92) | 18 (27) | 179 |
| Minimum Wage | | | | | |
| Yes | 61 (95) | 75 (100) | 51 (100) | 67 (100) | 254 |
| No | 3 (5) | 0 (0) | 0 (0) | 0 (0) | 3 |

AWARENESS OF EU BASED LAWS

Workers were questioned of their awareness of employment laws to ascertain their access to protective rights, and whether the rights were from the UK or EU. The workers were also asked if they were aware of the distinction between UK and EU based rights because EU based rights provided obligations on a Member State to transpose the effects of the law (usually a Directive) into domestic law. If the worker was unaware of this source of law then non-transposition may go unnoticed by the workers which consequently places their increased dependence on protection to their advisers and the State. In this research only 17% (43) of workers were aware of a distinction which demonstrates the barrier workers face

in awareness of employment rights and the role played by the EU in their protection. Of the individual sectors, the distinction in this awareness was most marked in the service sector where there was a distinct lack of awareness compared with the public sector where the workers responded with the highest number of positive responses to the question. This general lack of awareness could in part be related to the sources of information of their rights which the workers highlighted in the research.

SOURCES OF INFORMATION OF LEGAL RIGHTS

In terms of how access can be made to rights, the workers were questioned as to the sources of information used by them, as the source (and the impartiality and expertise) available can have serious consequences for access to rights. Overall the figures were 28% (media); 27% (employer); 26% (trade union); colleagues accounted for 17% and the workers' own research was a mere 2% of responses. This access clearly has potential problems for workers to this study due to the expertise provided by the media, which will generally be limited to areas of controversy, and by the nature of the news provided by that source: it will be an abridged form and not in great depth. The media also fails to inform of many important rights or substantial up-dates through legislative changes or case law, which limits the quality of this advice, and may have implications as this accounted for the single largest source of information. The employer, being the next single largest source, creates potential problems because of their reliance

on UK laws (which are often incomplete transpositions of the EU 'parent') and the fact that many employers avoid the protective employment rights of workers, and as being the source, can provide as much or little access as they choose. Workers also frequently fail to perform their own research, and hence are dependent upon these sources, which appears to place a barrier to access to justice, and further relies on whether workers are actively informed of their rights or whether they are required to ask about their rights (as inquisitiveness may lead to greater awareness of rights via one of the sources noted above). Overall only 54% (138) of the respondent workers were actively informed of their rights. The sources of these rights have already been noted as causing problems in accessing rights but it is also clear that as 46% (119) of the workers are not actively informed of their rights then this is a major constraint as to the access to these rights, and even more so if the workers are unaware of the sources of help available to them. Generally the responses given to this question were positive in that 77% (49), 89% (67) and 90% (60) of respondents in the Retail, Manufacturing and Public sector Case Organisations were aware of help from the advisory agencies (e.g. Advice Bureaux, Law Centres, the Equal Opportunities Commission etc.); however, there was a problem in the Service sector where only 20% (10) of workers were aware of the help available. Given the young workers at this organisation, and their lack of trade union membership, this deficiency in awareness could have negative implications for the workers' accessing rights.

The evidence therefore demonstrates a constraint in the workers' access to EU based rights. Their source of access is also limited and creates potential problems through lack of access, awareness or expertise, which all contribute to the denial of access to justice of workers to this study. As nearly one quarter of the respondents gained information from a trade union then the membership of these unions was an important aspect to gauge.

MEMBERSHIP OF TRADES UNIONS

Membership was considered in the study due to the protections afforded to members by the access to information, newsletters, legal advice, and legal representation to which non-members may not have access. It was further included to consider if trade union members, because of these resources, had higher numbers of respondents aware of employment rights than non-members. Of the 257 respondents to this research 43% (111) were members of a trade union (see Table 2), with the Manufacturing and Public sectors producing the highest percentages – 77% (59) and 51% (34), with comparatively low results in the Retail (17% (11)) and Service sectors (14% (7)). The workers from the Manufacturing and Public sector organisations were also the sectors and respondents who had the highest awareness of EU based laws among all the workers and there was a correlation between awareness of rights and trade union membership. The workers without the resources of a trade union may have

been more vulnerable to potential abuses by the employer,³⁶ or lack awareness,³⁷ and hence not wish to make a challenge through the current enforcement mechanisms.

Table 2: Are you a Member of a Trade Union?

| <i>Responses</i> | <i>Retail Organisation</i> | <i>Manufacturing Organisation</i> | <i>Service Sector Organisation</i> | <i>Public Sector Organisation</i> | <i>Total</i> |
|------------------|----------------------------|-----------------------------------|------------------------------------|-----------------------------------|--------------|
| Yes | 11 (17) | 59 (79) | 7 (14) | 34 (51) | 111 |
| No | 53 (83) | 16 (21) | 44 (86) | 33 (49) | 146 |
| Total | 64 | 75 | 51 | 67 | 257 |

Trade union membership was questioned and investigated along with awareness of rights because, as cited by Meager et al.'s research (p. 23), trade union membership is often a corollary to greater awareness of employment rights due to the advertising of the union and work of regional organisers and shop stewards. Similar points were found in this research with greater awareness of Equal Pay, Sex Discrimination and dismissals from those who described themselves as union members. However, in the issue of Parental Leave there was greater responses of awareness from non-members which possibly was due to there being fewer women than men in the category of trade union members, which was in contradiction to Meager et al.'s findings (p. 38). Therefore in some rights, an interest in the protection available may be of greater relevance to awareness than membership of a trade union.

³⁶ As lacking the resources to mount a challenge against the employer.

³⁷ As such they would be unlikely to be aware if they were being denied their rights.

PERCEPTIONS OF PROTECTION FROM RIGHTS

The workers' perceptions of their protection from employment laws was investigated because the UK has often fallen short of complete transposition of EU employment laws³⁸ and the workers' awareness of employment laws may have had an interesting effect on whether they felt protected. Despite the findings that the majority of workers did not have an awareness of many important employment rights, this did not appear to affect their perception of protection. 56% (143) of the respondents stated they felt protected with only 33% (84) of workers stating they specifically felt unprotected. This may have an implication for the role of advisers and requires more publicity of employment rights. This again places a burden on advisers who would have to take into account this lack of awareness and the greater assistance needed, in EU based laws in particular.

WORKERS' CLAIMS BASED ON THEIR EMPLOYMENT RIGHTS

Claims based on workers' employment law rights and these workers' willingness to bring a claim is relevant to any discussion on access to rights. The workers were asked about their willingness to bring an action against their employer to

³⁸ Such cases include Case C-383/92, *Commission of the European Communities v United Kingdom* [1994] ICR 664 regarding the transposition of the Acquired Rights Directive which was held unlawful due to its exemption of public sector workers; *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 regarding the qualification period for protection under the Directive; and the problems of transposition with the Maternity and Parental Leave Regulations [1999] which was subject to a claim that the stipulation that the rights granted would only apply to parents of children born or adopted after 15/12/99 was unlawful.

secure access to rights because evidence from Chambers and Horton (1990),³⁹ Graham and Lewis (1985), and Leonard (1986⁴⁰ and 1987)⁴¹ demonstrated that many workers fail to bring claims because of the retribution or fear of the consequences which often follow. Only 14% (36) of the respondents stated that they would bring a claim against their employer which may be due to experiences from personal actions, knowledge of treatment of other claimants, and the fact that the workers may not have the option to enforce laws, rather they need to continue working and generating an income (as noted by the respondent adviser at the CAB). This was particularly relevant for the young workers who dominated the service sector case organisation where only 2% (1) of the respondents noted their potential to bring a claim compared with almost one third of the workers in the public sector organisation (Table 3). There was a lack of willingness for workers to bring actions to enforce their rights against their employer and this was even less so when the claim was against the State.

Table 3: Would you bring a Claim against your Employer to Enforce your Rights?

| <i>Responses</i> | <i>Retail Organisation</i> | <i>Manufacturing Organisation</i> | <i>Service Sector Organisation</i> | <i>Public Sector Organisation</i> | <i>Total</i> |
|------------------|----------------------------|-----------------------------------|------------------------------------|-----------------------------------|--------------|
| Yes | 9 (14) | 5 (7) | 1 (2) | 21 (31) | 36 |
| No | 55 (86) | 70 (93) | 50 (98) | 46 (69) | 221 |
| <i>Total</i> | 64 | 75 | 51 | 67 | 257 |

³⁹ Chambers, G., and Horton, C. (1990) *Promoting Sex Equality: The Role of Industrial Tribunals* Policy Studies Institute, London.

⁴⁰ Leonard, A. (1986) *The First Eight Years: A Profile of Applicants to the Industrial Tribunals under the Sex Discrimination Act 1975 and the Equal Pay Act 1970: Who They Were, Their Claims, Their Success 1976-83* EOC, Manchester.

⁴¹ Leonard, A. (1987) *Pyrrhic Victories: Winning Sex Discrimination and Equal Pay Cases in the Industrial Tribunals 1980-1984* EOC, Manchester.

The workers were questioned if they would bring an action against the State to enforce their rights. This question was asked, not to identify if workers had an awareness of the concept of State Liability, but rather to determine if these workers would even contemplate suing a public body, not the employer, to enforce rights. Bearing in mind the current mechanism to enforce rights in the private sector is generally a State Liability action, if workers were not willing to undertake an action in this way the process of accessing rights is slowed until another worker brings an action which can force the State to alter the law. Only 9% (24) of the respondents stated they would bring such an action against the State and this strongly demonstrates the need for a more accessible enforcement mechanism which involves the employer rather than a public sector institution. These workers were probably unaware of the details and procedures of a State Liability action including costs, time, legal expertise needed,⁴² not to mention the fact that all they would essentially be claiming was damages and not the right which they had been denied, and yet they were still reluctant to consider this even in a hypothetical situation. Table 4 identifies the responses across the industry sectors and demonstrates a major barrier to workers using this method of accessing their rights and a need for a more effective remedy. 28% (9) of the public sector respondents stated they would be willing to bring a claim whilst less than 5% (13) of all other respondents would and this is a problem for a State Liability action. The workers who would be willing to bring such an action have

⁴² Marson, J. (2004) 'Holes in the Safety Net? State Liability and the Need for Private Law Enforcement' *Liverpool Law Review* Vol. 25, pp. 113-134.

the enforcement mechanism of Vertical Direct Effect of Directives available and hence may not require a State Liability action and the others who do not have that access would be unwilling to challenge the State.

Table 4: Would you Potentially bring a claim against the State to Enforce your Employment Rights?

| <i>Responses</i> | <i>Retail Organisation</i> | <i>Manufacturing Organisation</i> | <i>Service Sector Organisation</i> | <i>Public Sector Organisation</i> | <i>Total</i> |
|------------------|----------------------------|-----------------------------------|------------------------------------|-----------------------------------|--------------|
| Yes | 1 (2) | 3 (4) | 1 (2) | 19 (28) | 24 |
| No | 63 (98) | 72 (96) | 50 (98) | 48 (72) | 233 |
| Total | 64 | 75 | 51 | 67 | 257 |

EVIDENCE FROM ADVISERS

The evidence from the advisory agencies was essential to the research to determine their accessibility to the workers, their opportunity to use EU law directly in their advice and how the current enforcement mechanisms may affect their advice to workers – bearing in mind that the CAB and Law Centre were not-for-profit agencies without sufficient funding to finance expensive cases (such as State Liability actions). As the research aimed to extend beyond simply the level and sources of UK workers’ awareness of employment laws and rights into the advice which was available to them, then empirical data needed to be gathered from those sources whom the workers had identified both from the pre-survey discussions and the sources they noted in the questionnaire. This evidence was gathered for a qualitative approach to the subject to gain an in-depth awareness of how the advisers of these worker respondents impact on accessing EU rights.

From this material it was discovered that the workers had identified the following sources of help available to them in any claims against their employer or legal issues they may encounter - Solicitors; Citizens Advice Bureaux; Law Centres; and various trades unions of whom they were aware, or of which they were members. The sources chosen for the research were those which provided advice for free or on a subscription basis as the costs involved would stop the respondents from seeking advice from solicitors, and included the specific trades unions identified by the worker respondents. These agencies were used in this research as the study was from the perspective of the workers and hence was limited to this group of workers' awareness of the sources of help available.

THE ADVISERS' DIRECT USE OF EU LAW

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 (such as the National Association of Citizens Advice Bureaux (NACAB) 'Information System' as noted by the CAB respondent) which the adviser considered to be unquestionable and always correct. 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 interpretation⁴³ or may involve a damages action⁴⁴ which went beyond their skills.⁴⁵

It is also the case that these advisers knew about Direct Effect and particularly the lack of HDE, and therefore, without financial backing from a trade union, there was probably little reason to use the Directive as Indirect Effect was a difficult, opaque and uncertain method of interpretation⁴⁶ (Stein et al 1976)⁴⁷ and with no possibility of using HDE it resulted in only a State Liability option – which is very rarely used due to its expense. Enabling HDE could allow the relevant Directive to be used directly in an Employment Tribunal and result in its increased use by these agencies resulting in anomalies between the EU and UK laws being highlighted and remedied much earlier than at present.

THE SOURCES OF INFORMATION AVAILABLE TO ADVISERS

The sources available to the advisers at the case organisations was an important aspect of access to EU law as it might be argued that up-to-date sources, full access to materials and expert legal help would enable the adviser to fully

⁴³ Such as with Indirect Effect which is a method of statutory interpretation.

⁴⁴ 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.

⁴⁵ Enforcing EU rights through Indirect Effect or State Liability are 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.

⁴⁶ 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.

⁴⁷ Stein, E., Hay, P., and Waelbroeck, M. (1976) *European Community Law and Institutions In Perspective: Texts, Cases and Readings* Bobbs-Merrill Co.

research the area of employment law to assist the client. 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.

There was a distinct difference in the sources available depending upon the advice centre to which they belonged. The advisers at the Local Authority funded CAB and Law Centre did not have a specific legal department and had funding restrictions which resulted in most advice being 'information-based'⁴⁸ and limited case work. They were also hindered because advisers did not have lawyers to do this or the time themselves to spend with just one client. In contrast the advisers at the trades unions had information sent to them by their legal department as well as access to solicitors who would represent the client at any tribunal hearing.

The adviser at the CAB stated that they had referrals to, and training from, the local Law Centre who were the experts in employment law offering a free service to people in the district. The CAB used leaflets and publications in the press, but their main source of information came from their membership of NACAB and its 'information system'. While this advisory agency was a generalist bureau and complex issues would be referred to the Law Centre, there may have been a problem with the use of the 'information system'. This resource was regularly up-dated but the adviser stated that they referred to it and as it was 'completely up-to-date' they were unlikely to question whether the law contained

⁴⁸ 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.

on the system was correct: 'I'm hardly going to look at the information on the system and say "**oh that can't be right**". Without the adviser researching the issue themselves there may be a problem in advisers giving the wrong advice until it is challenged, as demonstrated in *BECTU*.⁴⁹

At the Law Centre the respondent stated they had the ability to attend training courses, they had access to books and journals and that the centre had resources to ensure they kept up-to-date. However, they did not use both the UK and EU laws together and further, they could not afford to subscribe to 'ECJ Employment Watch'. This had the effect of making awareness of developments and challenges being brought to the ECJ on matters of inconsistencies or clarifications regarding EU law and their transposition more difficult. This limited their ability to proactively advise clients as they had to wait for clarification of the UK laws in relation to EU law and further had to have the time to research these matters themselves.

The trades union respondents had access to legal departments which provided up-dates, leaflets and expertise on any area of employment law which the adviser needed clarification on. This resource was very valuable to the advisers and provided the adviser with an ability to ensure they were fully aware of any developments in the law.

It was clear from this research that there was a distinction in the expertise available to clients and the trades unions had the expert legal assistance, funding and resources to offer the most complete advisory service to clients. This point

⁴⁹ *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.

was further made by the respondents at the CAB and the Law Centre who recommend workers to be members of a trade union for the protection which this affords them.

THE AVAILABILITY OF EXPERT LEGAL ADVICE

The availability of expert legal advice to the respondent advisers was considered as this is fundamental in ensuring the more complex areas of law⁵⁰ may be comprehensively accessed. The respondents at the CAB and Law Centre stated that they occasionally had volunteer solicitors working at the centres and access to solicitors providing *pro bono* work – but this did not extend to EU matters of State Liability as these were beyond the scope of the solicitors' firms expertise.

In comparison to this, the trades unions did have dedicated legal departments that could be accessed for the clients and this extended to resources being available to bring claims to challenge the interpretation of EU law or State Liability claims. The respondent at the TGWU even stated that they would welcome a State Liability claim as this would be a very good advert for the union and wished to extend the rights for all workers. This service appears to offer great access to EU law for the members of the trades unions with the resources for the adviser to identify the potential denial of access to EU law and the expert legal help to follow this up with representations through the courts. However, this research project aimed at challenging this theoretical position by investigating the reality for workers in this region of the UK. These advisers at the

⁵⁰ Such as those with an EU dimension or involving enforcement of rights.

trades unions rarely used primary EU laws in their advice and therefore may be unaware if there is a problem in the transposition of EU Directives through the UK implementing Act. The main problem for the client workers is that the adviser respondents were not aware of the EU Directives in any detail 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. If this identification is not made then the availability of State Liability would not assist these workers. If adopted, HDE may remove the artificial distinction between EU and domestic laws, and potentially these advisers would use the EU law proactively due to its recognition in Employment Tribunals.

THE RESEARCH AND TRAINING FOR ADVISERS

With the evidence that many of the respondent advisers do not generally use both EU and UK laws when preparing their advice to clients, one of the possibilities is that they do not have the time to devote to researching these issues. This has implications for the depth and level of advice which these advisers can offer clients. Research into EU law is essential due to its dynamic nature and the continual changes in domestic and European case law which have altered advice (such as changes in the qualification for rights under the Working Time Directive in the *BECTU* case). There is evidence of a difference in

the quality of research materials available at the respondent case organisations which has resulted in research through reading national newspapers (CAB) to a limited amount of legal research on their own time (AEEU). The respondents each stated that any research was conducted outside of their working hours. It was impossible to give the time to research that they would have liked due to the pressure of work and numbers of clients that they had to advise.

The advisers further stated that they had the occasional opportunity for training but found the pressure of work resulted in this being *ad hoc* and the opportunity for time away from work to attend training courses was unrealistic. Once again it appeared that limitations were present in advisers being able to place themselves in a position to offer the clients full access to EU law advice.

THE ABILITY OF ADVISERS TO CHALLENGE UK LAW

Each of the respondents at the case organisations were asked if their advisory agency had the capacity and willingness to assist clients in challenging UK law (under the available enforcement mechanism of State Liability). The respondents at the CAB and Law Centre stated that their centres did not have the funds to support such an action, while at the trades unions, the respondents stated that they would be able to bring an action for their member if the case demonstrated the merit. They further noted that such an action would be taken by solicitors and barristers from their legal department. 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.

COMMENTARY

This section has demonstrated the limitations to the advice which the workers in this study would receive and why there is a problem in the workers gaining access to EU rights. The workers do not have sufficient awareness of UK and EU laws to assist in their access to non-transposed or incorrectly implemented Directives, and these advisers do not have time to research EU law or develop their skills in recognising breaches of EU law because of the barriers in the current enforcement mechanisms. HDE would ensure advisers would use EU primary laws and be encouraged to look towards the EU law itself as each of the advisers were aware of the presence of EU law and were also knowledgeable of the supremacy of EU law over inconsistent domestic legislation.⁵¹ Therefore HDE would enable advisers to look to the source of these

⁵¹ As provided in the European Communities Act [1972] s.2 (1) which reads "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect

protective laws in the first instance, and potentially use the laws if the UK fails to transpose on time the provisions of a Directive.

IMPLICATIONS OF THE EMPIRICAL EVIDENCE FOR ACCESS TO EU LAWS

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.⁵² 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). 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).⁵³

or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies." It is further evidenced in the case law as demonstrated in *R v Secretary of State of Transport ex parte Factortame Ltd* [1989] 2 All ER 692 [1989] 2 CMLR 353.

⁵² 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.

⁵³ 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).

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).⁵⁴ Through evidence from this research, 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)⁵⁵ and therefore the Commission's work regarding increasing awareness 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. It therefore requires the advice available to them 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

⁵⁴ Szyszczak, E. (1996) 'Making Europe More Relevant to its Citizens: Effective Judicial Process' *European Law Review*, October, pp. 351-364.

⁵⁵ Prechal, S. (1997) 'EC Requirements for an Effective Remedy' in Lonbay, J. and Biondi, A. (1997) *Remedies for Breach of EC Law* John Wiley and Sons, Chichester, New York, Brisbane, Toronto, Singapore.

knowledge of EU laws largely because either these are difficult and their clients would not bring such actions, or those advisers who were aware of the concept of enforcement mechanisms were aware that the ability to use EU laws directly in domestic courts between two private parties required the use of the doctrine of HDE. These advisers knew that HDE would not be granted in the domestic courts (although a system of 'disguised' effect has been witnessed (Dougan 2000)) and so was a fruitless exercise to pursue it. A barrier was therefore present because of this denial.

By granting HDE the advisers would have the increased incentive of looking at new EU Directives and be aware that if no transposing legislation arrived on time, the provisions potentially had the effect of being relied upon by all workers in the domestic courts. It is proposed that application of HDE would further encourage these advisers to study the terms of the implementing legislation to ascertain whether the two sources of law are compatible. This would stop the problems that advisers and workers have faced in the past⁵⁶ and provide a real and effective enforcement mechanism to all individuals (Coppel 1994;⁵⁷ Dougan 2000; and Hepple and Byre 1989 et al.)⁵⁸ and stop the unjust distinction between public / private sector workers; the transparency limitation of

⁵⁶ As in the cases of *R v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union supra* at n. 38., and *Biggs v Somerset County Council* [1995] ICR 811 where the problems of the UK's non-implementation or incomplete transposition, and ineffective enforcement mechanisms, have resulted in many workers being denied their rights under EU laws.

⁵⁷ Coppel, J. (1994) 'Rights, Duties and the End of Marshall' *Modern Law Review*, Vol. 57, No. 6, pp. 859-879.

⁵⁸ Hepple, B., and Byre, A. (1989) 'EEC Labour Law in the United Kingdom - A New Approach' *Industrial Law Journal*, Vol. 18, pp. 129-143.

Indirect Effect (Ross 1993);⁵⁹ the cost and correct legal forum issue of State Liability (Fitzpatrick 1997); and the political nature of Member States' transposition of EU rights (Craig 1997;⁶⁰ Ward 2000).⁶¹

A PROACTIVE APPROACH

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 sadly depressing 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 this falls to 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 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 but also because they can keep workers informed of new laws and ensure workers are protected. The

⁵⁹ Ross, M. (1993) 'Beyond Francovich' *The Modern Law Review*, January 1993, pp. 55-73.

⁶⁰ Craig, P. P. (1997) 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation' *European Law Review*, December, pp. 519-538.

⁶¹ Ward, A. (2000) *Judicial Review and the Rights of Private Parties in EC Law* Oxford University Press, Oxford and New York.

evidence from this study demonstrates that whilst many worker respondents 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. 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.⁶²

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 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 knowing that as long as they are within the

⁶² '... 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).

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 accessing EU rights due to their importance in this process. Importantly in this study of workers' seeking advice from these agencies is the longer term consequences which result from the advice they receive. 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 fail to review 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. This may also result in the opportunity to put right an incorrect transposition or interpretation through a challenge in the courts to be lost. There is consequently the need for a system of checks and balances in the advice provided to ensure advisers in the advisory agencies do use the most up to date materials and use these in providing advice to workers. The majority of workers in this study required assistance on employment rights and particularly so in EU based rights of which very few workers were aware. The system of Quality Marks⁶³ was used in the free advisory agencies to this study but this still did not provide the access

⁶³ The Community Legal Service provides a system of Quality Marks which provide an external check on an advisory service's level of advice - being for Information; General Help; or Specialist Help.

to the most detailed, or latest developments, of EU based laws and would leave workers without an adequate remedy to their employment problem. The Quality Marks granted and maintained under the Legal Services Commission⁶⁴ should ensure the flexibility is granted to enable the advisers to access EU materials and ensure they are fully versed in developments in EU legislation and case law.

A further issue involved in the proactive approach required to ensure access to EU laws is that of the enforcement mechanisms available. A major issue in restricting access in the domestic courts is the denial of HDE. The theoretical and legal reasons for denial of HDE have been discussed and have been dismantled in the literature (Marson 2004).⁶⁵ In essence HDE's adoption would not create a problem for employers because, as EU law is superior to inconsistent domestic law, the employer should be following EU law and consequently should not have to review two sets of laws. Therefore by enabling HDE to come into effect in our courts the employer would be aware of the necessity of complying with EU law rather than relying on the UK's interpretation, and the fact that the government has not transposed the law on time would not stop the effect of the EU law in the UK. Employers currently realise that if the worker has a problem with a non-implemented or incorrectly transposed Directive, the worker, if he or she wants access to it, has to bring a public law action against the State rather than exercising the right against the employer. The non-State employer enjoys a risk-free disregard for EU law particularly if an

⁶⁴ It is this body which administers the service and grants the award of Quality Mark (if appropriate) to the advisory service provider.

⁶⁵ Marson, J. (2004) 'Access to Justice: A Deconstructionist Approach to Horizontal Direct Effect' 4 *Web Journal of Current Legal Issues*.

anti-EU social policy government such as the Conservative party comes back into power. By allowing HDE the employer loses this protection and would be quickly compelled to ensure EU laws were followed in their workplace. This would further assist workers in the access to the rights they currently receive through organisations such as a CAB, Trade Union or Law Centre.

There are further 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 basic tools in order to offer the correct advice and assist workers in accessing their rights.

CONCLUSIONS

This empirically based research has demonstrated the problems both workers and their advisers have in accessing EU rights in the UK and has used this evidence to propose the adoption of the enforcement mechanism of HDE. The proposition for HDE has been an area neglected in the literature of the practical need for this remedy and how its denial has implications for an identifiable group of workers rather than the merely hypothetical and theoretical work which has preceded it. Due to their overall lack of awareness of rights, the workers are dependent on their local advisers to be able to appraise them of their rights, and these advisers are consequently the gate-way to access EU laws. Due to this dependence, the advisers have a great responsibility in facilitating access to rights. The advisers have a responsibility to be proactive in their research and advice, they must be competent in their advice (which requires external and internal scrutiny to maintain standards), and to possess the most up-to-date information available with a critical eye on the transposing legislation of EU provisions. The advisers in the study are competent in their jobs, and passionate about protecting the interests of their clients and members. They are however, hindered due to lack of funding, lack of time for research, and lack of sources of information between the advisory agencies. The workers in this study face limitations in accessing their EU rights and require access through action by the EU, the Government, their advisers, and they require the enforcement mechanisms to ensure they are not denied their fundamental employment rights.