GOVERNMENT REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE EU AND THE UK: CALL FOR EVIDENCE ON SOCIAL AND EMPLOYMENT REVIEW

RESPONSE BY LEWIS SILKIN LLP

Introduction

Lewis Silkin LLP is a commercial law firm with approximately 60 partners. Our main office is in London with smaller offices in Oxford and Cardiff. Our Employment, Reward and Immigration department is one of the largest and most highly rated in London. We act mainly for medium to large-sized employers, across a variety of industry sectors.

We consider that our experience as employment lawyers is relevant to questions 2, 3 and 10 but not to the other questions, so we are only responding to those questions.

Question 2

Q. To what extent are social and employment goals a desirable function of the EU in their own right?

A. Many of the social and employment goals introduced by the EU are regarded as desirable by both employers and employees, although there may be disagreement over the detail of the legislation. In our experience, employers generally approve of anti-discrimination legislation. (Indeed, the UK introduced the Equal Pay Act and laws against race and disability discrimination independently of the EU, so this legislation does not all originate from Europe.) Such legislation clearly benefits employees, by helping to prevent and providing a means of redress for workplace discrimination and harassment. In our view, if complied with, this legislation is also good for business because it seeks to ensure that the best candidates are recruited and retained, irrespective of irrelevant prejudicial considerations. It also, for example, aims to eliminate discriminatory harassment and bullying, which if unchecked can impact upon employee retention, morale and productivity.

Leave for family-related reasons enables employees to balance work and family life. It therefore benefits employees and society more widely. However, the amount of such leave and whether or not it is paid or unpaid are crucial factors in balancing the respective needs of employees, employers and the community.

The collective redundancy consultation regime in the UK was already considerably less onerous than many other European countries even before the period for consultation (for 100 or more redundancies) was recently reduced. However, employers can still find this difficult. On the other hand, employees and employee representatives can value the opportunity to make suggestions to try to reduce redundancies or mitigate the effects. In our experience, engaging in consultation may result in employers modifying their proposals. It can therefore achieve its aims.

Currently, employers cannot settle claims related to a failure to inform and consult on collective redundancies by means of a settlement agreement. This seems a curious anomaly and we would suggest that there is no reason why collective redundancy claims should not be able to be settled through a settlement agreement.

Although TUPE is often the subject of complaints, the goal of protecting employees when the business they are working in changes hands is a desirable one. However, some of the ways in

which EU law has been implemented in TUPE have created problems for employers. In particular, the prohibition on changing terms of employment if the reason for the change is related to the transfer has created real problems for employers. This prohibition resulted not from the wording of the Directive itself but from the way in which UK courts have interpreted a decision of the European Court of Justice (ECJ) (the *Daddy's Dance Hall* case). It is arguable that the UK courts have taken a far stricter interpretation than was necessitated by that decision. In addition, the extension of the Directive to service provision changes by the ECJ (which was apparently not envisaged by the original Directive) has created problems for employers.

Although concerns are frequently raised about working time law, the mischief that it is designed to address - ensuring employees' working hours are not so excessive as to threaten their health and safety - is relatively uncontroversial. However, as with other areas of EU law, some of the detail of the way it has been implemented or interpreted has been problematic for employers.

In our submission, many of the perceived burdens to business arise more from the ways in which EU legislation in general has been interpreted by the courts than by the legislation itself. We address this more fully in our answer to question 10 below.

One further important point is that frequent changes to employment law can make it difficult for employers to keep abreast of the latest developments. In this respect, even legal changes designed to reduce "red tape" for employers may in the short term increase the burden on them as they try to learn the parameters of the changed law. Once employers have mastered new legislation and set up systems to comply, it generally becomes less of a burden. Slowing the pace of change in both domestic and EU employment law would be beneficial for business.

Question 3

Q. What domestic legislation would the UK need in the absence of EU legislation?

A. In our view it would be difficult and undesirable for the UK to attempt to remove the protections conferred by the Equality Act 2010, family-related leave and protection, working time protection and the protection on transfers of undertakings. However, we suggest that these protections could productively be amended as set out in our answer to question 10.

Question 10

Q. How could action in social policy be undertaken differently? For example, are there ways of improving how EU legislation is made e.g. through greater adherence to the principles of subsidiarity and proportionality or the ways social partners are engaged?

A. Politicians, the media and businesses in the UK frequently seem to express concerns about the UK's continued membership of the European Union. In doing so, they often focus on the perceived unreasonable burdens imposed by EU employment laws. However, our view is that these perceived burdens arise principally from the ways in which those laws have been interpreted by courts and tribunals, in particular by the ECJ. Some of the judicial interpretations have diverged from the likely intentions of the drafters of the EU legislation, reflecting imprecise drafting or a failure by the drafters to foresee the consequences of the drafting.

EU laws are rarely reviewed: indeed, the need to garner sufficient support across Europe for changes usually renders a necessary updating of particular aspects near impossible. Sometimes EU laws are revised in order to incorporate ECJ case law without consideration being paid to whether or not the case law reflects the intentions of the original drafters. Matters would be

improved if a means were found to review legislation responsively to ensure interpretation reflects its original intentions.

The most common concerns about EU employment law relate to three areas:

- Working time
- Equality laws
- TUPE

The underlying "mischief" which each of these laws is designed to address is relatively uncontentious. These are, respectively: ensuring employees' working hours are not so excessive as to threaten their health and safety; outlawing unjustified discrimination against disadvantaged groups; and ensuring employees are protected when the business in which they work changes ownership.

In the following, we look at each of these areas in turn and identify certain aspects where ECJ case law has caused problems for employers.

Working Time

The definition of "working time" has been interpreted by the ECJ to cover periods of time which many would not regard as coming within the normal understanding of the term. This includes on-call time where the worker is on call at the employer's premises even if he or she is asleep. Hospital doctors are particularly affected by this issue.

We believe it is unlikely that working time was intended by the drafters of the Working Time Directive (93/104/EC) to include time when a worker is asleep. Article 2(1) defines "working time" as "any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice".

The ECJ case law (*SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2001] ICR 1116 and *Landeshauptstadt Kiel v Jaeger* [2004] ICR 1528) has held that article 2(1) can be broken down into three constituent parts:

- the worker is present at his workplace;
- the worker is at his employer's disposal; and
- the worker is actually carrying out his activities and duties.

According to the ECJ, those three elements cannot be regarded as cumulative. Instead, they should be regarded as autonomous aspects of "working time". This is because:

- The terms "disposal" and "carrying out his activities" are antithetical to each other.
- If they are treated as cumulative, you exclude from the scope of the Directive all time when the employee is not physically at the workplace but is still carrying out his duties; or when the worker is at the workplace but not carrying out his activities.

We suggest that the application of the three elements together is difficult to reconcile with the aim of the Directive, which is to ensure that workers have an adequate rest time. We consider that the drafters never intended the definition to include these three aspects autonomously. The original intention was probably to regard them as cumulative, but insufficient intention was

given to "working time" which would fall outside a definition which required all three constituents to be present.

Another example from the Working Time Directive is the calculation of holiday pay. The Directive is silent as to how holiday pay should be calculated. The ECJ has interpreted it in a way that is likely to include many types of bonus, overtime and commission payments.

There are, of course, different ways of remunerating workers and many are paid variably depending on a variety of factors, including: overtime; company, team and personal performance bonuses; and commission. If these are taken into account in calculating holiday pay, then in many cases the worker would receive supplemental payments larger than intended by the employer. If they are not taken into account, however, there is scope for abuse through employers reducing holiday pay by re-categorising elements of remuneration.

The problem is compounded in the UK by domestic legislation which has complex and uncertain provisions relating to the calculation of holiday pay, which have resulted in considerable litigation.

The ECJ has held in *Robinson-Steele v RD Retail Service Ltd* [2006] ICR 932 and *Williams v British Airways plc* [2011] IRLR 948 that:

- Workers must continue to receive their "normal remuneration" during their annual leave.
- Normal remuneration would include remuneration that is intrinsically linked to the performance of tasks which the worker is contractually required to perform.

We consider it unlikely that the drafters had regard to the complex range of remuneration models in operation and, if they had given the matter more thought, that they would not have introduced a definition as onerous as that of the ECJ.

There are further examples, such as the accrual of paid holiday during long-term absences such as sick leave or maternity leave. The ECJ case law has said that workers continue to accrue annual leave during sick leave and maternity and parental leave (*Stringer v HM Revenue & Customs; Schultz-Hoff v Deutsche Rentvenversicherung Bund* [2009] IRLR 214 and *Merino Gomez v Continental Industries del Caucho SA* [2004] IRLR 407). The drafters of the Directive probably never put their mind to this. Employees can be off work sick for many years, often unpaid or sometimes in receipt of insured long-term disability pay. It surely cannot have been the intention that such workers should be able to accrue holiday and return to work temporarily to take it, nor for them to return to work with a significant accrued holiday entitlement.

Minimum holiday rights were introduced as a health and safety measure to give workers a right to a paid break from work. This rationale does not apply to breaks from sick, maternity or paid leave and we would submit that the Directive should be amended so as to reverse the ECJ's interpretation.

Unlike the other concerns we have detailed above, we would submit that the media, political and business disquiet about the 48-hour week has been largely been misplaced. We have been advising businesses of all sizes on their employment law concerns since long before the advent of the Working Time Directive and the implementing UK Regulations. In our experience, the 48-hour week applies in few cases and is not generally a troublesome issue. Firstly, the UK benefits from the opt-out which permits workers to agree that the provision will not apply to them;

secondly, there are a host of exemptions, so many workers are not covered at all by the provision; and thirdly, the restriction only applies on average over a 17-week period, so it does not catch surges of work.

Since it now appears unlikely that there will be a decision at EU level to remove the opt-out from the Directive, we take the view that it would be better to focus attention on the other working time issues outlined above which are causing genuine problems for businesses.

Equality

Various ECJ decisions have held that it is potentially direct sex/pregnancy discrimination to treat a woman unfavourably because she has taken maternity leave, which includes discounting any of that maternity leave for the purposes of length of service/seniority rights. This is the case even if a member state's statutory maternity leave is considerably longer than the EU law minimum.

This causes particular problems in professional jobs where experience is used for career progression. It also causes problems with the expense of continuing all benefits during full maternity leave, including accrual of holiday entitlement.

Land Brandenburg v Sass [2005] IRLR 147:

- Unfavourable treatment because of absence on maternity leave is discrimination on the ground of the employee's pregnancy and maternity leave, and discrimination on the grounds of sex under the Equal Treatment Directive (at the time of the judgment, Directive 76/207).

- Statutory maternity leave of more than the minimum 14 weeks does not preclude that leave from being considered maternity leave under the Pregnant Workers Directive.

- Protection depends on the nature of the leave. In this case, the extra leave was for the same purpose – "intended to ensure the physical recovery of the mother following the birth and to allow her to care for the child herself. As the Court has repeatedly held, the objective of Directive 76/207...is precisely that two-fold protection for women".

- As a result, the total of 20 weeks leave "must be considered to be statutory leave intended for the protection of women who have given birth" and so must count towards a qualifying period of employment for access to a higher salary grade.

This case has led to the argument that all "maternity" leave is for this purpose and so cannot be discounted for any employment purpose, even where the total leave is considerably longer than the 14-week minimum (e.g. 52 weeks in the UK) and can be shared with the father/other parent.

Previous European cases made clear that women who are pregnant or on maternity leave are in a special protected position which cannot apply to a man, and so unfavourable treatment connected with pregnancy or maternity leave is always sex discrimination. There is no need for a male comparator. However, this analysis breaks down when considering extended "maternity" leave which can also be taken by the father/other parent: it is no longer leave that only applies to women.

The protection of women in the Directives and ECJ case law is based on the concept of "maternity leave", which is defined in the Pregnant Workers Directive.

There could be an amendment to the Pregnant Workers Directive to clarify that the definition of "maternity leave" under EU law is limited to a period required for health and safety, potentially with a cut-off point e.g. 20 to 24 weeks. Statutory leave in excess of this period would not be for the same purpose and not regarded as "maternity" leave, and so would not give women the same special protection in relation to benefits or improvements in working conditions during the absence, or other "unfavourable" treatment.

This would allow for the proper protection of women during a maternity leave period, but not extend this enhanced protection for a lengthy period after the health and safety reasons behind the Directives no longer apply.

This would fit better with the concept that leave to care for a young child soon after birth can be shared with the other parent, and would also help to encourage sharing with the other parent: a lengthy period of leave would no longer be labelled as for the protection of the woman who has given birth.

This would also be consistent with the decision of the European Court of Human Rights in *Markin v Russia* [2010] ECHR 1435 that it was in breach of Article 14 (non-discrimination) taken together with Article 8 (the right to respect for private and family life) for the Russian military to allow only women to take parental leave. A distinction was made between the purposes of maternity leave and parental leave. "Maternity" leave was to enable the mother to recover from the fatigue of childbirth and to breastfeed. "Parental" leave was to care for a child, in respect of which both mother and father were "similarly placed".

This approach would also help to avoid the current confusion about the circumstances in which an employer may offer enhanced maternity pay without also offering enhanced paternity pay for Additional Paternity Leave. (This arises partly due to the ECJ's decision in *Roca Alvarez v Sesa Start Espana ETT SA* (C-104/09), although the issue may have been partially resolved by the more recent decision in *Montull v Institutio Nacional de la Seguridad Social* (C-5/12)). Reserving the period outlined above for maternity leave would make it easier for employers to offer enhanced maternity pay for that period. After that period, any leave capable of being shared should be treated in the same way for men and women, and enhanced pay would therefore need to be offered to both (if employers choose to offer any enhancement).

Transfer of Undertakings

When originally made in 1977, the Acquired Rights Directive applied to safeguarding of employees' rights in the event of transfers of undertakings and businesses. Until the late 1980s, the Directive was understood to apply to business transfers but not to changes of service providers. Decisions of the ECJ changed that understanding. In effect, the ECJ extended the scope of the Directive to apply to service provision changes.

Although there are arguments for protecting the position of employees on changes of service provider, the legislative structure of the Directive is not adequate to regulate relations between potential transferors and transferees in that context. Issues are particularly acute on second-generation transfers as there will normally be no contractual relationship between the outgoing contractor (transferor) and incoming contractor (transferee).

The main problems are:

- There is generally no contractual relationship between outgoing and incoming contractor, but legal responsibility for employees and their contracts will transfer. The

incoming contractor will be responsible for actions and omissions of the unrelated outgoing contractor. Unless the customer enters into complex legal agreements, the outgoing contractor may be exposed to uncertainty and risks. If acting rationally, it will adjust the price accordingly, thus increasing the transaction costs. (This undermines the economic rationale of the Directive, which is to establish a position where there are no transaction costs in relation to employees who simply "pass through".)

In contrast, on a standard business transfer, there will nearly always be negotiations between the transferor and transferee over the terms on which the business is acquired. Employment aspects can be dealt with as part of that.

- The sale of a business generally involves transfer of land or premises adequate to carry on the business acquired. (Indeed, that is one of the factors that points to a transfer of a business rather than a mere transfer of assets.) In other words, it is essentially a static transaction, which fits easily within the structure of the Directive. In contrast, on transfers between service providers there are generally changes of location (possibly even between different countries). Issues concerning changes of location are not easy to resolve under the Directive:

    - It is only in a small minority of instances (generally highly paid professional roles) that employees will be willing to relocate a significant distance. In this context, the Directive acts as a burden on business, but without offering any meaningful protection to employees.

    - The European Commission has considered making changes to the Directive to regulate cross-border transfers, but has not come up with any appropriate structure. This underlines an inherent structural problem in seeking to apply it to such cases.

    - The Directive applies where the undertaking to be transferred is situated within the EU. Arguably therefore, the extension to changes in service provider means that the EU is purporting to regulate employment relations in non-EU states, outside its competence.

    - Article 4(2) of the Directive protects employees who are dismissed because the transfer involves a substantial change in working conditions to their detriment. Although that is a reasonable protection in the context of a business sale, it fits much less well with a change in service provider. This is particularly the case where there is an associated relocation, which will often inevitably involve a substantial change in working conditions.

Decisions of the UK domestic courts have attempted to make sense of the domestic implementation of the Directive in the context of service provision changes, but there is a constant tension arising from the fact that the provisions of the Directive were not designed to deal with such transactions.

Various decisions of the ECJ changed the initial understanding that the Directive only applied to business transfers:

Dr Sophie Redmond Stichting v Bartol [1992] IRLR 366

The ECJ held that the removal of a municipal state subsidy from one drug-abuse foundation (causing it to close) and the grant of the subsidy to a different foundation amounted to a transfer of an undertaking.

*Rask **v** ISS Kantineservice A/S* [1993] IRLR 133

This case established that a service provision change (on the facts, the outsourcing of the catering for a work canteen) could amount to a transfer of an undertaking.

Schmidt v Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen [1995] ICR 237

Süzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice [1997] IRLR 255

In *Schmidt*, the ECJ held that the Directive could apply to one cleaner and that there was no need for any transfer of assets when a bank outsourced its cleaning function. Although the ECJ has pulled back from the strong position stated in *Schmidt*, the position set out in *Süzen* still applies. In that case, the ECJ ruled that for there to be a transfer on a service provision change, there had to be a transfer of significant tangible or intangible assets or a taking over of a major part of the workforce. So, the Directive could apply to the transfer of a cleaning contract if the new contractor takes on some of the staff, even if nothing else transfers.

The simplest way to deal with the problems outlined above is to amend the Directive so that it reverts to its original purpose of protecting employees on transfers of businesses. This would avoid the very considerable costs imposed on business by application of rules between parties who have no other legal relationship.

If transfers between service providers are not excluded, the Directive should be amended either:

- to deal adequately with cross-border transfers; or
- to make it clear that cross-border transfers are not contemplated.

If cross-border transfers are not excluded, the Directive should also be amended to recite expressly that transfers within the Directive cannot occur to states outside the EU. This would be no more than a statement of the obvious: that the EU has no legal competence outside its territory. (Despite this, it is noteworthy that courts in the UK have treated the Directive as though it could regulate relations in non-EU jurisdictions.)

If the Directive continues to apply to changes of service providers, the rules on "substantial" changes in working conditions (Article 4(2)) should be amended to exclude relocation. The EU has not legislated in other areas to regulate the rights of employees on relocation, so it is difficult to see why it should do so in the context of a change in service provider. (UK legislation on individual redundancy deals expressly with changes on relocation, but it has no basis in EU law.)

Another problem is that currently the Directive applies to transfers of both public and private undertakings, but not "administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities".

There is no apparent rationale for this exception, which is a result of ECJ case law (*Henke v Gemeinde Schierke* [1996] IRLR 701) being incorporated into the revised Directive. The effect is to create uncertainty in some cases, but more generally to impose costs on government which needs to regulate specifically to replicate the Directive where there are such transfers.

It would be relatively straightforward to apply the Directive to public administrative reorganisations, so it should be amended to remove this exception.

Conclusion

We consider it likely that all the various issues outlined above, which are problematic for employers, have arisen from a combination of two main factors:

- insufficient attention being given to the drafting of the Directives, resulting in the courts interpreting ambiguous or uncertain legislation as best they can;
- the difficulty of reviewing the legislation after it has been implemented in order to ensure that it reflects the drafters' original intentions.

We have suggested above a number of specific areas in which the Working Time Directive, the Acquired Rights Directive and the Pregnant Workers Directive could usefully be amended to vary the ECJ's interpretations.

In addition, consideration needs to be given to the following:

- the process of drafting EU employment legislation and how it could be "reality checked" against the ways in which it might be interpreted and the contexts in which it will be operating within in member states;
- development of a system whereby all EU legislation could be reviewed periodically in light of relevant ECJ decisions and amended as necessary.

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