

Individual employment rights



Critically comment on the above statement with reference to effect of legislative change introduced by Labour Governments since 1997 in relation to one or more areas of individual employment rights.

I. Introduction

On the back of four electoral defeats, the Labour party sought to get the party into power by introducing a new set of ideas. Branded as “ New Labour”, and under new leadership, the Party moved to the middle ground of politics.

The Party discarded policies that were perceived to be unattractive to the electorate, such as unilateral disarmament, extension of public ownership and restoring legal immunity for trade unions. Instead, the Party embraced reforms that had their origins in the late 1980s under the leadership of Neil Kinnock.

Tony Blair, as the new leader, had no objections to policy when he found himself at the helm. He insisted upon putting a draft manifesto to a ballot of members in 1996, which was subsequently duly approved. This document later emerged as the 1997 general election manifesto titled: *New Labour: Because Britain Deserves Better.* (my italics)

The Party made a number of bold assertions in the document, such as: Britain will be better with new Labour . The manifesto then set out the commitments and policy pledges that the Party promised to fulfil if elected. More specifically, the Party outlined a raft of ‘ family friendly’ policies/commitments. In seeking to achieve this aim, the Party’s mantra was, inter alia:

‘ We will help build strong families and strong communities...’

‘ We Will Strengthen Family Life’

‘..... British men work the longest hours in Europe’

Work and Family

‘..... There must be a sound balance between support for family life and the protection of business from undue burdens – a balance which some of the most successful businesses already strike.’

i. The Labour Party’s Election Victory

The Labour Party’s won a landslide victory in May 1997, when it elected to office with a majority of 146 seats over its rivals. This victory was based, inter alia, on ‘ New Labour’s’ ideology and the ‘ 10 commitments covering a range of policy pledges’ , as enshrined in the Party manifesto. It was evidently a manifesto designed to win votes. The distancing of Labour from its close Union ties was to be replaced by a commitment to ensuring that:

‘ There will instead be basic minimum rights for the individual at the workplace, where our aim is partnership not conflict between employers and employees.’

This work seeks to outline the legislative changes that have been introduced by the Government of the day since arriving in office in 1997. The focus of the work is specifically targeted towards aspects of those legislative provisions that have had the greatest impact on the balance between family and working life in the UK, namely: the National Minimum Wage (‘ NMW’) per <https://assignbuster.com/individual-employment-rights/>

se and Working Time Regulations and, more specifically, paid annual leave entitlement.

II. Legislation in the Making

i. The Case for a Minimum Wage 2006 marked the centenary for calls for the implementation of a NMW (Sanders 1906). These calls were finally realized on 31st July 1998, when the NMW Bill received Royal Assent. The system of minimum wage protection that was in operation in the UK hitherto was termed the Wage Councils (Metcalf 1981), which had been abolished in 1993. However, this system was far from perfect, inter alia, as it did not cover all sectors.

The minimum wage policy has its roots in and is clearly tied to other areas of social welfare, such as: housing, health care and public assistance. The primary goal of such a policy was to improve the income of those at the bottom of the salary scale, with the objective of furnishing an improvement in the lives on those living in a state of poverty. This would also help to ‘reduce economic inequality and social unrest’ .

The latter has proved to be one of the main causes of strikes and work stoppages. It accordingly came as no surprise when seeking to fulfil their ‘family friendly’ manifesto commitments that the Government of Tony Blair embraced the notion of a NMW by seeking to introduce legislation to achieve this end .

On being elected to office, the ‘ New Labour’ government promised to introduce the legislation as soon as possible in the Queen’s speech on 1st May 1997. On 26 November 1997, as promised, the NMW Bill was introduced

before Parliament. The NMW Act 1998 acquired Royal Assent on 31 July 1998.

Albeit the Act was placed on the Statute book, the Bills passage through parliament was not smooth sailing. Concerns about the impact of introducing such far-reaching legislation were made apparent during the debating sessions. Most prominent was the concern expressed about the legislations expected serious adverse implications for jobs in the UK. It was stated during a Standing Committee D debate by Mr Tim Boswell (Daventry), that experts had forecast ‘ up a million job losses’ as a result of introducing the Act.

These concerns were echoed on behalf of most industry sectors. The rationale for these concerns was largely based on the premise that a NMW would increase costs for business, which could only be avoided if this put up employment until the wages bill dropped: it would lead to people pricing themselves out of jobs. Moreover, there were fears that a NMW would result in instability in ‘ local and regional economies and in job markets’

Irrespective of the concerns aired, the Government remained steadfast in defending its commitment to introducing a NMW. Following the introduction of the Act, the Low Pay Commission (‘ LPC’) was subsequently established as an independent statutory public body, which was established under the NMW Act 1998, in order to advise the Government about the NMW. Members of the independent LPC were appointed in July 1997. Her Majesty’s Revenue and Customs was to play the role of enforcement by prosecuting offenders.

In September – November 1998, a public consultation took place on the draft National Minimum Wage Regulations (‘ NMW Regulations). On 6th March

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1999, the NMW Regulations received Parliamentary approval, and came into force on 1st April 1999. In July 1999, the Employment Relations Act 1999 (c. 26) received Royal Assent. The Act contained two NMW provisions.

At the inception of the NMW, the LPC set a minimum wage of £3.60 per hour for adults (those aged 22 and above), which covered some 1.2 million jobs. A rate of £3.00 per hour was set for those aged between 18-21 (development rate). A rate of £3.00 per hour was introduced on 1st October 2004 for those between 16-17. On 1st October 2008, the NMW was set at £5.73 for adults, £4.77 for the development rate and £3.53 for those between 16-17.

ii Limits on Working Time

The origins of the Working Time Regulations can be traced to the Fundamental Social Rights of Workers, which was adopted at Strasbourg on 9th December 1989. Pertaining to the regulation of working time, the following declarations were made:

‘Every worker in the EC shall have a right to a weekly rest period and to annual paid leave..... to ensure the safety and health of Community workers, the latter must be granted minimum daily, weekly and annual periods of rest and adequate breaks.’

Prior to the introduction of the Working Time Regulations, legislation had never been introduced restricting the number of working hours. Before to the introduction of the aforementioned legislation, the labour market operated under an industry-based system known as the Wages Council (see Dickens,

Machin and Manning, 1999; Machin and Manning, 1994), which was abolished in 1993.

As noted at the outset, however, the impetus for the legislation has its source in the European Union ('EU'). EU law became an increasingly more important source of employment rights in the 1990s. This stemmed from the agreement on the Social Charter in 1989 and as a result of European Court of Justice ('ECJ') case law, albeit the UK opted out of the Social Charter until 1997. When Labour was handed over power, there were no nationwide legislative provisions regulating working time in the UK. Whilst that is the case, the Working Time Directive 93/104/EC should have been implemented by all Member States by 23 November 1996. The Directive was adopted pursuant to Article 138 (previously Article 118) of the Treaty of Rome, as amended by the Amsterdam Treaty. The Directive, which is strictly health and safety legislation, only required majority consent for its implementation. The legislation provided rights for workers of 4 weeks paid annual leave, minimum daily/weekly rest periods and a maximum 48-hour working week. The UK, however, failed to implement the Directive on time. In fact, the Conservative Government of the day, challenged the legality of the Directive (see *United Kingdom v Council of the European Union* (1997)). The UK did, however, eventually implement the Directive by introducing the Working Time Regulations 1998 (SI 1998/1833), albeit two years late. The original Regulations were subsequently amended by the Working Time Regulations 1999 (SI 1999/3372) to address a number of uncertainties in their original form. There have been successive amendments since in response to

revisions, which have effectively broadened the remit of the legislation, inter alia.

The Working Time Directive (93/104/EC) has now been repealed and replaced by the Working Directive (2003/88/EC), which came into force in August 2004.

III. Impact of Legislative Changes

i. National Minimum Wage Act 1998 (c. 39) (' NMWA 1998') The Act was introduced on 1 April 1999, and the National Minimum Wage Regulations 1999 (SI/1999/584) (' NMW Regulations') was soon after adopted by virtue of s 2 of the Act. S 1(1) of the NMWA 1998 imposes an obligation on employers to pay workers in any pay reference period, at a rate no less than the NMW. Pursuant to Regulations 10(1) and (2) of the NMW Regulations, a pay reference period is one month, or a shorter period in cases in which workers are paid in shorter intervals.

Under the Act, the entitlement of the NMW belongs to a worker in accordance with s 54(3) of the Act. The meaning of both “ worker” and “ employer” are given broad definitions under the legislation. All those qualifying as workers according to s 54(3) of the NMW Act 1998 are entitled to the NMW, providing s/he is working in the UK and is no longer of compulsory school age (see s 1(2) of the Act). A worker includes those working under a contract of employment and those under other applicable contracts . This also includes the likes of agency workers (see s 34 on the NMWA 1998) and home workers (see s 35 of the NMWA 1998) .

An example of how the courts have approached this problem can be found in the case of *Wolstenholme v Post Office Ltd* [2003] ICR 546. In the *Wolstenholme* case, the Employment Appeal Tribunal held that a sub-postmaster and postmistress were not workers, because they had a choice whether or not to do the work themselves. Furthermore, in the notable case of *Edmonds v Lawson* [2000] ICR 587, the Court of Appeal held that a pupil barrister was not a worker. Following the decision in *Carmichael v National Power plc* [1999] ICR 1226, almost certainly the definition of worker applies to casual workers also.

Ultimately, the definition of a worker in the NMWA 1998 can be analysed similarly to other definitions of a worker in employment law: See *Bamford v Persimmon Homes N W Ltd* UKEAT/006/06 (HH Judge Peter Clark presiding), and *Green v St Nicholas Parochial Church Council* UKEAT/0904/04 (Rimer j presiding).

In the event of a complaint about minimum wage, the person responsible is regarded as the person providing the salary (see s 34 NMWA 1998). By virtue of s 28(1), there is a presumption that an individual who claims to be covered by the Act does fall within its terms. This in turn places the burden of proof on the employer to prove that the complainant is not a worker for the purpose of the Act.

Those under 18 years of age were not covered at the outset (see Regulation 12(1) of the NMW Regulations 1999). However, these provisions were omitted by virtue of Regulation 3 of the National Minimum Wage Regulations 1999 (Amendments) (No. 2) Regulations 2004 (SI 2004/1930), which were

given effect from 1st October 2004. However, the NMW does not apply to self-employed people, volunteers, those between 16-17 on apprenticeships, those over 18 but under 26 during the first twelve months of their apprenticeships (see Regulation 2(5) and(8)), member of the armed forces and people working and living as part of a family unit (see Regulations 2(2) – (4) of the NMW Regulations 1999).

In determining the rate of remuneration to be paid, the NMW Regulations 1999 define different categories of work: Time work; Salaried hours work; Output Work and Unmeasured Work (see Regulations 3 – 6). As to what qualifies as ‘working time’, the case law has indicated that this is to be interpreted broadly. In *Scottbridge Construction Ltd v Wright* [2003] IRLR 21, the Court of Session found that time spent by a night watchman on the employer’s premises counted as working time, albeit he was entitled to sleep. Furthermore, in *British Nursing Association v Inland Revenue* [2002] EWCA Civ 194; [2003] ICR 19, time spent at home waiting to answer the telephone on employer’s night time service was deemed to be ‘working time’.

The procedure for determining the NMW is set out at Regulation 14 of the NMW regulation 1999. Essentially this is calculated by taking the remuneration for the pay reference period and dividing it by the number of hours worked.

By virtue of s 17 of the NMWA 1998, the entitlement to a NMW is implied into the contract of employment. Accordingly, a failure by an employer to pay an employee at least the NMW for work carried out will give rise to a claim in

the civil courts or the employment tribunal for a breach of contract, or more specifically an unauthorized deduction from wages, inter alia.

A complaint can also be made to HM Revenue and Customs who actively enforce non-compliance with the legislation.

Finally, a number of changes have been introduced by the Employment Act 2008, which came into force on 6 April 2009. These changes set out at sections 8 – 14 largely relate to non-compliance issues pertaining to the NMWA 1998.

ii The Working Time Provisions

a. The Definition of Worker

As is the case for the NMW, the Working Time provisions apply to workers. The meaning of worker is given the same definition as that under the NMW legislation. In the case of *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469; [2004] 3 All ER 98, a group of bricklayers who had sub-contracted to carry out work, were deemed to be workers for the purpose of this legislation because they were obliged to perform work personally.

According to Pill LJ's observation in the *Redrow* case, the issue is whether the person is contractually obliged to carry out the work in question (see [2004] 3 All ER 98, at para. 21). However, the remit of the legislation does not extend to children, as noted in *Addison v Ashby* [2003] ICR 667, where a paper boy was found not to be entitled to annual leave.

All workers are covered by the legislation except: (i) jobs where you can choose freely how long you will work; (ii) the armed forces, emergency

services and police are excluded in some circumstances; (iii) domestic servants in private houses; (iv) sea transport workers; and (v) mobile workers in inland waterways and lake transport workers on board sea going fishing vessels

b. Paid Annual Leave Entitlement

The significance of qualifying as a worker can not be underestimated, as pursuant to regulation 13(1)(c) of the Working Time Regulations (SI 1998/1833) ('WTR 1998'), a worker is entitled, inter alia, to 4 weeks paid annual leave each year. Any provisions within a contract, claiming that there is no entitlement to paid leave have been held to be void: *The College of North East London v Leather*, EAT (30/11/01). The paid annual leave entitlement has been extended by Regulation 13A, which was introduced by Regulations made under the Work and Families Act 2006. In effect, this will mean an extra 8 days leave for those working a standard 5 day week. This is aimed at giving workers leave on bank and public holidays in addition to the regular 4 weeks leave period. Also, pursuant to Regulation 13, part-time workers are entitled to leave, but on a pro-rata basis.

Young people between the ages of 16-18 are not normally entitled to work more than 8 hours a day or 40 hours per week .

The original qualifying period of 13-weeks was challenged in the European Court of Justice by the Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU). Many of BECTU's members work on short-term contracts, which resulted in complications about how to arrange paid annual leave on such contracts. The qualifying period was found to be inconsistent

with the European Working Directive, and as such workers were found to have accrued paid leave entitlement from their first day at work: See *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881

Working Time (Amendment) Regulations 2001 (SI 2001/3256), which came into effect on 25th October 2001, introduced provisions implementing the Working Time Directive which provide employees with the right to paid leave upon immediately commencing employment, instead of after 3 months, as was hitherto the case.

c. “ Rolled Up” Rate

A number of employers tried to overcome the aforementioned problem by inclusion of an element of holiday pay in their worker’s salary, or as it was commonly known “ rolled up” rate. However, whilst this was regarded as a genuine attempt to combat the problem in some cases, in others, employers made spurious claims that the “ rolled up” rate included holiday pay when it did not. This very point came before the European Court of Justice (‘ ECJ’) in the joined appeals of *Robinson-Steele v RD Retail Services Ltd*; *Clarke v Frank Staddon Ltd*; *Caulfield and Others v Hanson Clay Products Ltd* [2006] IRLR 386 ECJ. All the cases involved workers who had been paid so called “ rolled-up” holiday pay. The Court of Appeal and the Scottish Court of Session differed in their opinions about the permissibility of this type of pay. The matter was accordingly referred to the ECJ for its ruling. In its judgment, the ECJ stated, inter alia:

‘.... By those questions the referring courts are asking, in essence, whether Article 7 of the Directive precludes payment for minimum annual leave

within of that provision from being made in the form of part payment staggered over the corresponding annual period of work and paid together with the remuneration for work done...

The Directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form of part payments staggered over the corresponding annual period of work and paid together with remuneration for work done, rather than in the form of a payment in respect of a specific payment during which the worker actually takes leave.'

d. The New Rates

With effect from 2 August 2004, the Working Time Directive 93/104/EC and 2000/034/EC were revoked and consolidated by Working Directive 2003/88/EC, which introduces new annual holiday entitlements. These new rates are being phased in from October 2007 to April 2009 by the implementation of the Working Time (Amendment) Regulation 2007 (SI 2007/2079). Whilst public holidays can be taken as annual leave entitlement, there is no automatic right for employees to have leave on public holidays, unless their contract so provides: see *Campbell & Smith Construction Group Ltd v Greenwood* (2001) IRLB, 667, 10. Furthermore, a rest period could not amount to annual leave as noted in *Gallagher and ors v Alpha Catering Services Limited* [2005] ICR 673 (CA).

e. What Constitutes 'Working Time'?

In so far as what amounts to 'Working Time' for the purpose of the WTR provisions, this is to be construed as time in which the worker is:

(i) Working; (ii) at the employer's disposal; and (iii) carrying out his duties.

A notable case in which the ECJ considered this point is *Sindicato de Medicos Consumo de la Generalidad Valenciana* (Case C-303/98) [2001] ICR 1116.

The question faced by the ECJ was whether or not time spent by doctors “on call” during which they were required to be present at the health centre was ‘working time’ for the purpose of the Directive. It was found that those doctors who were required to be present and available at the centre were working, whereas those who are only required to be contactable at all times but not physically present at the health centre are not deemed to be working, unless they were providing health care services.

f. Complaints and Enforcement

In the event that an employee alleges that s/he is denied the above rights, they must set out their complaint in writing and submit it to their employer in the first instance. If the complaint is not resolved satisfactorily, they may initiate proceedings in the employment tribunal, but such a claim must be made within 3 months of the act or omission complained of having first arisen. If successfully argued, a claimant could receive compensation and /or a declaration of their rights. Any award would be calculated according to what is just and equitable in the circumstances or, if the claim pertains to holiday entitlement upon termination of employment, what is owed to the claimant.

IV. Conclusion

The NMW and the WTR have undoubtedly been the most influential pieces of legislation of the current Government's legacy to date. In fact, the very

electorate who voted them in office afforded the former the honour of being Tony Blair's greatest legacy before he left office .

At least in relation to the NMW, it can be categorically stated therefore that irrespective of the stern opposition during the Bill's passage through Parliament, the Party's decision to introduce the NMWA 1998, has largely proved to be a success without the concern about mass job losses manifesting. In fact, according to a study carried out titled the Impact of the National Minimum Wage on Profits and Prices: Report for Low Pay Commission, the effects of the NMW on employment have been tenuous, if not non-existent (Machin; Manning and Rahman, 2003; Stewart 2004). The focus of that particular study was placed on whether or not minimum wages priced workers out of jobs, one of the main concerns raised during the legislations passage through both Houses. This particular concern was not unfounded however, as it had also been predicted by labour market theorists (Borjas, 2004; Brown, 2003). The focus of the same study also concentrated on whether there is any effect on employment at all, as emphasized in so-called ' revisionist' circles. (Cord and Krueger, 1994)

Whilst the NMW is about to celebrate its eleventh anniversary, evidence of its success is axiomatic by concerns which arose about the perceived threat to NMW rules by the introduction of discriminatory legislation, such as the Employment Equality (Age) Regulations 2006 (SI 2006/1031). The Employment Equality (Age) Regulations 2006 came into force on 1st October 2006, and would permit tens of thousands of workers who are ' fit and healthy' to continue working past the age of 65, thereby prohibiting direct and indirect discrimination against them. In one article, it was claimed that <https://assignbuster.com/individual-employment-rights/>

the NMW, could be challenged as being discriminatory, given that workers under 21 can be paid less than their older counterparts . It was felt that this would result in job losses. On the whole, however, studies on the NMW suggest that the “ minimum wage has not only significantly reduced the incidence of low pay, it has also helped to contain wage inequality” (Fitzner, 2006, p. 14).

The effects of the European Working Time Directive, on the other hand, are still being felt. Whilst the Directive applies to most sectors, the National Health Service is a sector which is currently in the process of trying to ensure that it meets the August deadline for doctors in training. The Directive currently applies across all clinical and staff groups. In relation to junior doctors, however, the 48 hour working week has been being introduced incrementally. In 2004, the hours were reduced to 58 per week, in 2007 they were reduced to 56, and the final shift is 48 hours per week by 1st August 2009. It is expected that by this date all services (bar 24-hour patient care) will work a 48 hour a week. The implications for failing to meet the deadline could be dire for the Trust, as this could mean penalties for non-compliance. These can be awarded by employment tribunals, or alternatively orders for compliance being issued by the Health and Safety Executive, and ultimately fines. It was suggested in April 2008 that “ 53. 4% of junior doctors were estimated to be compliant”. If the deadline is missed, the UK could also face enforcement proceedings by the European Commission for non-compliance.

On the whole, however, what is apparent is that the legislation introduced by the Labour Party since taking up office in 1997 has drastically changed the landscape of individual employment rights in the UK. Admittedly, in relation

the Working Time Regulations, these changes were spearheaded and thrust upon the Government by the European Union. Whilst that may be the case, it cannot be denied that the NMW and the WTR regulations have collectively worked in tandem to improve the working conditions for hundreds of thousands of workers in the UK, and ultimately contributed to providing workers with the discretion to decide on how to strike the right balance between their family and working life commitments.

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