What would the abolition of the Human Rights Act mean for employment lawyers? Ben Collins & Nicola Newbegin share their thoughts

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IN BRIEF

- The repeal of HRA 1998 may have greater ramifications than are obvious at first blush.
- While the number of cases may be small, their results may be of huge significance for the individuals involved, for example those with spent convictions seeking employment.

The government has backed off from early legislation to abolish the Human Rights Act 1998 (HRA 1998) by omitting proposals for reform from the Queen's Speech, instead merely stating that the government would "bring forward proposals for a British Bill of Rights". However, there is no suggestion that the government has abandoned its plan entirely. What might the consequences of abandoning HRA 1998 be for the employment law community?

There is one school of thought which suggests that human rights add little to the protections offered by domestic and EU legislation on, eg, dismissal, discrimination and whistle blowing. Mummery LJ observed in *Leach v Ofcom* [2012] EWCA Civ 959, [2012] IRLR 839 that: "'Human rights' points rarely add anything much to the numerous detailed and valuable employment rights conferred on workers," and Elias LJ cautioned in *Turner v East Midlands Trains* [2012] EWCA Civ 1470, [2013] 3 All ER 375 that: "Strasbourg jurisprudence adopts a light touch when reviewing human rights in the context of the employment relationship." Practitioners may be familiar with judicial impatience in the face of an advocate's attempt to crowbar a barely significant human rights point into a case which is already well-served by domestic legislation.

Yet, although human rights issues arise in only a minority of cases, those cases often turn out to be of major significance. A short roll-call of human rights decisions in the employment field throws up some very recognisable names: *Eweida, Ladele, Stedman, Halford* and *Mba* are just a few examples. So what would an end to HRA 1998 mean for employment law?

This article is written at a time when it remains unclear how HRA 1998 might be repealed and with what it might be replaced. Perhaps the best guidance as to the government's thinking is to be found in a document produced in October 2014 entitled, *Protecting Rights in the UK—The Conservatives' Proposals for Changing Britain's Human Rights Laws*. Although described by Dominic Grieve QC, the former Conservative Attorney-General and now campaigner for the retention of HRA 1998 as a "recipe for chaos", these proposals provide perhaps the best guide as to what may be in store. Key features include the following:

- limiting the use of human rights laws to "the most serious cases", described as those that "involve criminal law and the liberty of an individual, the right to property and similar serious matters". It is not clear whether the employment sphere will be thought to be sufficiently "serious" to meet this test;
- limiting the territorial scope of human rights legislation to the UK (ruling out, for example, claims by service personnel deployed overseas);
- removing the requirement for UK courts to take into account judgments and decisions of the court and commission.
- reconsidering the application of the Strasbourg doctrine of proportionality in UK human rights law, on the basis that the application of the doctrine may result in "an essentially political consideration of different policy considerations";
- reconsidering the Strasbourg practice of treating the European Convention on Human Rights (the Convention) as a "living instrument", to be interpreted and if necessary reinterpreted in light of changes in society—described in the proposals as "mission creep".

This article is not the place for an analysis of the merits of those proposals. Much has been written elsewhere about the difficulties of giving effect to them, in particular in light of the status of the Convention in the devolution settlements and the Good Friday Agreement, as well as in EU jurisprudence—the latter of course being a particularly significant feature in discrimination. Given those uncertainties, the analysis which follows confines itself to an examination of how employment law might be changed if courts and tribunals were to approach cases wholly on the basis of domestic and EU law, with no regard to the Convention. We focus in particular on Arts 6, 8, 9 and 10, which provide contrasting examples of the impact of the Convention (and therefore the impact of its loss) in UK employment litigation.

Article 6: right to a fair trial

As the law currently standards, Art 6 is not generally engaged at the stage when an employer dismisses an employee (see

Mattu v University Hospitals of Coventry & Warwickshire [2012] EWCA Civ 641, [2012] 4 All ER 359). By comparison it is engaged when professionals are subject to regulatory proceedings, as was made clear by Lord Brown in *R (G) v Governors of X School* [2011] UKSC 30, [2011] 4 All ER 625 where he stated that proceedings before the General Medical Council and General Dental Council "indisputably" engage that Article, as well as applying to court and tribunal proceedings. Even without the protection of HRA 1998, courts and tribunals are subject to the overriding objective. The same may be true for some regulatory proceedings but not for all and as such resort would need to be had to, arguably more nebulous, principles of natural justice and fairness in the event that Art 6 could not be relied upon.

Article 8: right to respect for private & family life

The importance of Art 8 in employment law cases was confirmed by Lord Hope in *R (L) v Commissioner of the Metropolitan Police* [2009] UKSC 3, [2010] 1 All ER 113, in which he stated: "It has been recognised that respect for private life comprises, to a certain degree, the right to establish and develop relationships with other human beings… Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life: see *Sidabras v Lithuania* (2004) 42 EHRR 104."

Article 8 has recently been relied upon by those with past convictions who are seeking employment in roles where the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023) requires them to disclose past convictions during pre-employment checks even where those convictions are spent. The Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2014] 4 All ER 159, considered the interaction between the rules on spent convictions and enhanced criminal records bureau checks on the one hand and Art 8 on the other. It found that the blanket requirement in certain circumstances to disclose spent convictions, regardless of factors such as the nature of the offence, its disposal and the time which had elapsed since it took place was incompatible with Art 8, being a breach of the requirement of necessity and therefore not justified. As a result amending legislation was brought in—the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order (SI 2013/1198) and the Police Act 1997 (Criminal Record Certificates: Relevant Matters (Amendment) England and Wales) Order 2013 (SI 20140/1200)). While this legislation is not itself reliant upon the continuation of HRA 1998, it is not clear whether it would be repealed if HRA 1998 was abolished. Moreover, although the new legislation addresses the specific facts of *R (T)*, there are potentially other cases that fall outside of the new legislation but where disclosure might result in a breach of Art 8 and for which there would be no means of redress.

Article 8 has also been relied upon to protect employees from unjustified surveillance (for example *Copland v UK (App No 62617/00)*, [2007] All ER (D) 32 (Apr)). It is questionable whether such protection would be available without the ability to rely upon Art 8. For example, the Regulation of Investigatory Powers Act 2000 has been held not to apply to surveillance of employees for employment purposes even by public authorities (*C v The Police* [2007] 2 Pol LR 151) and, while covert surveillance by employers of employees is in many cases likely to breach the Data Protection Act 1998 (DPA 1998), the need for consent may well be complied with by generic policies or contractual provisions. Moreover DPA 1998 is itself the product of EU law (Directive 95/46/EC) which itself references Art 8 of the Convention (as well as being subject to Art 8 of the separate Charter of Fundamental Rights of the European Union). How the domestic implementation of such laws would be affected by the abolition of HRA 1998 remains unclear and, of course, the impact on EU-based law such as the DPA in the event of an EU exit is another question entirely.

Article 9: right to freedom of thought, conscience & religion

In practice the right to manifest one's belief in the employment context has often had limited consequences, for example, claims that a requirement to work at certain times or on certain days breached Art 9 have not ultimately succeeded before the European Court of Human Rights (ECt HR) (see *Ahmad v UK* [1982] 4 EHRR 126; *Stedman v UK* [1997] 23 EHRR CD 168) or under UK domestic legislation, even where the courts have expressly read that legislation so as to be compatible with Art 9 (*Mba v London Borough of Merton* [2013] EWCA Civ 1562, [2014] 1 All ER 1235). Similarly, whist Ms Eweida was successful in her argument before the ECtHR that BA had breached Art 9 when it refused to allow her to wear a crucifix at work, Ms Chaplin did not succeed in her claim to be able to wear the same whilst working as a nurse and Ms Ladele and Mr McFarlane did not succeed in their arguments relating to the requirement to conduct civil partnerships/counsel same sex partnerships respectively (*Eweida, Ladele, McFarlane and Chaplin v UK* [2013] IRLR 231, [2013] All ER (D) 69 (Jan)). Again in the domestic sphere, Mrs Azmi did not succeed in her argument that she should be allowed to wear a veil that covered her face when teaching with male teachers (*Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 484, [2007] All ER (D) 528 (Mar)).

Article 10: freedom of expression

Article 10 has been relied upon in the employment sphere for those seeking protection in whistleblowing cases, but with mixed results (see *Heinisch v Germany (App No 28274/08)*, [2011] IRLR 922 cf *Rommelfanger v BRD* [1989] ECHR 27). It has also been relied on in the unfair dismissal context (*Hill v Great Tey Primary School Governors* [2013] IRLR 274, [2013] All ER (D) 260 (Mar)) and in balancing the interests of employer and employee in injunction claims: *Ashworth v Royal National Theatre* [2014] EWHC 1176 (QB), [2014] IRLR 526.

Without Art 10 employees would still be able to rely upon the UK's existing whistleblowing law which is, of course, a product of domestic law and is not backed by an EU directive or similar and the weighing of fairness in the context of dismissal and injunction claims ought in any event to take into account the competing interests of the employer and employee.

That being so, the repeal of HRA 1998 would seem likely to have much less impact in cases concerning freedom of expression than other freedoms.

The future?

Time and space do not permit consideration of many other fields in which human rights considerations arise. Article 11, for example, has an obvious impact on collective labour relations—but that is a topic large enough for an article on its own.

For the present, given that the number of cases in which HRA 1998 has a decisive role is small, it may be that repeal of HRA 1998 will be less life-changing for employment lawyers than for those working in some other fields. Nevertheless, there are likely to have been other cases which have not needed to have been brought because the impact of HRA 1998 has modified employer behaviour; or where HRA 1998-based arguments have led to favourable settlements rather than lengthy litigation. Furthermore, while the number of cases may be small, their results may be of huge significance for the individuals involved, for example those with spent convictions seeking employment. As such the repeal of HRA 1998 may have greater ramifications than are obvious at first blush. NLJ

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