

## European Labour Law

*European Labour Law* explores how individual European national legal systems, in symbiosis with the European Union, produce a transnational labour law system that is distinct and genuinely European in character.

Professor Brian Bercusson describes the evolution of this system, its national, transnational and global contexts and its institutional and substantive structures. The collective industrial-relations dimension of employment is examined, and the labour law of the EU as manifested in, for example, European works councils is analysed. Important subjects which have traditionally received little attention in some European labour law systems are covered, for example the fragmentation of the workforce into atypical forms of employment. Attention is also given to the enforcement of European labour law through administrative or judicial mechanisms and the European social dialogue at intersectoral and sectoral levels.

This new edition has been extensively updated, as the EU's influence on this area of social policy continues to grow.

**Professor Brian Bercusson** was Professor of European Social and Labour Law at King's College London. Immediately before taking up his position at King's, he held the Chair in European Law at the University of Manchester. Previously, Professor Bercusson served as Jean Monnet Fellow and Professor of Law at the European University Institute, and was a visiting professor at the University of Siena.

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## Preface

The first edition of this book was published in 1996, and although it was by no means the first book on the subject, it was in some way the most original, stimulating and rigorous. As well as being also the most comprehensive in terms of the issues covered, it was the first convincingly to make the case for European Labour Law as a wide-ranging discipline in its own right, with a distinct identity separate from national labour law systems, but influenced by them. Such visionary thinking was to elevate the debate about European Labour Law at a time when, imperfectly schooled in EC law, many British labour lawyers in particular encountered EC Labour Law only collaterally through matters like equal pay or the transfer of undertakings, and then sometimes only cautiously, nervously and reluctantly.

There are now many more books on European Labour Law which have been published since 1996. But few show the same learning, the same experience, or the same understanding of the subject as are revealed in the pages that follow. Indeed, this volume is only Part One (the General Part) of what had been intended as a two volume enterprise (with Part Two (the Special Part) being an examination of the substance of the law). As such, the present volume is concerned principally with the evolution, development and identity of European Labour Law; the process by which European Labour Law is made (notably by Social Dialogue as a means of setting and implementing labour standards), and the emerging constitutionalisation of labour rights, notably in the EU Charter of Fundamental Rights of 2000.

Doubtless, Brian would not have allowed the opportunity to pass without updating the text at various points, and I should take this opportunity here to indicate three developments in descending level of importance. The first is the decision of the European Court of Human Rights in *Demir and Baykara v Turkey* (12 November 2008) which succeeded in putting a smile back on the faces of labour lawyers everywhere. Decided within 12 months of the ECJ's decisions in *Viking* and *Laval* (considered in some detail on chapter 21 below), the Grand Chamber of the European Court of Human Rights consciously and deliberately overruled its earlier decisions on the matter to hold that the right to freedom of association in article 11 of the European Convention on Human Rights (ECHR) now includes the right to collective bargaining.



Moreover, according to the Court, not only does the right to freedom of association include a right to bargain collectively, but there may be a duty to have in place 'legislation to give effect to the provisions of international labour conventions' (para 157), the latter being the yardstick against which the substance of the right to collective bargaining for the purposes of article 11 is to be assessed. This recognition of the right to collective bargaining on the basis of ILO Convention 98 is not only an astonishing development, but at a time when trade unions are looking for ways to challenge the decisions of the ECJ in *Viking* and *Laval*, it is an extremely timely one, given the commitment of the ECJ to take full account of the Strasbourg jurisprudence. The decision in *Demir* thus creates the alluring possibility of complaints being made in the Strasbourg Court against an EU Member State about the latter's failure to comply with the ECHR because of obligations arising under EU law.

The second issue to which attention might be directed is the Temporary Agency Workers Directive (2008/104/EC), which came too late for inclusion in the text, and represents one of the few social rights' achievements of the Barroso Commission, of which there is a great deal of well-placed criticism in the pages that follow. The importance of the Directive – to some extent inspired by, but not a product of, the Social Dialogue process – relates to its introduction of the principle of equal treatment for temporary agency workers, in the sense that the 'basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job' (Article 5(1)). This principle is, however, subject to a number of important exceptions, including the following in Article 5(4):

Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

The enigmatic Article 5(4) is another concession to the United Kingdom, with the website of the Department for Business, Enterprise and Regulatory Reform (incongruously the government department responsible for workers' rights) already containing the text of an agreement between the government, TUC and CBI (negotiated some time before the Directive was even finally approved). This is an agreement on 'how fairer treatment for agency workers in the United Kingdom should be promoted, while not removing the important flexibility that agency work can offer both employers and workers'. Tilting the balance more clearly in favour of 'flexibility' rather than 'fairness' (at least for

some), the parties have undertaken that the principle of equal treatment for temporary agency workers may be postponed for the first 12 weeks of the employment, which means that it will not apply to agency workers on short term placements. See [www.berr.gov.uk](http://www.berr.gov.uk).

The other major development which addresses issues dealt with in the text at various points is the John Major Maastricht-style opt out from the Solidarity provisions of the EU Charter of Fundamental Rights negotiated by Tony Blair and Gordon Brown as a condition of accepting the Treaty of Lisbon. That opt-out is now enshrined in domestic law – as a result of the European Union (Amendment) Act 2008 – and provides that

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

The provisions of the Charter in question are those dealing with rights to information and consultation, the right to collective bargaining, and the right to strike. Quite what significance this will have is unclear, not just because the future of the Lisbon Treaty remains uncertain (though probably now more secure in a climate of global financial crisis), but also because developments in the Strasbourg Court may mean that fundamental human rights will find themselves adopted as universal principles of EU Law (with no British or Polish opt – outs) by routes other than the EU Charter of Fundamental Rights. If this is correct, it will reinforce the predictions in the text below, that the United Kingdom will be unable to build high enough barriers to keep back the rising tide of European Labour Law, even on the right to strike.

As many readers of this book will know (and as will by now be clear), this edition is being published posthumously. The book was completed and submitted to Cambridge University Press shortly before Brian’s sudden death on 17 August 2008. The manuscript is published as submitted, and no liberties have been taken with the text, by either the copy-editor, or by myself as proof-reader. In other words, nothing has been done to detract from a book that reflects Brian’s great ambition for European Labour Law (a theme that shines through the first parts of the book), his great optimism about the new institutions that are distinguishing features of European Labour Law (a theme that stands out in the middle sections of the book), or his growing disappointment (not to be confused with pessimism) with some national governments and the European Commission, as well as the European Court of Justice (a theme that emerges in the final sections of the book).

That disappointment would, however, have been lifted by the *Demir* case, and by the even more recent decision of the European Court of Human Rights in *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009, where it appears to have been held that article 11 of the ECHR now also protects the right to strike. For Brian was never in any doubt about the purpose of Labour Law generally, or European Labour Law in particular, at a time when much of the vigour and colour have been drained from both disciplines. Nor was he ever in any doubt about the responsibility of the labour lawyer to be steadfast and imaginative in the defence of workers’ rights. As will again be clear from the pages that follow, Brian combined profound scholarship with an unyielding commitment to the trade union movement, by which he was held in the highest regard. This book is an extraordinary legacy to labour lawyers everywhere, and a brilliant synthesis of scholarship and commitment by a man who stood at the forefront of his discipline.

KD Ewing