8 UK EMPLOYMENT REGULATION IN OR OUT OF THE EU

J. R. Shackleton

Europe's reach[1]

When in 1973 the UK joined the EEC, later the EU, it only involved committing the country to rather limited elements of employment regulation – most notably the principle of equal pay for men and women, embodied in Article 119 of the Treaty of Rome. As equal pay was already the law in the UK, this might not be thought to be of great significance, but it became clear over time that the European interpretation of the principle was stricter than the original UK legislation had intended. The 1975 Equal Pay Directive and a subsequent ECJ ruling established that it is not only equal pay for the same work that is covered by equality legislation, but also 'work to which equal value is attributed'. The implications of this Directive are still resounding more than 40 years later, with employers obliged to make comparisons between apparently very dissimilar jobs that men and women undertake.[2] Moreover, what is meant by 'pay' was broadened to

1 A fuller discussion of the development of EU competence in this area can be found in HM Government (2014).

2 One recent case concerns Birmingham City Council, which is estimated to owe more than £1 billion in back pay following a legal ruling. Thousands of female council workers, such as carers, cleaners and cooks, have come forward with claims after it was ruled they had been discriminated against compared with male roadworkers, male street sweepers and bin men, who had picked up extra pay through regular overtime and other bonuses. See *Birmingham Post* (2014) Council is 'stalling' on equal pay

include occupational pensions, and two European rulings in 1994 subsequently established that the exclusion of part-time workers from employers' schemes was illegal because females were more likely to work part-time than men.

The European Commission's ability to propose employment regulation was limited until the 1990s, although some intervention was possible under health and safety powers. In 1989, however, the Charter of Fundamental Social Rights of Workers set out considerable new areas of European 'competence'. This Charter became part of the Maastricht Treaty. John Major's government opted out of what became known as the 'Social Chapter', but the incoming New Labour government signed the UK up to the full programme in the Treaty of Amsterdam. European influence on UK employment regulation was further entrenched by the Human Rights Act of 1998, which incorporated the European Convention on Human Rights into UK law. However, Labour was more reticent when signing the 2007 Treaty of Lisbon. Together with Poland, it secured an exemption from a further extension of EU powers over employment matters. The Lisbon Treaty's new Charter of Fundamental Rights included 54 provisions over a wide range of matters, including such employment-related elements as the right to strike, the right to collective bargaining, the right to fair working conditions and protection against dismissal. Although the UK's opt-out was regarded at the time as watertight, there have been occasional concerns that European Court rulings may lead to these rights being extended to the UK.[3]

settlements, 3 May. http://www.birminghampost.co.uk/news/local-news/birmingham-city-council-stalling-equal-7066029, and *Birmingham Post* (2015) 'Staff died' waiting for Council Pay update, 25 June. http://www.birminghampost.co.uk/news/regional-affairs/staff-died-waiting-city-council-9521937 (both accessed 15 September 2015).

3 Of course, UK workers already have significant rights in these areas, but they are granted by the UK Parliament and could be amended or scrapped. If they were to become subject to European law, however, this would no longer be the case.

Whether or not these concerns are justified, it is already the case that many areas of UK employment regulation are now required by our European obligations and cannot be unilaterally reformed or scrapped while we remain members of the EU.

Such areas include the (currently highly controversial) freedom of movement between member states; restrictions on working hours; parental leave; pro rata payments for part-time workers; information and consultation requirements (including European Works Councils for large multinationals); consultation over collective redundancies; equal conditions for permanent and agency workers; maintaining conditions for workers transferred between undertakings; and the outlawing of discrimination, not just between men and women, but on grounds of ethnic origin, religion, sexual orientation, disability and age.

It may be easier to point to areas where there is *not*, as yet, a common European approach. One is minimum wages, where there is no compulsion for EU members.[4] Another is unfair dismissal, an important UK concept that does not have exact counterparts in other European countries.[5] A third is collective bargaining, where there are, as yet, no trans-European requirements.

In this chapter, I sketch the contours of European labour law and its intellectual background, drawing a contrast with the UK's traditions as well as the ideas of Anglo-American economists and contemporary classical liberals. I go on, however, to explain how there is now a strong domestic taste for interference in labour markets, which means that exit from the EU,

4 Although Jean-Claude Juncker, the new President of the European Commission, is among those who have advocated that a compulsory minimum wage be set by each national authority: http://www.euractiv.com/sections/social-europe-jobs/juncker-calls-minimum-wage-all-eu-countries-303484 (accessed 22 July 2014). See also Schulten (2010).

5 'Unfair dismissal' is a form of employment protection legislation (EPL) that lays down conditions under which contracts can legitimately be terminated. It now only applies to people who have been employed for two years, and it is one of the less strict EPL regimes in the EU (OECD 2013: Chapter 2).

while increasing the potential for deregulation, might initially make less difference than is often assumed. I conclude by outlining a minimum regulatory package, which might form the basis for a 'new start', were a future UK government able and, above all, willing to think seriously about the labour market from first principles.

European law and the labour market

Our European obligations arise primarily from *Treaties* (for instance, the free movement of labour) and from *Directives* (for instance, limitations on working time). The latter are proposed by the European Commission and must be adopted by the Council of Ministers and the European Parliament. They lay down end results to be achieved in every member state. National governments must adapt their laws to meet these goals, but they are free to decide how to do so. A time limit is set for a Directive to be 'transposed', as the eurojargon has it, into domestic law.

Table 4 lists some of the most important employment Directives. The table shows the most recent relevant Directives, which consolidate and add to earlier Directives. The development of European labour law has moved in one direction only, to greater transnational regulation. The process has never gone into reverse: indeed, it is difficult to see quite how it could be reversed significantly without a fundamental change in approach. Each new member of the EU has to sign up to the whole package, the principle of the *acquis communautaire*. There is no obvious constitutional mechanism to unpick existing Directives: this is one of the problems hindering attempts to renegotiate the terms of the UK's relationship with the EU.[6]

6 Although it has been argued that a member state's parliament could in principle alter the way in which it has transposed Directives, removing any 'gold plating' (discussed later in this chapter) accreted in the process of transposition (Sack 2013).

Table 4 **Key European employment directives**

Area	*Main features*	*Most recent Directive #*
Equal pay	Forbids all gender discrimination in relation to pay, broadly defined.	2006/54/EC
Equal treatment in employment and occupation	Requires equal treatment in employment and membership of certain organisations; no discrimination by gender, age, disability, religion, belief or sexual orientation.	2006/54/EC
Collective redundancies	Requires employers to consult staff representatives and provide information about reasons for redundancy, criteria for selection, etc.	98/59/EC
Transfer of undertakings	Aims to safeguard employment rights, requires consultation with employees when business ownership is transferred.	2001/23/EC
Protection of employees in event of insolvency	Aims to guarantee payment of employees if employer becomes insolvent.	2008/94/EC
Obligation to inform employees of applicable working conditions	Employees must have job specification, information about pay, leave arrangements, etc.	91/533/EEC
Pregnant workers	Mandates fourteen weeks maternity leave, protected employment, avoidance of exposure to risks, time off for antenatal care, etc.	92/85/EC
Posting of workers	Employers' obligations in posting of workers to other member states in the provision of services.	96/7/EC
Working time	Fixes maximum working week, requires rest periods, mandates four weeks annual paid leave.	2003/88/EC
European Works Councils	Employers with 1,000+ employees in EEA must set up a European Works Council.	2009/38/EC
Parental leave*	Mandates four months unpaid time off for each parent of a child aged up to eight.	2010/18/EU
Leave for family reasons*	Rights to unpaid time off for urgent family reasons.	97/75/EC
Part-time working*	Requires comparable treatment to full-time staff on open-ended contracts.	98/23/EC

Table 4 **Continued**

Area	*Main features*	*Most recent Directive #*
Fixed-term work*	Fixed-term workers must not be treated less favourably than permanent workers; maximum renewals of short-term contracts mandated.	99/70/EC
Temporary agency work*	Requires equal treatment of agency workers in respect of pay, working time and annual leave.	2008/104/EC
Maritime labour standards	Requires ratification of ILO Maritime Labour Convention.	99/95/EC

Latest directive may consolidate earlier directives or Treaty obligations. Equal pay, for example, dates back to the Treaty of Rome in 1957.
*Under Framework Agreement.
Sources: http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/index_en.htm (accessed 26 June 2014), Sack (2014).

Another point worth noting in Table 4 is that several Directives have been developed under 'framework agreements' involving what Brussels terms 'European social dialogue'. That is, their content has been agreed following discussion between 'social partners'. For instance, the Fixed-term Work Directive resulted from discussions between three bodies: the private sector UNICE[7] (*Union des confédérations de l'industrie et des employeurs d'Europe*), CEEP (*Centre européen des entreprises à participation publique et des entreprises d'intérêt économique general*, a body representing public sector employers) and ETUC (the European Trade Union Confederation). This corporatist dialogue could be argued seriously to under-represent the interests of smaller businesses and unorganised workers (including the self-employed and unemployed).

In addition to Directives, there are *Regulations*. These are the most direct form of EU law, as once passed (either jointly by the

7 Since rebranded as 'BusinessEurope'.

EU Council and the European Parliament or by the Commission alone) they have immediate legal force in every member state. For example, Regulation (EEC) 1408/71 covers the application of social security schemes to people moving between member states. It requires that persons residing in the territory of a member state enjoy the same benefits as the nationals of that state, a provision that has been highly controversial as mobility between EU members with very different living standards has increased in recent years. Regulations have also been used to mandate sectoral provisions relating to Directives. Thus, for instance, Regulations set specific limitations on working time in road transport, railways, civil aviation and seafaring.

There are also *Decisions*, which can come from the EU Council or the Commission, and relate to specific cases. They require individuals or authorities to do something (or else stop doing something).

Finally, the ECJ also has the power to adjudicate in cases of employment law that come before it, and its rulings have been very important in defining, for example, the scope of European legislation on age discrimination and the interpretation of the Working Time Directive. ECJ decisions cannot directly overturn domestic laws, but they may oblige UK governments to alter legislation to make it compatible with EU law.

A recent example of a ruling that, if confirmed, may lead to alterations in UK law is the ECJ Advocate-General's opinion[8] that obesity can amount to a disability, and thus obese individuals should be a protected group in terms of discrimination legislation.

8 The verdict concerned the case of a grossly overweight Danish childminder who was sacked because it was claimed that he could no longer fulfil his duties: amongst other things it was said that he needed help to tie children's shoelaces. See *The Guardian* (2014) Obesity can be a disability, EU Court rules, 18 December. http://www.theguardian.com/society/2014/dec/18/obesity-can-be-disability-eu-court-rules (accessed 15 September 2015).

Why intervention?

No labour markets anywhere escape some regulation, which goes back hundreds of years. There have been a few rigorous advocates of a completely free market, at least where adults are concerned[9] – most notably Richard Epstein (1984, 2003) with his continuing defence of the 'contract at will'. Epstein sees the freedom to engage in employment relationships as analogous to freedom to trade. He points out that the contract at will, which allows employers and employees to end contractual relationships without any repercussions, reduces the complexity of such relationships and consequent litigation, and thus promotes employment. He argues that employment relationships are fundamentally misread if they are assumed to involve inherent inequality between employers and employees, and he asserts that in reality freedom to contract works, in most cases, to the advantage of both parties (Epstein 1984: 953).

Epstein's logic has much to commend it. But many, perhaps most, economists have nevertheless accepted the need for a considerable degree of intervention in labour markets. Where economic reasoning is adduced to support intervention in 'Anglo-Saxon' countries such as Britain and the US, it usually involves an analysis of the ways in which the market for labour services fails to meet the strict assumptions of perfect competition. This model is derived from the neoclassical revolution of the latter part of the nineteenth and first half of the twentieth century, and it has been embodied in standard textbooks ever since as the touchstone of an optimal economic system.

Those adhering to this approach invoke the concept of market failure (Bator 1958) and point to a number of areas where

9 The argument for the exclusion of minors from many types of employment dates back to the early nineteenth century, although economists have sometimes queried this (Kis-Katos and Schulze 2005).

labour markets appear to perform badly (Wachter 2012). These include alleged externalities,[10] information asymmetries[11] and imbalances of market power.[12]

Probably a more fundamental argument for intervention in employment, however, does not lie in such quibbles about the assumptions of perfect competition. Rather, it lies in the claim that labour market outcomes are intrinsically *unfair*: they offend against some conception of social justice. Hayek (1976:58) called social justice 'a mirage', on which no two people could ever agree. It is nevertheless a powerful mirage and has led to many attempts to interfere with the workings of labour markets. Very obvious examples in Britain include 30 years of incomes policies from the 1940s to the 1970s, and more recently minimum wages and equal pay legislation.

10 These are held to arise where decisions by employers and employees focus on private concerns and do not encompass wider third-party costs or benefits of employment: one example might be the creation of a large number of redundancies in an area where there are currently few alternative sources of employment.

11 These arise where different groups have access to different amounts of information. For instance, suppose an employer knows that a particular production process is hazardous to health, while employees are unaware of this; or suppose that potential private providers of unemployment insurance do not know anything about the level of commitment and motivation of individuals and so face moral hazard problems when offering such insurance. Such dangers are often held to justify government intervention on health and safety matters or to provide unemployment benefits.

12 Whereas the idealised competitive system assumes a large number of buyers and sellers of labour services competing with each other, in practice one or both sides of the market may be in a rather stronger position. This is usually considered to be the employer side: if there is only one (*monopsony*) in a particular geographical or occupational area, wages may be forced down below the level that would prevail in a more competitive market. However, a particular group of workers that can control the supply of labour (perhaps through a trade union, perhaps through a professional body) may exercise some monopoly power to force wages up. Some regulatory intervention might be advocated in either of these circumstances, although Austrian economists point out that positions of market power tend to be undermined over time through innovation (the collapse of union power in the docks with the advent of containerisation is a case in point) and unanticipated ways of doing things.

This is not strictly a market failure in economists' terms; rather, it is a political reaction against labour market outcomes such as extreme inequalities in pay. If this reaction is strong in the UK, it is stronger still in some continental countries: in France, for example, President Hollande came into power to reverse the modest elements of employment deregulation that took place under his predecessor, and to raise taxes on high earners.

What all these rationalisations for government action downplay or ignore, however, is the possibility of 'government failure' (McKean 1965). For government intervention, seductive in theory, is frequently ineffective in reaching its ostensible objectives. First, governments cannot, any more than the private sector, know everything that is relevant to economic decisions, so it is not omnipotent in relation to externalities or information asymmetries. Indeed, private firms may be better placed to gather useful information, as it is in their direct financial interest to do so. So, for example, even a well-intentioned and hard-working government employment agency may be worse at finding you a job than a private agency.

Secondly, intervention will always involve costs, which may be greater than any benefit. A mandated benefit such as paid holidays may lead to reduced employment (if the costs are passed on to the consumer), or it may be offset by a reduction in wages. There can often be knock-on, second- or third-order effects from a decision to intervene: it changes the market and creates incentives for new forms of behaviour, which may be considered worse than those the intervention sought to improve. Imposing a minimum wage may lead employers to worsen other aspects of a worker's job, or may lead to compromising safety to save money or reducing fringe benefits or intensifying shift work. Or it may force workers onto benefits or out into the shadow economy, where wages are lower than legitimate businesses are allowed to pay. And there is evidence that anti-discrimination legislation can

lead to reduced pay and/or reduced employment for 'protected groups' such as older workers[13] and those with disabilities.[14]

There are also considerable compliance costs associated with employment regulation. Records must be kept, procedures must be reorganised, training must be provided to everyone, new staff need to be taken on to check and monitor. As many regulations (for instance, in the area of discrimination) are ambiguous and the costs of getting things wrong can be very high, defensive HR departments often impose excessive levels of compliance to reduce risk.[15]

Third, rules and regulations may be unduly influenced by interested parties to secure advantages for themselves at the expense of other firms, workers and consumers – this is known as 'rent seeking'. A suggestion that nursery staff need more training, for example, may be hijacked by training providers, trade unions[16] and other commercial interests with an agenda of their

13 In examining the effects of state age protection and age discrimination laws in the US, Joanna Lakey concludes that 'employers … react to these laws by failing to hire older men who will be more difficult to fire' (Lakey 2008: 458).

14 Acemoglu and Angrist (2001) claim that the Americans with Disabilities Act led to a reduction in the employment of disabled workers. Bambra and Pope (2007) produce some evidence for the Disability Discrimination Act having had the same effect in the UK.

15 There are now over 250,000 employees shown in the Annual Survey of Hours and Earnings as having personnel, industrial relations, training or human resources in their job title, and this ignores junior administrators and a share of the time of general managers and others. On a narrower basis, the Institute of Personnel Management (now the Chartered Institute of Personnel and Development) had 12,000 members in 1979: in 2014, the CIPD had in excess of 135,000.

16 The union movement in the UK used to be very wary of labour market regulation. There was a strong belief in 'free collective bargaining', with unions negotiating with employers to improve the conditions of their members. A national minimum wage was opposed, and Wages Councils were only tolerated in sectors where, for various reasons, unions were weak. The development of employment rights was treated with suspicion, as they might be a means by which governments undermined unions. Indeed, this was part of the reason why the Conservatives introduced unfair dismissal legislation (originally proposed by the Donovan Commission and rejected by the union movement) in the early 1970s. Now, however, a much weaker trade union movement sees government intervention as positive and devotes much campaigning energy to pushing tighter employment regulation.

own, which may not coincide with the perceived problem. As they are a concentrated source of influence, they tend to do better at getting their way than widely dispersed interests such as those of parents and their children. Interested parties always include government regulators, who may try to influence political decisions that favour the expansion of their remit and thus lead, over time, to larger civil service or other budgets and more power.

And, of course, democratic politicians almost inevitably respond to 'the vote motive' (Tullock 2006). They are drawn to policies that appeal to the median voter, even though they may be quite conscious on one level that such policies are likely to be ineffective or even counter-productive – for example, pressuring firms to alter their remuneration systems for executives.[17]. The median voter, in the context of the labour market, is an 'insider' employed in a secure and reasonably well-paid job. He or she tends to favour policies that maintain and enhance that position – improvements to working conditions, restrictions on job entry, employment protection. Less well-placed outsiders (labour market entrants, minority groups), who may lose from such policies, have little political influence.

These factors taken together suggest that we can be excused for having a sceptical attitude towards proposals for government intervention in labour markets in whatever context. But it is also important to emphasise the special factors that impart a bias towards regulation, and regulation of a particularly inefficient kind, in the EU context.

European political economy

For one thing, emphasis on economic analysis is often seen as an Anglo-Saxon vice, which does not have as strong an appeal

17 To be fair, such behaviour may not be as reprehensible as it is often painted, for in a party system it is always necessary for politicians to compromise, accepting some policies that they dislike in return for support over other issues that they consider more important. The recent experience of coalition government in the UK surely drives this home.

in continental Europe, where economics has, in the past, had less influence than jurisprudence. Legal traditions dating back to the Romans, and in modern terms built on Napoleonic and Bismarckian ideas about the role of the state, emphasise government control and regulation, with rights-based ideas rather than the tradition of common law (Siebert 2006).

Political systems support this: in the post-war period, leading parties in Western Europe were either social democratic (particularly strong in Northern Europe) or Christian Democrats (emphasising Catholic traditions of social concern). And, with the expansion of the EU to embrace much of the formerly communist Eastern Europe, a large population was absorbed that had grown up with the expectation of extensive state involvement in the labour market.

Allied to this has been the popularity of systems of proportional representation, which leads to frequent coalitions and an expectation of compromise, particularly in those countries, such as Germany, Italy and Spain, which had been torn apart in the inter-war period by extremes of right and left. In parallel with this was the expectation in many countries that compromise should also prevail in the conduct of employment relations. Hence, there is widespread recognition of, and government support for, collective bargaining,[18] and various forms of worker representation[19] in large private sector businesses in Germany, France, the Netherlands and elsewhere. More generally, there is broad sympathy with the idea of social dialogue between representatives of capital and labour.

Indeed, this preference for compromise and deal-making might even have been responsible in the first place for the expansion of EU competence to include employment regulation. Some commentators have argued that the development of the Social

18 In France, for example, the results of such bargaining extend to all workers in a sector or industry, even though membership of the bargaining unions is often pitifully low.

19 Works Councils and employee representation on supervisory boards.

Charter in the 1980s was a response to the development of the single market. As this was seen (wrongly) mainly to benefit business interests, the expansion of the social dimension was thought to provide benefits to workers, a kind of *quid pro quo*. The union side of the social partnership saw increasing international competition as threatening workers:

> the expansion of EU labour regulation was born out of a concern that the increased competition resulting from the completion of the single market in 1992 would lead to a race to the bottom in labour standards (ibid.: 3).

This fear of what is termed 'social dumping' is widespread: the European Commission even has an official definition. It describes the practice as a situation 'where foreign service providers can undercut local service providers because their labour standards are lower'.[20] To economists, this looks perilously close to protectionism. And, logically, if EU members are not to be allowed to compete over employment regulation, why should they be allowed to compete over wages? Or even over other advantages, such as transport links, or better training, or higher levels of capital investment?

Finally, the particular form of governance of the EU, with the Commission (a sort of Civil Service) having such an important role in initiating policy[21] – a role found in no nation state – arguably produces a permanent bias towards interference in labour markets.

Moreover, since the EU's budget is currently constrained to a fixed proportion of EU GDP, regulatory solutions to perceived

20 http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/social-dumping (accessed 19 July 2014).

21 It is important to note that the Commission finances a large number of pressure groups and charities, which, according to Snowdon (2013), generate apparent public support for the policies it wishes to pursue.

problems are inevitably preferred to financial redistribution. Where economic inequality is an issue, for example, a nation might favour some income-related benefit, which could be targeted at those most in need. A European 'solution' would instead be to mandate employers to provide extended leave, reduced working hours and so forth, even though this might not be the economically most efficient way of helping people,[22] or indeed what the intended 'beneficiaries' necessarily want or value.

Would repatriation of powers over the labour market make enough of a difference?

The levels of intervention associated with the EU have led many UK-based critics to argue for significant repatriation of government powers over employment regulation as a key element in any renegotiation of the country's relationship with its European neighbours. What would be the impact of success in this endeavour?

Complete withdrawal from the EU would bring some clear benefits. It would, for example, prevent a qualified majority of EU members imposing further employment restrictions on the UK; it would remove the necessity for involvement of 'social partners' in labour market matters; it would remove the powers of the ECJ to add new non-negotiable obligations on British employers. It might be possible, while staying in the EU, to achieve some of these benefits – although it might leave open the possibility of 'back door re-regulation' of the labour market using other means, such as new health and safety obligations and changes to competition and company law.

But what effect would repatriation of some or all powers over employment have? Open Europe (Booth et al. 2011) has

22 A bias that is also often found amongst single-issue pressure groups, which prefer mandates (for example, employer adjustments to the needs of disabled people) or prohibitions (for example, smoking bans) to transfers and taxes.

calculated the continuing cost of European regulation of labour markets by adding up the costs shown in government impact assessments conducted at the time legislation was passed. On this basis, it calculated that a 50 per cent cut in the cost of regulation could add £4.3 billion, in 2011 prices, to GDP. On some back-of-the-envelope assumptions about the proportion of such a gain going into productivity increases, it further suggested that the equivalent of 60,000 new jobs could be created.

Seizing on these estimates, the Fresh Start Project (2012; 2013) noted that the bulk of these gains would come from scrapping the Temporary Agency Workers Directive and the Working Time Directive.[23] It put the repeal of this legislation at the centre of its proposals for renegotiation of the UK's European employment commitments.

It is not clear what process might be followed, for remember that all the relevant legislation has been passed by the UK Parliament, and Parliament must repeal it. One approach suggested by Iain Mansfield[24] in the extreme case of a complete UK withdrawal is to pass a 'Great Repeal Act', which would require all European-influenced legislation to be reviewed within three years. While I have a good deal of respect for Mansfield's proposals, such a review (unpicking 40 years of legislation) would be a truly massive task to conduct alongside a normal legislative programme, and some prioritisation would surely be necessary.

Even if legislation could be unpicked relatively easily, it is simplistic to think, as the Fresh Start project seems to assume, that repealing the relevant legislation would necessarily free up significant resources, at least in the short term. For the costs arise through having to develop new procedures (for example, to record working time), taking on extra workers, altering contracts

23 According to Open Europe, two-thirds of the costs of European employment regulation are associated with these two Directives.

24 In his winning entry for the Institute of Economic Affairs' 'Brexit' prize (Mansfield 2014).

and shift arrangements and so forth. Companies would find it costly to reverse such changes, and few might initially choose to do so, given that it would mean disruption and cause friction with employees.

Over time, new entrants might take advantage of relaxed regulation, and existing firms might alter their practices, but such innovations could take years to emerge, and they could be overtaken by other labour market changes and new patterns of work (for example, the spread of self-employment and working from home – which, incidentally, may already have mitigated some of the original costs of European regulation).

But, in any case, given the continuing (indeed, growing) predilections of our domestic politicians for regulation, would a domestic review process lead to significant change? It is worth noting the words of Lord Mandelson, admittedly made while he was a European Commissioner:

> Before you accuse Brussels of excessive regulatory zeal, remember that a greater part of the burden on business comes from national measures which go beyond what is required by European legislation.[25]

Mandelson may very well have been correct in his assessment.[26] It is indeed possible that European Directives complained about in public were secretly welcomed by UK administrations. Some certainly seem to have been 'gold-plated': that is, the transposing legislation has added to Directive requirements in various ways, so that regulation goes beyond what is mandated by the EU. Gold-plating, according to Tebbit (n.d.), can occur when the

25 http://europa.eu/rapid/press-release_SPEECH-07-365_en.htm (accessed 13 July 2014).

26 Though, as Vaughne Miller (House of Commons Library 2010) shows in his lengthy examination of the issue, it is no easy task to put a figure on the proportion of legislation directly resulting from Brussels.

government extends the scope of its implementing legislation beyond what is required by a Directive, when it fails to take advantage of exemptions allowed by a Directive, when it introduces penalties for employers in its implementing legislation that go beyond the penalties required by a Directive or when it introduces its transposing legislation earlier than required.

One example is the Working Time Directive's requirement for four weeks annual holiday; since the Directive came into force, the Labour government increased this to 5.6 weeks (Department for Business Innovation and Skills 2014: 8). Similarly, the Coalition government added significantly to the parental leave requirements of the 2010 Directive. Sack (2013) provides other examples.

In any case, the recent imposition of pension auto-enrolment, the new Conservative government's National Living Wage, its apprenticeship levy proposals and compulsory pay audits hardly suggest that even centre-right UK politicians are enthusiastic for a large-scale reduction in employment regulation. The Labour Party,[27] the Liberal Democrats and the Green Party all advocate further expansions of employment law.

So, although recovery of domestic powers over employment law may be a *necessary* condition for major deregulation of the labour market, it is very far from being *sufficient*. Those arguing for greater labour market freedom need to change the mindset of our own politicians, and indeed the current beliefs of much of the general public.

It needs patiently to be explained that much employment regulation does very little to benefit employees as a whole. Though

27 The recently elected Labour Party leader Jeremy Corbyn wants much more regulation of labour markets, including a higher living wage than the UK's Living Wage Campaign is calling for, a maximum wage fixed as a multiple of the lowest paid and the banning of zero-hours contracts. He has also hinted that, if David Cameron's renegotiations lead to exemptions from EU employment law, he might propose leaving the EU.

it may protect and boost the incomes of some groups of workers, this is often at the expense of other, perhaps more vulnerable, people. It certainly does little to boost economic growth. More fundamentally, it may erode personal freedom and choice in subtle ways and contribute to a culture of dependency.

A minimum level of regulation?

But it would be unwise to assert that there are no grounds for any restrictions on employment matters at all. Substantial deregulation is certainly needed, but there may still be a core element of regulation that many market liberals would support. Opinions may differ on this, but my suggestions would be as follows.

First, it seems reasonable to place some restrictions on the hours worked and types of jobs undertaken by children and young people.

Second, safety considerations do require some limitations on hours worked in areas such as transport and healthcare, where employees working excessive hours (even if voluntarily) may be a danger to others.

Third, employment contracts need to be enforceable, cheaply and effectively. Where employers irresponsibly breach contracts or fraudulently deprive workers of agreed pay, employees need some cheap and effective mechanism for redress.

Fourth, recognising that dismissal without any notice at all can be very destructive to the well-being of employees and their families, but that excessive employment protection can have adverse effects on job creation, we need a form of no-fault dismissal with some minimum level of compensation.[28]

It is also rather difficult to imagine that in today's world there should not be some form of anti-discrimination legislation,

28 Perhaps on the lines suggested in Adrian Beecroft's report to the Department for Business Innovation and Skills (2012). This sensible proposal was vetoed by the Liberal Democrats when they were part of the Coalition.

despite its often perverse effects. However, legislation should be much more tightly drawn, and there should be limits on the compensation that can be claimed.[29]

There may be other elements that could be added to this list, but it is clear that any such list would be a great deal shorter than that covering today's employment legislation. At the moment, there are approaching 100 different areas in which employment law constrains businesses and employees. Whether we are to be in or out of the EU, this needs to change.

References

Acemoglu, D. and Angrist, J. D. (2001) Consequences of employment protection? The case of the Americans with Disabilities Act. *Journal of Political Economy* 109: 915–57.

Bambra, C. and Pope, D. (2007) What are the effects of anti-discriminatory legislation on socioeconomic inequalities in the employment consequences of ill health and disability? *Journal of Epidemiology and Community Health* 61: 421–6.

Bator, F. M. (1958) The anatomy of market failure. *Quarterly Journal of Economics* 72(3): 351–79.

Booth, S., Persson, M. and Scarpetta, V. (2011) Repatriating EU social policy: the best choice for jobs and growth? Open Europe, London. http://archive.openeurope.org.uk/Content/Documents/Pdfs/2011EUsocialpolicy.pdf (accessed 10 July 2014).

Department for Business, Innovation and Skills (2012) Report on employment law (Beecroft report).

Epstein, R. A. (1984) In defense of the contract at will. *University of Chicago Law Review* 51: 947–82.

29 It is interesting to note that the recent introduction of charges for employment tribunal applications has dramatically reduced claims for unfair dismissal where there is an upper limit on compensation, but claims concerning sex discrimination (where there is no such limit) may have risen. See *The Times* (2014) Sex bias cases are growth industry fuelled by big payouts, 23 July.

Fresh Start Project (2012) Options for change green paper: renegotiating the UK's relationship with the EU. http://www.eufreshstart.org/downloads/fullgreenpaper.pdf (accessed 9 July 2014).

Fresh Start Project (2013) Manifesto for change: a new vision for the UK in Europe. http://www.eufreshstart.org/downloads/manifestoforchange.pdf (accessed 9 July 2014).

Hayek, F. A. (1976) The atavism of social justice. In *New Studies in Philosophy, Politics, Economics and the History of Ideas*. London: Routledge and Kegan Paul.

HM Government (2014) Review of the balance of competences between the United Kingdom and the European Union: social and employment policy. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332524/review-of-the-balance-of-competences-between-the-united-kingdom-and-the-european-union-social-and-employment-policy.pdf (accessed 10 October 2015).

House of Commons Library (2010) How much legislation comes from Europe? Research Paper 10/62. http://www.parliament.uk/business/publications/research/briefing-papers/RP10-62/how-much-legislation-comes-from-europe (accessed 9 July 2014).

Kis-Katos, K. and Schulze, G. G. (2005) Regulation of child labour. *Economic Affairs* 25(3): 24–30.

Lakey, J. (2008) State age protection laws and the Age Discrimination in Employment Act. *Journal of Law and Economics* 51: 433–60.

Mansfield, I. (2014) *A Blueprint For Britain: Openness Not Isolation*. London: Institute of Economic Affairs.

McKean, R. N. (1965) The unseen hand in government. *American Economic Review* 55: 496–506.

OECD (2013) *OECD Employment Outlook 2013*. Paris: OECD Publishing.

Sack, P. (2013) The Midas touch: gold-plating of EU employment directives in UK law. Policy Paper, Institute of Directors, London. http://www.iod.com/influencing/policy-papers/regulation-and-employment/the-midas-touch-goldplating-of-eu-employment-directives-in-uk-law (accessed 9 July 2014).

Schulten, T. (2010) A European minimum wage policy for a more sustainable wage-led growth model. Article. http://www.social-europe.eu/2010/06/a-european-minimum-wage-policy-for-a-more-sustainable-wage-led-growth-model/ (accessed 10 July 2014).

Siebert, W. S. (2006) Labour market regulation in the EU-15: causes and consequences – a survey. Discussion Paper 2430, IZA, Bonn.

Snowdon, C. (2013) Euro puppets: the European Commission's remaking of civil society. Discussion Paper 45, Institute of Economic Affairs, London.

Tebbit, A. (n.d.) Does the government 'gold-plate' EU employment directives? http://bit.ly/1TzszRl (accessed 10 July 2014).

Tullock, G. (2006) *The Vote Motive*. Hobart Paperback 33. London: Institute of Economic Affairs.

Wachter, M. L. (2012) Neoclassical labor economics: its implications for labor and employment law. In *Research Handbook on the Economics of Labor and Employment Law* (ed. C. L. Estland and M. L. Wachter). Northampton, MA: Edward Elgar.