

Taking Human Rights Seriously at Work: The Past, Present and Future of Employment Law

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ABSTRACT

Human rights are increasingly adopted as a perspective on employment law and the regulation of work. Yet there remains a lack of clarity over key questions such as how the relationship between employment law and human rights should be understood, why human rights law has had limited impact in this context and whether/how it might more effectively advance workers' interests. This article uses the academic writings and judicial decisions of Sir Patrick Elias as a lens through which to consider these issues. It makes three central contributions, relating, respectively, to the past, present and future of employment law and human rights. First, it is suggested that employment law be reimagined so that human rights are a central and foundational concern, with a core goal of employment law being to ensure that human rights are taken seriously at work. Second, by reference to Elias' scholarship and leading decisions, the article identifies the systemic barriers that mainstream interpretations of human rights law create to the protection of workers' human rights. Finally, the article outlines potential future applications of human rights law in the employment context which, together, would represent a significant step towards a more comprehensive framework for protecting workers, that takes human rights seriously at work.

1. INTRODUCTION

Human rights have gained increased prominence as a foundational and analytical perspective on the regulation of work over recent decades. Human rights arguments are now commonly raised in employment litigation and a growing body of scholarship adopts a human rights approach to core employment law issues. Despite this, the value of aligning employment law

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with human rights is contested, and there remains a lack of clarity over key questions such as how the relationship between employment law and human rights should be understood, why human rights have so far had limited impact on UK employment law and whether/how human rights might more effectively advance workers' interests. This article addresses these questions, using the academic writings and judicial decisions of Sir Patrick Elias as a lens through which to consider the evolving relationship between employment law and human rights. As a highly respected and influential judge, as well as an accomplished scholar, Elias' views provide us with valuable insight into the judicial self-understanding of these issues. His approach to human rights law is also representative of mainstream judicial thinking, so provides a helpful study for advancing our more general understanding of employment law and human rights.

The article makes three central contributions, relating, respectively, to the past, present and future of employment law and human rights. First, contrary to the traditional narrative of employment law endorsed by Elias, it is suggested that the field be 'reimagined'¹ to one where the protection of human rights is necessarily a central concern. This reorientation is required once the distinction between the *legal protection* of human rights and the narrower category of *human rights law* is properly understood. The foundational role of human rights for employment law helps fill the normative gap in traditional narratives grounded in inequality of bargaining power, and should lead to greater openness to human rights arguments as these must be recognised as furthering employment law's purpose. Second, the article explores the implications of prevailing approaches to the Human Rights Act 1998 (HRA) for employment law, by reference to Elias' extra-judicial writings and leading decisions. In doing so, it illustrates the systemic barriers that mainstream interpretations of human rights law, such as the importation of the margin of appreciation doctrine, create to protecting workers' human rights.

On the one hand, this analysis is reassuring for employment lawyers, as it indicates the limited impact of human rights in this context is not indicative of any exceptional treatment or judicial antipathy towards workers. It is also dispiriting, however, as it means human rights arguments will struggle to benefit workers while these underlying principles remain in place. The

¹This language is adopted from A. Bogg and others, *Human Rights at Work – Reimagining Employment Law* (Oxford: Hart, 2025), which undertakes an extended reimagining of employment law as applied human rights law.

final section, therefore, seeks to reimagine the future relationship between human rights and domestic employment law. It outlines potential developments in the law, relating to the scope of protections and interpretation of employment contracts, that would better protect workers' rights under a more interventionist approach to the HRA than favoured by Elias. Together, these would represent a significant step towards more comprehensive protection of workers' human rights, reducing the gaps and fragmentation currently present in the law, and helping to achieve employment law's goal of ensuring human rights are taken seriously at work.

2. HUMAN RIGHTS AND EMPLOYMENT LAW: PAST

The prevailing view is that human rights historically play little role in underpinning employment law in the UK. This reflects Leary's observation of workers' rights and human rights running on 'parallel tracks'.² Despite the inclusion of labour rights in many international human rights documents, employment law is traditionally framed as addressing inequalities of bargaining power rather than protecting human rights at work.

The traditional narrative of employment law is encapsulated in Elias' statement that workers are generally in 'a position of subordination' and employment law is 'designed to mitigate this imbalance in bargaining power'.³ As Bogg highlights, there appears to be little role accorded to human rights in this portrayal of the field.⁴ Human rights are also notably absent in Elias' early writing on industrial action, where the 'right to strike' is treated as a purely statutory rather than human or constitutional right.⁵ This is unsurprising given that the notion of a human right to strike is historically absent from our domestic law, with Elias and other scholars drawing a 'fundamental distinction' between our system of negative immunities from

²V. Leary, 'The Paradox of Workers' Rights as Human Rights' in L. Compa and S. Diamond (eds), *Human Rights, Labour Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 2003).

³P. Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 *OJLS* 869, 870.

⁴A. Bogg, 'Can We Trust the Courts in Labour Law? Stranded Between Frivolity and Despair' (2022) 38 *IJCLIR* 103.

⁵P. Elias and K. Ewing, 'Economic Torts and Labour Law: Old Principles and New Liabilities' (1982) 41 *Cambridge Law Journal* 321; P. Elias, 'The Strike and Breach of Contract: A Reassessment' in K. Ewing and others (eds), *Human Rights and Labour Law: Essays for Paul O'Higgins* (London: Mansell, 1994).

contract and tort liability and jurisdictions that protect industrial action ‘as a basic human right’.⁶

It initially seems, therefore, that if human rights are to have a role in Elias’ vision of employment law, it can only be as an external force, importing foreign values and concepts that influence the field. This is very different from an understanding of employment law as grounded in human rights, under which employment law becomes, to some extent at least, a branch of applied human rights law.⁷ It is argued, however, that the relationship between human rights and employment law should be reconceived, so that human rights are seen as always having played an important role in employment law’s foundations.⁸ Understanding this foundational role of human rights provides important context for the legal analysis that follows, and suggests human rights arguments should find ready acceptance as continuous with rather than disruptive of employment law’s underlying goals. Moreover, this reimagining can be achieved without discarding the valuable insights of the traditional narrative.

This reorientation is made possible by distinguishing between the *legal protection of human rights* at work and the role of *human rights law* in the field of employment law. Human rights law, meaning the freestanding abstract rights found in international law or domestic constitutions, is not the only way that human rights are protected by law.⁹ In most cases, it is normal domestic legislation and common law rules rather than any specific body of ‘human rights law’ that provide the bulk of substantive protection to rights such as expression, privacy and bodily security.¹⁰ Indeed, as Elias himself acknowledges, these sources may well provide stronger protections of rights than the minimum levels required by human rights law.¹¹

⁶P. Elias, ‘Laws Against Strikes’ (1973) 2 ILJ 57.

⁷C. McCrudden, ‘Labour Law as Human Rights Law: A Critique of the Use of “Dignity” by Freedland and Kountouris’ in A. Bogg and others (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015).

⁸See similarly, V. Mantouvalou and H. Collins, ‘Human Rights and the Contract for Employment’ in M. Freedland and others (eds), *The Contract of Employment* (Oxford: OUP, 2016).

⁹The argument here is premised on the acceptance of human rights as pre-legal moral norms, as under theories such as J. Griffin, *On Human Rights* (Oxford: OUP, 2008); J. Tasioulas, ‘Towards a Philosophy of Human Rights’ (2012) 65 *Current Legal Problems* 1. It will therefore be unpersuasive to those who reject the existence of human rights independently of any legal enactment.

¹⁰P. Yowell and others (eds), *Legislated Rights Securing Human Rights through Legislation* (Cambridge: CUP, 2018).

¹¹P. Elias, ‘Lord Renton Lecture - The Rise of the Strasbourgeoisie: Judicial Activism and the European Court of Human Rights’ (24 November 2009).

Once it is recognised that human rights are frequently secured by means other than human rights law, in the narrow technical sense, employment law must be seen as always having been centrally concerned with the protection of workers' human rights. This includes the first employment law protections relating to minimum factory standards and restrictions on working time, which protected the rights to life, bodily security and family life (albeit entirely inadequately). Modern employment law statutes on whistleblowing, deductions from wages and parental rights similarly help secure workers' human rights to expression, property and family life. More broadly, the law of unfair dismissal provides employees with some, if rather weak,¹² protection from employer interferences with their human rights. In other words, employment law functions to provide *legal protection of human rights* at work even absent any influence of *human rights law*.

Although not couched in the language of human rights, our domestic legal protections of workers' ability to act collectively through trade unions have similarly always been concerned with realising the human right to freedom of association. The lack of any abstract or freestanding rights to freedom of association, collective bargaining or to strike does not mean that the extensive statutory frameworks supporting 'collective laissez-faire' were not, in substance, giving effect to these rights. Understood this way, the UK's system of legal immunities always secured a right to strike (again, far from perfectly), even without the enactment of any such 'positive' statutory or constitutional right.¹³ This analysis can also be applied to the common law, with the contractual doctrines on restraint of trade helping secure a right to work,¹⁴ and employers' duties towards workers in contract and tort protecting their rights to life, bodily security and privacy, among others.¹⁵

Following this, a core concern and normative goal of employment law is necessarily to protect workers' human rights. In other words, to ensure human rights are taken seriously at work. Moreover, reconceiving employment law in this way is not as incompatible with the traditional narrative as might initially appear, even if the language of human rights has not

¹²V. Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *MLR* 912; P. Collins, 'The Inadequate Protection of Human Rights in Unfair Dismissal Law' (2018) 47 *ILJ* 504.

¹³Recently acknowledged in *SoS for Business and Trade v Mercer* [2024] UKSC 12.

¹⁴H. Collins, 'Progress towards the Right to Work in the United Kingdom' in V. Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart, 2014).

¹⁵J. Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) 48 *ILJ* 515.

historically motivated legislation or judicial reasoning. Because the idea that employment law exists to address inequality of bargaining power lacks sufficient normative content to justify the field: some further explanation is needed of *why* the inherent inequality between capital and labour is problematic.¹⁶ References to bargaining power can therefore only be a placeholder for deeper normative considerations, and human rights provide one way of filling this ‘normative gap’ in the traditional narrative.¹⁷

Indeed, the idea that labour law exists to protect workers’ inherent rights, what we would now label as human rights, from employers can be found in the work of early labour law scholars. Kahn-Freund, for instance, believed that workers have a moral right to select representatives with a say in making workplace rules.¹⁸ Claims that labour law is essential for securing workers’ freedom and dignity can similarly be linked to human rights, which are often seen as underpinned by these values.¹⁹

It is important to note, however, that the reimagining proposed here does not position human rights as the *sole* goal or foundation of employment law. A range of other justificatory concepts, such as dignity, capabilities and freedom from domination, are undoubtedly also relevant.²⁰ We must therefore be careful that approaching employment law as applied human rights law does not crowd out these values. How we can best construct a pluralistic theory of labour law that incorporates these various strands and, crucially, provides the means of identifying and resolving any tensions between them remains an important open question. But the place of human rights as a central element of any such theory should be beyond doubt. Building on this, the following sections consider the current limits and future potential of human rights law in shaping employment law.

¹⁶ B. Langille, ‘Labour Law’s Theory of Justice’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011).

¹⁷ J. Atkinson, ‘Human Rights as Foundations for Labour Law’ in H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (Oxford, OUP, 2018).

¹⁸ O. Kahn-Freund, *Labour and the Law*, 2nd edn (London: Stevens, 1977) 12.

¹⁹ P. Davies and M. Freedland (eds), *Kahn-Freund’s Labour and the Law*, 3rd edn (London: Stevens, 1983) 69; B. Webb and S. Webb, *Industrial Democracy* (London: Longmans, 1902) 847; R. Dukes, ‘Hugo Sinzheimer and the Constitutional Function of Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011).

²⁰ See generally H. Collins, V. Mantouvalou and G. Lester (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018).

3. HUMAN RIGHTS LAW AND EMPLOYMENT LAW: PRESENT

A. The HRA 1998

Whatever one's views on the historical and normative links between employment law and human rights, it is no longer plausible to deny the close relationship between them as a matter of domestic law. This is primarily due to the Human Rights Act 1998, although EU and common law fundamental rights have also been influential.²¹ This section sets out Elias' general approach to adjudication under the HRA, which is representative of prevailing judicial thought, and assesses its implications for employment cases. The analysis identifies the systemic reasons why human rights arguments have had a limited impact on employment law, and unfair dismissal law is discussed as an example of where the HRA's impact has been unduly constrained.

Before this, it is helpful to outline the relevance of the HRA for employment law. The Act requires that courts interpret and apply both legislation and common law doctrine in a manner that respects Convention rights.²² Under the HRA, courts are mandated to resculpt the law, including employment law, to protect Convention rights.²³ The potential for the HRA to influence employment cases outside the public sector is largely due to Member States' positive obligations to secure Convention rights.²⁴ As part of these duties, the ECtHR has consistently found that states must introduce and enforce legal protections of workers' Convention rights against disproportionate interferences by employers.²⁵ The duty of domestic courts under the HRA to apply the law consistently with these positive obligations means that any area of employment law where Convention rights are engaged must now be scrutinised to determine whether it strikes a fair balance between competing rights and interests. Where domestic employment law falls short

²¹ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62; *R (Unison) v Lord Chancellor* [2017] UKSC 51.

²² A. Young, 'Mapping Horizontal Effect' in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011).

²³ *X v Y* (2004) ICR 1634.

²⁴ See generally L. Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Cambridge: Intersentia, 2016).

²⁵ For an overview, see V. Mantouvalou, 'The Human Rights Act and Labour Law at 20' in A. Bogg, A. Young and J. Rowbottom (eds), *The Constitution of Social Democracy: Essays in Honour of Keith Ewing* (Oxford: Hart, 2020).

B. Elias and the HRA

These views are reflected in Elias' critique of the proportionality test, and more specifically, the final stage, which involves courts 'balancing' rights interferences against the benefit to the policy goals being pursued.²⁸ Elias believes 'there is little which can be properly called judicial in this exercise' as 'there are no obvious objective criteria for making this assessment'.²⁹ Elsewhere, he describes this aspect of the proportionality test as 'comparing values which are not truly commensurable — apples and pears'.³⁰ Without entering the extensive philosophical debate on the nature of proportionality, the brief response to this incommensurability critique is that the 'balancing' involved is metaphorical. It does not describe a process of weighing up individual rights and public interests on a common scale but is rather a heuristic for fully fledged moral reasoning.³¹ The assessment of the underlying

³¹ G. Letsas, 'Proportionality as Fittingness: The Moral Dimension of Proportionality*' (2018) 71 *CLP* 53.

reasons justifying a decision that proportionality involves is thus akin to that of reasonableness review in public law.³²

One need not accept Elias' characterisation of proportionality review, however, to see the plausibility of his view that it is 'constitutionally inappropriate' to give judges the power to determine moral and political questions better left to democratically accountable representatives.³³ Such concerns will be familiar to employment lawyers from Keith Ewing's work on the judicial enforcement of human rights and risk of 'juristocracy'.³⁴ There are also echoes of Kahn-Freund's caution towards human rights arguments due to the risk of involving courts in 'a power struggle made up to look like a fight for human rights'.³⁵

Elias' discussion of proportionality also contains a degree of legal realism that, while surely accurate, is unusual to hear from the bench. He views it as inevitable that, when applying proportionality, judges' personal views and 'ideology' will influence their assessment of what amounts to an appropriate balance of competing rights and interests, and their willingness to disrupt the balance struck by Parliament.³⁶ A spectrum of interventionism, therefore, exists that all judges must place themselves on. It is evident from Elias' critique of several Supreme Court decisions that he places himself on the cautious end of this spectrum.³⁷ Given this, he believes 'there is legitimate cause for concern that the weapon of human rights may be too readily wielded by the judges so as to undermine decisions of the executive and the legislature'.³⁸

Irrespective of any personal scepticism, however, Elias is nevertheless very clear that constitutional principle demands courts apply the proportionality test to scrutinise legislation and public authority decisions. This is required both by Parliamentary sovereignty, as the HRA instructs judges to apply proportionality, and the rule of law, as it is 'an integral part of the rule of law that courts give effect to Parliamentary intention'.³⁹

The critical question is therefore how judges should exercise their powers under the HRA. The emphasis Elias places on giving effect to Parliament's

³²H. Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 *MLR* 265.

³³Elias, 'Reflections' (n.26) 7–8.

³⁴K. Ewing, 'Bill of Rights Debate: Democracy or Juristocracy in Britain' in K. Ewing et al. (eds) *Human Rights and Labour Law: Essays for Paul O'Higgins* (London: Mansell, 1994).

³⁵O. Kahn-Freund, 'Trade Unions, the Law and Society' (1970) 33 *MLR* 241, 255.

³⁶Elias, 'Reflections' (n.26) 18; Elias, 'Comment' (n.27) 78.

³⁷Elias, 'Comment' (n.27).

³⁸*Ibid.* 78.

³⁹*Ibid.* 74.

legislative intent leads him to answer this by reference to the ‘mirror principle’,⁴⁰ which requires courts to keep pace but go no further than Strasbourg when interpreting Convention rights.⁴¹ Doing so gives effect to Parliament’s purpose in enacting the HRA, of providing domestic protections to Convention rights that reflect those provided in Strasbourg. Courts should therefore follow the ECtHR’s interpretations of Convention rights and integrate their jurisprudence into domestic law. This is necessary despite Elias believing there is a ‘strong case’ that the ECtHR has ‘expanded human rights in unacceptable ways’.⁴²

There is clear tension here between Elias’ support for mirroring Strasbourg and his cautious attitude to human rights adjudication. The democratic legitimacy and superior institutional competence of Parliament lead him to favour weak judicial scrutiny of legislation on human rights grounds. Elias thus believes there is a ‘powerful’ argument for only applying a rationality test at the final stage of proportionality review,⁴³ a considerably weaker level of scrutiny than normally provided by the ECtHR. However, this tension is partly resolved through the mirror principle itself. For instance, Elias endorses mirroring the ‘manifestly without reasonable foundation’ standard of review used by the ECtHR in cases involving social and economic policy,⁴⁴ which domestic courts have adopted to deny human rights challenges to social security reforms.⁴⁵

More generally, Elias reconciles the need to mirror Strasbourg with his preference for light-touch human rights review by arguing that domestic courts should import the ‘margin of appreciation’ (MoA) afforded by the ECtHR. In his 2009 Renton Lecture, Elias criticised the alternative approach taken in *Re G*,⁴⁶ where domestic courts were thought to be able to determine whether the prohibition of unmarried couples adopting violated ECHR Article 8, even if the issue fell within the MoA. This position appears sound, given that domestic courts as part of the national authorities afforded the margin of discretion by Strasbourg,⁴⁷ and have been endorsed in other Supreme Court decisions.⁴⁸ However, Elias argues *Re G* mistakenly adopted

⁴⁰ Elias, ‘Renton Lecture’ (n.11).

⁴¹ *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26.

⁴² Elias, ‘Comment’ (n.27) 78.

⁴³ Elias, ‘Reflections’ (n.26) 54.

⁴⁴ *Ibid.* 13.

⁴⁵ *SG v SSWP* [2015] UKSC 16; *DA v SSWP* [2019] UKSC 2.

⁴⁶ *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38.

⁴⁷ E. Brems, ‘Misunderstanding the Margin? The Reception of the ECtHR’s Margin of Appreciation at the National Level’ (2023) 21 *International Journal of Constitutional Law* 884.

⁴⁸ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; *Gilham v Ministry of Justice* [2019] UKSC 44.

an ‘autonomous’ conception of the rights protected by the HRA rather than one that views them as continuous with those protected in Strasbourg. Under his approach, domestic courts should avoid disrupting the balance struck by Parliament and find no violation wherever an issue falls inside the MoA. Elias supports this by reference to the HRA’s purpose of creating domestic remedies equivalent to those at Strasbourg, pithily commenting that providing remedies within the MoA would create ‘home rights’ rather than ‘bring rights home’.⁴⁹

Some 12 years later, Elias’ preferred approach to the margin of appreciation was adopted by the Supreme Court in *R (Elan-Cane) v SoS for the Home Department*, which overruled the treatment of the margin in *Re G* as obiter and wrong.⁵⁰ In *Elan-Cane*, the Court found the question of whether ECHR Article 8 entitled the claimant to a non-gendered passport fell within the MoA, and that as a result there could be no violation for failing to provide one. The margin of discretion given to states by the ECtHR must therefore now be passed on to Parliament by domestic courts, with significant implications for human rights arguments in the employment context. The systemic barrier this creates to protecting workers’ Convention rights is explored, and challenged, below.

Stepping back, we can see that Elias adopts a nuanced approach towards the HRA, which largely reflects mainstream judicial thinking.⁵¹ In applying the Act, he seeks to protect Convention rights as intended by Parliament while upholding constitutional principles such as Parliamentary sovereignty, the separation of powers and the rule of law. He supports the integration of Convention rights and ECtHR jurisprudence into domestic law, while endorsing a deferential application of proportionality review that limits disruption to the balance of rights and interests struck by Parliament. What, then, are the implications of this for human rights in the employment law context?

C. The HRA and Employment Law

Examining some of Elias’ leading judgments on human rights and employment law illuminates the systemic challenges of protecting workers through

⁴⁹Elias, ‘Renton Lecture’ (n.11).

⁵⁰*R (Elan-Cane) v SoS for the Home Department* [2021] UKSC 56.

⁵¹L. Graham, ‘Has the UK Supreme Court Become More Restrained in Public Law Cases?’ (2024) 87 *MLR* 1073.

human rights law. Two key features emerge from this analysis. A willingness to accept that Convention rights are relevant in employment cases and that domestic employment law must be compatible with ECtHR principles, combined with a restrained approach to achieving this alignment and significant caution about avoiding results that overstep the judicial role.

Elias' application of the mirror principle has often placed him at the forefront of increasing judicial recognition that human rights are relevant to employment law. This can be seen in his treatment of cases involving religious belief at work. In his EAT judgment in *Ladele*, for instance, Elias J rejected the claimants' argument that her Article 9 ECHR right to freedom of religion was engaged by a requirement to perform civil partnership ceremonies contrary to her religious beliefs.⁵² Although Elias accepted that domestic equality law must in principle be read in conformity with ECHR Article 9, he found there was no interference with Article 9 'because the employee could resign and take up other employment'.⁵³ This reasoning expressly mirrored the ECtHR's restrictive approach in *Stedman v UK*,⁵⁴ which was viewed as settling the matter.

There is a sharp contrast between the EAT's conclusion in *Ladele* and Elias LJ's judgment four years later in *Mba v Mayor and Burgesses of the London Borough of Merton*.⁵⁵ In that case, Article 9 was readily thought to be engaged by the requirement to work on Sunday, contrary to the claimant's religious belief. The difference is explained by the ECtHR's reversal in the intervening period of their restrictive approach to the protection of Convention rights at work. In *Eweida v UK*, Strasbourg had since found the ability to quit did not prevent interferences with workers' Article 9 rights,⁵⁶ and so Elias' decision in *Mba* had to mirror this revised position.

The broad interpretation of rights adopted at Strasbourg means the mirror principle will frequently require domestic courts to acknowledge that workers' Convention rights are at stake where they might otherwise be reluctant to do so. But the principle can also have the effect of denying Convention rights are engaged, as in Elias' judgment in *Ladele*. Another example is *Mattu v University Hospitals of Coventry & Warwickshire NHS*

⁵² *London Borough of Islington v Ladele* [2009] IRLR 154, [24]. Confirmed in *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, with Elias' EAT decision described as 'impressive and cogent'.

⁵³ *Ibid.* [120].

⁵⁴ (1997) 23 ECHR CD 168.

⁵⁵ [2013] EWCA Civ 1562 [34].

⁵⁶ [2013] IRLR 231.

The most significant example of Elias breaking new ground in recognising Convention rights at work is *RMT v Serco*, where he acknowledged the existence of a right to strike as part of the HRA's protection of Article 11.⁶¹ This is symbolically important due to the long-standing denial that a right to strike was anything 'much more than a slogan' in domestic law.⁶² Following *RMT v Serco*, the law governing industrial action must now be approached through the lens of fundamental rights. The decision also recognises that human rights are frequently secured other than by human rights law, so rejects any fundamental distinction between the UK's system of negative immunities and positive rights-based protections of industrial action.⁶³ This paved the way for the Supreme Court decision in *Mercer*, where the relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 were expressly framed as domestic protections of the human right to strike.⁶⁴

⁵⁷[2012] EWCA Civ 641.

⁵⁸*Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2009] EWCA Civ 789.

⁵⁹*IWGB v CAC and another* [2023] UKSC 43.

⁶⁰For critique, see J. Atkinson, 'Employment Status and Human Rights at Work: An Emerging Approach' (2023) 86 *MLR* 1166, 1188.

⁶¹*RMT v Serco* [2011] EWCA 226.

⁶²*Metrobus v Unite The Union* [2009] EWCA Civ 829, [118].

⁶³*RMT v Serco* (n.59), [9].

⁶⁴*SoS for Business and Trade v Mercer* (n.15), [73].

⁶⁵ *Metrobus v Unite The Union* (n.62).

⁶⁶*RMT v Serco* (n.59), [9].

⁶⁷Ibid. [87]

union's legal immunities should be narrowly construed to minimise disruption to employers' property rights. As the ILO Committee of Experts noted, the interpretive approach in *RMT* makes it more difficult for employers to obtain injunctions to prevent strike action.⁶⁸ Since the decision, there have been several cases bearing this out,⁶⁹ and significantly fewer employer attempts to stymie industrial action based on minor breaches of procedural rules.

Elias' decisions, therefore, go beyond acknowledging the relevance of human rights in employment cases and demonstrate a willingness to integrate Convention principles into domestic law. However, this is often done in a way that keeps the impact of Convention rights on domestic law to a minimum. For example, Bogg and Dukes argue that the neutral interpretive approach adopted in *RMT* does not go far enough in protecting the right to strike.⁷⁰ On their view, recognition of a human right to strike means legislation should be interpreted so as to facilitate exercises of this right, rather than merely being applied neutrally. Another example is in *Mba*, where Elias LJ was willing to align the test for justifying indirect discrimination with the ECtHR's proportionality approach in Article 9 cases, but declined to align indirect discrimination law with Article 14 by reading down the requirement of collective disadvantage.⁷¹ This can be contrasted with the more interventionist approach adopted in other cases where this aspect of indirect discrimination claims was read down to achieve compliance with EU law.⁷²

Perhaps the most significant manifestation of Elias' reluctance to disrupt Parliament's legislative choices is his support for mirroring of the ECtHR's margin of appreciation doctrine in domestic law. Whatever the substantive merits of this view (discussed further below), it has severe consequences for human rights arguments in employment cases. Domestic courts refusing to scrutinise alleged violations of Convention rights that fall within the margin of appreciation weakens the protection of human rights across all areas of law. But it has a particularly detrimental impact on workers' human rights claims, as many of the factors Strasbourg uses as indicators of wide national

⁶⁸ ILO, 'Direct Request (CEACR) - Adopted 2012' (2013) 102nd ILC session.

⁶⁹ *Balfour Beatty Engineering Services v UNITE* [2012] EWHC 267 (QB); *London Underground v ASLEF* [2011] EWHC 3506 (QB); *British Airways Plc v British Airline Pilots Association* [2019] EWCA Civ 1663.

⁷⁰ A. Bogg and R. Dukes, 'Statutory Interpretation and the Limits of a Human Rights Approach: *Royal Mail Group Ltd v Communication Workers Union*' (2020) 49 ILJ 477.

⁷¹ *Mba v Mayor and Burgess of the London Borough of Merton* (n.56).

⁷² *BA v Rollett* [2024] EAT 131.

discretion will be present in these cases. A wider margin is generally given in cases involving politically contentious issues, those with broad social or economic impacts, and matters involving positive obligations or conflicts of rights.⁷³ A wider margin is also applied in claims involving corporate bodies as claimants, including trade unions, rather than natural persons.⁷⁴ These considerations all commonly arise in employment cases, meaning there is likely to be a broad MoA that prevents domestic courts from scrutinising alleged rights violations.

The impact of the margin of appreciation is evident in cases involving collective labour rights under ECHR Article 11. The ECtHR has on several occasions refused several challenges to UK trade union law on the basis that they fall within the margin of appreciation.⁷⁵ Domestically, the doctrine has also led to minimal scrutiny being applied in challenges to notice and ballot requirements and the statutory trade union recognition framework.⁷⁶ These effects will only be amplified if the margin of appreciation is mirrored in domestic employment cases following *Elan-Cane*, with ACL Davies arguing that this approach leaves Article 11 challenges to trade union law with little chance of success.⁷⁷ Decisions such as *Wilson and Mercer* do highlight that the MoA is not unlimited even in Article 11 cases.⁷⁸ But the principle undoubtedly creates a substantial barrier to all but the most extreme examples of these claims.

In sum, Elias' treatment of human rights arguments in employment cases is continuous with his generally restrained approach to the HRA. While his caution is underpinned by legitimate constitutional concerns, it creates the risk of overly conservative applications of the HRA that fail to adequately protect workers' Convention rights. The following section examines the intersection of unfair dismissal and human rights law, which illustrates this risk.

⁷³J. Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: CUP, 2019) 160–96.

⁷⁴*Bernh Larsen Holding AS v Norway* (App No 24117/08).

⁷⁵*National Union of Rail, Maritime and Transport Workers (RMT) v UK* [2014] ECHR 366; *Unite the Union v UK* [2016] ECHR 1150. For critique, see K. Ewing and J. Hendy, 'Article 11(3) of the European Convention on Human Rights' [2017] *EHRLR* 356.

⁷⁶*Metrobis v Unite* (n.60); *Pharmacists' Defence Association Union (PDAU) v Boots Management Services Ltd* [2017] *IRLR* 355, [68].

⁷⁷A. C. L. Davies, 'Article 11 in the Mirror: The Importance of Section 2 Human Rights Act 1998 in Understanding the Courts' Approach to Article 11 of the European Convention on Human Rights' [2025] *ILJ*. Available at <https://doi.org/10.1093/indlaw/dwaf014> (accessed 22 August 2025).

⁷⁸*Wilson v UK* [2002] *IRLR* 568; *SoS for Business and Trade v Mercer* (n.13).

D. The HRA and Unfair Dismissal

The unfair dismissal case of *Turner v East Midlands Trains Ltd* demonstrates both aspects of Elias' approach to human rights and employment law discussed above.⁷⁹ Namely, an openness to recognising that human rights are at stake and must be protected at work and a simultaneous reluctance to disrupt existing legal interpretations. The case is an instance where reluctance to change existing domestic interpretations of employment law led to a failure to adequately protect human rights at work.

The claimant in *Turner* was dismissed for alleged misconduct involving fraud and dishonesty, and argued the dismissal was unfair because the disciplinary procedure fell short of that required by the Article 8 ECHR right to private life. More precisely, she contended first that the dismissal's effect on her reputation, social relationships and job prospects amounted to an interference with Article 8. Second, that a proportionality test should be used to determine the question of procedural fairness rather than the standard 'range of reasonable responses' test (RoRR).

Perhaps surprisingly in retrospect, the alleged impact of the dismissal on Turner's reputation was easily accepted by Elias LJ as meaning Article 8 was engaged.⁸⁰ Indeed, each of the negative effects on her reputation, relationships and employment prospects was found to be capable of amounting to an interference with Article 8 in principle. But, taken alone, the impact on the claimants' social relationships and ability to find work would have been insufficient to do so on the facts. The important insight of Elias LJ here, that a dismissal might engage Article 8 due to its *consequences* for an individual's private life in addition to where the *reasons* threaten Convention rights, was at the frontier of Strasbourg's recognition of human rights at work. While the ECtHR had already adopted this consequences-based approach in some instances,⁸¹ the position was not fully clarified until the later case of *Denisov v Ukraine*.⁸²

It might even appear that *Turner* goes beyond Strasbourg in recognising Article 8 is threatened, as, unlike *Denisov*, it did not apply a seriousness threshold to determine whether Article 8 was engaged. Although dismissal for alleged dishonesty is clearly capable of having a sufficiently serious impact to meet this criterion, there was no assessment of the effect of the

⁷⁹ *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470.

⁸⁰ *Ibid.* [29]–[34].

⁸¹ *Schüth v Germany* (App No 1620/03); *IB v Greece* (App No 552/10).

⁸² (App No 76639/11).

The argument in *Turner* that the RoRR provides weaker procedural protection than required by Article 8, and should be replaced by proportionality review, was less successful. In *X v Y*, Mummery LJ had found that in most cases there would be no divergence in results between the RoRR and the proportionality review, but that in some cases there might be a difference, so proportionality review should be integrated into the fairness test.⁸⁴ In *Turner*, Elias LJ agreed the RoRR would normally lead to the same result as proportionality review, but disagreed on the need to expressly incorporate proportionality into the fairness enquiry. This was because heightened scrutiny was found to be possible under the RoRR where Convention rights were at stake; in effect narrowing the 'band' of responses that would be considered reasonable. Elias therefore concluded the test 'provides a sufficiently robust, flexible and objective analysis' to provide equivalent, or even greater, protection than required by Article 8.⁸⁵

Although the true ratio of *Turner* was narrow, the case is usually taken as establishing the RoRR's compatibility with the ECHR more generally.⁸⁸ This conclusion of compatibility is unpersuasive, however, when extended beyond the original context of procedural protections under Article 8.

⁸³*Turner* (n.79), [35].

⁸⁴[2004] ICR 1634.

⁸⁵ *Turner* (n.79).

⁸⁶See similarly, T. Hickman, 'Problems for Proportionality' (2010) 2010 *New Zealand Law Review* 303.

⁸⁷Ibid. [42]–[45]. Citing *Turek v Slovakia* (2007) 44 EHRR 861.

⁸⁸Including by Elias L. J. in *A v B* [2016] EWCA Civ 766, [23].

little problem with *Turner*. It is plausible that the RoRR could be applied to reach the same outcomes as the ECtHR's proportionality analysis, so that dismissals that disproportionately interfere with Convention rights inevitably fall outside the range of reasonable responses. In an ideal world, this is certainly how the RoRR would be applied irrespective of the HRA, and is how Elias appears to envisage the test operating. Unfortunately, the reality falls short of this ideal.

Elias' confidence that the RoRR adequately protects Convention rights flows from his view of unfair dismissal law as inherently flexible and imposing significant restrictions on managerial power.⁸⁹ This can be contrasted with the view of Hugh Collins that the RoRR is highly deferential to employers,⁹⁰ and inadequate to protect Convention rights because it involves weaker scrutiny than proportionality.⁹¹ Overall, Collins' characterisation seems the more accurate one. While the RoRR may sometimes protect Convention rights in dismissal claims,⁹² it is often applied in a manner closer to *Wednesbury* reasonableness,⁹³ despite repeated insistences that the RoRR imposes stricter scrutiny than rationality review or a perversity test.⁹⁴

Another problem is that in many cases the human rights dimension of dismissals is simply not recognised or adequately considered.⁹⁵ Human rights arguments may either be overlooked entirely,⁹⁶ or wrongly dismissed as irrelevant.⁹⁷ Such oversights will lead to the RoRR being applied with its normal high level of deference towards employers, rather than any heightened scrutiny. Even where Convention rights are recognised as engaged, they are generally not given appropriate weight within the RoRR test. The Court of Appeal decision in *A v B Local Authority*, where a headteacher was dismissed for their personal friendship with a convicted child sex offender, illustrates this risk.⁹⁸ Although the Court of Appeal reiterated their view

⁸⁹ P. Elias, 'Fairness in Unfair Dismissal: Trends and Tensions' (1981) 10 ILJ 201.

⁹⁰ H. Collins, 'Capitalist Discipline and Corporatist Law - Part I' (1982) 11 ILJ 78; H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford: OUP, 1992).

⁹¹ V. Mantouvalou and H. Collins, 'Private Life and Dismissal: *Pay v UK*' (2009) 38 ILJ 133. See also P. Collins (n.12); Bogg and others (n.1) 270.

⁹² *Keable v London Borough of Hammersmith and Fulham* [2019] UKET 2205904/2018.

⁹³ *Vickers Ltd v Smith* [1977] IRLR 11 (EAT); *Saunders v Scottish National Camps Association* [1980] IRLR 174. As articulated by Morrison J in *Haddon v Van den Bergh Foods Ltd* [1999] IRLR 672 EAT.

⁹⁴ *Post Office v Foley* [2000] EWCA Civ 3030; *Orr v Milton Keynes Council* [2011] EWCA Civ 62.

⁹⁵ P. Collins, *Putting Human Rights to Work: Labour Law, The ECHR, and The Employment Relation* (Oxford: OUP, 2022) Ch 6.

⁹⁶ *GM Packaging Ltd v Haslem* (2014) UKEAT/0259/13/LA.

⁹⁷ *Pay v Lancashire Probation Service* [2004] ICR 187.

⁹⁸ *A v B Local Authority & Anor* [2016] EWCA Civ 766.

that the RoRR is compatible with Convention rights, only Elias LJ in the minority applied the test in a manner that gave significant weight to the claimant's private life and so would have found the dismissal unfair.

While it might therefore be possible *in theory* for the RoRR to have the same outcomes as proportionality review, the failure to expressly incorporate proportionality into the fairness enquiry means that, *in practice*, tribunals fail to apply the necessary scrutiny. The effect of *Turner* is thus to leave the protection of Convention rights as illusory rather than 'practical and effective' as required by the ECtHR.⁹⁹

In addition, and crucially, it is not only the *outcomes* of the RoRR that matter for ECHR compatibility but also the *process* by which courts reach these outcomes. For instance, the ECtHR has found that when assessing the fairness of dismissals that interfere with Convention rights, national courts must consider whether the employer could have used a less intrusive means to achieve their aim (ie action short of dismissal).¹⁰⁰ This contrasts sharply with the RoRR, under which dismissals may be fair even if they are not necessary to achieve the employers' goals. The ECtHR has also identified a range of factors domestic courts must consider and give appropriate weight to in some specific contexts, such as where dismissals interfere with workers' expression,¹⁰¹ or privacy.¹⁰² Again, these factors need not be considered under the RoRR. Even if the test consistently gave the same results as proportionality, as envisaged by Elias, it would therefore fall short of the standards set by the ECtHR.

Following this, a structured proportionality test should be used to assess the fairness of dismissals that threaten Convention rights, with tribunals expressly considering factors identified as relevant by Strasbourg. It would be relatively straightforward to achieve this under HRA section 3, given the open-ended nature of the statutory language and the protective goals of the legislation. Indeed, it closely resembles the approach proposed in *X v Y* that has not been taken up more widely, and writing extra-judicially, Elias himself recently endorsed moving to a proportionality test even without any reliance on the HRA.¹⁰³

⁹⁹ *Airey v Ireland* [1979] 2 EHRR 305.

¹⁰⁰ *Barbulescu v Romania* [2017] IRLR 1032; *Fuentes Bobo v Spain* (2001) 31 EHRR 50.

¹⁰¹ *Herbai v Hungary* [2019] ECHR 378; *Aghajanyan v Armenia* (App No 41675/12).

¹⁰² *Barbulescu v Romania* (n.100).

¹⁰³ P. Elias, 'Foreword' in J. Adams-Prassl, A. Bogg and A. C. L. Davies (eds), *Landmark Cases in Labour Law* (Oxford: Hart, 2022) vi–vii.

The law of unfair dismissal provides a case study of how overly cautious applications of the HRA can lead to failures to protect workers' Convention rights. But for members of the judiciary, who bear the weighty responsibility of upholding constitutional principle, the risk of occasionally failing to protect Convention rights at work is likely preferable to the alternative of overgenerous protection. This is reflected in Elias' observation that a claimant who is unsuccessful in their HRA claim can take the case to Strasbourg, whereas the state has no opportunity to challenge overgenerous interpretations before the ECtHR.¹⁰⁴ This view seemingly overlooks the ability of Parliament to legislatively override judicial interpretations of Convention rights and so ultimately force challenges to be taken to Strasbourg. Nevertheless, Elias' assessment of the respective costs of under-/over-enforcement of the ECHR is representative of wider judicial thinking.¹⁰⁵ This likely helps explain the restrained application of the HRA in employment law and beyond.

4. HUMAN RIGHTS LAW AND EMPLOYMENT LAW: FUTURE

The preceding sections demonstrate a gap between current applications of human rights law in employment cases and employment law's underlying goal of ensuring human rights are taken seriously at work. This final section, therefore, considers how the interactions between the HRA and employment law could evolve to better achieve this goal. In addition to making the case against the domestic mirroring of the margin of appreciation, several doctrinal developments are explored that would provide more effective protection of human rights at work. These are undoubtedly more interventionist in nature than current mainstream approaches to the HRA, embodied by Elias. To some extent, they therefore represent a 'reimagining' of the potential future of employment law and human rights. They are nevertheless plausible, and broadly consistent with currently accepted principles of human rights law, and demonstrate how the potential of human rights law to advance workers' interests might be unlocked.

¹⁰⁴Elias, 'Renton Lecture' (n.11).

¹⁰⁵See, for example, *R (AB) v Secretary of State for Justice* [2021] UKSC 28 [57].

The above analysis provides an important insight into the reasons for human rights law's limited impact in employment cases. Namely, that this is the result of the good faith application of orthodox doctrines of human rights law rather than any exceptional treatment of or hostility towards workers' interests. We should therefore be wary of portraying the rejection of workers' human rights claims as simply the most recent iteration of the courts' long-standing unwillingness to recognise and protect workers' interests.¹⁰⁶

The absence of any exceptional treatment of employment law is heartening, but also troubling, as it indicates that the HRA will struggle to benefit workers under current interpretive approaches. Those seeking to unlock the potential of human rights law at work must therefore aim to reorientate judicial thinking towards approaches that better recognise and give appropriate weight to workers' rights. Central to this is the need to reject the transplantation of the margin of appreciation into domestic law, which creates a significant and unjustified barrier to advancing workers' interests through human rights law.

¹⁰⁶See similarly, Davies (n.77).

¹⁰⁷For a recent assessment, see Bogg (n.4).

¹⁰⁸K. Polomarkakis, 'A Culture of Commodification? Labour Rights in the Charter of Fundamental Rights of the European Union' (2025) 54 ILJ 117.

and national authorities.¹⁰⁹ The principle exists to allow for variation in their protection based on local needs and conditions,¹¹⁰ and recognises the primary role of national institutions in protecting rights.¹¹¹ It is afforded to states *as a whole* rather than legislatures, and has nothing to say about the division of responsibility for rights protection between national institutions.¹¹² This specific function and context make the MoA conceptually ill-suited to be imported to the national level.

This conceptual mismatch can be seen in the fact that the justifications for the MoA at Strasbourg do not apply, or rather apply differently, at the national level. The MoA is primarily grounded in the principle of subsidiarity and the idea that national authorities are better placed to understand the relevant domestic law and context and balance the competing rights and interests.¹¹³ But domestic courts will better understand these local matters than Strasbourg, and be better equipped to assess the balance struck by legislation. Less deference will therefore be owed by national courts on these grounds than that required at Strasbourg. Considerations of democratic legitimacy, which also underpin the MoA,¹¹⁴ similarly have different implications at the international and national levels, as the transnational nature of the ECtHR means lighter touch scrutiny than in domestic rights adjudication will likely be appropriate. While the arguments underpinning the MoA do support some judicial deference at the national level, therefore, the appropriate extent of this will differ. Moreover, the level of deference needed is an important question of national constitutional principle. It should not be answered, or avoided, by simply mirroring the margin of appreciation applied by the ECtHR.

Given this, it is no surprise the ECtHR has stated the MoA is ‘a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of State at the domestic level.’¹¹⁵ Far from being an invitation for deference by domestic courts, the MoA is premised on robust national protection of Convention rights,¹¹⁶ and Strasbourg may apply a narrower margin where

¹⁰⁹D. Spielmann, ‘Whither the Margin of Appreciation’ [2014] *CLP* 49; Brems (n.49).

¹¹⁰*R (Kebilene) v DPP* [2000] 2 AC 326.

¹¹¹Spielmann (n.109).

¹¹²‘The Independent Human Rights Act Review’ (London: Ministry of Justice, 2021) CP 586, 96.

¹¹³*Handyside v UK* [1976] EHRR 737 [48]; *SAS v France* [2014] ECHR 695 [129]; Gerards (n.73) Ch 71.

¹¹⁴*Hatton v UK* [2003] 37 EHRR 28 [97].

¹¹⁵*A v UK* (App No 3455/05) [184].

¹¹⁶Copenhagen Declaration (2018), [10]; Spielmann (n.109).

Despite the strong arguments against mirroring the margin, might this nevertheless be required under the HRA? Lord Reed concludes so in *Elan-Cane*, on the basis that finding violations in cases that fall within the margin would go beyond Strasbourg, and so be contrary to the mirror principle.¹²⁴ A key premise underpinning this view is that if Strasbourg would find something that falls within the MoA, this is the same as a substantive finding of no violation, which must be mirrored domestically.¹²⁵ The better view, however, is that where an issue falls within the MoA, Strasbourg is deferring to national authorities' assessment of Convention rights.¹²⁶ Crucially, within this discretionary margin, states are equally entitled to find there *has* been a violation as to find *no* breach. In practice, the MoA is only applied by the ECtHR to defer to domestic findings of no violation, because cases cannot be taken to Strasbourg where domestic authorities have already found a violation. But states are nevertheless free to determine for themselves whether rights have been violated within the margin. Given this, it is artificial to equate something falling within the MoA with findings of

¹²⁶*Re G (Adoption: Unmarried Couple)* (n.47), Lord Craig at [50].

non-violation, and unnecessary for domestic courts to import the doctrine into rights adjudication.

The argument made by Elias for importing the MoA is somewhat similar, as it relies on the purposive reasoning commonly used to justify the mirror principle. The claim being that the goal of the HRA to 'bring rights home' means domestic courts should not provide more generous protection of Convention rights than Strasbourg.¹²⁷ They must therefore not provide a remedy where an issue falls within the MoA. However, this argument is based on an overly narrow, remedially focussed, understanding of the HRA's purpose. Creating domestic remedies that act as counterparts to those available in Strasbourg is certainly one important goal of the Act. But the HRA also aims to reduce the number of claims that need to be taken to Strasbourg, and mirroring the MoA conflicts with this goal as it will have the effect of propelling more claims to the ECtHR.¹²⁸ More broadly, the purpose of the HRA is to establish effective domestic protection of Convention rights and ensure the UK's compliance with its international law obligations by aligning domestic law with Convention principles. On this framing, a purposive interpretation of the HRA does not support mirroring the MoA; if the Act's purpose is to align domestic law with ECHR standards, it should not be applied in a way that conflicts with the ECtHR's jurisprudence on the MoA.

The approach to the MoA endorsed by Elias and adopted in *Elan-Cane* represents an unnecessary barrier to the domestic protection of workers' Convention rights. Domestic courts should instead be free to resolve questions of Convention rights within the MoA. While there is a need for judicial deference when applying the HRA, both in and outside the MoA, the extent of this should be decided as a matter of domestic constitutional principle. Even without any reversal in approach, however, there remain areas of employment law where human rights have the potential to exert greater influence.

B. Human Rights and the Scope of Employment Law

The HRA and ECHR have significant implications for the protective scope of employment protections, meaning the body of rules determining when

¹²⁷ Elias, 'Renton Lecture' (n.11). See also *R (Elan-Cane)* (n.51) para 92.

¹²⁸ 'The Independent Human Rights Act Review' (n.112) 125–9.

and by whom statutory rights can be relied upon.¹²⁹ Where domestic employment law functions to protect Convention rights, both the positive obligations imposed by the ECHR and the Article 14 right to non-discrimination require that all boundary rules determining the scope of these protections stand in need of justification.¹³⁰ The HRA's incorporation of these principles means that domestic courts must scrutinise employment law's boundaries in cases where Convention rights are engaged, and if they cannot be justified, to interpret these rules as not barring the claim so far as possible. While the impact of human rights in this context can already be seen in several cases,¹³¹ there is potential for this to be further recognised and extended.

Successful human rights challenges to the boundaries of employment law have so far largely involved exclusions of occupational groups from worker status. But the HRA demands scrutiny of *all* rules that determine entitlement and access to the protections of Convention rights at work. This includes the legal tests used to define employment status and exclude claimants from the categories of employee or worker, such as those relating to personal service and substitution clauses or mutuality of obligation. But it also extends to other restrictions on protective scope, such as rules relating to employer size, qualifying periods or time limits for bringing claims.

One significant boundary that might be open to challenge on human rights grounds is the exclusion of 'limb-b workers' from unfair dismissal protection and parental rights. Both these areas of employment law function to protect Convention rights but are currently only enjoyed by those with employee status. The right to private and family life is clearly engaged by the rules defining entitlement to maternity and parental rights.¹³² Dismissals will similarly engage Convention rights if they are based on the employees' exercise of a Convention right or have a significant effect on their private life.¹³³ The HRA therefore demands the exclusion of limb-b workers from these employment protections be justified. This denial of Convention rights protections must be shown to strike a fair balance of competing rights and

¹²⁹ Protective scope is used rather than 'personal scope' as it encompasses all legal rules governing the scope of protections beyond employment status, including jurisdictional and procedural limits.

¹³⁰ Atkinson (n.61).

¹³¹ *Gilham v Ministry of Justice* (n.48); *Vining v London Borough of Wandsworth* [2017] EWCA Civ 1092; *National Union of Professional Foster Carers (NUPFC) v The Certification Officer* [2021] EWCA Civ 548.

¹³² *Konstantin Markin v Russia* [2013] 56 EHRR 8.

¹³³ H. Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2021) 50 ILJ 36.

interests, as required by the doctrine of positive obligations, and to be proportionate, as required by Article 14. If this is not possible, tribunals and courts must seek to expand the category of employee to encompass claimants who would otherwise be classed as limb-b workers, or consider giving a declaration of incompatibility where this is not possible.

The question of whether ‘limb-b’ workers are justifiably excluded from unfair dismissal and parental rights protections requires a fuller assessment than is possible to give here. But it is far from obvious what reason might be provided for this, given the extensive similarities between individuals in each group in practice, and the lack of any bright line between the two categories in law. Alan Bogg has recently argued that the shared features of employees and workers make the latter’s exclusion from unfair dismissal protection arbitrary, and therefore incompatible with the principle of equality before the law.¹³⁴ If correct, this would also suggest that the unequal treatment of workers should not be regarded as striking a fair or proportionate balance of interests under the ECHR. The question would then be whether HRA section 3 permits tribunals and courts to interpret the concept of employee to include claimants who would otherwise be classed as limb-b workers.

While undoubtedly involving a more interventionist approach to the HRA than some would be comfortable with, adopting a broader understanding of employee status via HRA section 3 should be possible in many cases. For instance, this might be achieved by lowering the threshold of control that is required for employee status, adopting a more worker-friendly approach to substitution clauses, or relaxing the requirement of ongoing mutuality of obligations. Such interpretations will not generally go against the grain or protective purposes of employment legislation, of safeguarding individuals working in positions of dependency and subordination,¹³⁵ as both employees and workers alike are subject to these conditions. The requirement that HRA section 3 not be used to adopt interpretations that conflict with fundamental features of legislation might present more difficulty, as the distinction between worker and employee is arguably a central feature of the legislation on parental and dismissal rights. However, the courts would not be fully abolishing this distinction, but rather merely shifting the already blurred boundary between the two in cases where Convention rights would otherwise be left unprotected. Furthermore, courts have already read down

¹³⁴A. Bogg, ‘Employment Status and Equality Before the Law: Three Arguments from Equality’ (2025) 29 *Edinburgh Law Review* 258.

¹³⁵*Uber v Aslam* [2021] UKSC 5.

the need for claimants to have a contract to be classed as a worker,¹³⁶ which similarly appears central to the statutory definition. It should therefore also be possible to expand the concept of employee to some claimants who would normally fall just on the other side of the employee/worker boundary.

The conclusion that courts should have significant interpretive leeway over the definition of ‘employee’ is bolstered by the fact that this category is a creature of the common law, defined by reference to contracts of service, rather than solely a statutory creation. The courts themselves are therefore largely responsible for shaping its substantive content.¹³⁷ Although the common law category of contracts of service has been integrated into statutory employment protections, we should not assume that Parliament intended this concept to remain stationary and have the same content as when originally referred to in legislation. Indeed, the law has developed significantly in this area and continues to do so.

Irrespective of whether employment law’s existing boundaries can be justified, and the outcome of any future litigation in this area, the need to scrutinise these exclusionary rules is an important implication of human rights for employment law. Requiring that any exclusions from Convention rights protections at work be justified is a paradigm shift that upends the traditional common law approach, where the burden falls squarely on claimants to justify their inclusion. While some might view this scrutiny of employment law’s boundary rules as ‘constitutionally disruptive’,¹³⁸ this is nevertheless what is demanded by the HRA.

C. Human Rights and the Contract of Employment

Another area of employment law where human rights law has the potential to exert greater influence is in respect of the interpretation of employment contracts. Although the ECHR is not directly effective within employment relationships, member states will be in breach of their positive obligations if domestic law permits employers to disproportionately interfere with workers’ Convention rights.¹³⁹ This is part of the broader requirement that private law doctrines be consistent with Convention rights.¹⁴⁰ States are generally

¹³⁶For example, *NUPFC v The Certification Officer* (n.131).

¹³⁷G. Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *OJLS* 543.

¹³⁸Bogg (n.134).

¹³⁹Mantouvalou (n.25).

¹⁴⁰See, for example, defamation in *Kharlamov v Russia* (2015), and property law in *Pye v UK* (App No 44302/02).

free to choose how to secure Convention rights within private relationships such as employment, but any area of domestic law that functions to protect Convention rights must strike a fair balance in doing so.¹⁴¹ Domestic courts must seek to give effect to these positive obligations in private employment law disputes due to HRA section 6, which requires they act consistently with Convention rights when applying and incrementally developing the common law.¹⁴²

In *Pla v Andorra*, the positive obligations imposed by the ECHR were found to require domestic courts to interpret private law documents consistently with Convention rights.¹⁴³ *Pla* involved adopting a Convention-compatible interpretation of a will that departed from how the document would normally be interpreted under domestic law. But the reasoning applies equally to domestic judicial treatment of employment and worker contracts.¹⁴⁴ When combined with the HRA, the effect of this is to mandate something akin to a private law ‘principle of legality’ equivalent to that found in public law. Under the public law version of that principle, Parliament is assumed to legislate in line with fundamental rights, meaning statutory provisions are interpreted in a manner that respects these rights unless this is impossible due to express language or necessary implication.¹⁴⁵ By analogy, the ECHR jurisprudence means that contracting parties should similarly be assumed to not have agreed terms that infringe or waive their Convention rights unless it is impossible to avoid such an interpretation.

This private law principle of legality has important implications for the interpretation of contracts for the performance of work. First, it means that express terms in employment and worker contracts should be interpreted in ways that avoid disproportionately interfering with Convention rights wherever possible. This includes adopting narrow interpretations of contractual discretions or powers in employment contracts, so that employers are not too readily afforded contractual authority to infringe Convention rights.¹⁴⁶ For instance, an express contractual term giving the employer a

¹⁴¹ J. Atkinson, ‘Workplace Monitoring and the Right to Private Life at Work’ (2018) 81 *MLR* 688.

¹⁴² On this indirect horizontal effect of the HRA, see G. Phillipson and A. Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74 *MLR* 878.

¹⁴³ *Pla v Andorra* 42 EHRR 25. See also *Mustafa and Tarzibachi v Sweden* 52 EHRR 24.

¹⁴⁴ P. Collins (n.95) Ch 7. The principle that judicial enforcement of contracts must be consistent with the ECHR was recognised domestically in *McDonald v McDonald* [2016] UKSC 28.

¹⁴⁵ *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115.

¹⁴⁶ To some extent, the implied term of trust and confidence already plays a similar role by fettering exercises of managerial authority that threaten workers’ human rights, see Atkinson (n.15).

discretionary power to introduce workplace monitoring and surveillance systems should be interpreted as only permitting employers to introduce such systems where they are compliant with workers' Convention rights. An approach to interpreting express terms along these lines can already be seen in *Smith v Trafford Housing Trust*,¹⁴⁷ where a narrow construction of a contractual restriction on the employees' freedom of expression was adopted, albeit without any reliance on the HRA. There is significant room for this approach to be expressly grounded in the HRA and applied more consistently.

The need to interpret contracts consistently with Convention rights also has implications for implied terms in employment contracts. One example is that employees' implied duty of obedience should not be interpreted as requiring them to comply with instructions that infringe their Convention rights. The ECHR requires disproportionate interferences with Convention rights not be permitted by domestic law. Following this, the common law should not endow instructions of this kind with legitimate contractual authority. While significant, developing the law in this way would be relatively straightforward. The implied duty of obedience already only applies where instructions are lawful and reasonable.¹⁴⁸ It is therefore a simple and incremental step to treat the existing limit of 'reasonableness' as imposing a requirement of proportionality where Convention rights are at stake. In much the same way that it was argued above that reasonableness should be aligned with proportionality in the context of unfair dismissal.

Another implication of the private law principle of legality is that employers' implied contractual duties should be incrementally developed to ensure respect for workers' Convention rights. Several implied terms already protect aspects of workers' human rights, but the duty of mutual trust and confidence is most relevant to the protection of Convention rights. The nature of trust and confidence, as a general standard that embodies societal expectations about appropriate workplace behaviour,¹⁴⁹ means that employer conduct that disproportionately infringes employees' Convention rights is also likely to breach trust and confidence.¹⁵⁰ This implied duty of employers

¹⁴⁷[2012] EWHC 3221.

¹⁴⁸*Donovan v Invicta Airlines* [1970] 1 Lloyd's Rep 486; S. Deakin and others, *Deakin and Morris' Labour Law*, 7th edn (Oxford: Hart, 2021) 330.

¹⁴⁹L. Barmes, 'Common Law Implied Terms and Behavioural Standards at Work' (2007) 36 ILJ 35.

¹⁵⁰B. Hepple, 'Human Rights and Employment Law' [1998] *Amicus Curiae* 19.

helps secure aspects of workers' rights to freedom of association, religious belief, private life and freedom of expression, among others.¹⁵¹

The courts have not yet fully aligned trust and confidence with the protection of workers' Convention rights, however, and the implied term is currently more lenient towards employers.¹⁵² The ECHR and HRA should therefore prompt courts to close this gap and make clear that disproportionate interferences with Convention rights by employers will amount to breaches of trust and confidence. This would again be a relatively small incremental step for the common law to take, given the extensive overlap that already exists between the two standards.

5. CONCLUDING REMARKS: TOWARDS COMPREHENSIVE PROTECTION OF HUMAN RIGHTS AT WORK?

This article has examined the past, present and future of human rights and employment law through the jurisprudence and scholarship of Sir Patrick Elias. It was argued that the protection of workers' human rights has always been a central goal of employment law, even prior to the advent of any specific body of 'human rights law'. More recently, this link has been made explicit by the HRA, which has embedded human rights into domestic employment law. Despite greater judicial recognition of the many intersections of human rights and employment law, however, the HRA's practical impact on the field remains constrained. Elias' application of the Act exemplifies this and highlights the systematic barriers created to workers' human rights claims by orthodox doctrines of human rights law.

The article also identified several doctrinal developments that would improve the protection of workers' rights, if a more interventionist approach was adopted to the HRA. This includes extending the personal scope of employment protections where human rights are at stake, aligning the range of reasonable responses test with proportionality, and interpreting employment contracts in a manner consistent with Convention rights. When combined with the removal of the qualifying period for unfair dismissal by the Employment Rights Bill, the cumulative effect would be to reshape the law of unfair dismissal into a more comprehensive means of protecting human rights at work.

¹⁵¹ Atkinson (n.138).

¹⁵² Ibid.

Under the reimagined future of human rights and employment law developed here, individuals whose Convention rights are infringed at work would generally be able to resign and vindicate their rights through claims of constructive unfair dismissal. There would remain gaps in protection, such as the need for workers to resign to bring a claim, and the limited remedies available.¹⁵³ Nonetheless, the proposals illustrate how the HRA might be applied to take a meaningful step from our fragmented legal protections towards comprehensive protection of human rights at work. In so doing, human rights law would better contribute to achieving employment law's long-standing normative goal of ensuring the legal protection of workers' human rights: or put differently, of taking human rights seriously at work.

¹⁵³P. Collins (n.12).