影印版法学基础系列

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ESSENTIAL EMPLOYMENT LAW

艾利森·邦
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（第二版）

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本书导读

本书主要介绍了英国劳动法，罗马条约、阿姆斯特丹条约以及欧共体指令和判决对英国劳动法的深刻影响也在本书中得到了详尽的体现。随着英国《雇用关系法案》(1999 年)的颁布，本书中有关的内容及时做了最新修订。本书的特色在于其语言简明扼要，叙述流畅生动，搜集了几乎全部有关的案例和欧盟指令及制定法中的相关条文，以雇员的利益保护为主线，介绍和论述了英国及欧盟有关劳动雇用法律方面的变化和革新，为我国修改、研究和借鉴劳动雇用法律提供了丰富的资料。

本书的内容涉及雇用合同的内容及合同终止、雇员在雇用过程中的法定权利、反歧视以及工会与雇主的关系等几大方面。

英国的劳动雇用合同仅在雇员和雇主之间成立，个体经营者不能成为雇用合同的主体，雇用合同的内容由默认条款和明示条款共同构成，其中默示条款包含了雇主的义务和雇员的义务；雇员在雇用过程中享有法定权利，享有法定权利的前提条件是“雇用的连续性”，享有的法定权利既包括特定状况下(如生病期间、解雇期间或短期工作期间)报酬的计算，又包括具有特殊身份的人(如母亲、父亲以及童工等)享有的特殊权利；在反歧视方面重点介绍了性别歧视，对各种直接和间接形式的性别歧视作了详细论述，并对与性别歧视有紧密关系的同等待遇法案作了专节陈述，同时规定了起诉期限、举证责任及救济措施，另外简要介绍了种族歧视、残疾歧视、宗教歧视、年龄歧视；劳动合同的终止原因包括非法解雇、不公平解雇以及视为不公平解雇，非法解雇又叫违约解雇，是指雇主没有正当理由不给予通知或不给予足够通知而解雇雇员，它与不公平解雇在时效期间、救济方法、法庭程序、对雇员的赔偿限制等方面都有所不同；工会是结社自由权的体现，工会通过与雇主签订集体合同以及要求雇员加入工会来运作，但法律在协调和补充工会的权利义务方面仍然起着不可替代的作用。在英国，罢工不是一种一般性的权利，但是因罢工导致侵权的话，可以免除工会的侵权之责，也可以免除雇员的违约之责。目前出现了以赋予工人罢工的权利的方案取代目前对工会免责的做法的争论，但英国仍倾向于保守，仍然采取的是免除工会的侵权责任的做法。

由于英国的判例法传统，阅读本书时，在方法上应注意判例与制定法及

欧盟指令的协调关系，在内容上应注意有关雇用合同中默示条款的介绍、特定性别的人（如母亲和女职工）的特有权利、非法解雇与不公平解雇的区别、有影响的集体合同权利和罢工的权利，这些都是和我国劳动法不同或者说是能填补我国劳动法空白的规则。我国作为一个经济迅速发展、劳动力供需旺盛的发展中国家，协调好资方和劳方的关系，不仅有利于国家整体的经济发展，而且与保护人权和维护社会弱势个体的合理利益息息相关。

本书相关内容的翻译者为武汉大学博士研究生徐琼。若有谬误之处，敬请学界前辈、同仁及读者批评指正。

译　　者

2004 年 4 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

The Cavendish Essential series is now in its second edition and is a well established favourite among students.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne
General Editor, Essential Series

Preface

There is arguably never an ideal time to update an Employment Law textbook, but the summer of 1999 seems particularly fraught, since the Employment Relations Bill 1999 is currently finishing its passage through Parliament. It is presumed that this will have the status of a fully fledged statute around the time of publication and so it is referred to throughout as the Employment Relations Act 1999 and treated as being in force, although its implementation will be staggered over several months and much of the detail is yet to be revealed. To avoid confusion with the Employment Rights Act 1996, which is referred to as the ERA 1996, the new Act is abbreviated to EReA 1999.

Given this caveat, the law is stated as at July 1999.

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Contents

目　录

1 Introduction

You should be familiar with the following areas:

- the scope of employment law
- the sources of employment law including European law
- the machinery for resolving disputes in employment
- statutory bodies with specialised employment functions

The scope of employment law

Employment law is one of the more dynamic and controversial areas of English law; so controversial, in fact, that there is no agreement even on what it should be called. Books headed Labour Law, Employment Law or Industrial Law will be found to cover much the same material, that is:

- individual employment law – the law governing the relationship between individual employees and their employer;
- collective labour law – the law governing the relationship between employers and employee organisations, that is, trade unions;
- statutory controls over health and safety at work.

Due to the major growth in the content of employment law generally, the law on health and safety at work often has to be moved to a separate manual. The law on health and safety at work is not covered in this volume.

Employment law is a matter of close interest to political parties, which accounts for the growth of legislation on employment matters in the last 30 years. It is also a matter of concern for the European

Union (EU), and there has been a vast influx of law from Europe into UK employment law in recent years, not all of it tune with the views of the government of the day.

It is necessary to consider briefly the sources of employment law and the legal framework within which it operates.

Sources of employment law

Labour law is found in common law, in statute law and in European law.

Common law

The relationship of employer and employee, the terms of the contracts of employment, the respective duties of employer and employee are all governed by the principles of the law of contract which emanate from the common law. In addition, access to the statutory protection given to employees is dependent on the existence of the contract of employment whose requirements are again set by the common law.

The common law has also been important in the development of collective labour law. Trade unions were illegal organisations in the eyes of the common law and any industrial action they organised was seen as a civil offence, that is, a tort. Statutory protection has been given to both trade unions and their activities over the years. It is still necessary, however, in any action to restrain trade union activity to first identify the tort they are alleged to be committing. The common law also remains important in establishing the relationship between a trade union and its members.

Legislation

Legislation has become increasingly important in recent years. In the 1960s and 1970s, many Acts of Parliament provided new rights for employees, for example, the right to redundancy payments, the right not to be unfairly dismissed, the right not to be discriminated against on the ground of sex or race. In the 1980s and 1990s, the emphasis changed with the advent of the Conservative government and much legislation was introduced to restrict the immunities of trade unions organising industrial action. When the Labour Party came to power in May 1997, they acted as soon as possible to 'opt in' to the Social Protocol (more commonly, but, erroneously, referred to as the 'Social Chapter'). This led to the UK making provisions to comply with the

European Works Council Directive and also the Parental Leave Directive. The latter is dealt with by the Employment Relations Act (EReA) 1999 which it was stated would be the only major piece of employment law legislation to be passed during the Labour government's first term of office.

European Law

Entry into the European Union has resulted in very many significant developments. European law takes precedence over national law, whether case law, prior legislation or even subsequent legislation (*Factortame v Secretary of State for Transport* (1991)).

The greatest effect on English law has been in the area of sex discrimination, transfer of undertakings and health and safety.

There are three basic sources of European law.

The Treaty of Rome

The Treaty of Rome is directly effective within all the countries of the European Union, and does not need any national legislation for its implementation. It has direct effect both horizontally and vertically, that is to say, it will confer rights upon individuals both against other private citizens and against the state, for example, Art 141 of the Treaty of Rome which requires equal pay for men and women (see Chapter 4).

The Treaty of Amsterdam

This treaty, which came into effect on 1 May 1999, was negotiated with a view to preparing the EU for enlargement through institutional and procedural reform. In the event, no such reforms were made and the treaty has done little more than update some previously agreed modifications. In terms of policy, there is an extra chapter on employment and the Social Chapter has now become incorporated into the text of the treaty. For students, the most annoying aspect of the treaty is that it has renumbered several articles of the Treaty of Rome as a result of streamlining; for example, the former Art 119 has now become Art 141 (the basis for equal pay legislation, as mentioned above).

The legislation of the European Union

- Regulations which, like the Treaty, are directly applicable; and
- Directives, which require national governments to introduce legislation to achieve a certain end. If not implemented, or imperfectly implemented, these too can be directly effective in so far as they affect 'emanations of the State' (that is, vertical effect). This phrase has been liberally interpreted to cover not only public authorities but 'a body, whatever its form which has been made responsible, pursuant to a method adopted by the State, for providing a public service under the control of the State'. On this basis, the House of Lords held that British Gas was an emanation of the State (*Foster v British Gas* (1991)).

  They are not, however, directly effective against private employers (they do not have horizontal effect). Employees of private employers may instead sue the government for damages for their failure to implement the directive as required. In *Francovich v Italian Republic* (1992), it was held that a government could be sued provided:

  - the directive was intended to confer rights on individuals;
  - it is sufficiently clear and direct;
  - the individual can show that he suffered loss as a result of the government's failure.

In the early years, directives could only be passed by the unanimous vote of all Member States, but, in 1986, the Single European Act permitted majority voting on measures aimed at the functioning of the internal market. While unanimity is still required with regard to general employment law matters, qualified majority voting applies to directives on health and safety. It is expected, with the growth in the numbers of countries within the European Union, that qualified majority voting will increase.

The decisions of the European Court of Justice (ECJ)

The ECJ is the final arbiter in the interpretation of European law. When matters involving European law arise in a case, they can be referred directly to the ECJ for resolution or they can be decided by the national court in accordance with existing interpretations of the European Court.