

# **The Impact of EU Fundamental Rights on the Employment Relationship**

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# The Impact of EU Fundamental Rights on the Employment Relationship

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## Abstract

The purpose of this thesis is to assess the impact of the EU Charter of Fundamental Rights (the Charter) on the employment relationship. The Charter has long been praised for its inclusion of socio-economic rights alongside traditional civil and political rights. It might have been thought, therefore, that the Charter would be a particularly potent tool in the employment context, characterised as it is, by the continuous interaction between economic and social rights. However, to draw an analogy from George Orwell's *Animal Farm*, although 'all rights are equal, some rights are more equal than others'. Not only does the Charter distinguish between 'rights' and 'principles', but the EU Court of Justice (CJEU) seems actively to prioritise the Charter's economic freedoms over the social rights. This thesis focuses on the consequences of this variable geometry for the regulation of the employment relationship. In particular, it examines the widening gap between contractual autonomy/business freedom as a fundamental right found in article 16 of the Charter and the employment rights contained in the Solidarity Title.

Of particular concern from an employee's perspective is the decision of the CJEU in the case of *Alemo-Herron* and its progeny. In a series of highly deregulatory judgments, the CJEU has found that the employee-protective aim of the relevant legislation was incompatible with the employer's freedom to conduct a business. At the same time, the CJEU has been reluctant to invoke the Charter's employment rights to give an employee-friendly reading to legislation. The effect of this divergence for the employment relationship is explored in two ways. On a micro level, the thesis looks to the very practical or 'day to day' influence of fundamental rights at various stages in the life cycle of the employment contract. It addresses the relationship between individually agreed employment terms and fundamental rights sources. The macro level considers the broader question of the effect of fundamental rights on the EU's (or the State's) ability to regulate the employment relationship more generally. It is demonstrated that there may be a systemic problem with fundamental economic freedoms being prioritised over social rights, namely the employment provisions of the Charter.

## **Preface**

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text

A version of chapter II, section B has been published as Niall O'Connor, 'Interpreting Employment Legislation Through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 *European Labour Law Journal* 193.

This thesis, including footnotes, does not exceed the permitted length.

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# I. Introduction and Methodology

## 1. Background

This thesis seeks to examine the impact of the EU Charter of Fundamental Rights (the Charter) on the employment relationship. The Charter has long been praised for its inclusion of socio-economic rights alongside traditional civil and political rights. It might have been thought, therefore, that the Charter would be a particularly potent tool in the employment context, characterised as it is, by the continuous interaction between economic and social rights. However, to draw an analogy from George Orwell's *Animal Farm*, although 'all rights are equal, some rights are more equal than others'. Not only does the Charter distinguish between 'rights' and 'principles', but the EU Court of Justice (CJEU) seems actively to prioritise the Charter's economic freedoms over the social rights. This thesis focuses on the consequences of this variable geometry for the regulation of the employment relationship. In particular, it examines the widening gap between contractual autonomy as a fundamental right found in article 16 of the Charter and the employment rights contained in the Solidarity Title.

Of particular concern from an employee's perspective is the decision of the CJEU in the case of *Alemo-Herron* and its progeny. In a series of highly deregulatory judgments, the CJEU has found that the employee-protective aim of the relevant legislation was incompatible with the employer's freedom to conduct a business. At the same time, the CJEU has been reluctant to invoke the Charter's employment rights to give an employee-friendly reading to legislation. The effect of this divergence for the employment relationship is explored in two ways. On a micro level, the thesis looks to the very practical or 'day to day' influence of fundamental rights at various stages in the life cycle of the employment contract. It addresses the relationship between individually agreed employment terms and fundamental rights sources. The macro level considers the broader question of the effect of fundamental rights on the EU's (or the Member States') ability to regulate the employment relationship more generally. It demonstrates that there may be a systemic problem with fundamental economic freedoms being prioritised over social rights.

## 2. The Charter and English law

The reference point of this thesis will remain primarily on the relationship between EU fundamental rights and the English common law contract of employment. The common law will be used in two respects, first, in considering the effect of fundamental rights arguments on common law principles, notably freedom of contract, and second, by examining the ability of common law concepts, for example implied terms, to encapsulate or promote fundamental employment rights.

It may be thought a particularly (in)opportune moment to be examining this question following the decision of the British people to leave the European Union, but there are several reasons for choosing to examine the Charter's impact on common law principles. First, the thesis was conceived prior to Brexit and the common law is the legal system best known to the author. Second, the EU will continue to be composed of a few other common law jurisdictions. Third, even following Brexit, existing employment legislation—including the Charter's influence on that legislation—will be preserved at least for the time being. Fourth, as the Commission's draft guidelines make clear, the EU is likely to insist that the UK replicate and maintain an equivalent level of social protection in return for any free trade agreement. Fifth, it is a useful stock-taking exercise to examine the current impact of EU human rights on employment legislation and thereby the employment contract, as this will demonstrate what the UK stands to lose (or indeed gain) during the Brexit process.

Part of this thesis will also explore the alternative ways in which the English common law might take up the fundamental rights baton in the absence of the Charter. Finally, there are broader lessons to be drawn for both the UK and the EU as to the appropriate balance to be achieved between the regulation of the employment relationship in order to protect employees and the business autonomy of employers.

Although this is not intended to be a 'Brexit thesis', it is difficult to escape the emphasis placed on the Charter and indeed the role of the CJEU more generally during the referendum campaign. The Prime Minister, from as early as the Conservative Party Conference in October 2016 made the uncharacteristically specific commitment to leaving the jurisdiction of the CJEU a 'red line' issue for the Brexit negotiations.<sup>1</sup> It was, however, Boris Johnson who led the way in deriding the Charter's influence over British legislation. In the *Telegraph* article in which he first declared his support for Brexit, Mr Johnson wrote:

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<sup>1</sup> David Alan Green, 'Brexit, Why did the ECJ become a UK "Red Line"?' *The Financial Times* 12 April 2017.

[i]t was one thing when that court contented itself with the single market, and ensuring that there was free and fair trade across the EU. We are now way beyond that stage. Under the Lisbon Treaty, the court has taken on the ability to vindicate people’s rights under the 55-clause “Charter of Fundamental Human Rights”, including such peculiar entitlements as the right to found a school, or the right to “pursue a freely chosen occupation” anywhere in the EU, or the right to start a business (...) These are not fundamental rights as we normally understand them, and the mind boggles as to how they will be enforced. Tony Blair told us he had an opt-out from this charter. Alas, that opt-out has not proved legally durable, and there are real fears among British jurists about the activism of the court.<sup>2</sup>

It is apparent, then, that for eurosceptics such as Johnson, the Charter was an unacceptably powerful weapon in the CJEU’s arsenal, capable as it was, of overriding national sovereignty. Any undergraduate law student could point out the inaccuracy of Johnson’s assessment. Indeed, anyone could point out the inconsistency between raising fears of the Charter’s influence while simultaneously sneering at the difficulties of enforcing its provisions. As this thesis will show, however, there may be more than a grain of truth to the argument that the Charter is both inert and yet unpredictably dynamic. The employment context provides a useful backdrop against which to assess these apparent contradictions.

### 3. Human rights and the employment relationship

The idea of examining the relationship between human rights and the employment relationship is not a particularly novel one. However, much of the existing literature tends either to focus on the role in the employment context of civil/political/public human rights—notably those found in the European Convention on Human Rights (ECHR)<sup>3</sup> or notes the influence of human

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<sup>2</sup> Boris Johnson, ‘There is Only One Way to Get the Change We Want – Vote to Leave the EU’ *The Daily Telegraph* 16 March 2016.

<sup>3</sup> See for eg Hugh Collins and Virginia Mantouvalou, ‘Human Rights and the Contract of Employment’ in Mark Freedland (ed), *The Contract of Employment* (OUP 2016) 188; Virginia Mantouvalou, ‘Human Rights and Unfair Dismissal: Private Acts in Public Spaces’ (2008) 71 MLR 912; Gillian S Morris, ‘Fundamental Rights: Exclusion by Agreement?’ (2001) 30 ILJ 49; Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 137; K D Ewing, C A Gearty and B A Hepple, *Human Rights and Labour Law* (Mansell 1994); Robin Allen and Rachel Crasnow, *Employment Law and Human Rights* (OUP 2002); Robin Allen, Rachel Crasnow and Anna Beale, *Employment Law and Human Rights* (OUP 2007); John Bowers and Jeremy Lewis, *Employment Law and Human Rights* (Sweet & Maxwell 2001); Virginia Mantouvalou, ‘Labour Law and Human Rights’ 41 (2016) *New Zealand Journal of Employment Relations* 3; Hugh Collins and Virginia Mantouvalou, ‘*Redfearn v UK*: Political Association and Dismissal’

rights on private law more generally,<sup>4</sup> or finally sets out the potential effects of the Charter's employment rights in a rather broad-brush manner, placing a particular emphasis on the legislative process and on 'Social Europe' rather than on the contract of employment itself.<sup>5</sup> These trends are understandable. The ECHR has been incorporated into domestic law since 1998 via the Human Rights Act (HRA) and so its effects on the employment relationship have been more fully fleshed out. The Charter, by contrast, is still a relatively new instrument, having achieved binding legal status only in 2009. In addition, the Charter's drafters, as we shall see, appear to have gone out of their way to ensure that the social provisions would have a minimum impact on domestic employment law. Despite this, the potential influence of the Charter on specific types of contract is beginning to be recognised.<sup>6</sup> The influence of contractual autonomy as a fundamental right has also gained traction in recent years, largely as an immediate reaction to the above-mentioned decision in *Alemo-Herron*.<sup>7</sup>

#### 4. Original contribution

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(2013) 73 MLR 909; Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529; Hugh Collins and Virginia Mantouvalou, 'Private Life and Dismissal: *Pay v UK*' (2009) 38 ILJ 133.

<sup>4</sup> See for eg Hugh Collins, 'The Challenges Presented by Fundamental Rights to Private law' in Kit Barker, Karen Fairweather, Ross Grantham (eds), *Private Law in the 21<sup>st</sup> Century* (Hart 2017); Olha O Cherednychenko and Norbert Reich, 'The Constitutionalization of European Private Law: Gateways, Constraints and Challenges' (2015) European Review of Private Law 797; Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 ELRev 479; Hugh Collins, 'The (In)compatibility of Human Rights and Private Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014); Hugh Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' in Hans W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Elgar 2011); Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in Ulf Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 171; Arthur Hartkamp, 'Fundamental Rights, Fundamental Freedoms and Contract Law' in Stefan Grundman (ed), *Constitutional Values and European Contract Law* (Kluwer 2008) 85; Olha O Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?' (2007) 3 Utrecht Law Review 1; Olha O Cherednychenko, 'The Constitutionalization of Contract Law: Something New under the Sun?' (2004) 8 Electronic Journal of Comparative Law; Hugh Collins, 'The Impact of Human Rights on Contract Law in Europe' (2011) 22 European Business Law Review 425;

<sup>5</sup> See for eg Mark Bell, 'Constitutionalization and EU Employment Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 137; Catherine Barnard, 'The Protection of Fundamental Social Rights in Europe After Lisbon: A Question of Conflicts of Interest' in Sybe de Vries and others (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 37; Catherine Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in Sybe de Vries and others (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015) 173; Marianne Gijzen, 'The Charter: A Milestone for Social Protection in Europe' (2001) 8 MJ 33; Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014); Tamara Hervey and Jeff Kenner, *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003).

<sup>6</sup> Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017).

<sup>7</sup> See for eg Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 ERCL 167; Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 ILJ 434; Jeremias Prassl, 'Business Freedom and Employment Rights in the European Union' (2015) 17 CYELS 189.

The original contribution of this thesis can be seen in a number of aspects. First, there is the contrasting examination of the influence of human rights at both the level of the individual contract and more broadly on the regulation of the employment relationship. Second, the thesis adopts a comprehensive analysis of the influence of the Solidarity Title, juxtaposing it with article 16 on the freedom to conduct a business. This has simply not been possible until now given the dearth of case law, with existing analysis remaining largely speculative in nature, although as explained below, this is a charge that may also be levelled at elements of this thesis. The third original aspect is the questioning of the wider systemic effects of prioritising the Charter's economic freedoms over its employment rights. As such, a comparison is made between *Alemo-Herron* and previous 'landmark' (allegedly) deregulatory judgments such as *Lochner* and the infamous *Viking/Laval* line of cases. Did these cases have the impact that labour lawyers feared, and will *Alemo-Herron* go the same way? Finally, and perhaps most importantly, is the application of these fundamental rights principles to common law concepts. Classic common law contractual concepts such as derogability and default terms are re-examined through a fundamental rights lens, with the Charter acting as the focal point. Put simply, the question is how do fundamental rights via the medium of employment legislation trickle down to the individual contract of employment?

## 5. Why the Charter?

The next question that must be addressed is why does this thesis focus on the Charter at all? Commentators have long discussed the potential effects of human rights arguments on the employment relationship even prior to the adoption of the Charter in 2000 and its granting of legal effect in 2009. The reasons for choosing the Charter are two-fold. First, the very *raison d'être* of the Charter was to consolidate or render more visible existing sources of EU fundamental rights including the International Labour Organization (ILO) Conventions, the European Convention on Human Rights (ECHR), the Community Social Charter and the European Social Charter (ESC). The influence of this *acquis* can therefore be funnelled through the Charter. Second, unlike many existing human rights instruments such as the ECHR, the Charter does not (at least in theory) distinguish between social and economic rights and so it is particularly relevant in the employment context. Discussion of the interpretation of the ECHR and its application to the employment context has largely been excluded. This issue has already been extensively dealt with the literature and there is very little overlap between

the Charter Employment Rights and the Convention.<sup>8</sup> Where such overlap does exist, for example in relation to the right to strike and collective bargaining, lessons will be drawn from the Convention case law. In addition, article 53 of the Charter mandates that if a provision is also found in the Convention then it should be given the same interpretation. Also excluded from the scope of thesis is the more recent European Pillar of Social Rights. This is not a rights-instrument as such, but is rather a ‘road map’ aimed at ‘upward convergence’ between the Member State social systems, including areas over which the Union has no competence, such as wages. As a ‘proclamation’ addressed to the institutions, the Pillar has a status similar to the Charter before it was granted legal effect in 2009. It also takes the form of a ‘recommendation’ addressed to the Member States. Neither a proclamation nor a recommendation has direct legal effect.<sup>9</sup> The Pillar also makes clear that the Charter is one of its sources of inspiration. This may mean that the Pillar can be relied on in future to govern the interpretation of Charter provisions covering the same field. Thus, as things stand, the likely immediate effects of the Pillar on existing EU employment law are too uncertain to be considered at this stage. It currently has more relevance for the legislature (at EU and national level) than for the CJEU, the institution that forms the focus of this thesis.

As mentioned, particular attention is devoted to the employment rights found in the Solidarity Title and article 16 on the freedom to conduct a business. The equality concept has to some extent been excluded because equality as a general principle has enjoyed a long history in EU law and has infused the CJEU’s approach to the interpretation and application of employment legislation from the very beginning. In addition, the notion of equality is intimately linked with the Treaty, somewhat impeding an assessment of the Charter’s role in this context. The equality concept will, however, be drawn upon as a reference point throughout the thesis where it serves an illustrative purpose.

Having said all this, it may simply be the case that it is still too early to assess the real impact of the Charter on the employment relationship. There is no doubt that the CJEU is by now well-used to dealing with the Charter in the employment context. The Charter has now been referred to 223 times as of April 2018 by the CJEU and the Advocates General.<sup>10</sup> Although

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<sup>8</sup> See for eg Filip Dorssement and others (eds), *The European Convention on Human Rights and The Employment Relation* (Hart 2013).

<sup>9</sup> Zane Rasnača, ‘Social summit preview: Can the European Pillar of Social Rights deliver on its promises?’ LSE Blogs 16 November 2017.

<sup>10</sup> Based on a search of ‘Charter of Fundamental’ at curia.europa.eu using the subject matters ‘social security’, ‘social policy’ and ‘employment’.

this may be thought a particularly low figure given that many of the Charter's provisions are of potential relevance to the employment relationship.

## 6. Structure of the thesis

Headings are outlined using the following system I, A, 1, 1.1, a. EU cases and legislation are cited in short hand in the footnotes, with a full citation included in the bibliography.

The structure of the thesis is as follows. Chapter II explores the relevance of the EU Charter for the employment relationship. It starts by setting out the background and the purpose of the Charter before turning to vexed question of the 'constitutionalisation' of the employment relationship. This chapter concludes by setting out the methods by which the Charter (with a focus on the employment rights at this stage) may penetrate the employment relationship, before discussing some of the limits on this process. Chapter III traces the CJEU's treatment of the freedom to conduct a business found in article 16 of the Charter, which Steven Weatherill has provocatively described as an 'aberrant veneration'.

If Chapter II describes the potential erosion of contractual concepts in the employment context in the face of social rights, Chapter III asks whether such an assessment may have been premature. Although it is certainly correct to say that the employment contract has been considerably influenced by social rights, the CJEU is broadening its fundamental rights horizons, opening the door to competing economic rights, notably freedom of contract. This chapter begins by defining and delimiting the notion of contractual autonomy as found at EU level. Particular attention is then paid to the case of *Alemo-Herron* and its progeny—cases in which the CJEU has adopted a particularly aggressive reading of article 16 to defeat competing social goals. Chapter III concludes by asking whether *Alemo-Herron* really was a one-off, an aberration to be forgotten, or whether the CJEU's aggressive approach to article 16 has now hardened.

Chapter IV explores the potential broader or 'macro' impact of this granting of fundamental rights status to business freedom ie the impact of business freedom as a fundamental right on the ability of the EU to regulate the employment relationship. Comparisons are drawn from the US *Lochner* era at the turn of the last century. Is *Alemo-Herron* the EU's *Lochner* moment (or indeed, is it the start of a *Lochner* process)? In other words, just how systemic is the prioritisation of fundamental economic freedoms over fundamental social rights and are the

consequences really as bad as certain employment lawyers think? If article 16 is to continue to be prioritised, are there alternative forms of employment regulation that might escape the reach of contractual autonomy as a fundamental right?

This sets the scene for a discussion in Chapter V of the micro level, ie an assessment of the potential impact of the employment rights and contractual autonomy as a fundamental right on the *contract* of employment. This is done through a consideration of the impact of fundamental rights on the hierarchy of sources of employment terms. The chapter starts with the ‘external’ hierarchy, ie the relationship between labour law sources outside of the contract. The relationship between the common law, statute, human rights and private agreement is considered before turning to the ‘internal’ dimension ie the relationship between the various types of terms found within the contract of employment itself.

Chapter VI considers the impact of the Brexit and the Charter’s removal on the employment relationship. The key provisions of the Withdrawal Bill are addressed, before considering how the Charter’s absence might influence the employment relationship. The chapter concludes by looking to the future and asks whether the common law is capable of replicating the Charter and whether this is an endeavour worth pursuing. Is the common law, with its chequered history of interaction with employment legislation capable of stepping into the breach to guarantee the protection of fundamental social rights and what of the continued role for contractual autonomy?

## 7. Methodology

In terms of methodology, this thesis focuses largely on gathering, analysing and drawing connections between CJEU case law. Such a case-centred approach has recently been criticised by van Gestel and Micklitz, who argue that EU doctrinal research has become too focused on the CJEU as its point of reference. They argue that EU academics seem to have ‘more trust in supranational courts than in the EU legislature’, which ‘could be a first indication for herd behaviour, legal scholars following a wider trend without critical reflection’.<sup>11</sup> As shall be demonstrated throughout this thesis, the CJEU continues to play a significant role in the governance of the employment relationship, a situation which must be contrasted with the lack

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<sup>11</sup> Rob van Gestel and Hans-Wolfgang Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *ELJ* 292, 299.

of legislative activity in this context. The CJEU will continue to be a major point of reference for some time to come.

It is also hoped that by here articulating the methodology adopted, some of van Gestel and Micklitz's justified criticisms of doctrinal legal research can be addressed. In particular, they criticise policy-driven research that strives to emphasise issues concerning 'effectiveness, efficiency, impact, influence and so on, whereas usually these criteria are not operationalised'.<sup>12</sup> Adopting the word 'impact' in the title of this thesis may therefore appear somewhat cavalier. It is, of course, notoriously difficult to measure the 'impact' of any external source on judicial behaviour. This is perhaps particularly so in the case law of the CJEU, with its terse reasoning and absence of dissenting opinions. This thesis makes no claim at having adopted any sort of scientific approach to defining or measuring 'impact'. Rather, an attempt has been made to assess the qualitative effects of the Charter by exploring the relative weight of Charter arguments. This has been achieved by examining the precise point of entry of such arguments in the CJEU's reasoning. Essentially, the question is whether fundamental rights arguments are crucial to the outcome of cases or whether they act simply as ornaments or rhetorical flourishes. Having measured the impact of the Charter on a particular judgment, how then might we make the leap to assessing the impact of that judgment on employment law more generally? This thesis adopts the twin approach taken by Freedland and Prassl to measure the impact of a judgment. First, there is the question of whether a topic covered by a judgment is 'of particular significance and controversy in a specific regulatory domain of EU law, be that due to the development of a novel legal point or due to a change in tack in existing approaches' and second 'whether the decision has caused particular upheaval or controversy in at least some of the Member States' domestic systems'.<sup>13</sup> It will be shown that in some instances the Charter cases meet these criteria while in others they fall short.

Although this thesis is primarily doctrinal in nature, it is by no means sealed off from policy or indeed political perspectives. As such, it does not conform to the traditional understanding of doctrinal or black letter research as being focused 'almost entirely on law's own language of statutes and case law to make sense of the legal world' with law being 'seen as a self-contained system which is politically neutral and independent of other academic disciplines'.<sup>14</sup> It is difficult for any labour lawyer, let alone an EU labour lawyer to be entirely politically

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<sup>12</sup> *ibid* 301.

<sup>13</sup> Mark Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart 2015) 3.

<sup>14</sup> Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart 2011) 31.

neutral. The choice of research topic and the choice of examples are, of necessity, coloured by the author's preconceptions as to how the fundamental rights in the Charter *ought to* be used. As such, the thesis breaks once again with a 'pure' doctrinal approach which has been described as confining suggestions for reform within the premise of the doctrinal analysis: '[a] doctrinally-based thesis therefore, would not argue that the law needs reforms because it is inconsistent with wider social values or is unfair to a sector of society, but because it is vague, or is inconsistent, and thus leads to uncertainty in its application'.<sup>15</sup>

Perhaps a better description of the approach adopted by this thesis might be found in legal realism. This school posited that 'the outcome of legal disputes was not determined by considerations such as the consistent and logical application of the law, devoid of moral or policy considerations' but rather '[l]egal realists worked to uncover the reality behind judicial decisions arguing that judges responded more to facts than to rules'.<sup>16</sup> Ironically, it could be said that human rights arguments have placed a greater emphasis on the rule of law rather than on the consequences a particular decision might have. As this thesis will demonstrate, in the context of the Charter, the CJEU has shown itself willing to use human rights to overlook certain aspects of legislative text only to reemphasise them at a later date, depending on the potential consequences for the economic governance of the Union. It is to the growth of the role of fundamental social rights in the employment relationship that we now turn.

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<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.* 32.

## II. The Charter and the Employment Relationship

The purpose of this chapter is to set out the nature of the relationship between the fundamental employment rights found in the Charter and the employment relationship. In Section A, the sources and content of the Charter's employment rights are outlined. This is followed by a discussion of the very applicability of the Charter to the employment relationship by exploring the definition of both labour rights and human rights. Section B contains an analysis of the methods by which the Charter's employment rights might influence the employment relationship, namely as a standard of review and as a tool of interpretation. It will be shown that the impact of the Charter's social provisions on the employment relationship has, for now, been minimal, but that there is potential for development should the Court of Justice of the EU (CJEU) engage with the employment rights in a more meaningful way. It is to those employment rights that we now turn.

### A. The Employment Rights

This section sets out the background and purpose of the Charter before turning to the content and human rights-underpinning of its employment rights. This is followed by an exploration of the barriers undermining their potential impact on the employment relationship.

#### 1. Background and purpose of the Charter

The Charter's history is well known and need not be retold here in any detail.<sup>1</sup> It is also well known that, in the absence of a statement of EU human rights in the founding Treaties, it had been left to the CJEU to develop human rights as general principles of EU law.<sup>2</sup> The deficiencies in this system of fundamental rights protection soon became apparent, not least due to the lack of transparency of those rights, and there were calls for the codification of EU human rights in a single written text. These calls were finally heeded with the proclamation of

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<sup>1</sup> See for eg Joseph Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 ELJ 95; Gráinne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 ELRev 126; Aalt Willem Heringa and Luc Verhey, 'The EU Charter: Text and Structure' (2001) 8 MJ 11; Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) CMLRev 617.

<sup>2</sup> Case C-29/69 *Stauder*; Case C-4/73 *Nold*.

the Charter at the Nice Summit in December 2000. Despite codification, the status of the Charter rights remained unclear and it was not until the entry into force of the Lisbon Treaty in December 2009 that the Charter was granted full legal effect and the same legal value as the Treaties themselves.

According to Weiler, much of the Charter is ‘drafted in the magisterial language characteristic of our constitutional traditions’.<sup>3</sup> At first glance, therefore, the Charter may appear remote from the practical content of the employment contract. This lack of clarity is not aided by the manner of the Charter’s incorporation. The Charter is not to be found within the text of the Treaty itself, but is rather incorporated by reference in article 6 of the Treaty on European Union (TEU) which provides that:

[t]he Union recognises the rights, freedoms and principles set out in the Charter (...) which shall have the same legal value as the Treaties (...) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (...) Fundamental rights, as guaranteed by the European Convention (...) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Article 6 TEU makes clear, then, that the Charter is but *one* of three sources of EU fundamental rights, the others being the European Convention on Human Rights (ECHR) and human rights as general principles of EU law (general principles are also inspired by the international rights texts to which the EU Member States adhere). The relationship between the Charter and the other sources will be discussed at various stages of this thesis but it is now settled that the CJEU will first consider the Charter and will only then look to other rights sources if the Charter is insufficient. Whether this approach is deliberate or merely a matter of practicality remains unclear.<sup>4</sup> It suffices for now to note that the Charter was not intended to replace the existing rights sources but was merely adopted to codify or render more visible these rights.<sup>5</sup> In short, the Charter’s adoption may have been no more than a presentational affair with few intended substantive consequences. However, this is not to deny the consequences that might nonetheless derive from granting the Charter constitutional value. The Charter’s limited intended purpose also belies the fact that far from representing an exercise in mere visibility,

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<sup>3</sup> Weiler (n 1) 95.

<sup>4</sup> Sonia Morano-Foadi and Stelios Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’ (2011) 17 ELJ 595.

<sup>5</sup> Lord Goldsmith, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 CMLRev 1201.

the Charter's drafters were necessarily selective in the provisions that they deemed worthy of fundamental rights protection.<sup>6</sup> Certain rights found in other international social rights instruments have been excluded, notably the right to a fair wage.<sup>7</sup> But equally, other rights not typically found in human rights documents have been added. This approach can most clearly be seen in Title IV entitled 'Solidarity'.

It has been suggested that the inclusion of social rights in the Charter stemmed from the insistence of the Finnish delegation that the ECHR, which was at that point over five decades old, was no longer fit for purpose.<sup>8</sup> As a result of the inclusion of social rights, it has been said that the Charter can be considered 'the most comprehensive and modern instrument for the protection of fundamental rights, not only in Europe, but perhaps also globally in terms of the scope of the rights protected and the level of protection it supplies'.<sup>9</sup> There are numerous Charter provisions from across its various titles that may have a bearing on the employment relationship. This thesis focuses on four provisions found in the Solidarity Title. Particular attention will be paid to the 'individual' social rights which have a close connection to the employment contract, namely article 30 on the protection from unfair dismissal and article 31 on the right to fair and just working conditions. Also relevant are the 'collective' social rights found in article 27 which provides for worker information and consultation and article 28 on the right to bargain collectively. It is worth setting out the text and source of these provisions at this juncture as their language and content will be relied on when it comes to assessing the influence of the Charter on the employment relationship.

## 2. The content of the 'employment' provisions in the Charter

The idea here is not to reconsider the background and genesis of the employment rights in the Charter, but rather to highlight some of their features which are particularly salient for analysing their impact on the employment relationship. Emphasis is placed here on their personal scope, textual content and connection to employment legislation.<sup>10</sup> As mentioned, a distinction can be drawn between the individual and collective Employment Rights.

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<sup>6</sup> Heringa and Verhey (n 1) 12.

<sup>7</sup> RESC 1996, art 4 right to fair remuneration.

<sup>8</sup> Nilo Jääskinen, 'The Place of the EU Charter Within the Tradition of Fundamental and Human Rights' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart 2015) 11, 11.

<sup>9</sup> *ibid* 12.

<sup>10</sup> See Steve Peers and others (eds), *The EU Charter: Text and Commentary* (Hart 2014).

## 2.1. *The individual Employment Rights*

We begin with article 31 which provides that:

- (1) '[e]very worker has the right to working conditions which respect his or her health, safety and dignity'.
- (2) '[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

Immediately striking is the broad personal scope of this provision which applies to 'every worker'. The worker concept has an autonomous EU law definition, deriving largely from the case law on free movement of persons. In *Lawrie-Blum*, the CJEU held that the worker concept 'must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned'. The essential feature of an employment relationship, however, is that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.<sup>11</sup> Whether subordination and a genuine and effective economic activity exist, is a matter for the national court to determine.<sup>12</sup>

Beyond its broad personal scope, article 31 has been praised for its unequivocal language and its close connection to fundamental rights. Article 31(2), in particular, has been described as 'a pioneering Charter provision in that it had an early and bold impact on the interpretation of the right to paid annual leave'.<sup>13</sup> Article 31(2) made its first appearance in the opinion of Advocate General (AG) Tizzano in *BECTU*.<sup>14</sup> In that case, *BECTU*, a trade union, argued that the UK Government had incorrectly implemented the Working Time Directive (WTD) by imposing conditions on the entitlement to paid annual leave, for which there is no justification in the Directive.<sup>15</sup> AG Tizzano thought it appropriate to take a step back from the WTD in order to place the entitlement to paid annual leave in the broader context of fundamental social rights.<sup>16</sup> The right to paid leave, he noted, was not introduced with the adoption of the WTD,

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<sup>11</sup> Case C-66/85 *Lawrie-Blum* para 17.

<sup>12</sup> See Mark Bell, 'Constitutionalization and EU Employment Law' in Hans W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014).

<sup>13</sup> Alan Bogg, 'Article 31' in Peers and others (n 10) 833, 835.

<sup>14</sup> AG opinion in Case C-173/99 *BECTU*.

<sup>15</sup> Consolidated Directive 2003/88.

<sup>16</sup> AG opinion in Case C-173/99 *BECTU* para 26.

but rather, it has long been considered a fundamental right.<sup>17</sup> The AG thought that the inclusion of a right to paid annual leave in the Charter made it easier to ‘apprehend the meaning and scope of the principle laid down in Article 7 of the Directive’.<sup>18</sup> Indeed, as a fundamental social right, the right to paid leave is ‘an automatic and unconditional right granted to every worker’.<sup>19</sup> The fact that the Charter contained a right to paid annual leave had the effect of ‘fortifying’ the AG’s conclusion that any precondition must be an unlawful derogation from a fundamental right.<sup>20</sup> The CJEU came to the same conclusion but avoided any reference to the Charter—which at this point did not have legal effect—preferring instead to classify the entitlement of every worker to paid annual leave as a ‘particularly important principle of [Union] social law’.<sup>21</sup>

Article 31(2) is particularly useful for our purposes given its intimate link to employment legislation. This relationship is made clear by the Explanations which are attached to the Charter and which act as interpretative guidance.<sup>22</sup> According to the explanations corresponding to article 31(2), its legislative source can be found in the WTD. Although to date, its impact has largely been confined to the context of paid annual leave. Article 31(1) is also linked to EU employment legislation, but the relationship is less concrete.<sup>23</sup> Article 31 will primarily serve as our reference point for examining the Charter’s influence on the CJEU’s interpretative methodology.

The next relevant provision is article 30 which provides that ‘[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices’. As with article 31, this provision has a broad personal scope, applying to ‘every worker’. Article 30 is somewhat unusual in that the concept of dismissal has clear fundamental rights implications, yet this is an area in which the Union has not adopted any specific legislation with a direct link to the termination of the employment contract, although equality legislation does apply to dismissal. Article 153(1)(d) of the Treaty on the Functioning of the European Union (TFEU) also authorises the European Parliament and the Council to adopt, by means of Directives, minimum requirements as regards the protection of workers whose

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<sup>17</sup> See art 24 UNDHR 1948, art 2(3) ESC 1961, art 7(d) UN Charter on Economic, Social and Cultural Rights 1966.

<sup>18</sup> AG opinion in Case C-173/99 *BECTU* para 29.

<sup>19</sup> *ibid.*

<sup>20</sup> Bogg (n 13) 847.

<sup>21</sup> Case C-173/99 *BECTU* para 43.

<sup>22</sup> Art 52(7) of the Charter.

<sup>23</sup> Directive 89/391/EEC.

employment contract is terminated. However, article 153(1) TFEU specifies that termination of employment falls outside the ordinary legislative procedure. There has been little appetite on the part of the Member States to adopt legislation dealing specifically with the termination of the employment relationship. It has been suggested that this reluctance stems largely from the ambiguity of the right itself, with article 30 representing an ‘essentially defensive right to protect the worker against the abuse of managerial power’.<sup>24</sup> Certainly, article 30 lacks the precision and force of language that article 31 enjoys. In addition, this right is subject to ‘Union law, national laws and practices’. As we shall see, this may have the effect of limiting the strength of this provision.

In addition to this lack of legislative initiative, there is also an absence of case law on article 30. However, for the purposes of this thesis, a consideration of a fundamental right not to be unfairly dismissed may give us an insight into how ‘domesticated’ employment legislation with a former (although as yet largely dormant) fundamental rights underpinning may be treated post-Brexit. In addition, article 30 does touch upon EU legislation such as the Transfer of Undertakings Directive (TUD) analysed in more detail in the next chapter.<sup>25</sup>

## **2.2. *The collective Employment Rights***

Turning to the ‘collective’ employment rights, article 27 provides that ‘[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices’. Again, in contrast to article 31, this provision is somewhat lacking in precision and is heavily dependent on national law and practice for further elucidation, a situation that has been confirmed by the CJEU.<sup>26</sup> Article 27 is particularly interesting, however, in that, as has been noted by Filip Dorssemont, ‘[t]he right to information and consultation cannot be dissociated from the exercise of the managerial prerogative. It constitutes a procedural restriction of the latter. The exercise of the managerial prerogative is deeply rooted in the freedom to conduct a business’.<sup>27</sup> Article 27, as with the individual employment rights, is closely related to the EU legislative acquis, in particular the Collective Redundancies Directive (CRD)<sup>28</sup> and the TUD. Article 27 will primarily assist us in addressing the question of the

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<sup>24</sup> Jeff Kenner, ‘Article 30’ in Peers and others (n 10) 805, 806–807.

<sup>25</sup> Directive 2001/23.

<sup>26</sup> Case C-176/12 *AMS*.

<sup>27</sup> Filip Dorssemont, ‘Article 27’ in Peers and others (n 10) 749, 750.

<sup>28</sup> Directive 98/59/EC.

Charter's role as a standard for reviewing EU legislation and Member State legislation falling within the scope of EU law where it has been described as having a 'shielding' effect.

Finally, article 28 tells us that '[w]orkers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action'. The right to bargain collectively and to strike has occupied discussion in the fundamental rights field for many years.<sup>29</sup> It is well known that article 28 and the internal market freedoms have long interacted with each other.<sup>30</sup> These freedoms have recently been explicitly linked to article 16 on the freedom to conduct a business, the focus of this thesis.<sup>31</sup> But, before embarking on further analysis of the Charter's employment rights, it is worth taking a step back to consider the wider question of how we are to define human rights in this context. Are employment rights human rights and does it really matter if this label can apply to the Charter?

### 3. Employment rights as human rights

Are social rights human rights? Should they be, and more specifically, are the employment rights found in the Charter human rights? The question of whether such a characterisation even matters is explored in further depth in Chapter V when we come to consider the future of fundamental social rights in the UK post-Brexit. This section starts by setting out the traditional characteristics attributed to human rights before asking where the Charter provisions fit into this paradigm.

#### 3.1. *Are labour/social/employment rights human rights?*

We must address two questions here: (a) whether labour rights are human rights and (b) if they are, where they fall in the human rights hierarchy. First, we must clear up some terminology. A lingering question remains whether the terms 'social rights', 'labour rights' and 'employment rights' are interchangeable and if not, which should apply to the provisions contained in the Charter's Solidarity Title. It is suggested that the term 'social rights' is a much broader concept covering wider human needs beyond employment, such as the right to

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<sup>29</sup> K D Ewing and John Hendy, 'The Dramatic Implications of *Demir* and *Baykara*' (2010) 39 ILJ 2.

<sup>30</sup> Case C-438/05 *Viking* and Case C-341/05 *Laval*.

<sup>31</sup> Case C-201/15 *AGET*.

housing, education and other resource-demanding rights. The term ‘labour rights’, although narrower, still covers the working relationship beyond the mere contract of employment, as it touches upon areas such as the prohibition of forced labour and access to placement services. The term used in this thesis to describe the four Charter provisions discussed above is ‘Employment Rights’. This term is used to designate those rights that have a particularly close connection to the *contract* of employment and may therefore be distinguished from the notion of employment rights as typically understood by labour lawyers. But the question remains: are employment rights human rights?

a. Characteristics of human rights

Four characteristics of human rights have been suggested. First, human rights represent urgent and compelling moral claims. Second, human rights are universally applicable. Third, human rights represent strict standards. Finally, human rights embody timeless, fundamental needs.<sup>32</sup> Various attempts have been made to show that employment rights do not meet these criteria.<sup>33</sup> It is argued that rights such as limited working hours or paid annual leave, are simply not as compelling or imperative as, say, the right to life. This must of course be true. It cannot be doubted that certain human rights must be prioritised, but the fact that some rights may be more important than others does not detract from the characterisation of the less ‘important’ rights as human rights. Human rights instruments like the Charter also recognise the potential for conflict between the rights contained therein and have developed mechanisms to facilitate the balancing of such rights.<sup>34</sup>

It is also true that most employment rights can in some way be connected to more ‘compelling’ civil or political rights, for example, the right to human dignity, the prohibition of torture and the right to life in both the sense of survival and the sense of a meaningful or fulfilled life. The second argument that employment rights are not as universal as other human rights must fall for similar reasons. It is certainly the case that most employment rights depend on the party’s characterisation as a ‘worker’ or an ‘employee’ and to that extent do not apply to the population as a whole by virtue of their humanity, but this is to ignore the reality that most of us must work at some point in our lives and also to overlook the value of work to the human experience.

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<sup>32</sup> Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 ELLJ 151, 164.

<sup>33</sup> See for eg Jay Youngdahl, ‘Solidarity First Labour Rights are not the same as Human Rights’ (2009) 18 New Labour Forum 30; Jay Youngdahl, ‘Youngdahl Replies’ (2009) 18 New Labour Forum 46; Cass Sunstein, ‘Against Positive Rights: Why Social and Economic Rights Don’t Belong in the New Constitutions of Post-Communist Europe’ East European Constitutional Review Vol 2 No1 (1993) 35.

<sup>34</sup> For limitation of the Charter rights see article 52.

In addition, many civil rights are also dependent on gaining some form of status such as citizenship (as is usually the case with the right to vote).

As to the argument that employment rights do not embody strict standards, ie they vary from country to country depending on available resources, Mantouvalou points out that many ‘universal’ rights such as the prohibition of torture also have resource implications eg the obligation to maintain decent prison conditions and in any case there is a continued obligation to ‘strive’ to meet these rights requirements.<sup>35</sup> Finally, the idea that employment rights evolve over time whereas human rights are timeless is also easily refuted. Many labour rights can be said to represent ‘abstract principles that are always applicable, irrespective of the historic circumstances. It is this abstract normative standard that is timeless, and against which the actual working conditions in different periods of time should be assessed’.<sup>36</sup>

#### b. Relationship with traditional human rights

Beyond the question of whether employment rights are human rights lies the more vexed question of their relationship to traditional civil and political rights. Social rights are considered second generation rights and deemed worthy of weaker protection than classic rights such as the right to life and protection from torture, for several reasons. First, it is argued that human rights language has usually been invoked against the state which conforms more closely to the ideal of civil and political rights. Social rights on the other hand are conceived as positive rights, requiring state action rather than inaction. In addition, social rights are seen as having cost and resource allocation implications. Social rights ‘thereby impose conditional and indeterminate obligations that are programmatic in nature’.<sup>37</sup> As we will examine below, this distinction has had an effect on the juridical status of social rights, with commentators continuing ‘to insist upon the benchmark of justiciability (...) as a true test of a “real” human right’.<sup>38</sup>

The distinction can be criticised. As Gearty comments, ‘[n]ever satisfactory in its cold war heyday, the incoherence of such an approach has done great damage to the subject by suggesting a foundational distinction between rights where none exists’.<sup>39</sup> We have mentioned that many civil and political rights have resource implications and are often dependent on the

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<sup>35</sup> Mantouvalou, ‘Are Labour Rights Human Rights?’ (n 32) 166.

<sup>36</sup> *ibid* 169.

<sup>37</sup> Judy Fudge, ‘The New Discourse of Labour Rights: From Social to Fundamental Rights?’ (2007) *Comparative Labor Law and Policy Journal* 29.

<sup>38</sup> H J Steiner, P Alston and R Goodman, *International Human Rights in Context* (3<sup>rd</sup> edn, OUP 2007) 313.

<sup>39</sup> Conor Gearty in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart 2011) 17.

rights claimant achieving a particular status before the right can be invoked. As Mantouvalou tells us, ‘economic and social rights do not differ conceptually, contrary to what was suggested in the past because all rights can impose positive and resource-demanding duties’.<sup>40</sup>

The final argument against the human rights characterisation of social rights is that it is undemocratic to leave such sensitive decisions in the hands of the judiciary. This narrow vision of democracy ‘leads us to lose sight of the fact that democracy, properly understood, requires satisfaction of certain basic needs’.<sup>41</sup> In response to this particular criticism, commentators have suggested that the leap to justiciable social rights ‘is too bald to be achieved directly; it is necessary to shuffle towards them through the less disputed field of the civil and political’.<sup>42</sup> At certain points, the Charter itself adopts this approach of viewing social rights as a reflection of more compelling civil and political rights. Article 31(1), for example, explicitly ties that provision to the notion of human dignity. In one respect, this approach is to be welcomed for its recognition that employment rights, here the right to safe working conditions, are intrinsically linked to notions of human dignity. On the other hand, such an approach may have the effect of devaluing social rights, emphasising that they are only worth protecting to the extent that they reflect a more compelling pre-existing dignitarian notion.

Having determined then that social rights may in some cases be considered human rights—or at the very least connected to human rights—it is necessary to consider whether the Charter Employment Rights are human rights.

### 3.2. *Are the Charter Employment Rights human rights?*

The most obvious answer to this question is that the Charter Employment Rights are included in a human rights document and must therefore be human rights. As Mantouvalou remarks, ‘[t]he positivist would list all these documents, and would claim that labor rights are human rights sometimes, in some jurisdictions’.<sup>43</sup> This assertion is strengthened if we look to the Charter’s Explanations, which make clear the human rights pedigree of the Charter’s Employment Rights. We see that a number of the provisions derive from the European Social Charter (ESC), an earlier fundamental social rights text. Article 31(1) finds its source in article 3 ESC and article 26 of the revised ESC which relate to health and safety and dignity at work.

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<sup>40</sup> Mantouvalou in *ibid* 161.

<sup>41</sup> *ibid* 123.

<sup>42</sup> Conor Gearty in *ibid* 74 referring to Sandra Fredman, ‘Scepticism Under Scrutiny: Labour Law and Human Rights’ in Tom Campbell, K D Ewing and Adam Tompkins (eds), *Sceptical Essays on Human Rights* (OUP 2001) 197.

<sup>43</sup> Mantouvalou in Gearty and Mantouvalou (n 39) 155.

Article 31(2) derives from article 2 ESC which guarantees ‘just conditions of work’. The ‘fundamental’ nature of the right to paid leave has also been recognised under this provision.<sup>44</sup> The Explanations also point to the 1989 Community Social Charter as a source for the rights contained in article 31. Point 19 governs health and safety while point 8 concerns the right to rest and paid annual leave. Article 30 derives from article 24 of the Revised European Social Charter (RESC) which provides for protection in cases of dismissals initiated by the employer. Article 27 is derived from article 21 of the RESC which is more specific in setting out the nature of information and consultation required as well as points 17 and 18 of the Community Charter which also govern information and consultation requirements in a more detailed manner.

Article 28 is a somewhat unusual example in that it is both more intimately linked to a rights instrument, in this case article 11 of the ECHR and yet it is also more dubious whether it is a right at all, at least in the UK. In this country, there is no positive *right* to strike, but rather a series of legislative immunities. In addition to article 11 ECHR, article 28 is also connected to article 6 ESC on the right to take collective action and points 12 to 14 of the Community Charter also dealing with collective action and the right to bargain collectively. Clearly, the Employment Rights have long been considered worthy of international protection. In addition, most of the arguments levelled at the justiciability of social rights generally do not apply to the Charter’s Employment Rights specifically. First, none of the four Employment Rights necessarily entail any state expenditure (although many workers are, of course, employed in the public sector) and do not therefore involve the distribution of resources, although there are likely to be costs involved for employers. Second, the four rights considered have largely been fleshed out in legislation and so in this respect cannot be criticised as being vague, abstract standards.

Looking to the national constitutions of the Member States produces a less emphatic result. The concept of human dignity expressed in article 31(1) can be found in several domestic constitutions, but the national approaches to the more specific issue of health and safety regulation and working conditions are far from homogenous. As a result, it is ‘unlikely that interpretative difficulties under Article 31 will be susceptible to resolution by invoking common constitutional traditions as a principal guide’.<sup>45</sup> Like article 31, article 30 is not sourced directly from the Member State constitutions.<sup>46</sup> Some national constitutions do contain

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<sup>44</sup> Conclusions XII-2, Statement of Interpretation on art 2(3) 62.

<sup>45</sup> Bogg (n 13) 842.

<sup>46</sup> Kenner (n 24) 817.

a commitment to collective action and freedom of association similar to article 28, although as we have seen, the UK protects no such right. Article 27 is perhaps the most distant from the rights found in national constitutions. None of this is to say, however, that other constitutional principles such as equality, dignity, solidarity and legitimate expectations are irrelevant to the employment relationship. As we shall also see, other international rights sources beyond those referred to in the text of the Explanations may also be relevant for the interpretation of employment legislation.

So, the rights contained in the Charter may, for their very inclusion in rights texts, be human rights after all (at least at an international level) but is this enough? Referring to the United Nations Declaration of Human Rights (UNDHR), Gearty comments that although it reads very well, ‘when it comes to the origin of these rights, why they exist in the form that they do, what gives them moral force, the document is oblique, indeed almost coy’, with reference to ‘inherent dignity’, ‘peace’, ‘freedom’, ‘justice’ and equality being ‘expected to provide the necessary explanations’.<sup>47</sup> Although similar criticisms may be aimed at the Charter, we are in the more fortunate position of being able to rely on the Explanations. We have already seen that the Charter’s Employment Rights have a particularly close connection to other social rights instruments as well as employment legislation. Indeed, as will become apparent, ‘the guiding principle for or against the inclusion of a “Solidarity” right has been the recognition of such a right in already existing EC/EU rules’.<sup>48</sup> This tells us that they are at least legislative rights, but what makes them human rights?

A potential solution suggested by Gearty, again in the context of UN human rights sources is to ‘track back behind the language of rights to explore the principles and values which make sense of rights, which further explain their power, and in doing so provide the linkages between them’.<sup>49</sup> He notes that, ‘principles’ provide us with ‘guides for action (...) in particular concerning the specification of rights’ while ‘values’ ‘function at a more abstract level, explaining what lies behind the choice of these (...) principles’.<sup>50</sup> In other words, principles are derived from the values (principles here should not be conflated with the rights/principles distinction in the Charter which is dealt with further below).

The Charter opens with rather vague language: ‘[t]he peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values’.

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<sup>47</sup> Gearty in Gearty and Mantouvalou (n 39) 14.

<sup>48</sup> Willem Heringa and Verhey (n 1) 29.

<sup>49</sup> Gearty in Gearty and Mantouvalou (n 39) 15.

<sup>50</sup> *ibid* 16.

But this is then followed by a clearer articulation of the principles and values underpinning the Charter. Values include ‘human dignity, freedom, equality and solidarity’ while the principles are said to be ‘democracy and the rule of law’. It is not obvious that the terms ‘values’ and ‘principles’ are used here in the same manner suggested by Gearty. Indeed, it seems as if the values and principles expressed by the Charter are as indeterminate as each other. Nevertheless, knowledge of the values underpinning the Charter may allow us to outline more clearly the ‘principles’ governing its Employment Rights, thereby demonstrating that they are just as capable of being classed as human rights as any of the Charter’s more traditional civil and political provisions. Is there a connection between the four Employment Rights and the Charter’s ‘values’?

a. The Charter’s values

Article 31(1) provides the clearest statement of the values underpinning that provision, but even this is a rather bald statement that every worker is entitled to working conditions which are respectful, of among other things, his human ‘dignity’. The texts of the other Employment Rights contain no such explicit link to the values allegedly espoused by the Charter. However, if we look to the explanations to article 1 entitled ‘dignity’ we see that ‘[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights’. It is then emphasised that the right to human dignity has already been recognised as a general principle of EU law.<sup>51</sup> As a result, ‘none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter’.

We can clearly see that despite its somewhat awkward positioning, human dignity is the value underpinning *all* of the Charter rights, including the Employment Rights. Any additional role for the solidarity value set out in the Charter’s preamble and indeed in the ‘Solidarity’ Title is not clearly articulated. Is it possible to move from the generality of the Charter’s values to the specificity of its principles? Again, if we look to the Explanations, we see that the principles that underpin the Employment Rights and thereby incorporate the Charter’s values are already set out in existing EU employment legislation.

The connection between the Employment Rights and various legislative provisions has already been noted. If we again take the example of article 31, we see that reference is made to the WTD. If we turn to the text of that Directive, we see that it lays down ‘minimum safety and

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<sup>51</sup> Case C-377/98 *Netherlands* paras 70–75.

health requirements for the organisation of working time, in respect of periods of daily rest, breaks, weekly rest, maximum weekly working time, annual leave and aspects of night work, shift work and patterns of work'. We can also note that '[t]he improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations'. Finally, 'workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours (...) The organisation of work according to a certain pattern must take account of the general principle of adapting work to the worker'. This demonstrates that, via the Explanations and the relevant legislation, we can move from the indeterminate notion of human dignity to the more concrete idea of limiting working hours for all EU workers. Of course, the statements in the recitals of the WTD are themselves given further substance in the subsequent provisions of the legislation and are also fleshed out by the CJEU. Therefore, the Charter only gets us so far. We know that there is a fundamental right to limited working hours but how limited must it be? We will come back to this point when examining the Employment Rights as a standard of review.

#### **4. Impeding the effectiveness of Employment Rights in the Charter**

Despite the Charter's rhetoric of indivisibility, the potency of (at least some) of the Employment Rights has been undermined in a number of respects. The limitation which the drafters sought to place on the invocability of the Charter's employment provisions 'can be seen most patently in the distinction drawn between rights, freedoms and principles'.<sup>52</sup> This distinction, which is contained in article 52(5), was intended to ensure that that the Charter's socio-economic rights would not become directly effective fundamental rights.<sup>53</sup> Article 52(5) therefore provides that principles only lead to rights to the extent that they are implemented in national law, or EU law in those areas where the EU has competence. Article 51(1) further emphasises the distinction, providing that rights must be 'respected', whereas principles must merely be 'observed'. The EU institutions should not violate the principles, but they have no

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<sup>52</sup> Síofra O'Leary, 'The Charter and the Future Contours of EU Social and Employment Law' in Allan Rosas and others (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 317, 319.

<sup>53</sup> *ibid* 333.

mandate to implement them as rights outside their own competence.<sup>54</sup> Is there any role for the principles the employment context?

#### 4.1. *What role for the principles?*

Principles only become significant when the CJEU is called on to interpret or review acts adopted by the EU or by the Member States when implementing EU law.<sup>55</sup> This is not to say that article 52(5) excludes the justiciability of all social rights, since the CJEU has already held that certain social rights are indeed judicially cognisable.<sup>56</sup> The distinction between rights and principles was addressed by AG Cruz Villalón in *AMS*.<sup>57</sup> He noted that, as is the case with most national constitutions, rights are usually designated as ‘social’ to indicate that no subjective—that is to say directly enforceable—rights are to be derived from them. Social rights may therefore be described as rights by their nature and content, but principles in terms of their operation.<sup>58</sup> In contrast to rights, principles evoke a broader notion of the obligations on public powers.<sup>59</sup> In addition, and as the Charter itself makes clear, principles can only function if they are subsequently implemented or rendered more concrete in legislation.<sup>60</sup>

The AG concluded that the EU and Member States are under a clear obligation by virtue of articles 52(5) and 51(1) to promote principles through implementation, despite the permissive wording of the Charter.<sup>61</sup> For the purposes of giving normative content to the principles, implementing acts should be understood as only those acts which ‘substantively and directly’ concretise the principle. Otherwise, whole areas of regulatory action could be considered implementation. On the other hand, when it comes to enforcement, implementing acts should be understood as being wider than mere acts that substantially and directly concretise the content of a principle.<sup>62</sup> To hold otherwise would lead to the ‘vicious circle’ of requiring such implementing acts to be assessed against the benchmark of a principle (article 27), the content of which would be identical to that given to it in the implementing act itself.<sup>63</sup> The AG concluded that article 27 was indeed a principle, given the limited scope of the provision, which was to be granted only ‘under the conditions provided for by Union law and national

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<sup>54</sup> Goldsmith (n 5) 1213.

<sup>55</sup> Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, 399.

<sup>56</sup> *ibid* 400.

<sup>57</sup> AG opinion in Case C-176/12 *AMS*.

<sup>58</sup> *ibid* para 45.

<sup>59</sup> *ibid* para 50.

<sup>60</sup> *ibid* para 45.

<sup>61</sup> *ibid* para 60.

<sup>62</sup> *ibid* para 69.

<sup>63</sup> Ante Portas, ‘AG Cruz Villalón in C-176/12 *AMS*: Rights vs. principles and the horizontal effect of Charter provisions’ *EU Law Blog* 11 September 2013.

laws and practices’, without setting out how the objective was to be reached.<sup>64</sup> As the AG put it:

quite apart from the actual proclamation of the right and the resulting duty to guarantee it, the scope of the right directly guaranteed by the provision is extremely weak [refers to national laws and practices] (...) This is confirmed by the fact that the article does not define any individual legal situations (...) specifies neither the kind of information nor the consultation arrangements (...) The content is so indeterminate that it can be interpreted only as an obligation to act, requiring the public authorities to take the necessary measures to guarantee a right.<sup>65</sup>

In addition to this textual argument, the AG also noted that there is a systemic argument pointing to article 27’s status as a principle. The group of rights found in the Solidarity Title are largely social rights and these social rights are largely worded in a manner similar to article 27. This leads to the ‘strong presumption’ that those rights belong to the category of principles.

This finding leads to two consequences, one relating to the *operating conditions* of the principles and the other to their *justiciability*. The first is connected to the ‘may be implemented’ element of the principle, in other words this is the ‘specific expression’ dimension already discussed. The second relates to the invocability of the principle. Here the AG finds that ‘it is evident (...) that its wording very implicitly but unequivocally excludes the possibility of directly relying on a “principle” so as to exercise an individual right based on that principle (...) confines the justiciability of “principles” to their (...) refined state as rules and acts’.<sup>66</sup> In other words, principles cannot be directly relied on by individual litigants.

The CJEU did not explicitly address this issue, focusing not on the distinction between rights and principles but rather between those provisions that are sufficient *in and of themselves* to be relied upon and those which were not. From the perspective of private litigants, this approach is not entirely satisfactory, as the content of each Charter provision must be analysed separately in order to determine whether it is capable of being relied on.<sup>67</sup> In any event, given the strong legislative acquis in the field of worker consultation, the effect of a finding that article 27 is a principle may not be so dramatic.<sup>68</sup>

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<sup>64</sup> AG opinion in Case C-176/12 *AMS* para 54.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid* para 68.

<sup>67</sup> *ibid* para 43.

<sup>68</sup> Dorssemont (n 27) 750.

The CJEU had occasion to clarify its approach in the case of *Glatzel*.<sup>69</sup> This was the first case in which the CJEU explicitly addressed the rights/principles distinction. This case concerned the review of the compatibility with the Charter of conditions laid down in the Annex of EU legislation relating to physical ability to drive.<sup>70</sup> The question that arose here was whether such conditions amounted to discrimination contrary to article 21 of the Charter governing non-discrimination and article 26 on the integration of persons with disabilities. The CJEU found that it did not have sufficient information to strike down the Annex, but it did engage in a useful discussion of the rights/principles distinction.

Rather than reviewing the compatibility of the measure with both articles 21 and 26 in combination, the CJEU treated them separately. The reason for so doing was that, unlike article 21, article 26 was a principle and not right. The CJEU arrived at this conclusion as article 26 ‘does not require the EU legislature to adopt any specific measure’ and that ‘in order for that article to be fully effective, it must be given more specific expression in EU law or national law’.<sup>71</sup> This conclusion is not, however, controversial as the Explanations explicitly mention article 26 as an example of a principle. Nonetheless, it shows that rights are a much stronger standard of review than principles.

Olsson points out that the CJEU actually adopted two different approaches in *AMS* and *Glatzel*. In *AMS*, the CJEU focused on the *wording* of article 27 to arrive at the conclusion that it was not clear enough to be relied on, while in *Glatzel*, the CJEU concentrated on article 26’s *status* as a ‘principle’.<sup>72</sup> She goes on to note that the arguments against granting article 27 the status of a right ie it is vague, the substance relates to legislation and it is contained in the Solidarity Title apply equally to article 28 which may be a right.<sup>73</sup> It would seem, then, that both the AG’s systemic and textual approaches to identifying principles in *AMS* can be discounted. This still leaves us in the dark as to the correct criteria to apply in identifying principles. Following both *AMS* and *Glatzel*, it is more appropriate to talk about the distinction not between rights and principles but rather between those rights that are sufficient in themselves and those that are not, although, the two categories may overlap ie non-directly effective rights may in fact be principles.

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<sup>69</sup> Case C-356/12 *Glatzel*.

<sup>70</sup> Directive 2006/126/EC.

<sup>71</sup> Case C-356/12 *Glatzel* para 78.

<sup>72</sup> Petra Herzfeld Olsson, ‘Possible Shielding Effects of Article 27 on Workers’ Rights to Information and Consultation in the EU Charter of Fundamental Rights’ (2016) 32 *International Journal of Comparative Labour Law and Industrial Relations* 251, 260.

<sup>73</sup> *ibid* 261.

We already know, then, that article 27 of the Charter is probably a principle, but what of the other Employment Rights? Article 31 is the only provision not specified as being subject to ‘Union law, national laws and practices’. This would suggest that this is a right which is sufficient in itself to be relied upon without further specification in legislation (although the details must be left to the legislation). In *Dominguez*, AG Trstenjak appeared to suggest that article 31 was indeed a right.<sup>74</sup> In her words, ‘the very wording of this provision immediately suggests the conclusion that entitlement to paid annual leave was designed to be a ‘fundamental right’, whereupon inclusion in the ‘principles’ referred to in Article 51(1) of the Charter, which do not create any direct subjective rights and indeed need to be given expression by the entities to which it is addressed, can instantly be ruled out’.<sup>75</sup> Article 30 is guaranteed only in accordance with Union law, national law and practices which suggests that it is a principle. Furthermore, in *Nagy*, the CJEU noted that the applicants were acting under the misapprehension that article 30 was a directly effective right.<sup>76</sup> Article 28, as we have already discussed, is somewhat unusual in that it is firmly couched in the language of rights and indeed the general principle has been recognised as such by the CJEU.<sup>77</sup> However, we have already mentioned that in the UK there is no positive right to strike and article 28 is subject to Union law, national laws and practices. In any case, it is now clear that the rights/principles distinction acts as a potential barrier to the justiciability of fundamental employment rights. An additional and potentially more significant hurdle is the question of the very applicability of the Charter to private parties.

#### 4.2. *Applicability to private parties*

The scope of the Charter is governed by article 51(1), which provides that ‘the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union (...) and to the Member States only when they are implementing Union law’. The Charter is not explicitly addressed to private parties and it was ‘certainly possible to argue therefore that the Charter was not intended to apply to private disputes’.<sup>78</sup> However, in *AMS*, the AG took some steps to clarifying this issue.<sup>79</sup> *AMS*, a trade union, sought to rely on article 27 of the Charter to challenge a private employer’s refusal to establish worker consultation pursuant to Directive 2002/14.<sup>80</sup> Under the French legislation implementing the Directive, the employer was entitled

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<sup>74</sup> AG opinion in Case C-282/10 *Dominguez* paras 75–79.

<sup>75</sup> *ibid* para 76.

<sup>76</sup> Joined Cases C-488–391/12 and 526/12 *Nagy*.

<sup>77</sup> Case C-438/05 *Viking*; AG opinion in Case C-282/10 *Dominguez* para 79.

<sup>78</sup> *Lenaerts* (n 55) 377, fn 11.

<sup>79</sup> Case C-176/12 *AMS*.

<sup>80</sup> Directive 2002/14/EC.

to exclude certain categories of employment contract from the calculation of the number of employees. We saw that the CJEU found that this aspect of the French legislation was not compatible with the Directive. Despite this, the remedies available to AMS were unclear, given the CJEU's consistent rejection of the horizontal effect of Directives.<sup>81</sup> AMS therefore sought to rely directly on article 27. We have already seen that the Charter's principles are not capable of being relied on in this way.

As to the broader argument that any provision of the Charter could not be invoked in a dispute between private parties, the AG noted that this was not a question of the horizontal application of the Directive as such. The AG roundly rejected the argument that because the Charter is addressed to the Union and the Member States, it cannot apply to private parties. It is often the case that constitutions do not expressly refer to the addressees and duty bearers of the rights. It therefore comes down to an issue of interpreting the Charter.<sup>82</sup> For the AG, the entire purpose of article 51(1) was merely to clarify the extent to which fundamental rights are binding on the institutions and the Member States. It was not intended to address the question of horizontal effect. In any event, the horizontal effect of fundamental rights is already known in EU law, for example the equality principle, and so the Charter could not have been intended to change things for the worse without explicitly doing so.<sup>83</sup>

The influence of the Charter on private parties depends on the individual provisions in question. Some rights are particularly apt to be invoked in the private sphere while others less so. Article 27 is an example of former as the 'heading of the article is [refers to] *within the undertaking* [and so it] must be accepted that "the undertaking" is in some way involved in the effectiveness of that right (...) [even though the primary obligation is on the public authorities to ensure the right exists]'.<sup>84</sup>

The CJEU accepted that the French legislation in question could be considered an implementing measure of the Directive and could thus engage the Charter.<sup>85</sup> On the other hand, the provision of the Directive prohibiting the exclusion of certain types of contract from the calculation of employee numbers could not be said to derive from the wording of article 27.<sup>86</sup> For that reason, the CJEU was able to distinguish the present case from its earlier finding in *Küçükdeveci* that employees could invoke the general principle of non-discrimination on the

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<sup>81</sup> Case C-176/12 *AMS* para 36.

<sup>82</sup> AG opinion in Case C-176/12 *AMS* para 30.

<sup>83</sup> *ibid* para 21.

<sup>84</sup> *ibid* para 40.

<sup>85</sup> *ibid* para 43.

<sup>86</sup> *ibid* para 46.

grounds of age, which was given expression in article 21(1) of the Charter against private employers.<sup>87</sup> This is because article 21(1) contained a clear prohibition of discrimination, which was in itself sufficient to lead to a subjective individual right. The CJEU instead relied on its established case law on the alternatives to the absence of horizontal direct effect of directives including consistent interpretation and state liability. Despite this, the CJEU is implicitly accepting the idea that the Charter is applicable to private parties provided that the Charter provision in question is sufficiently precise, clear and requires no further legislative implementation. The AG in *Dominguez* also insisted that despite being a right, article 31 is not capable of horizontal direct effect.<sup>88</sup> Despite the limitations placed on the principles, certain Member States have insisted on further measures to prevent the development of social rights. The UK was one such Member State.

### 4.3. *The UK opt out*

At the time of the Charter's drafting, the British delegation was not content that the Charter's horizontal provisions would be enough to prevent the creep of social rights. A second line of attack was opened up, with the UK seeking an opt out from the Charter altogether.<sup>89</sup> As Barnard has pointed out, however, this opt out marks the 'triumph of rhetoric over reality' given that the Charter most certainly applies to the UK as an EU Member State when it acts within the scope of EU law (for example, when it implements EU legislation). Certainly, in the case of article 31, the relevant rights have been provided for in national law via implementing legislation. In addition, because article 31 does not refer to national law or practice, it is unlikely that the interpretative value of article 31 is diminished when applied to the UK.<sup>90</sup> The only true opt out from the Charter, Barnard suggests, is to be found in article 1(2) of Protocol 30 which provides that '[i]n particular, and for the avoidance of doubt, nothing in Title IV (...) creates justiciable rights applicable to (...) the United Kingdom except in so far as (...) the United Kingdom has provided for such rights in its national law'. This provision serves the role of 'making sure that if any of the provisions of Title IV are in fact classed as rights they are not justiciable in respect of the UK'.<sup>91</sup> This may have particular implications for articles 31 and 28 which are 'rights' and can therefore not be directly relied upon in the

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<sup>87</sup> Case C-555/07 *Kücükdeveci*.

<sup>88</sup> AG opinion in Case C-282/10 *Dominguez* para 80.

<sup>89</sup> Protocol No. 30 [2007] OJ C 306/157. See also Joined Cases C-411/10 and C-493/10 *NS*.

<sup>90</sup> Bogg (n 13) 850.

<sup>91</sup> Catherine Barnard, 'The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer 2008) 10.

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In any event, the intended purpose of the Protocol was largely political, not legal. As Dougan notes, debate surrounding the adoption of the Lisbon Treaty centred on the ‘accusation that the economic and social rights contained in Title IV of the Charter would provide the basis for a judicial assault upon the UK’s (neo-) liberal employment legislation’.<sup>92</sup> As such, the ‘Protocol’s primary purpose is to serve as an effective political response to a serious failure of public discourse. Indeed, the Protocol emerges as a fantasy solution to a fantasy problem: the Charter is not actually a serious threat to UK labour law’.<sup>93</sup>

The above limitations on the invocability of the employment rights may negate their status as human rights. Perhaps therefore, in the context of the Charter, it is time to abandon the human rights paradigm (if it was ever truly applicable).

## 5. Abandoning the human rights paradigm?

It is notable that the Charter refers to ‘fundamental’ rights as opposed to ‘human’ rights. It should be remarked that the EU institutions also refer to ‘Human and Fundamental Rights’, thereby distinguishing between the two concepts, without, however setting out the differences between them.<sup>94</sup> A potential rationale for this distinction may be the inclusion in the Charter of references to the four fundamental ‘freedoms’ of the EU legal order namely, goods, services, establishment and capital. The term ‘fundamental’ rights is therefore all embracing, covering classic human rights such as the right to life as well as the Union-specific rights such as the freedom to establish a business anywhere in the EU. Of course, a downside to this all-embracing approach may be to undermine classic human rights by placing them alongside the economic rights of potentially non-human actors. The freedom to conduct a business, analysed in greater detail below, is a case in point.

Looking again at the language adopted by the Charter itself, beyond references to the ECHR, the Charter adopts the term ‘human rights’ only once. Article 53 provides that ‘[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective fields of application, by Union law and

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<sup>92</sup> Michael Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) CMLRev 617, 666.

<sup>93</sup> *ibid* 670.

<sup>94</sup> <[europarl.europa.eu/RegData/edudes/BRIE/2016/576011/IPOL\\_BRI\(2016\)576011\\_EN.pdf](http://europarl.europa.eu/RegData/edudes/BRIE/2016/576011/IPOL_BRI(2016)576011_EN.pdf)> accessed 23 May 2017.

international law and international agreements'. In other words, the sole mention of human rights is in reference to rights contained in other more explicitly 'human rights' documents. Having said that, the term 'human' is mentioned several times in the Charter 'human dignity', 'human community', 'human body', 'human beings', 'inhuman', 'human health' mostly in the opening Titles concerning dignity and freedoms. The sole reference in the Solidary Title is to 'human health'. None of the Employment Rights make any pretence at being human rights at all. Rather, the terms adopted here are the more restrictive 'workers'<sup>95</sup>, 'their representatives'<sup>96</sup> 'every worker'.<sup>97</sup> It could be countered, of course, that this is merely a reflection of the fact that employment rights must necessarily be restrictive in their personal scope. Only workers or employees can enjoy such rights; they are not universally applicable human rights and, as we saw, this is often the primary criticism addressed to advocates of labour rights as human rights.

A more appropriate terminology might therefore be 'fundamental Union rights', or even 'fundamental principles of European Union employment law', an autonomous notion free from the constraints of ordinary human rights theories. Clapham refers to 'fundamental Community rights' in his discussion of early social rights cases such as *Defrenne*.<sup>98</sup> He notes that the fact that this equal pay case arose in the context of a private employment relationship was no obstacle to the application of rights considerations, in this instance the equality principle. The vehicle through which the rights were applied was the Union notion of direct effect, a legal tool that is usually unavailable in the context of other rights documents.<sup>99</sup> In addition, he highlights that far from being universally applicable, reliance on the EU notion of equality 'may depend on being a [Union] national or on the [Union] transnational context in which they operate'.<sup>100</sup> As such, we can see that sometimes EU law goes further than ordinary human rights instruments in allowing litigants to rely on the principle of direct effect to vindicate their rights, while in others it is more restrictive, applying only to Union nationals. Expressing employment rights as being specific to the EU would also have serious repercussions for UK labour law post-Brexit, more of which below.

From the above, it can be seen that it is often difficult to discern the precise status of the Employment Rights contained in the Charter, given that they derive from other international

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<sup>95</sup> Art 27.

<sup>96</sup> *ibid.*

<sup>97</sup> Art 30; art 31.

<sup>98</sup> Case 43/75 *Defrenne*.

<sup>99</sup> Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon 1993) 252.

<sup>100</sup> *ibid* 248.

rights instruments such as the ECHR, International Labour Organization (ILO) Conventions, Community Social Charter and the ESC as well as the general principles and even ordinary EU employment legislation. However, the fact that these rights have been re-proclaimed in the Charter is the strongest possible indication of their status as fundamental rights. In addition, the clear intention of the Treaty drafters was to grant the Charter the same value as the Treaties and thereby constitutional status. Once again, for their very inclusion in a constitutional rights text, we can claim that the Charter Employment Rights are indeed constitutional rights. This is, of course, all very well in the abstract, but what are the practical consequences of this constitutionalisation process?

## B. Constitutionalising the Employment Rights

It has already been noted that the ability of litigants to rely on the Employment Rights has been impeded in a number of respects, so to what use can they be put? Jääskinen suggests six possible functions for social rights that derive largely from Finnish legal doctrine.<sup>101</sup> First, social rights may create for the individual a (subjective) right that can be exercised without the need to invoke other legislative provisions. Second, social rights may confer the legislator with a power to adopt provisions that would otherwise be excluded (competence effect). Third, they may create a *mandate* for the legislator to achieve a certain objective. Fourth, social rights can require the derogation or non-application of a provision that conflicts (derogation effect). Fifth, social rights may have an *interpretative effect* in the sense that other provisions have to be interpreted to the extent possible in a way that is in harmony with the right. Finally, social rights may have a programmatic effect in the sense that there is a ‘best endeavours’ obligation to realise the rights as far as possible. Some of these effects are expressly excluded by the Charter. For example, the Charter is not intended to extend the competences of the Union in the employment field. To date, the most prevalent effect of the Charter can be seen in its use as both a standard of review (derogation effect) and a tool of interpretation (interpretative effect). We begin with the Charter’s role as ground for reviewing EU legislation.

### 1. Standard of review of EU law

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<sup>101</sup> Niilo Jääskinen, ‘Fundamental Social Rights in the Charter—Are They Rights? Are the Fundamental?’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights* (Hart 2014) 1703.

Human rights as general principles of EU law have long been used as a ground for reviewing not only the legality of EU acts<sup>102</sup> but also Member State acts falling within the scope of EU law. Falling ‘within the scope of EU law’ are situations in which Member States implement EU law,<sup>103</sup> derogate from EU law,<sup>104</sup> and act within the sphere of EU law. This role of the general principles has now been taken up by the Charter, as the following examples illustrate.

### 1.1. *An example from equality law*

There are no examples of Employment Rights being used as a standard against which to assess the compatibility of EU law with the Charter but illustrative of this possibility is the case of *Test-Achats*.<sup>105</sup> In that case, the CJEU was asked to determine whether the lack of a ‘sunset clause’ in a derogation contained in Directive 2004/113/EC on equal access between men and women to goods and services was compatible with articles 21 and 23 of the Charter, governing equal treatment. The derogation allowed insurance companies to continue discriminating between men and women, when calculating insurance premiums, for a seemingly indefinite period.

Human rights considerations are front and centre in this judgment, with the CJEU starting by referring to the recitals of the Directive which contain a strong reference to article 6 TEU and the Union’s commitment to fundamental rights.<sup>106</sup> The Directive then notes that ‘Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter (...) prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas’.<sup>107</sup> Particular emphasis is placed on the purpose of the Directive, namely ‘to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment’.<sup>108</sup> As a derogation to this principle, article 5(2) permitted Member States to allow proportionate differences in premiums to be attributed to sex.

The referring Belgian Constitutional Court did not explicitly refer to the Charter in its questions, but rather to article 6(2) TEU. The CJEU nevertheless immediately assessed the compatibility of the derogation with the Charter rather than the general principles, holding that

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<sup>102</sup> Case C-303/05 *Advocaten*.

<sup>103</sup> Case 5/88 *Wachauf*.

<sup>104</sup> Case C-260/89 *ERT*.

<sup>105</sup> Case C-236/09 *Test-Achats*.

<sup>106</sup> *ibid* para 3.

<sup>107</sup> *ibid*.

<sup>108</sup> Art 1 of the Directive.

‘Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. Since recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of that directive must be assessed in the light of those provisions’.<sup>109</sup> The CJEU went on to find that when the EU decides to take action to achieve equality, ‘it must contribute in a coherent manner, to the achievement of the intended objective, without prejudice to the possibility of providing for transitional periods or derogations of limited scope’.<sup>110</sup> As no temporal limitation was placed on the derogation period, article 5(2) was not compatible with the Charter.

This case demonstrates the ability of the Charter to act as strong standard for reviewing EU legislation, having the effect of overturning, or at the very least clarifying, the intention of the legislature. It also demonstrates the importance that will be attached by the CJEU to references to the Charter contained in the recitals of the legislation itself. This approach could already be seen in early case law on paid annual leave, in which the CJEU showed a willingness to rely on international social rights norms such as the ILO Conventions if it was expressly referred to in the legislation.<sup>111</sup> As much of the existing EU legislative acquis in the employment context pre-dates the Charter, it remains to be seen whether the Employment Rights may have a potentially similar role to the equality concept.

## **1.2. *The potential of the Employment Rights***

Because there is no case law on the matter, the potential for the Employment Rights to act as a standard of review of EU legislation must be largely speculative. It has been suggested that the WTD, with its myriad opt outs and derogations may be particularly apt for review in light of the Charter. According to O’Leary, such opt outs may be ‘viewed in a different, and perhaps stricter light if the right from which they derogate has been included in the Charter as a fundamental right to which the EU adheres’.<sup>112</sup> It may well be the case that the granting of legal status to the Charter will have the effect of limiting the ability of the Union to adopt legislation restricting or further derogating from a right contained therein. Article 53 of the Charter provides that ‘[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [by EU law, international law and Member State constitutions]’. This is a standstill clause and is particularly relevant in relation to article 31(2). The right to paid annual leave has consistently been held to be a

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<sup>109</sup> Case C-236/09 *Test-Achats* para 17.

<sup>110</sup> *ibid* para 21.

<sup>111</sup> For eg the AG opinion in Case C-350/06 *Schultz-Hoff*.

<sup>112</sup> O’Leary (n 52) 324.

fundamental social right from which there can be no derogation. It may follow that paid annual leave is also an inderogable right under the Charter.<sup>113</sup>

What of the other rights provided for in article 31? We know that article 31 posits the right to limited working hours, rest periods and paid annual leave. As mentioned above, however, we are not told the specific time periods over which these rights are to be calculated. Again, we have to rely on the WTD to further flesh out these rights. The WTD specifies, for example, that workers have a right to a maximum working week of 48 hours.

This again demonstrates that it is not possible to view the Charter in isolation, but despite this symbiosis it would also be a mistake to consider the Charter and the Directive as synonymous. As Bogg warns, ‘the codification of the 48-hour working limit would be mistaken in framing the right under Article 31(2). The requirement that the maximum be “reasonable” under Article 31(2) (...) would allow the flexible setting of maxima to be calibrated by relevant factors such as the intensity of work in a particular industry’.<sup>114</sup> It has even been suggested that the *existing* opt outs and derogations in the *current* WTD might not be compatible with article 31 and would therefore be held invalid if challenged. Once again, we are confronted with the complex relationship between the Charter and employment legislation. We know that the Charter was intended merely to codify existing rights, for example the right to a limited working week found in the WTD. Now it might be suggested by Bogg that article 31 may only have transposed part of that right, ie the right to limited working hours stripped of the derogations contained in the Directive. It has been suggested that such an approach is consistent with the fact that article 31 is not specified as being subject to Union law, national laws and practices. The rights contained in article 31 are not therefore capable of limitation via legislation.<sup>115</sup>

With respect, this position is not tenable. Attributing any intent to the Charter’s drafters (and thereby the Member States) to undermine the derogations contained in the Directive is difficult given the longstanding struggles associated with the review of the existing WTD. As Bogg admits, ‘[t]here *may* be some scope for derogation under Article 31(2), but within much stricter limits than are currently envisaged by Article 22 of the Directive’.<sup>116</sup> In addition, article 52(1) which governs the permissible limitations on Charter rights applies to each of the Charter’s provisions. This article specifies that any limitation must be provided for by law, respect the essence of the right, be proportionate, necessary and genuinely meet objectives of the general

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<sup>113</sup> Bogg (n 13) 867.

<sup>114</sup> *ibid* 857.

<sup>115</sup> *ibid* 863.

<sup>116</sup> *ibid* 865.

interest. Therefore, none of the Charter's rights are absolute and the only means of limiting them is via EU or domestic legislation.

Beyond article 31, it has been posited that article 27 may also serve a possible shielding effect thereby 'suppressing EU attempts to restrict rights on information and consultation provided by EU secondary legislation or proposed amendments and/or attempts to restrict national legislation'.<sup>117</sup> Article 30 is a less likely candidate given its weaker connection to EU employment legislation, but it may nevertheless act as a buttress or reaffirmation of rights contained in existing legislation such as equality law and its protection against discriminatory dismissal. Similarly, article 28 has no direct relationship with EU legislation.

The CJEU also now uses the Charter when assessing the compatibility of Member State law with human rights standards.<sup>118</sup> The scope of application of the Charter is the same as the general principles. In other words, it will also apply to the Member States when they act 'within the scope of EU law'.<sup>119</sup> The CJEU has since clarified that the mere fact that the EU had powers in a certain area was not sufficient to bring national action in that area within the scope of EU law.<sup>120</sup> Rather, it was necessary to establish a more specific connection to EU law. The criteria identified by the CJEU include: whether the national rule implements EU law; whether the rule pursues objectives other than those covered by EU law and whether there are specific EU law rules governing the matter of capable of having effect on it.<sup>121</sup> It is often difficult in the case law to separate out the question of interpretation and that of review. This can be seen from the case law in which the national court will seek a preliminary reference from the CJEU on the interpretation of EU legislation which will then have a bearing on the validity of national law with that legislation. For the sake of clarity, then, we move now to look at the Charter as an interpretative tool before then examining its role as a standard for the review of national legislation.

## 2. Tool of interpretation of EU law

The role of the Charter as a tool of interpretation is confined solely to EU law as the CJEU does not have the competence to interpret national law. This is an area in which the potential

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<sup>117</sup> Olsson (n 72) 257.

<sup>118</sup> Case C-447/09 *Prigge*.

<sup>119</sup> Case C-617/10 *Åkerberg Fransson*.

<sup>120</sup> Case C-198/13 *Hernández*.

<sup>121</sup> *ibid.*

impact of the Charter on the employment relationship has been most keenly felt. In order to set the scene, it is useful to outline the CJEU's pre-existing methods of interpreting legislation both generally and more specifically in the employment context. The limitations of the literal approach to interpreting EU legislation are discussed before turning to the CJEU's preference for contextual and teleological approaches. This is followed by an examination of the Charter's Employment Rights as a tool of interpretation before looking at the uneasy relationship between fundamental rights arguments and the interpretation of employment legislation.<sup>122</sup> The aim here is not to consider the purposive approach to the interpretation of the Charter's provisions themselves, which is an issue common to most human rights instruments, notably the ECHR.<sup>123</sup> Rather, the idea is to consider how the Charter's Employment Rights have been used to steer a purposive interpretation of EU employment legislation.

### 2.1. *The existing interpretative methods of the CJEU*

According to Fennelly, the object of interpretation 'lies in [uncovering] the true intention of the lawmakers, whether they be framers of a constitution or a treaty, legislators, or drafters of secondary legislation'.<sup>124</sup> First, we must determine when a provision of EU law may need to be interpreted. It goes without saying that legislation requires interpretation when there are doubts as to the meaning of its provisions. This may be for a number of reasons, including linguistic uncertainty, vagueness, ambiguity, imprecision, incompleteness, value pluralism, rule instability, gaps in the law, and most importantly in the context of Union legislation; open-textured language.<sup>125</sup> There are additional complications associated with the interpretation of EU law, notably multilingualism and a rather opaque legislative drafting process associated with the quest for compromise and consensus. These specific features only serve to heighten the difficulties associated with interpretative tools found in all national legal systems.

An added difficulty for the interpretation of EU legislation is that it must be interpreted in accordance with the Treaties. This is further complicated by the fact that the Treaties themselves require interpretation and often contain even vaguer and more open-textured language than legislation. Such indeterminate values as 'human dignity', 'freedom', 'democracy', 'equality', 'ever closer union', 'solidarity', 'cooperation', 'justice' and

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<sup>122</sup> Parts of this section have been taken from Niall O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 ELLJ 193.

<sup>123</sup> For a discussion of the interpretation of rights beyond the Charter see George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279; Jeff King, *Judging Social Rights* (2012 CUP).

<sup>124</sup> Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1996) 20 Fordham Int'l L J 656, 657.

<sup>125</sup> Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart 2012) 52–76.

‘citizenship’ pepper the Treaty, without any guidance as to how such values should be used or interpreted. Some of these concepts have been further developed in secondary legislation leading to a certain symbiosis or indeed circularity, more of which below.

An additional factor in EU law is that it is not always clear that a question of interpretation even needs to be referred to the CJEU in the first place. In *CILFIT*, the CJEU clarified that national courts are not obliged to refer a question in cases ‘where previous decisions of the Court have already dealt with the point of law in question (...) even though the questions at issue are not strictly identical’.<sup>126</sup> A question is further defined as *acte clair* when ‘the correct application of [Union] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved’.<sup>127</sup> A final complicating factor is the structure of the CJEU’s judgments, which have been so heavily influenced by both French legal reasoning and by the French language. This has led to what Beck describes as certain ‘building blocks’ in the CJEU’s judgments, ‘that is, paragraphs which occur again and again in identical or nearly the same form in the Court’s case law on particular subjects’ which serves to further promote ‘vagueness and general uncertainty about the precise meaning of the Court’s pronouncements and the state of the case law’.<sup>128</sup>

Having determined that a provision needs to be interpreted, we must look to the tools used to interpret it. Turning to the Treaties or secondary legislation for guidance is of little use as neither contain any provision governing interpretation, although this is usually absent from any international treaty. It is of necessity, therefore, that we must turn to the case law of the CJEU to discover its interpretative criteria. From a very early stage, the CJEU has insisted that in interpreting the Treaties ‘it is necessary to consider the spirit, the general scheme and the wording’ of the relevant provision.<sup>129</sup> Itzcovich identifies three more precise interpretative criteria used by the CJEU, namely linguistic, systemic and dynamic.<sup>130</sup> Linguistic criteria involve the derivation of legal arguments from the semantic and syntactic features of the different language versions of an EU provision (wording). Such an approach includes a determination of the ‘proper meaning of the words’ which is at the heart of literal interpretation.<sup>131</sup> Given the peculiarities of EU law, such an approach is not always appropriate or desirable. As such, the CJEU has benefited from more expansive interpretative tools. This

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<sup>126</sup> Case C-283/81 *CILFIT* para 14.

<sup>127</sup> *ibid* para 16.

<sup>128</sup> Beck (n 125) 174–175.

<sup>129</sup> Case C-26/62 *Van Gend en Loos* para 12.

<sup>130</sup> Giulio Itzcovich, ‘The Interpretation of Community Law by the European Court of Justice’ (2009) 10 *German Law Journal* 537, 549.

<sup>131</sup> *ibid* 550.

brings us to the second criteria, namely systemic or contextual interpretation which takes into consideration other provisions of the same legal text or other areas of the legal system (general scheme). In such cases, the legal provision is to be interpreted in a way which is consistent with the ‘system’.<sup>132</sup> Finally, dynamic criteria of interpretation look not to the text, but the objectives pursued by EU law (spirit).<sup>133</sup> It is these dynamic criteria of interpretation that are ‘the most characteristic of the [CJEU’s] legal reasoning’.<sup>134</sup>

Dynamic reasoning may be further broken down into three related categories. First, there is a functional interpretation, which assumes that a provision should be interpreted in the manner that best ensures the realisation of the goal it seeks to achieve. Second, and most importantly in the EU context, there is the teleological or purposive approach under which a provision should be interpreted in accordance with the goals or purposes of a legal order or legislative scheme. Finally, there is the consequentialist approach which considers the practical consequences of a chosen interpretation.<sup>135</sup> The use of non-literal methods of interpretation is not unique to the Charter. George Letsas, discussing the ECHR argues that far from stemming exclusively from vague language, the purposive approach necessarily arises because ‘legal practitioners do not share the same linguistic criteria on how to identify the truth of legal propositions and that disagreement in law is widespread and deep’.<sup>136</sup> In any event the classification of interpretative methodologies set out above is beset by limitations, but for present purposes, it acts as useful shorthand for the division of interpretative approaches adopted by the CJEU. We now turn to examine how the CJEU applies these methods to the interpretation of employment legislation.

## *2.2. Interpreting employment legislation*

In the interpretation of secondary employment legislation, the CJEU adopts the same purposive/teleological method used in other contexts.<sup>137</sup> EU employment legislation contains specific terms that must be given autonomous Union meanings. We need only think of the controversy surrounding the definition of the ‘worker’ or ‘pay’ in Union law and the complex relationship between the Union definition and national legal systems.<sup>138</sup> In this respect, a literal interpretation would be wholly inadequate. Therefore, the CJEU will ‘seek to resolve the legal

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<sup>132</sup> *ibid* 552.

<sup>133</sup> *ibid* 555.

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*.

<sup>136</sup> Letsas (n 123) 280.

<sup>137</sup> *ibid* 542.

<sup>138</sup> Case C-256/01 *Allonby; Jivraj v Hashwani* [2011] UKSC 40.

uncertainty by reference to the purpose, general scheme and/or normative status of the measure as well as the context in which it is to be applied'.<sup>139</sup> As we shall see, the closest thing we have in legislation as a guide to interpretation are the recitals which often themselves contain concepts that 'are either open-textured, vague and/or essentially contested'.<sup>140</sup> Again, the notion of 'autonomous concepts' and their interpretation is not unique to EU law. The ECtHR, for example, has been alert to the need to prevent contracting states from avoiding the Convention's application. One way of achieving this has been to guarantee an autonomous interpretation for key concepts within the Convention's provisions.<sup>141</sup> As Letsas notes, 'the autonomous concepts of the Convention enjoy a status of semantic independence; their meaning is not to be equated with the meaning that these very same concepts possess in domestic law'.<sup>142</sup> Having identified these issues, we can now examine the CJEU's pre-Charter approach to interpreting employment legislation in order to assess the impact of the Employment Rights.

a. The pre-Charter case law

Even the briefest of glances at the pre-Charter case law on the interpretation EU employment legislation demonstrates teleology in action. The usual—although not universal—result is an employee-protective reading of the relevant legislation. Once again, we turn to the WTD. We have already seen that the WTD's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. The recitals of the Directive show that it has a highly worker-protective telos; '[t]he improvement of workers' safety, hygiene and health (...) is an objective which should not be subordinated to purely economic considerations'; '[a]ll workers should have adequate rest periods'; 'the organisation of work according to a certain pattern must take account of the general principle of adapting work to the worker'. The recitals go on to recognise the need for flexibility, but even this is said to be conditional on 'ensuring compliance with the principle of protecting the safety and health of workers'.

The Directive itself contains a comprehensive list of definitions. Working time is defined in article 2(1) as 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practices'. This

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<sup>139</sup> Beck (n 125) 189.

<sup>140</sup> *ibid* 172.

<sup>141</sup> See for eg *Engel and Others v the Netherlands* (1976) Series A no. 22.

<sup>142</sup> Letsas (n 123 ) 282.

seemingly comprehensive definition is, in reality, emptied of all content in the absence of further fleshing out, a task that has been left to the CJEU. The Court has consistently held that both working time and rest time may not be interpreted in accordance with national law but rather ‘constitute concepts of [Union] law which must be defined in accordance with objective characteristics by reference to the scheme and purpose of the [Working Time Directive]’.<sup>143</sup> The reason for adopting the purposive or teleological approach in this context was to secure the full efficacy and uniform application of those concepts in all Member States, as *any* other interpretation would ‘frustrate’ the objective of the Directive. Furthermore, the CJEU declared that this interpretation was the *only* one that accorded with the purpose of the Directive.<sup>144</sup> This approach is particularly interesting, as the CJEU is saying that although it has been left the task of interpreting the legislation—which was clearly open to interpretation or the question would never have arisen—it was only realistically capable of one interpretation. As such, the CJEU was able to adopt an expansive interpretation of ‘working time’ in *SIMAP* to include inactive on-call time.<sup>145</sup>

The CJEU has repeatedly held that, in view of both the wording of the Directive (literal interpretation) and its purpose (purposive/teleological interpretation) and scheme (schematic interpretation), its various provisions ‘constitute rules of [Union] social law of particular importance from which every worker must benefit as a minimum requirement necessary to ensure protection of his safety and health’.<sup>146</sup> This led the CJEU in *Commission v United Kingdom*, to reject the distinction drawn by the UK Government between limits and entitlements in the WTD. For the UK, the employer was only under an obligation to actively ensure that workers *actually* benefit from limits to working time but not entitlements such as rest periods. The CJEU held that such a distinction was unsustainable as ‘neither the various language versions of that directive nor the Court’s case-law relating to that directive, its objective and the nature of the rights to rest which it lays down’ support the distinction between entitlements and limits.<sup>147</sup>

In the context of paid annual leave, we see the CJEU once again repeating the formula that this entitlement is ‘a particularly important principle of Union social law from which there can be no derogations’. This led the CJEU in *BECTU* to find that the expression contained in article 7(1) WTD ‘in accordance with the conditions for entitlement to, and granting of such leave

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<sup>143</sup> Case C-151/02 *Jaeger* para 58.

<sup>144</sup> *ibid* para 70.

<sup>145</sup> Case C-303/98 *SIMAP*.

<sup>146</sup> Case C-484/04 *Commission v United Kingdom* para 38.

<sup>147</sup> *ibid* para 45.

laid down by national legislation and/or practice’ must be interpreted as referring only to the arrangements for paid annual leave and not the *existence* of that right.<sup>148</sup>

What can we take from the CJEU’s pre-Charter approach to the interpretation of employment legislation? We can see that invariably the structure of the judgments starts by setting out in some detail, the relevant legislative provisions (including the preambles) of both the EU legislation and the relevant national implementing legislation. In some cases, the CJEU leaves it at that, referring back to these provisions only sparingly. In other cases, the CJEU draws heavily from the recitals which play a strong role in the subsequent interpretation.<sup>149</sup> We also see that the CJEU places less emphasis on the legal basis of the legislation in the Treaty. The CJEU will limit itself to interpretation within the framework of the legislation, turning only to primary law if the *telos* is not clear. In other cases, the CJEU has drawn heavily from international rights instruments.<sup>150</sup> All of the above is done in pursuit of the purpose of the legislation,<sup>151</sup> whilst ensuring the effectiveness and uniform application of EU law.<sup>152</sup> The CJEU usually does so without violating the meaning of the words, but has the advent of fundamental rights had any impact on the CJEU’s approach?

### 2.3. *Fundamental rights as a vehicle of interpretation*

Having set out the CJEU’s purposive approach to the interpretation of employment legislation, we can now proceed to examine the place of fundamental rights within this interpretative scheme. With all the discussion surrounding the Charter as an interpretative tool, we may lose sight of the fact that the fundamental rights have long been used as a tool of interpretation in the guise of general principles of EU law.

#### a. Lessons from the general principles

It will be recalled that the general principles of EU law are those principles that have been derived—largely by the CJEU—from unwritten rules not contained in the Treaty or secondary legislation. The reason for the CJEU’s ‘discovery’ of fundamental rights as general principles results largely from the absence of any explicit commitment to fundamental rights contained

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<sup>148</sup> Case C-173/99 *BECTU* paras 43, 52–53.

<sup>149</sup> Case C-484/04 *Commission v UK* para 2; Case C-173/99 *BECTU* para 37; Case C-135/83 *Abels* para 17.

<sup>150</sup> Case C-151/02 *Jaeger* para 47; Case C-173/99 *BECTU* para 39.

<sup>151</sup> Case C-151/02 *Jaeger* para 45; Case C-303/98 *SIMAP* para 34; Case C-484/04 *Commission v UK* para 35; Case C-214/10 *KHS* para 30; Case C-173/99 *BECTU* para 36; Case C-4/01 *Martin*; Case C-135/83 *Abels* para 18; Case C-29/91 *Bartol* para 18; Case C-478/03 *Celtec* para 26; Case C-55/02 *Commission v Portugal* para 48; C-449/93 *Rockfon* para 3; Case C-80/14 *USDAW* para 60.

<sup>152</sup> Case C-151/02 *Jaeger* para 58; Case C-55/02 *Commission v Portugal* para 44; C-449/93 *Rockfon* para 25; Case C-80/14 *USDAW* para 45.

in the founding Treaties. The background to the development of the general principles is expanded upon in the next chapter. For now it suffices to note that a major function of the general principles is to act as an aid to interpretation, allowing the Court to ‘follow an evolutive interpretation and be responsive to changes in the economic and political order’.<sup>153</sup> The general principles are highly value-based and inherently vague and ‘[l]inguistic uncertainty at the level of principles therefore translates directly into secondary interpretative legal uncertainty’.<sup>154</sup>

Initially, the CJEU was reluctant to allow litigants to invoke the fundamental rights they may have enjoyed under national law. This approach changed significantly following the *Stauder* case in which the CJEU held that the right to human dignity, found in German law, was part of the legal order of the Union itself.<sup>155</sup> Although the EU’s commitment to fundamental rights via the general principles is to be broadly welcomed, the potential for unforeseen consequences was largely underestimated at the time. In fact, the debate as to the place of fundamental rights within the EU’s legal order continues to prove contentious, a situation that, as we shall see, has not been resolved by the introduction of the Charter. As Leczykiewicz has remarked, ‘[d]oes the category of “fundamental rights” as concepts of EU law infuse that legal system primarily or exclusively with social values or is it perhaps a vehicle of another transformation, towards greater liberalization and deregulation?’.<sup>156</sup> Despite such uncertainties, the CJEU’s approach to interpretation in fundamental rights cases even more closely conforms to the purposive/teleological paradigm, reflecting a number of factors including ‘the lack of detailed secondary legislation, conceptual vagueness in the key treaty provisions and value pluralism in the sense that many cases involve a clash between conflicting norms of roughly equal status’.<sup>157</sup> In the employment context, the impact of the general principles has been most keenly felt in the equality field.

Take, for example, the case of *P v S*, where the general principle of equality was used to grant an expansive reading to the Equal Treatment Directive (ETD).<sup>158</sup> The CJEU was tasked with determining whether discrimination on the grounds of gender could be extended to cases of gender reassignment. The CJEU held that ‘the scope of the directive cannot be confined to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights that it seeks to safeguard, the scope of the directive is also such as to

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<sup>153</sup> Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 18.

<sup>154</sup> Beck (n 125) 166.

<sup>155</sup> Case C-29/69 *Stauder*.

<sup>156</sup> Dorota Leczykiewicz, ‘Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?’ in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 171, 171.

<sup>157</sup> Beck (n 125) 298.

<sup>158</sup> Council Directive 2000/78/EC.

apply to discrimination arising, as in this case, from the gender reassignment of the person concerned'.<sup>159</sup> As O'Leary notes, '[t]he sequence of the Court's reasoning in this case is instructive. It recalled that the ETD was but the expression, in a particular field, of the principle of equality, which is one of the fundamental principles of EU law and that the right not to be discriminated against on grounds of gender is one of the fundamental human rights whose observance the Court has a duty to ensure'.<sup>160</sup> In other words, the CJEU took as its starting point the need to respect fundamental rights (read the need to respect the purpose/objectives of the legislation) when determining the scope of the legislation, rather than first assessing the scope and then verifying whether fundamental rights had, in that context, been respected.<sup>161</sup>

A complicated, and as yet unanswered, question is the relationship between the general principles and the Charter. Given that the Charter was merely intended to codify or render more visible *existing* EU fundamental rights, this then begs the question of whether the Charter was intended to replace the general principles or whether the two sources are coterminous and mutually dependent. Most commentators agree that the CJEU's primary point of reference is, and should now be, the Charter as this is 'in keeping with the intentions of the Treaty authors, which granted the Charter the same value as that of the Treaties' and is 'also more in keeping with national constitutional cultures which, bred in a civil law tradition, feel more comfortable with written lists of rights'.<sup>162</sup> Leaving aside the CJEU's use of the general principles, what is the role for the Charter itself in the interpretation of EU employment legislation?

#### 2.4. *The Charter as an interpretative tool*

As already noted, from the outset, the Charter has been characterised by its limited ambitions. However, O'Leary suggests that '[t]he inclusion of a subject matter, whether in the form of a right or a principle, in the Charter, will of necessity influence the manner in which the Court will consider the precise content of the right or principle in question, its range of application and the weighing of conflicting interests'.<sup>163</sup> That the Charter has a role to play in the interpretation of EU legislation should be unsurprising given that it is not in itself a source of rights, but rather a list of Union rights deriving from various other sources, including legislation.

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<sup>159</sup> Case C-13/94 *P v S* para 20.

<sup>160</sup> O'Leary (n 52) 328–329.

<sup>161</sup> *ibid* 329.

<sup>162</sup> Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' (2014) 16 *CYELS* 361, 377.

<sup>163</sup> O'Leary (n 52) 322.

A major difficulty in using the Charter as a vehicle of interpretation is that the Charter provisions themselves must first be interpreted. If we look to the Explanations, we are either confronted with equally vague statements, or we are referred to existing legislative provisions and jurisprudence. This has led to the somewhat circular position that EU legislation will be interpreted against the backdrop of a Charter which itself is to be interpreted through the lens of EU legislation as already interpreted by the CJEU. It should not be surprising that inconsistent results begin to emerge. In addition, the Charter can only act as a tool of interpretation if the CJEU chooses to engage with it. In many cases, where a fundamental rights link may have been thought to exist, the CJEU either finds that the Charter is inapplicable as the case is outside the scope of EU law, or it simply ignores the fundamental rights aspect altogether.<sup>164</sup>

Barnard has spoken of the silence of the Charter.<sup>165</sup> She argues that in some cases, the CJEU has been unjustifiably reticent in its use of the Charter. In other cases, she points to situations in which the CJEU has rightly refused to engage with fundamental rights arguments. Finally, she argues that there are other contexts still in which the CJEU would be perfectly justified in keeping silent. Her concerns largely focus on democratic legitimacy, arguing that the CJEU should not overturn legislative compromises.<sup>166</sup> Another concern is that the use of the Charter may in fact obscure the real arguments rather than bringing any clarity. The following represents not so much a plea for silence in certain situations, but rather a recognition of the Charter's inherent limitations as an interpretative tool in the employment context despite the interpretative role it has been given. It is shown that the Charter, already beset by contradictions, is simultaneously inert and unpredictably dynamic. What then is the added value of bringing fundamental rights arguments to the interpretative task? Do they in fact add clarity to judicial reasoning or are they a vehicle for judicial activism and incoherent interpretation?

### 2.5. *The Charter and the interpretation of employment legislation*

The CJEU is by now well-used to dealing with the Charter in the employment context. It is not, however, enough to assess the Charter's impact from the mere fact that its provisions have been cited by the CJEU or an AG. What is the real impact of the Charter arguments? If we

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<sup>164</sup> Case C-34/10 *Brüstle*; Case C-34/09 *Ruiz Zambrano*.

<sup>165</sup> Catherine Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart 2015) 173.

<sup>166</sup> *ibid* 182.

look again at the WTD, we saw at the beginning of this chapter that the CJEU's approach in cases like *BECTU* heralded a promising start to the life of the Charter, as the Court was willing to infuse its interpretative task with fundamental rights arguments. If we delve deeper, however, can it be said that the Charter has made any real difference?

a. Continuation of the purposive approach

The CJEU is still adopting a strongly purposive approach, continuing to refer to the recitals and the objectives of the legislation but now simply adding the Charter into the teleological mix. We can see this approach in *ANGED*,<sup>167</sup> a case in which the CJEU was asked whether article 7(1) WTD must be interpreted as precluding national provisions under which a worker who becomes unfit for work during a period of paid annual leave is not entitled subsequently to the paid annual leave which coincided with the period of unfitness for work. The CJEU starts by using its well-worn mantra that paid annual leave 'must be regarded as a particularly important principle of European Union social law from which there can be no derogations'.<sup>168</sup> In the next breath, the CJEU states that not only is the right particularly important, but that it is *also* 'expressly laid down in Article 31(2) of the Charter'.<sup>169</sup> This is the last we hear of the Charter. The CJEU instead reverts to its usual approach, noting that 'the purpose of entitlement to paid annual leave is to enable the worker to rest'.<sup>170</sup>

This pattern is continued in subsequent cases. The CJEU starts by reaffirming that paid annual leave is 'a particularly important principle of European Union social law from which there can be no derogations'.<sup>171</sup> It then notes, almost in passing, that the right is also contained in article 31(2) of the Charter.<sup>172</sup> The Court moves on to look at the purpose and objectives of the legislation (as it has always done),<sup>173</sup> to find that, in accordance with settled case law, concepts such as working time and paid leave must be interpreted broadly.<sup>174</sup>

It is also remarkable that many of the paid leave cases in which the Charter is cited do not come with an AG opinion.<sup>175</sup> This may be suggestive of the fact that the CJEU has significant experience in dealing with the question of paid annual leave and this may also be a factor

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<sup>167</sup> Case C-78/11 *ANGED*.

<sup>168</sup> *ibid* para 16.

<sup>169</sup> *ibid* para 17.

<sup>170</sup> *ibid* para 19.

<sup>171</sup> Case C-219/14 *Greenfield* para 26; Joined Cases C-229/11 and C-230/11 *Heimann* para 22; Case C-178/15 *Sobczyszyn* para 19; Case C-337/10 *Neidel* para 28.

<sup>172</sup> Case C-219/14 *Greenfield* para 27; Case C-178/15 *Sobczyszyn* para 20; Case C-155/10 *Williams* para 18.

<sup>173</sup> Case C-219/14 *Greenfield* para 29; Case C-539/12 *Lock* para 15; Case C-178/15 *Sobczyszyn* para 23

<sup>174</sup> Case C-539/12Z *Lock* para 14, Joined Cases C-229/11 and C-230/11 *Heimann* para 23.

<sup>175</sup> Case C-219/14 *Greenfield*; Case C-337/10 *Neidel*; Case C-178/15 *Sobczyszyn*; Case C-78/11 *ANGED*.

accounting for the somewhat formulaic judgments handed down since the Charter came into force. Just how pervasive, then, is this approach and is it at all possible to unpack the role of the Charter in the Court's decision making? In other words, is the Charter instrumental to deciding employment cases or is it merely a rhetorical device?

b. Assessing the Charter's role

One way of determining the Charter's impact might be to examine a case in which the AG referred extensively to the Charter while the CJEU was able to reach the same conclusion without mentioning it at all. It will be recalled that this is precisely what happened in *BECTU*, the foundational Charter judgment in the context of paid annual leave. There are also other examples. In *Schultz-Hoff*, the question that arose was whether a former employee who had been on sick leave was entitled to an allowance in lieu for paid annual leave that he was unable to take by the time the employment relationship had terminated.<sup>176</sup> Many of the arguments put forward by the parties revolved around the issue of the purpose of the WTD. The respondent employer argued that to allow the employee to carry over periods of leave from year to year without restriction would be at odds with the purpose of the Directive, namely to grant the worker minimum rest periods. To allow this would also encourage employers to terminate the relationship rather than risk allowing paid leave to accumulate.<sup>177</sup> The UK Government went further, arguing that the 'appellant was not working whilst on sick leave and therefore had no need for "actual rest" from work'.<sup>178</sup> The Commission, on the other hand, sought to distinguish between the purpose of sick leave and paid annual leave, noting that 'sick leave is a consequence of the worker's incapacity for work and is not for the purpose of rest, time to recover and recuperation but rather recovery and the restoration of health and capacity for work'.<sup>179</sup> This case essentially revolved around the interpretation of article 7 WTD, in particular the phrase 'in accordance with the conditions for entitlement to, and granting of, such leave, laid down by national legislation and/or practice'.

AG Trstenjak's opinion is particularly noteworthy for opening (as AG Tizzano had done in *BECTU*) with a section headed '[t]he entitlement to paid annual leave as a fundamental social right'. Again adopting the language of *BECTU*, the AG commented that 'I take the view that, in order to be able to give a meaningful answer to the national court, it is necessary to step back and view the entitlement to paid annual leave both as implemented in secondary law

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<sup>176</sup> AG opinion in Case C-350/06 *Schultz-Hoff*.

<sup>177</sup> *ibid* para 21.

<sup>178</sup> *ibid* para 24.

<sup>179</sup> *ibid* para 28.

within the [Union] legal system and in the wider context of fundamental social rights'.<sup>180</sup> The AG began by setting out the purpose of the Directive before commenting in language reminiscent of *Mangold/Küçükdeveci* that 'in interpreting Article 7 (...) it should be borne in mind that the right to minimum paid annual leave was not upheld for the first time in the working time directive; it has long been included, together with an indication of the period of leave guaranteed, amongst fundamental social rights recognised by international law'.<sup>181</sup> She goes on to note that '[e]ven more significant, in my view, is the fact that the inclusion of this right in the Charter (...) appears to provide the most reliable and definitive confirmation that it constitutes a fundamental right'.<sup>182</sup> This has the 'consequence' of establishing 'the right to annual paid leave as a human right available to all'.<sup>183</sup> Although she did accept that the Charter was not yet legally binding, the AG suggests that paid leave may be a general principle of EU law—although this was subsequently rejected by the AG in *Dominguez*—and could therefore be relied on in the interpretation of the WTD.<sup>184</sup> Once again, however, it is not at all apparent how this declaration follows through in the rest of the opinion. Rather, reference is instead made to 'effectiveness' of EU law and frustrating the 'objectives' of the legislation.<sup>185</sup> Finally, the AG concluded that '[o]n the basis of the abovementioned case-law, the grant of sick leave to the detriment of paid annual leave must be prohibited since otherwise this fundamental right could be deprived of its substance'.<sup>186</sup>

Yet again, we see that the prior case law has a particularly heavy bearing on the decision, with the effect of the inclusion of paid annual leave in the Charter being merely confirmatory or even incidental to the outcome. In this case it was held, relying on *Schultz-Hoff*, that being on sick leave could be no impediment to an additional right to paid annual leave or payment in lieu. That the Charter did not make a significant difference is evidenced by the fact that the CJEU did not rely on it. In its judgment, the CJEU simply repeated the phrase that we have seen time and again that '[a]ccording to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of [Union] social law from which there can be no derogations'.<sup>187</sup> Despite this, the CJEU found that the WTD does not preclude, as a rule, national legislation which lays down conditions for the exercise of the right to paid annual leave expressly conferred by the WTD, including even the loss of that

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<sup>180</sup> *ibid* para 34.

<sup>181</sup> *ibid* para 36.

<sup>182</sup> *ibid* para 38.

<sup>183</sup> *ibid* para 39.

<sup>184</sup> *ibid* para 40.

<sup>185</sup> *ibid* para 46.

<sup>186</sup> *ibid* para 59.

<sup>187</sup> Joined Cases C-350/06 and C-520/06 *Schultz-Hoff* para 22.

right at the end of a leave year or of a carry-over period, provided however that the worker who has lost his right to paid annual leave has actually had the opportunity to exercise the right conferred. But, the WTD also had to be interpreted as precluding national legislation or practices which provide that, on termination of the employment relationship, no allowance in lieu of paid annual leave not taken is to be paid to a worker who has been on sick leave for the whole or part of the leave year and/or carry-over period, which was the reason why he could not exercise his right to paid annual leave.

There are also examples which on the face of it show heavy reliance by the CJEU on the Charter. In *Fenoll*, the question to be addressed by the CJEU was whether a worker who had become sick and had leftover paid annual leave was entitled to a payment in lieu of that leave upon termination of the relationship. The situation was complicated by the fact that the applicant's status as a worker was called into question. The judgment opens in paragraph one with a reference to the Charter, seemingly suggesting that article 31 would have a strong influence on the subsequent judgment. It becomes apparent, however, that the strong reference to article 31 actually stemmed from the wording of the question referred by the national court which asked whether '[a]rticle 31 of the Charter [must] be interpreted as meaning such a person as described (...) can be classified as a "worker" within the meaning of Article 31?' and '[m]ay such a person as described in the first question rely directly upon the rights conferred on him by the Charter (...)?'.

It is clear that the judgment would, of necessity, revolve around the interpretation and application of the Charter.<sup>188</sup> Nevertheless, the CJEU once again started by noting its early case law in which the worker concept had been interpreted broadly.<sup>189</sup> On the question of the invocability of the Charter, the CJEU found that because the factual situation had arisen prior to the Charter being granted legal effect, it could not be relied upon here.<sup>190</sup> Therefore, despite emphasising the fundamental nature of the rights found in the Charter, the CJEU paid short shrift to its application to the case.

*Fenoll* demonstrates that the Charter cannot be expected to resuscitate an argument that could not have been made using ordinary legislative principles. It is not clear what would have happened had the CJEU found that he was not a worker for the purposes of the WTD and the Charter did not apply. It is suggested that it would have made no difference. If the legislation

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<sup>188</sup> See also Case C-230/11 *Heimann*.

<sup>189</sup> Case C-316/13 *Fenoll* para 24.

<sup>190</sup> *ibid* para 47.

(as interpreted by the CJEU) could not be relied upon, then the Charter would be of no assistance in seeking to achieve the same status.

That article 31(2) does not make a great deal of difference to the substance of the reasoning is perhaps unsurprising if we remember how closely linked article 31(2) is to the wording of the WTD itself. Turning again to *Fenoll*, for example, we saw that the CJEU was asked to interpret the term ‘worker’ for the purposes of the WTD. In this case, the CJEU more carefully linked the question to the Charter, noting that ‘[t]he question to be answered is, therefore, whether Mr Fenoll carries out that activity as a worker within the meaning of Article 7 of Directive 2003/88 and of Article 31(2) of the Charter’.<sup>191</sup> In other words, the concept had the same meaning in both the Directive and the Charter. Looking to the Charter alone would not provide any help with determining the appropriate interpretation of the ‘worker’ concept. The CJEU therefore relied on its earlier case law, defining the ‘worker’ broadly.<sup>192</sup>

AG Mengozzi also highlighted the fact that any interpretation of ‘worker’ within the meaning of the WTD must also apply to article 31(2) of the Charter ‘in order to ensure the uniformity of the scope of application *ratione personae* of the right to paid leave’.<sup>193</sup> He continued that it ‘is clear from the settled case-law of the Court that every worker’s right to paid annual leave must be regarded as a particularly important principle of Union social law, *henceforth* enshrined in Article 31(2) of the Charter’.<sup>194</sup> The ‘henceforth’ is important in demonstrating continuity and merely serves to highlight the fact that the Charter will become a new point of reference. Having said that, the legislation itself remains key as it must be read ‘in conjunction’ with the Charter.<sup>195</sup> An unanswered question is whether the CJEU considers ‘a particularly important social right’ and the Charter’s social rights to be coterminous. If they are, then again, we should not be surprised if the Charter has no real bearing on the interpretative outcome.

An example of article 31(2) being referred to outside the paid leave context can be seen in the opinion of AG Wathelet in *Hälvä*.<sup>196</sup> This case concerned the interpretation of article 17 WTD on permissible derogations for unmeasured work or for work that is determined by the workers themselves. The question here was whether relief foster parents could be classed as workers and whether they came within the scope of the WTD. The AG first set out the principles of interpretation underpinning the WTD.<sup>197</sup> The AG noted that ‘[s]uch is their importance that

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<sup>191</sup> *ibid* para 23.

<sup>192</sup> *ibid* para 27.

<sup>193</sup> AG opinion in Case C-316/13 *Fenoll* para 26.

<sup>194</sup> *ibid* para 27.

<sup>195</sup> Case C-316/13 *Fenoll* para 43.

<sup>196</sup> AG opinion in Case C-175/16 *Hälvä*.

<sup>197</sup> *ibid* paras 51–54.

the limitation of maximum working hours, and entitlement to daily and weekly rest periods and to an annual period of paid leave, have been expressly recognised as fundamental rights in Article 31(2).<sup>198</sup> Once again, this is the sole reference to the Charter, with the AG able to reach the conclusion that the applicants were indeed workers and that they did not come within the scope of the article 17 derogation by conducting a detailed analysis of existing case law and the WTD itself.

Finally, the post-Charter case law continues to show the purposive/teleological approach will not always lead to an interpretation that protects employees. Although the CJEU had held in *Schultz-Hoff* that article 7 WTD does not preclude the loss of paid leave provided that the worker actually had the opportunity to take leave,<sup>199</sup> that right is qualified where a worker is on prolonged sick leave, with the risk of accumulated periods of leave that this would entail.<sup>200</sup> The CJEU here used the purposive approach to achieve an employer-protective reading of the legislation, holding that ‘in light of the *actual* purpose of the right to paid annual leave (...) a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave’.<sup>201</sup>

Outside the field of article 31, the Charter’s employment rights have had less of an impact, although there are some signs of potential future developments. In *Pujante*, for example, the issue was whether fixed term workers counted towards the threshold requirements contained in the Collective Redundancies Directive (CRD).<sup>202</sup> AG Kokott in interpreting the provisions of the Directive held that ‘[u]ltimately these guarantees [contained in the Directive] flow from the basic right to protection against unjustified dismissal’.<sup>203</sup> Although article 30 of the Charter was not referred to again, nor was it taken up by the CJEU, it is clear that the fundamental right infused the interpretation of the Directive from the outset. This approach makes it somewhat difficult to ascertain the beginning and the end of the Charter’s influence. This confusion stems largely from the fact that, as already discussed, the Charter finds its origins in existing legislation which it is then used to interpret.

The CJEU’s rather lacklustre approach to the interpretation and application of article 28 can be explained by the absence of a clear link between that provision and EU employment

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<sup>198</sup> *ibid* para 67.

<sup>199</sup> Joined Cases C-350/06 and C-520/06 *Schultz-Hoff*.

<sup>200</sup> Case C-214/10 *KHS*.

<sup>201</sup> *ibid* para 34.

<sup>202</sup> AG opinion in Case C-422/14 *Pujante*.

<sup>203</sup> *ibid* para 1.

legislation. This approach can be contrasted with the altogether more radical effects of article 11 of the ECHR, which governs freedom of association. In *Demir*, the ECtHR came to the rather narrow finding that Turkish law interfering with the rights of civil servants to form a trade union was not compatible with article 11.<sup>204</sup> As Ewing and Hendy note, this narrow finding masks the Court's radical departure from its pre-existing case law denying that certain trade union rights formed the core of article 11.<sup>205</sup> As the authors note, 'the ECtHR is pulling in a different directions from its Luxembourg counterpart, with the mouth-watering possibility of a High Noon conflict between the two'.<sup>206</sup> The ECtHR in *Demir*, in adopting a 'living instrument' approach to the Convention, also drew heavily from external standards found in other rights instruments such as the ESC and indeed the Charter, holding that 'The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values'.<sup>207</sup> This review of the case law on the Employment Rights as a tool of interpretation demonstrates the difficulty in assessing the precise role of the Charter. For the time being, there is very much a link between the pre and post-Charter case law, with the CJEU continuing to adopt a purposive approach to the interpretation of EU employment legislation. This is hardly surprising given that the CJEU has generally adopted an employee-friendly reading of legislation which already had the expressed legislative purpose of protecting workers. The Charter merely serves to emphasise this and adds an extra layer of credibility to the CJEU's approach. The use of the Charter to review national law is perhaps more controversial, as evidenced by its more limited role in that field.

### 3. Standard of review of national law

We have determined that due to the link between legislation and the Charter, fundamental rights have the potential to act as a standard of review of national implementing legislation, but as mentioned, the issues of interpretation and review are not always easy to separate. In many cases the CJEU is first asked to interpret legislation (whether in light of the Charter or not) or interpret the Charter itself before *then* considering the compatibility of national legislation with that interpretation. This is made somewhat more opaque by the division of

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<sup>204</sup> *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008

<sup>205</sup> KD Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara* (2010) 39 ILJ 2.

<sup>206</sup> *Ibid* 3.

<sup>207</sup> *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008 para 85.

competences between the CJEU and the national courts. In *Mayor*, the CJEU reiterated the well-established point that ‘the Court has no jurisdiction, in proceedings [preliminary reference] to rule on the compatibility of rules of national law with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of [Union] law necessary to enable that court to rule on the compatibility of those rules of national law with [Union] law’.<sup>208</sup> In other words, the CJEU does not decide national cases, but rather leaves it to the national court to decide in the final instance, taking into account the guidance issued by the CJEU, which can be more or less detailed. To what extent, then, have the Employment Rights been relied on in this context?

Article 30 has been a weak standard of review (defined as the level of deference the CJEU is willing to give to legislative measures that might arguably infringe the Charter), with the CJEU usually finding that the issue at hand is outside the scope of EU law and therefore the Charter is of no application or that a Directive relating to article 30 is not really at issue.<sup>209</sup> For example, in *Poclava*, the CJEU was asked first to interpret EU legislation before using it as a standard against which to review Spanish legislation implementing Directive 1999/70, itself implementing the framework agreement on fixed term work.<sup>210</sup> *Poclava*, who was Bolivian, worked as a cook for a hotel. She started on a full-time contract of indefinite duration, with a one-year probationary period. This type of contract, with a probationary period, was introduced to ease the burden on employers during the financial crisis. As such a period was not usually available, the question arose as to whether there was discrimination between different types of employee. In other words, the national legislation establishing the contract of indefinite duration to support entrepreneurs had to be assessed for compatibility with article 30.

The CJEU, having interpreted the Directive, found that ‘[i]t follows from the definition of “fixed-term worker” in Clause 3 of the Framework Agreement and from the national legislation applicable to the case before the referring court that an employment contract such as that under which Ms Poclava was employed cannot be categorised as a fixed-term contract’.<sup>211</sup> This case therefore fell outside the scope of the Directive and thereby EU law, meaning that the Charter could not apply.

AG Mengozzi was more explicit in his opinion in *Mono Car*, holding that:

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<sup>208</sup> Case C-323/08 *Mayor* para 30.

<sup>209</sup> Case C-395/15 *Daouidi*; Case C-323/08 *Mayor*.

<sup>210</sup> Case C-117/14 *Poclava*.

<sup>211</sup> *ibid* para 35.

[w]e cannot disregard the decision made by declaring, in that article, that the protection should cover every worker against any ‘unjustified’ dismissal. That qualification makes clear that the protection is not provided, as a fundamental individual right, with respect to every kind of irregularity that a dismissal might involve. It makes clear that there must be a serious irregularity (...) Breaches of Directive 98/59, on the other hand, do not appear to be such as to justify reference to Article 30’.<sup>212</sup>

It is clear that article 30 is not capable of addressing every issue relating to the dismissal process.

Article 27, as we know, has served litigants little better as a standard of review. We saw that *AMS* concerned the review of national legislation in light of Directive 2002/14/EC, which ‘implemented in detail the right now declared in Article 27’.<sup>213</sup> Once again, the Charter had been raised by the referring court in its question when it asked ‘[m]ay the fundamental right of workers to information and consultation, recognised by Article 27 (...) and as specified in the provisions of Directive (...) be invoked in a dispute between private individuals (...) In the affirmative, may those same provisions be interpreted as precluding a national legislative provision which excludes [certain employees] from the calculation of staff’.

Article 28 has perhaps had the weakest role to play either as a tool of interpretation or as a standard of review. It is well known that in both *Viking* and *Laval*, the CJEU declared the fundamental rights status of the right to strike as a general principle of EU law. In *Laval*, the CJEU held that ‘[a]lthough the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of [Union] law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with [Union] law and national law and practices’.<sup>214</sup> Since then, the use of article 28 has been confined to considering whether rules set down in collective agreements could be reviewed for compatibility with EU law. The CJEU has been emphatic that they can.

The CJEU invariably starts by noting the importance of collective bargaining. For example, in *Hennigs*, the CJEU held that ‘[t]he nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental

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<sup>212</sup> AG opinion in Case C-12/08 *Mono Car* para 97.

<sup>213</sup> AG opinion in Case C-176/12 *AMS* para 2.

<sup>214</sup> Case C-341/05 *Laval* para 91.

right to collective bargaining recognised in Article 28 of the Charter, have taken care to strike a balance between their respective interests'.<sup>215</sup> Nevertheless, the CJEU went on to note that '[w]here the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law'.<sup>216</sup> In that case, it was found that age was not an appropriate criterion to determine pay scales, with the fact that this rule derived from a collective agreement making no difference. As the CJEU concluded, '[t]he fact that European Union law precludes that measure and that it appears in a collective agreement does not interfere with the right to negotiate and conclude collective agreements recognised in Article 28 of the Charter.'<sup>217</sup> This pattern is repeated in subsequent cases.<sup>218</sup>

Once again, article 31 is the Employment Right that has been most frequently invoked in the review of national legislation, although this may simply reflect the fact that the WTD has been the subject of the most litigation. In *Heimann*, the question was whether article 31(2) of the WTD had to be interpreted as precluding Member State practice according to which a reduction in days worked would lead to a pro rata adjustment in entitlement to paid leave.<sup>219</sup> If so, the next question was whether the Directive and the Charter precluded the imposition of zero-hour contracts leading to the loss of entitlement to paid annual leave. Here, a social plan provided for the extension of the contracts of dismissed workers for one year, while suspending their obligation to work and the employer's obligation to pay a salary (zero hours short-time working). The employer argued that during this period, the employees were not entitled to paid annual leave. The CJEU referred to its earlier case law in which it was held that the concept of paid annual leave could not be interpreted restrictively.

However, the case law relating to concurrent periods of sick leave and annual leave could not be applied *mutatis mutandis* to the position of a part time worker.<sup>220</sup> A person in this position, unlike the case of a worker on sick leave, is capable of resting. According to the CJEU, 'it follows from all the foregoing considerations that the answer to the first question must be that [the Charter and the WTD] must be interpreted as meaning that they do not preclude national legislation or practice (...) under which the paid annual leave of a worker on short-time working is calculated according to the rule of pro rata temporis'.<sup>221</sup>

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<sup>215</sup> Case C-297/10 *Hennigs* para 66.

<sup>216</sup> *ibid* 67.

<sup>217</sup> *ibid* para 78.

<sup>218</sup> Case C-476/12 *Bankiers*.

<sup>219</sup> Joined Cases C-229/11 and C-230/11 *Heimann*.

<sup>220</sup> *ibid* para 26.

<sup>221</sup> *ibid* para 36.

The ‘it follows’ is a non-sequitur as the CJEU did not deal with the Charter in any way in the preceding paragraphs, or indeed anywhere else in the judgment. This presents a real difficulty in trying to ascertain the impact of the Charter. The articulation of its influence is confined to references to preceding case law in which the Charter *may* have had an influence on the interpretation of the WTD. What we are really presented with then is the Directive (as interpreted by the Charter) as a standard of review. Given, however, that we have seen that the Charter’s Employment Rights have had a particularly weak influence as a tool of interpretation, this seems to narrow the role of the Charter even further.

Recently, however, the CJEU has begun more clearly to express the precise role of article 31. This approach is most evident in the opinion of AG Tanchev in *King*.<sup>222</sup> In that case, a Mr King had been employed under a ‘self-employed commission only contract’ which was silent on the issue of paid annual leave. He was subsequently offered a standard employment contract that did deal with annual leave but turned this down, preferring to remain self-employed. He was dismissed on his 65<sup>th</sup> birthday and sought to claim allowance in lieu for the leave that he had not taken over the course of his employment.

The question for the AG was whether a worker such as Mr King, who had been afforded a right to paid leave only part way through the employment relationship (if at all) lost the right to paid annual leave if he did not take steps to enforce or invoke that right. The UK Working Time Regulations at regulation 13 stipulated that employees must take their paid annual leave in the relevant year or the right is extinguished. The Charter plays a prominent role in this case with the AG holding that ‘I have come to the conclusion that, in the light of the considerable normative weight of the right to paid annual leave under EU, international and Member State law, requiring a worker rather than an employer, to take steps to create an adequate facility for the exercise of paid annual leave would unlawfully make the existence of the right subject to a pre-condition’.<sup>223</sup>

According to the AG ‘The dominance in the case-law of disagreements concerning the conditions for the exercise of paid annual leave, rather than its existence, might well be reflective of the status of the right (...) embedded as it is in the corpus of fundamental rules of labour law to which adherence is generally rigorous’.<sup>224</sup> This is an interesting observation in that the AG seems to suggest that the description or recognition of a right as fundamental or

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<sup>222</sup> AG opinion in Case C-214/16 *King*, confirmed by the CJEU.

<sup>223</sup> *ibid* para 4.

<sup>224</sup> *ibid* para 29.

particularly important has a bearing on national compliance with that right and therefore the type of disputes that come before the CJEU.

The AG then attempts to convey more precisely the impact and significance of article 31. It is said that this provision ‘is a specific manifestation of respect for human dignity’ which is further evidenced by the Explanations which point to the human rights credentials of paid annual leave.<sup>225</sup> Although the precise mechanisms for ensuring respect for this right was left to the Member State court, the effect of article 31 is to remove ‘any doubt whether it is the employer or the worker who should bear the risk of non-compliance with the right (...) at least with respect to which of them is to create the facility for its exercise’.<sup>226</sup> Finally, the AG provides a welcome clarification as to article 31’s status as a right rather than principle. It is a right given its wording, its imperative nature in EU law and its substantial normative value.<sup>227</sup> In any case, both rights and principles enjoy the same role in interpreting EU legislation and thereby national legislation. In the present case, consistent interpretation of UK law was possible, so it was not necessary to address the question of whether the right to paid annual leave might be a general principle of EU law qua *Mangold*. The AG is also explicit that the opt out is of no relevance here given that the right to annual leave is clearly expressed in domestic legislation.

Once again, it can be seen from the case law that while article 31(2) remains the most prominent employment provision, it still has an uncertain record as a standard for the review of national legislation. Is it perhaps the case that the CJEU is reluctant to invoke the Charter in this context in order to avoid national sensitivity (or indeed antipathy) towards the Charter? In any event, it can be stated that the Charter’s Employment Rights have not had the effect that many employment lawyers hoped, and many Charter sceptics feared.

#### 4. Conclusion

This chapter has served the function of setting out the background and content of the employment provisions in the Charter’s Solidarity Title, namely article 30 on unjust dismissal, article 31 on fair and just working conditions, article 27 on worker information and consultation and article 28 on collective bargaining. The preferred term to describe these provisions was Employment Rights, a term used to designate those rights with a particularly

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<sup>225</sup> *ibid* paras 35 and 36.

<sup>226</sup> *ibid* para 44.

<sup>227</sup> *ibid* para 52.

close connection to the employment relationship, as opposed to the broader notion of social or labour rights. Avoiding the term social rights also circumvents some of the arguments that are traditionally raised to deny human rights status to such rights. The Employment Rights can be described as human rights due to their content and origin in other international rights texts as well as for their inclusion in the Charter itself. It was also shown that the text of the Charter only gets us so far, as it must be considered in relation to its underlying values which are further fleshed out in the Explanations, legislation and CJEU case law. Having said that, although it may be possible to characterise the Employment Rights as human rights, little may be gained from such a characterisation. This is because the Employment Rights have already been granted constitutional status and thereby a clear constitutional function. There are three aspects to this function, namely a tool of interpretation of EU law and a standard of review of both EU law and Member State law falling within the scope of EU law. It has been demonstrated that the role played by the Employment Rights in each of these contexts has represented an exercise in continuity. To an extent, the Employment Rights' limited role can be explained by the barriers impeding the effectiveness of those rights. First, there is the rights and principles distinction. Second, there is the question of whether the Charter can apply to private parties. Third, at least in this country, there is scepticism or downright hostility to the Employment Rights, as evidenced by the UK's (attempted) opt-out, and indeed to some extent, Brexit. Finally, the CJEU itself has been, at times, reluctant to fully engage with the Employment Rights. It is perhaps ironic, therefore, that the extent of the Charter's added value appears to be that the CJEU is more comfortable in relying on a written human rights text. To this extent, the CJEU has been emboldened in that its long-held approach to interpreting provisions of legislation (or at least the concept of paid annual leave) as important social rights has now essentially been codified in the Charter, although there is a certain irony in a return to textualism to bolster a purposive approach. More democratically legitimate it may be, revolutionary it is not. As a standard of review, the Employment Rights have been even weaker. Articles 27, 28 and 30 have rarely been invoked as standards of review, but have in certain cases been used as rhetorical devices, for example the use of article 28 to reinforce the importance of collective bargaining. Article 31 is the most frequently invoked Employment Right but even here the CJEU tends merely to refer to previous case law where the Charter may have played a role. The extent of the Charter's influence on the employment relationship, if viewed through the lens of the Employment Rights alone, has been rather disappointing. Beyond the interpretative field, the influence of the Employment Rights on employment legislation has remained largely untested. The same cannot be said for article 16 on the

freedom to conduct a business and its treatment in the employment field, to which we now turn.

### **III. The ‘Aberrant Veneration’ of Contractual Autonomy as a Fundamental Right in the Employment Field**

This chapter sets out the notion of contractual autonomy and its limitations in EU law. This enables us to assess where *Alemo-Herron* fits into this historical context and also allows for a determination of the Charter’s role in this field. Section A starts by outlining the concept of freedom of contract as a general principle of EU law. It then turns to explore the content of article 16 of the Charter, which provides for the freedom to conduct a business. Section A concludes with a consideration of the specific limitations on contractual freedom found in EU law. Section B begins by setting out the background to the Transfer of Undertakings Directive (TUD). This is an area in which the potential negative consequences of a newly energised notion of contractual autonomy have been most keenly felt. This takes us to our analysis of the fulcrum of this thesis, namely the highly deregulatory decision of the CJEU in the case of *Alemo-Herron*. The background to that case is set out here, before turning in subsequent chapters to consider its broader consequences for the regulation of the employment relationship. Finally, section C considers the relationship between the Charter and the general principles, both generally and within the specific context of business freedom.

#### **A. The Concept of Contractual Autonomy and its Limitations in EU Law**

This section sets out the notion of contractual autonomy and its limitations in Union employment law. We examine freedom of contract as a weak general principle and a weak fundamental right before turning to some specific considerations in the employment field.

##### **1. Freedom of contract as a (weak) general principle**

Freedom of contract as a general principle of EU law has always been rather limited, particularly in the face of competing social rights. It is worth bearing in mind that the early case law on the general principles as fundamental rights is deeply entwined with the concept of business and contractual freedom.

The CJEU's first recognition of business freedom as a general principle came in *Nold*.<sup>1</sup> The proceedings in *Nold* concerned a decision of the European Commission taken under the European Coal and Steel Community (ECSC) Treaty relating to the operation of a German coal company, Ruhrkohle AG. Pursuant to this decision, the Commission made the right to purchase coal directly from that company conditional upon the conclusion of a contract of two years' duration under which the purchaser would buy at least 6000 metric tons of Ruhr coal for the domestic sector. As a result, Nold lost its right to act as a direct wholesaler of Ruhr coal.

Nold sought to argue that this decision infringed its property rights and its freedom to pursue a business activity. Advocate General (AG) Trabucchi agreed that the right to property and business freedom were indeed protected by Member State constitutions and that the CJEU was obliged to take these into consideration as they now form part of the [Union] legal order. However, the company's argument that the Commission's decision infringed its commercial rights was simply too broad to be sustained as:

[t]o impose conditions on the right of direct access to coal supplies implies that, however wide these conditions may be, there might always be an undertaking which is unable to satisfy them and which is consequently deprived of the possibility of carrying on direct trade. In that way, the result would be to deny the [Union] executive any power to intervene in the economy.<sup>2</sup>

The idea, taken largely from national constitutions and international treaties, is that property rights are not absolute but must be subject to limitations in the public interest.<sup>3</sup> The AG in *Nold* further commented that '[r]ecognition by the Constitution does not mean that the subject matter is no longer subject to any rules'.<sup>4</sup> We can see here the idea that the constitutionalisation of a particular right does not make it immune from competing considerations. It may be, however, that context is key here.

From reading the opinion, it is clear that the AG considered the ECSC Treaty to be *inherently* concerned with the organisation of the economy, an approach reflected in the most recent European Free Trade Association (EFTA) Court decisions concerning the TUD set out below. According to article 2 of the ECSC Agreement, its objective is to contribute 'through the

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<sup>1</sup> Case C-4/73 *Nold*.

<sup>2</sup> AG opinion in Case C-4/73 *Nold* 513.

<sup>3</sup> Albertina Albers-Llorens, 'Edging Towards Closer Scrutiny? The Court of Justice and its Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms' in Anthony Arnall and others (eds), *A Constitutional Order of States?* (Hart 2011) 245, 250.

<sup>4</sup> AG opinion in Case C-4/73 *Nold* 514.

common market for coal and steel, to economic expansion, growth of employment and a rising standard of living'. In order to achieve this, the institutions, as then constituted, had the task of ensuring an orderly supply to the common market by enabling equal access to sources of production, the establishment of low prices and improved working conditions.

The aims of the modern EU are rather more ambiguous, with article 2(3) of the Treaty on European Union (TEU) committing the Union to 'the establishment of an internal market based on sustainable development, balanced economic growth, price stability and a highly competitive social market economy, aiming at full employment and social progress'. Some of these aims are potentially contradictory and there is certainly a strong debate over whether they are best achieved through state intervention or deregulation.

In *Nold*, the CJEU agreed with the AG's conclusions, holding that although property rights and commercial freedoms were indeed general principles of EU law:

[f]ar from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest (...) on condition that the *substance* of these rights is left untouched.<sup>5</sup> (Emphasis added).

This case is noteworthy on two fronts. First, the CJEU clearly recognised a right to engage in commerce. Second, the case is equally noteworthy for the short shrift given by the CJEU to arguments based on this right, with no guidance offered as to what constitutes the 'substance' of this commercial freedom. It is apparent that the CJEU considered the freedom to conduct a business to be a decidedly weak general principle. Indeed, in virtually all subsequent cases, the CJEU has been equally reluctant to allow business freedom to defeat competing social or economic goals.

For example, in *Hauer*, the CJEU confirmed its finding in *Nold* and held that the restrictions on the freedom to pursue a trade—in this case wine growing—could be justified by the same reasons generally used to justify restrictions on property rights, notably reasons in the general interest. At the same time, the opinion of AG Capotorti is noteworthy for its expansive approach to the permissible restrictions on commercial activity, notably by drawing a distinction between property rights and the right to undertake economic activity:

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<sup>5</sup> Case C-4/73 *Nold* para 14.

[i]t is true that that as a result of the prohibition on new plantings of vines the owner of a plot of land is prevented from pursuing wine-making activity by using the resources of his land hitherto not planted with vines, but it is clear that the owner retains the possibility of growing vines on other plots of land, belonging to him or other persons, on which vineyards already exists. Therefore the limitation imposed affects the exercise of the right to property, not the exercise of the right to undertake economic activity, which is not guaranteed with regard to a particular sphere of application.<sup>6</sup>

The CJEU makes the same distinction between property rights and commercial activity in its judgment, noting that the ‘right to property is guaranteed in the [Union] legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights’.<sup>7</sup> The question then becomes one of ‘whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the [Union] or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the right of the owner impinging upon the very substance of the right to property’.<sup>8</sup>

The CJEU confirms that despite the need to distinguish between the concepts, the freedom to pursue a trade ‘far from constituting an unfettered prerogative, must, likewise be viewed in the light of the social function of the activities protected thereunder’.<sup>9</sup> Again, the CJEU in this case seems to go out of its way to find a justification for the restriction of economic activity, holding that it was ‘undeniably in the public interest’ to prevent a market surplus of wine.

As Oliver has noted, the cases that followed *Nold* and *Hauer* have reiterated the principles that the freedom to pursue an economic activity is not absolute, but must rather be considered in relation to its social function and provided that any restrictions are proportionate, in the public interest and do not impair the substance of the right (each of these elements is dealt with in detail in section C).<sup>10</sup> In all of these cases, the pleas based on the freedom to conduct a business failed. This line of case law is characterised by its consistency, spanning over 40 years of jurisprudence restricting the application of commercial freedom as a general principle. One

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<sup>6</sup> AG opinion in Case C-44/79 *Hauer*.

<sup>7</sup> Case C-44/79 *Hauer* para 17.

<sup>8</sup> *ibid* para 23.

<sup>9</sup> *ibid* para 32.

<sup>10</sup> See for eg Case C-230/78 *Eridania*; Joined Cases C-154/04 and C-155/04 *Alliance* para 126; Case 265/87 *Schröder* para 15; Case C-200/96 *Metronome* para 21; Case C-280/93 *Germany v Council* para 78; Case C-5/88 *Wachauf* para 18; Case C-177/90 *Kühn* para 16; Case C-210/03 *Swedish* para 72.

such case, *Spain and Finland*, occurs in the employment context and is therefore worth considering.<sup>11</sup>

In this case, the Spanish and Finnish Governments sought the annulment of Directive 2002/15/EC on the organisation of working time of persons performing mobile road transport activities. Article 1 of the contested Directive sets out its objective as being the establishment of ‘minimum requirements in relation to the organisation of working time in order to improve the health and safety protection of persons performing mobile road transport activities and to improve road safety and align conditions of competition’. Self-employed drivers were originally excluded from the Directive, but this exclusion was removed. The claimants argued that the inclusion of the self-employed had the effect of ‘preventing self-employed carriers by road from devoting all their time and effort to the prosperity of their undertaking and constitutes an impermissible infringement of their freedom to pursue an occupation and their freedom to conduct a business’.<sup>12</sup>

It was further argued that ‘while there is indeed justification for regulating the working time of employees, in view of their subordinate position as regards their employer, no such need for protection exists for self-employed workers, who must be free to organise their activities as they wish’.<sup>13</sup> In addition to arguments based on the freedom to conduct a business, the Finnish Government argued that the subjection of self-employed drivers to the Directive also breaches their freedom to pursue an occupation ‘under which an operator must be able to decide freely on the amount and the organisation of the working time he intends to devote to his business activities’.<sup>14</sup>

It is not clear what differences may be discerned between these two freedoms (freedom of occupation and freedom to conduct a business), a topic which will be addressed further below. The CJEU in *Spain and Finland* recognised that the freedoms are linked and that both have previously been recognised as general principles. Given the legitimate [Union] interest in promoting road safety, the CJEU held that ‘the regulation of the working time of self-employed drivers envisaged in the contested directive cannot be regarded as a disproportionate and intolerable interference impairing the very substance of the freedom to pursue an occupation and the freedom to conduct a business, or as a breach of the principle of proportionality’.<sup>15</sup> As Albers-Llorens has noted, it is ‘hard to avoid the conclusion that only where a [Union] measure

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<sup>11</sup> Joined Cases C-184/02 and C-223/02 *Spain and Finland*.

<sup>12</sup> *ibid* para 46.

<sup>13</sup> *ibid* para 47.

<sup>14</sup> *ibid* para 49.

<sup>15</sup> *ibid* para 60.

essentially led to the exclusion of an economic activity could a holder of an economic right be successful in proving the infringement of that right'.<sup>16</sup>

The first explicit recognition of a freedom of *contract* as opposed to the more general freedom to pursue a trade or economic activity can be found in *Sukkerfabriken*.<sup>17</sup> In this case, the CJEU found that EU legal acts, which restrict contractual freedom, might only be permissible to the extent that the acts themselves give explicit authority for the intervention in private contractual relations, as 'no rules or information are provided on the prescribed procedure, the forms or the competent authorities for the action contemplated, such as would be expected if a restriction were to be placed upon the freedom of contract'.<sup>18</sup> One could certainly be forgiven for missing this supposed commitment to contractual autonomy. In addition, the CJEU in *Spain v Commission* has held that the authorising act must simply stipulate the exact forms and procedures to be followed by the intervening authority. The CJEU in that case held that 'the right of parties to amend contracts concluded by them is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of [Union] rules imposing specific restrictions in that regard'.<sup>19</sup> The relationship between freedom of contract and freedom to pursue an economic activity must be considered further.

### **1.1. Freedom of contract and the freedom to pursue economic activity**

The Explanations to the Charter make clear that the freedom to conduct a business contained in article 16 is composed of three distinct elements. The first element is the freedom to pursue an economic or commercial activity. The Explanations provide the cases of *Nold* and *Eridania* as sources for this element of the freedom. Strikingly, however, *Nold* uses no such formula, referring instead to the right 'freely to choose and practice their trade or profession', which is much narrower than the broader concept of economic activity expressed in the Explanations. This is even more so when we consider that in the same paragraph of *Nold* the CJEU goes on to state that '[a]s regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity'.<sup>20</sup>

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<sup>16</sup> Albors-Llorens (n 3) 255.

<sup>17</sup> Case C-151/78 *Sukkerfabriken*.

<sup>18</sup> *ibid* para 20.

<sup>19</sup> Case C-240/97 *Spain* para 99.

<sup>20</sup> Case C-4/73 *Nold* para 14.

In the case law following *Nold*, the CJEU is inconsistent in its terminology. In some cases it repeats the ‘trade or profession’ formula.<sup>21</sup> In other cases such as *Alliance for Natural Health*, the CJEU removes any reference to pursuing a trade or profession and instead states that ‘[i]t is clear from settled case-law that the right to property and (...) the freedom to pursue an economic activity, form part of the general principles of [Union] law’.<sup>22</sup> In other cases still, the CJEU refers to both the exercise of a trade or profession and the right to pursue a commercial or economic activity.<sup>23</sup> Finally, the second case set out in the Explanations, *Eridania* provides that ‘the carrying on of economic activities must be guaranteed’.<sup>24</sup> Ignoring both that the Explanations misspell the case name and the fact the second paragraph referenced does not support the proposition that commercial freedoms are protected,<sup>25</sup> this is still a bald statement rather than an express commitment to business freedoms.

The second element of the freedom to conduct a business as set out in the Explanations is freedom of contract. The Explanations rely on two cases in this respect, although again they cite aspects of the judgments that do not support the proposition. In the first of these, *Sukkerfabriken*, the CJEU held that the legislation in question provided no rules ‘on the prescribed procedure, the forms of the competent authorities for the action contemplated, such as would be expected if a restriction were to be placed upon freedom of contract’.<sup>26</sup> In *Spain*, the CJEU held that the right of parties to amend contracts concluded by them is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of [Union] rules imposing specific restrictions in that regard’.<sup>27</sup> The third and final element of the freedom to conduct a business is the right to free competition which is beyond the scope of this thesis.

It is clear, then, that both the right to pursue a commercial or economic activity and freedom of contract are constitutive elements of the freedom to conduct a business. It is not at all clear, however, that the right to pursue a commercial activity should be a subset of the freedom to conduct a business at all, but rather they appear to be coterminous. In addition, the relationship between this right to pursue a commercial activity and freedom of contract is equally unclear. Surely, without freedom of contract, any right to conduct a business or to pursue an economic activity would be meaningless. Nonetheless, the Charter does indeed distinguish between the two elements of freedom to conduct a business. Everson and Gonçalves Correia remark that

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<sup>21</sup> Case C-265/87 *Schröder* para 15.

<sup>22</sup> Joined Cases C-154/04 and C-155/04 *Alliance* para 126.

<sup>23</sup> Case C-210/03 *Swedish* paras 72, 74.

<sup>24</sup> Case C-230/78 *Eridania* para 20.

<sup>25</sup> *ibid* para 31.

<sup>26</sup> Case C-151/78 *Sukkerfabriken* para 20.

<sup>27</sup> Case C-240/97 *Spain* para 99.

‘[t]o date the Court has confirmed that, in line with its established case law, commencing with *Nold*, the freedom to conduct business under article 16 will continue to encompass not only freedom to engage in commercial activity, but also a principle of contractual autonomy’.<sup>28</sup>

Furthermore, it is clear that there must be many more elements to a freedom to conduct a business than the three listed in the Explanations to the Charter. What the Charter teaches us, then, is that the case law on the general principle, far from representing a comprehensive statement of business freedom, rather consists of a selective approach to the freedom. The uncomprehensive nature of the general principle was lamented by AG Cruz Villalón in *Alemo-Herron* when he remarked that ‘the case-law has not, in fact, provided a full and useful definition of this freedom. The judgments in which the Court has had occasion to rule in this area have gone no further than either referring to the right to property or simply citing the provisions of Article 16 of the Charter’.<sup>29</sup> It is to this article 16 and the freedom to conduct a business as a fundamental right to which we now turn.

## 2. Freedom of contract as a weak fundamental right

Article 16 of the Charter provides that ‘[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognised’. It is immediately striking that this provision adopts very similar wording to that found in the Charter’s Employment Rights. The freedom (not the right) is merely *recognised* and even then, only in so far as it accords with Union law and national laws and practices. It would appear that article 16 must, following the approach adopted by the AG in *AMS*, be classed as a principle given the limitations found in the wording of the provision itself. It is certainly true that the freedom to conduct a business has largely been reserved for extreme cases, with its primary function being as a counterweight to other fundamental rights.<sup>30</sup> It is worth considering these cases despite the fact that they tend to deal with the freedom to conduct a business more generally, rather than specifically with freedom of contract.

As we have seen from the Explanations, freedom of contract is a constituent element of the freedom to conduct a business. It will be demonstrated that although the freedom to conduct a

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<sup>28</sup> Michele Everson and Rui Correia Gonçalves, ‘Article 16-Freedom to Conduct a Business’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 437, 452.

<sup>29</sup> AG opinion in Case C-426/11 *Alemo-Herron* para 49.

<sup>30</sup> Peter Oliver, ‘What Purpose does Article 16 of the Charter Serve?’ in Ulf Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 281, 299.

business is a fundamental right, it is not absolute. Rather, just as with the general principle, it must be considered in relation to its social function, provided that any restrictions placed on this right are in the public interest and do not impair the very substance of the right.

### 2.1. *Early case law on article 16*

Most of the early case law on article 16 followed the pattern of the general principle, with arguments based on the freedom to conduct a business being largely unsuccessful.<sup>31</sup> Some of these cases restate the standard formula found in the case law on the general principle<sup>32</sup> that the freedom to conduct a business ‘may be restricted, provided that those restrictions correspond to objectives of general interest pursued by the European Union and that they do not constitute a disproportionate and intolerable interference which would affect the very substance of the right so guaranteed’.<sup>33</sup> This also reflects the language used in article 52 of the Charter which sets out the permissible limits on all Charter rights.

Everson and Gonçalves Correia comment that article 52 reproduces the CJEU’s case law and for this reason ‘the strong presumption must be one that historic limitations imposed by the Court will continue to apply’.<sup>34</sup> This is not entirely true. Article 52 of the Charter does indeed provide that ‘[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’. What can be seen from article 52 and some of the case law on article 16 is that the formula contained in the general principle case law has been somewhat truncated, with the following being excluded ‘[b]oth the right to property and the freedom to pursue a trade or business form part of the general principles of [Union] law. However, those principles are not absolute, but must be viewed in relation to their social function’.<sup>35</sup> Having said that, the CJEU does, at times, use the same formula including reference to the social function.<sup>36</sup>

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<sup>31</sup> Case C-210/00 *Käserei*; Case C-441/07 *Alrosa*; Case C-201/09 *ArcelorMittal*; Case C-216/09 *Commission v ArcelorMittal*; Case C-316/09 *MSD*; Case C-544/10 *Deutsches Weintor*; Case C-59/11 *Association Kokopelli*; Case C-171/11 *Fra.bo*; Case C-283/11 *Sky Österreich*.

<sup>32</sup> Case C-280/93 *Germany v Council* para 78; Case C-265/87 *Schröder* para 15; Case C-5/88 *Wachauf* para 18; Case C-177/90 *Kühn* para 16.

<sup>33</sup> Case T-52/09 *Nycomed* para 89.

<sup>34</sup> Everson and Gonçalves Correia (n 28) 459.

<sup>35</sup> Case C-280/93 *Germany* para 78.

<sup>36</sup> Case T-614/13 *Romonta* para 59; Case C-544/10 *Deutsches Weintor* para 54;

In other cases, arguments based on infringements of article 16 appear to have been ‘tacked on’ to the end of a judgment, with the General Court expressing frustration in one case at ‘the mere abstract reference to such an infringement’.<sup>37</sup> Other cases deal with article 16 (however briefly) but do not refer to the case law on the general principle.<sup>38</sup> Tellingly, many of the AG opinions containing references to art 16 are not subsequently taken up by the CJEU.<sup>39</sup>

In one such opinion, *Alrosa*, a case concerning a competition law commitment not to contract with a particular party, AG Kokott seems to resolve the distinction between commercial freedom more generally and contractual autonomy specifically:

[c]ontractual freedom is one of the general principles of [Union] law. It stems from the freedom to act for persons. It is also inseparably linked to the freedom to conduct a business. In a [Union], which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed. The case-law of the Court of Justice also recognises that economic operators must enjoy contractual freedom.<sup>40</sup>

Despite this, the AG went on to confirm the restricted approach to the freedom of contract whereby contractual autonomy can be limited following due legislative procedure.<sup>41</sup> According to the AG, the Commission decision to restrict potential contractual partners was not ‘unfair, but a completely lawful means by which the Commission pursues the legitimate aim of effectively protecting competition against distortion’. Indeed, the risk of losing a desired contractual partner is one which ‘must be borne (...) like any other economic operator in an open market economy. This does not impair the contractual freedom enjoyed’.<sup>42</sup>

In this case, the AG has been described as having ‘proceeded to confirm the restricted procedural approach to contractual autonomy that the historic Court had pursued (...) whereby contractual freedom might be restricted following due legislative procedure’.<sup>43</sup> Everson and Gonçalves Correia go on to note that ‘[f]or now, the assumption must accordingly be that contractual freedom will form a part of the jurisdiction of Article 16, but that its ambit remains restricted’.<sup>44</sup> Their first prediction was correct, freedom of contract is indeed part of the

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<sup>37</sup> Case T-17/12 *Hagenmeyer* para 122; Case C-510/10 *DR* para 57; Case C-283/11 *Sky Österreich* para 47.

<sup>38</sup> Case T-256/11 *Ezz*; Case T-190/12 *Tomana*; Case T-17/12 *Hagenmeyer*.

<sup>39</sup> Case C-171/11 *Fra.bo*; Case C-59/11 *Association Kokopelli*; Case C-316/09 *MSD*; Case C-216/09 *Commission v ArcelorMittal*; Case C-201/09 *ArcelorMittal*; Case C-441/07 *Alrosa*; Case C-210/00 *Käserei*.

<sup>40</sup> AG opinion in Case C-441/07 *Alrosa* para 225.

<sup>41</sup> *ibid* paras 229–230.

<sup>42</sup> *ibid* para 230.

<sup>43</sup> Everson and Gonçalves Correia (n 28) 457.

<sup>44</sup> *ibid*.

jurisdiction of article 16, although even the Charter’s Explanations (however weakly) already pointed to this conclusion. Their second prediction that the freedom would continue to be restricted may have been misplaced as can be seen from a closer examination of the CJEU’s case law on article 16.

## 2.2. Sky Österreich: *Continuity with the general principles*

Of particular note is the CJEU’s judgment in *Sky Österreich*,<sup>45</sup> which concerned the validity of certain provisions of the Audiovisual Media Services Directive.<sup>46</sup> Articles 15(1) to 15(5) of the Directive required broadcasters to provide competitor access to coverage of ‘events of high interest to the public’. Article 15(6) further stipulated that compensation for such access could not exceed ‘the additional costs in providing access’.

Sky Sports Austria held the exclusive rights to broadcast certain high-profile football matches in Austrian territory. Sky later entered into a contract with ORF, granting it the right to produce short news segments in return for a fee. ORF subsequently challenged this fee before the domestic courts, arguing that it exceeded the actual cost incurred by Sky in granting access to the footage (such costs were in fact non-existent in this case). The Austrian court decided to refer a preliminary question to the CJEU, asking essentially whether the Directive was compatible with article 16. The CJEU found that the provisions of the Directive prevented the holder of exclusive broadcasting rights from deciding the price to charge for access and thus amounted to an interference with the business freedom protected by article 16.<sup>47</sup> Despite this, the CJEU went on to hold that the restriction was justified. The CJEU held, drawing from the general principle jurisprudence, that the freedom to conduct a business is not absolute but must be viewed ‘in light of its social function’.<sup>48</sup>

The CJEU considered that the contested provision did not affect the core content of the freedom to conduct a business since it did not ‘prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights’.<sup>49</sup> The CJEU then went on to note that on the basis of the general principle case law and:

in the light of the wording of Article 16 of the Charter, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of

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<sup>45</sup> Case C-283/11 *Sky Österreich*.

<sup>46</sup> Directive 2010/13.

<sup>47</sup> Case C-283/11 *Sky Österreich* para 44.

<sup>48</sup> *ibid* para 45.

<sup>49</sup> *ibid* para 49.

certain provisions of Title IV of the Charter, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.<sup>50</sup>

As Oliver points out, the CJEU views the words ‘in accordance with Union law and national laws and practices’ in article 16 as giving greater leeway to public authorities to restrict business freedoms in the public interest than they otherwise would have. In addition, he notes that the CJEU ‘considers this language to have been inserted into article 16 so as to reflect its own case law which has always been ambiguous towards the freedom to conduct a business’.<sup>51</sup>

It is also clear from this case that the CJEU prefers to rely on other Charter rights when faced with a restriction of a fundamental right, a topic explored further in Chapter IV. In the present case, the Court was reassured by the fact that the purpose of the legislation was to safeguard the fundamental freedom of citizens to receive information and the freedom and pluralism of the media, which are both contained in article 11 of the Charter.<sup>52</sup>

The CJEU concluded that the legislature had ‘ensured that the extent of the interference with the freedom to conduct a business (...) are confined within precise limits’.<sup>53</sup> This is the only pre-*Alemo-Herron* judgment to deal specifically with freedom of contract as well as the more general business freedom. However, no reference is made to the cases on freedom of contract as a general principle set out in the Explanations to the Charter.<sup>54</sup> This judgment is particularly remarkable for its brevity. The CJEU, as with the general principle, is quick to accept the freedom to conduct a business as a fundamental right but is equally quick to limit that right in the face of competing fundamental rights contained in the Charter.<sup>55</sup> This also stands in marked contrast with AG Bot’s detailed analysis of the impugned provision’s effect on commercial freedom.<sup>56</sup> The CJEU has not always adopted this restrictive approach and an example of the CJEU having found a measure to be in violation of article 16 can be seen in *Scarlet Extended*.<sup>57</sup>

### 2.3. The Scarlet Extended ‘balancing approach’

In *Scarlet Extended*, a Belgian copyright society (SABAM) brought an action against Scarlet Extended, an Internet Service Provider for allegedly authorising the sharing of files by users

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<sup>50</sup> *ibid* para 46.

<sup>51</sup> Oliver (n 30) 292–293.

<sup>52</sup> Case C-283/11 *Sky Österreich* para 59.

<sup>53</sup> *ibid* para 61.

<sup>54</sup> *ibid* para 49.

<sup>55</sup> See also Case C-12/11 *McDonogh*.

<sup>56</sup> AG opinion in Case C-283/11 *Sky Österreich*.

<sup>57</sup> Case C-70/10 *Scarlet Extended*.

of its services. The first instance court agreed and granted an injunction against Scarlet, requiring that it monitor all electronic communications on its services and to block them if necessary. The cost of this monitoring was to be borne by Scarlet and for an unlimited period. Scarlet appealed this decision to a higher court, which in turn made a preliminary reference to the CJEU. The question before the CJEU was whether the injunction granted against Scarlet was compatible with a number of EU Directives read in light of article 16 of the Charter.<sup>58</sup>

This case is particularly interesting for its balancing of two competing fundamental economic rights found in the Charter, namely the protection of intellectual property contained in article 17(2) and the freedom to conduct a business in article 16. The CJEU seemed less reluctant to allow a claim based on article 16 when it was confronted with another economic right as opposed to a social right. The CJEU, as it has always done, stressed the need to strike a fair balance between these interests and went on to hold that the injunction failed to strike such a balance as it ‘has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced’.<sup>59</sup>

Once again, the CJEU buttressed its conclusions by reference to additional Charter rights, notably articles 8 and 11, which guaranteed the fundamental right of Scarlet’s customers to the protection of personal data and the right to receive and impart information.<sup>60</sup> It is clear, therefore, that the CJEU continued to use article 16 with trepidation and only found an infringement of that provision in conjunction with EU legislation and additional fundamental rights and after a careful consideration of competing interests.<sup>61</sup>

Despite this, *Scarlet* was perhaps an early indication that fundamental rights arguments might ‘offer private parties a more concrete and entrenched mechanism of resisting regulatory effects of national and EU law’.<sup>62</sup> Perhaps this case was also a warning shot in the run up to *Alemo-Herron* and tellingly is the first case on commercial autonomy (excluding the two cases on freedom of contract as a general principle) not to mention the ‘social function’ of business freedom nor indeed any limitation on that freedom.

What we can take from the early case law on article 16 is that it very much reflects the case law on commercial freedom as a general principle, including the inconsistency in that case

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<sup>58</sup> The most significant provision in this legislation was art 15(1) of Directive 2000/31.

<sup>59</sup> Case C-70/10 *Scarlet Extended* para 47.

<sup>60</sup> *ibid* para 50.

<sup>61</sup> Confirmed in Cases C-360/10 *SABAM* and C-314/12 *Constantin*.

<sup>62</sup> Dorota Leczykiewicz, ‘Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?’ in Bernitz and others (n 30) 172.

law. Some cases refer to the social function of commercial freedom. Others omit such a reference but nevertheless restrict the freedom through the proportionality principle. With the exception of *Scarlet Extended*, commercial activity arguments were defeated in all cases. This approach would change radically in the wake of the decision in *Alemo-Herron* and the CJEU's aggressive reading of freedom of contract as a fundamental right in the employment field.

## **B. Freedom of Contract as an 'Aggressive' Fundamental Right in the Employment Field**

In its recent jurisprudence in the context of the TUD, the CJEU has demonstrated its commitment to a particularly strong notion of contractual autonomy, at the expense of vulnerable employees. This section sets out the pre-Charter interpretation of the TUD, a similar exercise carried out in Chapter II with the WTD, before turning to the CJEU's decision in *Alemo-Herron*, which has been described as standing for a newly energised notion of contractual autonomy. First, it is necessary briefly to sketch the interaction between the TUD and the concept of contractual autonomy.

### **1. Legislative restriction of contractual autonomy**

It has already been noted that freedom of contract in its guise as a general principle has a limited role to play in EU employment law. EU employment legislation contains a number of mandatory terms that may not be derogated from in Member State legislation or the contract of employment.

It is perhaps unsurprising that concerns about the restriction of contractual autonomy by EU employment legislation have been most evident in cases concerning the TUD. From its very inception, the Directive has given rise to much litigation often on 'highly technical and fact-specific points'.<sup>63</sup> As the CJEU has remarked, the main aim of the Directive is 'to ensure as far as possible the continuation without change of the contract of employment or the employment relationship with the transferee in order to avoid workers being placed in a less favourable position by reason of the transfer alone'.<sup>64</sup> To achieve this, the TUD qualifies the

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<sup>63</sup> Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 *Alemo Herron v Parkwood Leisure*)' (2013) 42 ILJ 434.

<sup>64</sup> Case C-287/86 *Ny Mølle Kro*.

contractual autonomy principle by replacing the need for consent with one of automatic novation. Essentially, the Directive is a partial harmonisation measure which seeks to safeguard following the transfer, the rights which existed in national law before the transfer.<sup>65</sup>

The Directive was first introduced in the 1970s amidst fear that individual employees would suffer from the process of business restructuring due to the increased competition brought about by the creation of the internal market.<sup>66</sup> As Barnard notes, continental legal systems—notably France—have long protected existing provisions of employment contracts upon the transfer of an undertaking, although this was largely to ensure that the new employer acquired an already-trained workforce.<sup>67</sup> This position contrasts sharply with the approach of English law, which viewed the employment contract as a non-transferable personal contract.<sup>68</sup>

At common law, the transfer of a business to another employer had the effect of terminating the contract of employment.<sup>69</sup> In addition, it was not possible to substitute the transferee company as a party to the contract of employment without both its consent and the consent of the employees. This need for mutual consent has been described as ‘a clear consequence of the contractual basis of the employment relationship’.<sup>70</sup> The idea here is that it would be unconscionable to require employees to work for a new employer without their consent, as ‘[t]he contracts of employment, being personal to the employees concerned, cannot be treated in the same way as other business assets of the employer’.<sup>71</sup> Thus, the common law position reflects the idea that although the foundation of the employment relationship remains largely contractual, it is not an everyday contract but rather the position of the employee as a weaker party must be considered. In this respect, privity of contract, which may suggest the non-transferability of the employment relationship, must be qualified.

One of the effects of the TUD, at least on English law, was to undermine the importance of this consensual basis. Unsurprisingly, therefore, much of the debate surrounding the adoption of the Directive, at least in the United Kingdom, has been directed towards its influence on contractual autonomy and its interference with business freedoms more generally. It was suggested, in particular, that the Directive not only inhibits the ability of employers to restructure their workforces but it may also dissuade companies from acquiring new

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<sup>65</sup> *British Fuels Ltd v Baxendale* [1998] 4 All ER.

<sup>66</sup> Catherine Barnard, *EU Employment Law* (4<sup>th</sup> edn, OUP 2012) 578.

<sup>67</sup> *ibid.*

<sup>68</sup> *ibid.*

<sup>69</sup> Simon Deakin and Gillian S Morris, *Labour Law* (6<sup>th</sup> edn, Hart 2012) 244.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.* 245.

undertakings.<sup>72</sup> Indeed, the UK implementing regulations have been said to ‘constitute a major limitation on both the principle of freedom of contract and the power of employers to arrange their own commercial and corporate affairs in such a way as to minimise or fragment their employment law liabilities’.<sup>73</sup> Thus, it can be said that not only does the TUD interfere with the freedom of contract of the parties, but it also negates their freedom *from* the employment contract and the attendant obligations this entails, although, the right of employers to avoid the employment contract has never had a strong foundation. Nevertheless, the potentially extensive impact of the TUD on the principle of contractual autonomy is not in doubt.

Another change when compared with the traditional English approach is that under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE, the UK implementing legislation) the novation is automatic and is not dependent on the employee obtaining notice of the transfer or of the identity of the transferee.<sup>74</sup> There is no requirement that the transferee must accept the transfer, however, the consent of the employee is a continued requirement.<sup>75</sup> At common law, where the business of one employer is sold to another, there is no automatic novation or transfer of contracts of employment. Employment in English law is regarded as a personal contract with Lord Atkin describing the consent principle as ‘ingrained in the personal status of a citizen under our laws’.<sup>76</sup>

It is clear that the TUD has a strong interaction with the contractual autonomy principle. It should not be surprising, therefore, that when it came to engage with the freedom to conduct a business found in article 16, it was in the transfer of undertakings context that the freedom was most prevalent, particularly as an interpretative tool.

## 2. Article 16 as an interpretative tool

The Explanations attached to article 16 make no reference to EU legislation as being a source for that right. The role of article 16 as an interpretative tool is not, therefore, as immediately apparent as it was in relation to article 31 and the WTD. Nevertheless, as explained, article 16 is particularly relevant for the interpretation of the TUD given that the very rationale for the

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<sup>72</sup> Barnard (n 66) 580.

<sup>73</sup> Deakin and Morris (n 69) 234.

<sup>74</sup> SI 2006 No 246. The SI was further revised in 2014 by way of The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014.

<sup>75</sup> *ibid* 245.

<sup>76</sup> *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014.

Directive was the limitation of business freedom upon the transfer of a business from one employer to another. In order to assess article 16's role here, it is necessary to contrast the pre and post-Charter approach of the CJEU, as we did with article 31(2) above.

### 2.1. *Pre-Charter interpretative approach*

The preamble to the TUD recognises that 'economic trends are bringing in their wake, at both national and [Union] level, changes in the structure of undertakings, through transfers'. It further emphasises that 'it was necessary to provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded'. In other words, the Directive is intended to protect those employees who are performing the same job but under the orders of a different employer and, as such, the term 'rights and obligations' is broadly construed.<sup>77</sup> As Barnard notes, the CJEU has been particularly influenced by this wording,<sup>78</sup> being prepared to give a purposive interpretation to 'ensure as far as possible that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer'.<sup>79</sup>

For the rights to be engaged there must have been a transfer of an undertaking. How the notion of a 'transfer' is interpreted becomes crucial, and yet being typical of EU employment legislation, it is left (deliberately) vague. If we turn to article 1(b) of the Directive, we see that there is a transfer where (1) an economic entity; (2) has been transferred and (3) that entity retains its identity following the transfer. Article 1(1)(a) provides that the Directive's provisions apply to the transfer of an undertaking as a result of a 'legal transfer or merger'. This concept has been defined purposively. A number of language versions of the provision seemed to suggest that only contractual transfers were covered, whereas other versions—notably the English term 'legal transfer'—suggested it was wide enough to cover other forms of non-contractual transfer.<sup>80</sup> The CJEU rejected the narrower definition, looked to the purpose of the Directive and found that it can apply to all types of transfer.<sup>81</sup>

Particularly problematic has been the CJEU's interpretation of the third limb, namely that the entity has retained its identity post-transfer. In early cases, the CJEU tended to look at the

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<sup>77</sup> Case C-4/01 *Martin*.

<sup>78</sup> Barnard (n 66) 578–579; Case C-135/83 *Abels* para 6; Case C-19/83 *Wendelboe* para 8; Case C-105/84 *Foreningen af Arbejdsledere* para 15; Case C-24/85 *Spijkers* para 6.

<sup>79</sup> Case C-287/86 *Ny Mølle Kro* para 25; Case C-478/03 *Celtec* para 26.

<sup>80</sup> Barnard (n 66) 584.

<sup>81</sup> Case C-135/83 *Abels*; Case C-478/03 *Celtec*; Case C-29/91 *Bartol*.

labour law test focusing on similarity of activity. Adopting this labour law test was more employee-protective as it was likely to lead to a finding that a transfer had taken place.<sup>82</sup> This was entirely consistent with the Directive's employee-protective objectives. However, in *Süzen*, the CJEU adopted a commercial law test and found that the fact that activities pre and post-transfer were similar, even identical, did not lead to the conclusion that an economic entity had retained its identity.<sup>83</sup>

To determine whether the transfer of an 'economic entity' had taken place, the CJEU distinguished between two different types of business, assets-based, and non-assets based. With assets-based companies, there would be a transfer only where significant tangible or intangible assets were transferred. With non-assets-based businesses, ie in labour-intensive businesses, there would be a transfer only where the transferees take over a majority of the transferor's staff. Either approach would allow the transferee to avoid its obligations under the Directive as 'if few assets are transferred the transferee can avoid the Directive by refusing to employ the 'major part' of the workforce. This test renders the Directive in many cases a 'voluntary obligation', contrary to the spirit of a Directive designed to give employment protection.<sup>84</sup> What this shows is that although the CJEU also employs a purposive approach to interpretation in the context of the TUD, this does not always lead to an employee-protective result.

## 2.2. *Implementing the TUD*

The TUD was implemented into UK law via TUPE. The Regulations, like the Directive itself, ensure that upon the transfer of an undertaking, the contract of employment is not terminated but rather, the transferor's rights and obligations—including those towards the employees—are transferred to the transferee.<sup>85</sup> Once the transfer has been completed, the acquiring undertaking must observe existing employment conditions, including the terms of existing *collective agreements*, until a new agreement can be negotiated. Regulation 4(2)(a) provides that the effect of a transfer is to assign to the transferee 'all the transferor's rights, powers, duties and liabilities under or in connection with the contract of employment'. The CJEU has held that the equivalent TUD provision is non-derogable.<sup>86</sup>

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<sup>82</sup> Case C-392/92 *Schmidt*.

<sup>83</sup> Case C-13/95 *Süzen* para 15.

<sup>84</sup> Barnard (n 66) 597.

<sup>85</sup> Art 3(1) TUPE.

<sup>86</sup> Case C-324/86 *Daddy's Dance Hall*.

As mentioned above, the approach of the common law was to hold that the contract of employment was terminated upon the transfer to a new employer. After the introduction of the TUPE regime, however, English law embraced a strong notion of the transferability of collectively agreed terms and conditions as contained in a dynamic bridging clause, seemingly allowing post-transfer changes to the collective agreement to take effect. In English law, collective agreements are incorporated into the individual employment contract via a bridging term. It is this contractual bridging term that is transferred. The English courts could see no conceptual difficulty in private sector employers binding themselves to future public sector pay rates.<sup>87</sup> The question was whether EU law would adopt a similar approach.

### 2.3. *Werhof: A tentative renaissance for contractual autonomy*

In *Werhof*,<sup>88</sup> the CJEU was asked to rule on the interpretation of article 3(1) of the TUD which provides that '[t]he transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee'.

Werhof had been an employee of the company DUEWAG. According to the employment contract, the relationship was to be governed by the framework collective agreement, and by the wage agreement in force for the Nord Rhine-Westphalia iron and steel, metal and electrical industry. This collective agreement had been concluded between the NRW metal and Electrical Industry Federation (AGV)—of which Werhof was a member—and the trade union for the metal industry (IG Metall).

The company was subsequently converted into Siemens DUEWAG and was later transferred to Freeway, the defendant company. Freeway was not a member of any employers' association and so was not involved in any collective agreements. Subsequent to the transfer, Werhof agreed via a works agreement to waive all individual rights to wage increases pursuant to collective agreements entered into prior to the works agreement. This was followed by a supplemental provision to the employment contract setting out basic pay and performance bonuses. IG and AGV later concluded a new collective agreement, providing for wage increases. Werhof sought to claim these additional wages from Freeway.

The German appeal court found that Werhof had no claim based on paragraph 613(a)(1) of the Civil Code (which implements article 3 TUD). The court was, however, uncertain as to the compatibility of this provision of domestic law with the TUD and referred a preliminary

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<sup>87</sup> *Whent v Cartledge* [1997] IRLR 153.

<sup>88</sup> Case C-499/04 *Werhof*.

question to the CJEU. Essentially, the CJEU was asked to determine whether article 3(1) of the Directive must be interpreted as meaning that, where an undertaking was transferred, and a contract of employment referred to a collective agreement to which the transferor was a party but not the transferee, the transferee was not bound by collective agreements subsequent to the one in force at the time of that transfer.

Werhof urged the Court to permit a ‘dynamic’ interpretation of the clause incorporating a collective agreement into an employment contract (the bridging term). This would allow for the continuation of the collective agreement, despite the fact that the new employer was not involved in the negotiation of that agreement. It was argued that this approach follows from the spirit and purpose of the TUD, namely, the protection of employees in the event of a change of owner of the undertaking and, in particular, the safeguarding of their rights.<sup>89</sup> Freeway, on the other hand, argued that only the collective agreement in force at the time of the transfer is applicable. To hold otherwise, would be to impose such an obligation on the new employer that would hinder his freedom of association and his freedom to contract, which could be equated with expropriation of his property.<sup>90</sup>

AG Ruiz-Jarabo Colomer agreed with Freeway, noting that the ‘right of the person acquiring an undertaking must prevail over any other of lesser importance, such as the right of the employee to the financial advantages arising from the development of the collective agreements signed by the transferor of the company’.<sup>91</sup> Nowhere in the TUD is it suggested that any such right of an acquiring undertaking exists, let alone prevails over the competing rights of employees. Nonetheless, the CJEU was of the same mind, noting that an essential characteristic of any contract is the freedom of the parties to arrange their own affairs and that ‘in a situation such as the one in the main proceedings where the defendant is not a member of any employers’ association and is not bound by any collective agreement, the rights and obligations arising from such an agreement do not therefore apply to it, as a rule’.<sup>92</sup> The Court did note once again, however, that contractual autonomy was not absolute. To hold otherwise would be to erode the rights of employees, which would defeat the very purpose of the legislation, which was to protect such employees from the absolute application of the principle of freedom of contract.<sup>93</sup> This was not, however, the only interest to be protected and ‘the interests (...) of the transferee, who must be in a position to make the adjustments and changes

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<sup>89</sup> *ibid* para 17.

<sup>90</sup> *ibid* para 19.

<sup>91</sup> AG opinion in Case C-499/04 *Werhof* para 51.

<sup>92</sup> Case C-499/04 *Werhof* para 23.

<sup>93</sup> *ibid* para 24.

necessary to carry on his operations, cannot be disregarded'.<sup>94</sup> The CJEU went on to find that:

article 3(1) of the Directive must be interpreted as *not precluding*, in a situation where the contract of employment refers to a collective agreement binding the transferor, that the transferee, who is not party to such an agreement, is not bound by collective agreements subsequent to the one which was in force at the time of the transfer of the business.<sup>95</sup>

Essentially, the CJEU was holding that the TUD *does not require* the permissibility of dynamic incorporation clauses. The Court further highlighted the fact that the freedom of association is protected by article 11 of the ECHR and is a fundamental right protected by the Union legal order.<sup>96</sup> The Court concluded that to apply the dynamic interpretation as submitted by the claimant 'would mean that future collective agreements apply to a transferee who is not party to a collective agreement and that his fundamental right not to join an association could be affected'.<sup>97</sup> This corollary of the freedom of association, that is to say the freedom to dissociate, has also been recognised by the European Court of Human Rights (ECtHR).<sup>98</sup> As a result, an employer who was not a member of an association and therefore was not involved in negotiating the collective agreement could not be bound by it.<sup>99</sup> To hold otherwise would infringe the principle that contracts cannot impose obligations on third parties. A further effect might be to impose more obligations 'on an employer who had not been a party to an agreement than on the person who had been, leaving the former in uncertainty and exposed to the risk that conditions might be introduced behind his back'.<sup>100</sup> It is clear from this case that the CJEU was willing to *permit* the static approach, which is characteristic of German contract law. As the following discussion will show, however, the CJEU has recently departed from this pre-Charter position, holding that not only does the Directive permit a static interpretation, it actually *requires* it. This is the case of *Alemo-Herron* which stands at the boundary between the pre and post-Charter approach and has been described as standing 'for a newly energised deregulatory thrust driven by Article 16 of the Charter'.<sup>101</sup>

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<sup>94</sup> *ibid* para 31.

<sup>95</sup> *ibid* para 37.

<sup>96</sup> Case C-415/93 *Bosman*.

<sup>97</sup> Case C-499/04 *Werhof* para 34.

<sup>98</sup> *Young, James and Webster v United Kingdom* (Application No. 7601/76; 7806/77, s.52) 13 August 1981.

<sup>99</sup> Case C-499/04 *Werhof* para 23.

<sup>100</sup> *ibid* para 58.

<sup>101</sup> Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 ERCL 167, 179.

#### 2.4. *Alemo-Herron: A 'newly energised' notion of contractual autonomy*

The question which arose in *Alemo-Herron* was once again whether, in a situation in which contracts incorporating the terms of collective agreements transfer to new employers, they should be bound only by those terms in force at the time of the transfer (static approach) or whether new collective agreements negotiated after the transfer should also bind the new employer (dynamic approach).

The company in this case sought to rely on *Werhof* to challenge TUPE's allowance of the continuation of a collective agreement, despite the fact that the new employer was not involved in the negotiation of that agreement. The claimant was a former employee of Lewisham Borough Council, a UK local authority, working under an employment contract which expressly incorporated the terms of collective agreements—including pay—'as negotiated from time to time' by the National Joint Council (NJC), which is an external negotiating body for local authority employees. The local authority in question sold its leisure activities to a private undertaking, which subsequently transferred the business to Parkwood Leisure, the respondent in the present case. The problem was that the NJC agreement in question had expired before the transfer to Parkwood had taken place and a new agreement had yet to be negotiated. Parkwood refused to recognise the outcome of the subsequent negotiations, which introduced a retrospective agreement, as it was not a party to this new collective agreement. On that basis, Parkwood considered that the terms of the agreement were not binding on it, and refused to apply those terms when carrying out pay reviews.

The employees brought a claim before the Employment Tribunal (ET) which was dismissed in 2008. The Tribunal said that the judgment of the CJEU in *Werhof* ruled out the possibility of any transfer of dynamic clauses referring to collective agreements in the context of the transfer of an undertaking. The Employment Appeal Tribunal (EAT) set this decision aside and found for the employees, noting that *Werhof* did not apply to circumstances such as those covered by UK law. The EAT remarked in particular that '[i]t is not uncommon for an employer to agree with employees or a trade union that it will abide by wages set in a different forum by a third party, here a local authority bargaining structure'.<sup>102</sup>

The EAT continued that 'TUPE and the Directive are both measures aimed at protection, or safeguarding, of employees' rights, and it would to be odd if those rights which are accepted to be part of the canon in domestic labour law could be taken away by a subsequent

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<sup>102</sup> UKEAT/0456/08/ZT [14].

interpretation of the Directive, as to which Member States have a margin'.<sup>103</sup> The Court of Appeal disagreed—albeit reluctantly—noting that '[b]ut for the decision in *Werhof*, [it] would regard the claimants' case as unanswerable. The inclusion in their contracts of a term providing (inter alia) for their pay from time to time to be fixed by a third party body was a conventional contractual provision'.<sup>104</sup> The CJEU's decision in *Werhof*, which the Court of Appeal (CoA) considered indistinguishable from the present case, was decisive.

Finally, the employees brought an appeal to the UK Supreme Court (UKSC). Again, it was remarked that 'had this issue been solely one of domestic law, the question would have been open only to one answer'.<sup>105</sup> Lord Hope noted that the dynamic approach was

[e]ntirely consistent with the common law principle of freedom of contract (...) There can be no objection in principle to parties including a term in their contract that the employee's pay is to be determined from time to time by a third party such as the NJC of which the employer is not a member or on which it is not represented. It all depends on what the parties have agreed to, as revealed by the words they have used in their contract.<sup>106</sup>

In other words, the domestic approach combining common law and legislation was entirely adequate to protect the interests of employees.

The UKSC stayed the proceedings in order to make a preliminary reference to the CJEU. The CJEU was tasked with determining whether the dynamic approach adopted by English law was compatible with article 3 of the TUD read alongside *Werhof*. The UKSC was essentially asking whether the CJEU's reading of article 3(1) TUD in *Werhof* is to be interpreted as *prohibiting* the transfer of dynamic clauses and if this was the case, was there any possibility for national courts to be more generous in interpreting equivalent domestic implementing provisions, ie did the TUD operate as a floor or a ceiling on employment rights?<sup>107</sup>

#### a. Opinion of AG Cruz Villalón

The Opinion of AG Cruz Villalón provides a strong, but nuanced commitment to contractual autonomy while at the same time acknowledging the legitimate social objectives of the TUD.<sup>108</sup> As a starting point, the AG noted that the effect of *Werhof* was clearly to rule out the

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<sup>103</sup> *ibid* [49].

<sup>104</sup> [2010] EWCA 24 [46].

<sup>105</sup> [2011] UKSC 26 [7].

<sup>106</sup> *ibid* [9].

<sup>107</sup> Art 5 TUPE.

<sup>108</sup> AG opinion in Case C-426/11 *Alemo-Herron*.

possibility that the TUD *required* Member States to permit the transfer of dynamic clauses referring to future collective agreements. The remaining reasoning of the CJEU in that case was, however, largely determined by the specific circumstances which ‘were appreciably different from those of the case now before the Supreme Court’.<sup>109</sup> Parkwood, unlike Freeway, had taken over an undertaking that was originally in the public sector. Consequently, Parkwood could neither take part in nor indirectly influence the collective bargaining process that takes place within the NJC, which is exclusively a body for local government collective bargaining.<sup>110</sup>

The AG concluded that ‘in the context of the transfer of an undertaking, there is no obstacle to Member States allowing a transfer of dynamic clauses referring to future collective agreements’.<sup>111</sup> He noted that although the principal aim of the Directive was to protect workers in the event of a change of employer, there were also several employer-protective elements that could be discerned.<sup>112</sup> The AG thought that *Werhof* should not be read as laying down any general principle that it was ‘incompatible with the Directive to preserve the effects of dynamic clauses referring to future collective agreements’.<sup>113</sup> Rather, *Werhof* should be confined to the specific circumstances in that case which dealt with certain peculiarities of German contract law. Furthermore, ‘the “expectations” created by this clause for the employees of the transferred undertaking are markedly different from those generated by a static clause such as that in *Werhof*. In *Werhof*, the contractual clause was explicitly static and there was no real question that it could be interpreted dynamically. In the present case, the entitlements relied on were ‘more in the nature of certainties, as the clauses have been freely and expressly agreed between the parties, in accordance with the law in force at the time and are recorded in the contract of employment’.<sup>114</sup>

The TUD was therefore no ‘impediment to the United Kingdom allowing parties to use dynamic clauses referring to future collective agreements and accepting that such clauses are transferable as a consequence of the transfer of an undertaking’.<sup>115</sup> This part of the AG’s opinion is no more than a confirmation of the accepted view that the TUD, far from constituting a ceiling on Member State action, would allow for the continuation of the long-standing English approach to dynamic clauses referring to future agreements.

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<sup>109</sup> *ibid* para 19.

<sup>110</sup> *ibid*.

<sup>111</sup> *ibid* para 20.

<sup>112</sup> *ibid* paras 21–22.

<sup>113</sup> *ibid* para 31.

<sup>114</sup> *ibid* para 38.

<sup>115</sup> *ibid* para 39.

The next stage of the opinion becomes more problematic, as in a somewhat surprising and indeed controversial move, the AG rather tersely dealt with the argument raised in *Werhof* that the freedom of association, which is guaranteed by both the Charter and the ECHR was being infringed. According to the AG, the issue in *Alemo-Herron* was not that the new employer would be compelled to join an organisation in order to influence the contractual terms, but rather that it had no means of being so represented, as the NJC was a public body.<sup>116</sup>

Why did the AG feel the need to jettison the freedom of association arguments put forward and subsequently accepted by the CJEU in *Werhof*? The reason seems to be that the UKSC itself did not see it as an issue.<sup>117</sup> As Lord Hope put it:

[t]his point was directly relevant in Mr Werhof's case because of the way German employment law deals with collective agreements (...) Parkwood has not sought to argue that regulation 5 of TUPE is objectionable because it breached its article 11 Convention right of freedom not to join an association. There is no question of its being forced to become a member of one of the participants in the NJC. The appellants' contracts do not require this, and in any event it would not be eligible to do so.<sup>118</sup>

Put simply, the freedom of association point was not relevant here and in any event the issue had not been raised by the claimant company. Rather, the real issue was the employer's 'fundamental right to conduct a business', this was despite the fact that the company had also failed to raise this as an argument.<sup>119</sup>

This is the most controversial aspect of the AG's opinion as he raises of his own volition, the rarely invoked freedom to conduct a business contained in the Charter. Having said this, it is perhaps the case that the AG did no more than take his lead from *Werhof* in which the CJEU had already highlighted the impact of the dynamic approach on the contractual autonomy principle. The AG here simply took the analysis one stage further by invoking contractual autonomy as a fundamental right in article 16 of the Charter, albeit as we shall soon see, this subtle change in emphasis would in fact come to represent a sea change. In addition, the TUD has always been recognised as interfering with freedom of contract. This is indeed its very purpose. It is perhaps not entirely controversial that the contractual autonomy principle and article 16 were engaged in such a case.

In any event, despite highlighting the importance of the freedom to conduct a business in article

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<sup>116</sup> *ibid* para 44.

<sup>117</sup> Case C-426/11 *Alemo-Herron* para 31.

<sup>118</sup> [2011] UKSC 26 [47].

<sup>119</sup> AG opinion in Case C-426/11 *Alemo-Herron* para 46.

16, the AG went on to hold that a dynamic interpretation would not run contrary to article 16 so long as it was not unconditional or irreversible.<sup>120</sup> The AG noted that although freedom of contract was indeed a component of the freedom to conduct a business, the absence of extended rulings on the matter and the lack of binding force of collective agreements in the UK meant that article 16 had not been violated in the present case.<sup>121</sup>

For this reason, the AG's approach might be best described as a tentative renaissance of contractual autonomy. Although the importance of the principle as a fundamental right is recognised, it is easily defeated by competing social rights considerations. It is clear that the AG was concerned with overly interfering with the traditional English approach to the treatment of employment contracts, under which the applicability of dynamic clauses was the norm. It might therefore have been thought the English 'market facilitative' approach to contractual autonomy, discussed below, which allows for a dynamic interpretation of contractual terms, would have been permissible.<sup>122</sup> It is further worth noting that the UK (at the time) chose not to benefit from the limitation period on the continuation of collective agreements which is contained in article 3(3) TUD and which provides 'Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year'. Despite the tentativeness of the AG's approach, the article 16 genie had been let out of the fundamental rights bottle and would be seized upon by the CJEU.

#### b. Judgment of the CJEU

In its judgment, the CJEU, ostensibly relying on *Werhof*, preferred to adopt the German static approach, holding that where a transferee does not have the opportunity to participate in negotiations that are concluded after the date of transfer, the outcome of the negotiations should not be binding. The Directive must therefore be interpreted as *precluding* dynamic clauses referring to collective agreements negotiated after the date of transfer being enforceable against the transferee.<sup>123</sup> Like the AG, the CJEU held that a fair balance must be sought between the competing interests of employers and employees with due weight being given to the employer's freedom of contract found in article 16 of the Charter:

[i]t is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and

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<sup>120</sup> Case C-426/11 *Alemo-Herron* para 58.

<sup>121</sup> *ibid* para 54.

<sup>122</sup> Weatherill (n 101) 169.

<sup>123</sup> Case C-426/11 *Alemo-Herron* para 37.

to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity.<sup>124</sup>

To hold otherwise would be to reduce employer freedom ‘to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business’.<sup>125</sup> This was despite the fact that article 8 TUD permits the Member States to provide for greater employee protection.

The CJEU went on to note that a dynamic interpretation would limit the employer’s room for manoeuvre to make adjustments and changes, particularly given that ‘the transfer is of an undertaking from the public sector to the private sector, the continuation of the transferee’s operations will require significant adjustments and changes, given the inevitable differences in working conditions that exist between those two sectors’.<sup>126</sup> Given the employer’s need for room to manoeuvre, the dynamic interpretation would be ‘liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other’.<sup>127</sup> This approach is particularly troubling as employees moving from the public to the private sector are especially vulnerable to changes in their employment conditions.

It is apparent that the CJEU is willing to give precedence to an employer’s freedom of contract over the rights of employees as expressed in the Directive.<sup>128</sup> It might have been thought obvious that a constitutional guarantee of freedom of contract contained in the Charter would, by its very nature, have an impact on how the CJEU might perceive contractual autonomy. It is, however, the extent of this impact in the employment field that has been most surprising and controversial. Indeed, it is now abundantly clear that the CJEU has been far from consistent in its approach to freedom of contract, a situation that has been thrown into even further confusion by the introduction of the Charter.

As we saw, in its earlier case law on the matter, article 16 had largely been neglected by the CJEU, which seemed ‘unreceptive to any embrace of newly aggressive deregulatory bite driven by the Charter’.<sup>129</sup> Even in cases where the CJEU accepted the application of article 16, it was heavily conditioned by competing social interests, notably the protection of consumers. *Alemo-Herron* can therefore be said to constitute a significant departure from existing case law

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<sup>124</sup> *ibid* para 33.

<sup>125</sup> *ibid* para 35.

<sup>126</sup> *ibid* para 27.

<sup>127</sup> *ibid* para 29.

<sup>128</sup> Jeff Kenner, ‘Article 30 – Protection in the Event of Unjustified Dismissal’, in Steve Peers and others (n 28) 821.

<sup>129</sup> Weatherill (n 101) 177.

on contractual autonomy.<sup>130</sup> However, the precise nature of the CJEU's differing conceptions of freedom of contract as a general principle and freedom of contract as a fundamental right is far from clear. The CJEU certainly provides no indication that it was departing from its earlier conception of freedom of contract—perhaps an inevitable consequence of the quest for consensus on any issue which provokes such sharp divisions between Member State legal traditions.

c. Problems with the judgment

Prassl argues that the real problem with the CJEU's approach to freedom of contract lies neither with its recognition of contractual autonomy as a general principle nor with its application of the Charter. Rather, it 'is the aggressive interpretation of the hitherto rarely applied Article 16 (...) to justify the abrogation of employees' rights that breaks with well-established case law'.<sup>131</sup> The consequences of this departure are two-fold. First, the freedom of contract is elevated to a more significant position in article 16, which is not evident from a reading of the text. Second, the CJEU goes on to give this freedom too much weight by explicitly linking 'the freedom to conduct a business to a particularly strong notion of freedom of contract'.<sup>132</sup>

In addition, the analysis adopted by the CJEU reveals the Court's predisposition to reject the dynamic approach. In its judgment, the CJEU proceeded in two steps, the first of which was to find that there was a need to reconcile the competing aims of the Directive, that is to say between the protection of employees and the need for employer flexibility. This approach is in and of itself controversial and the CJEU might have felt compelled to reinforce this novel reading of the Directive by turning to article 16, regardless of the future consequences for employment regulation. Furthermore, the CJEU adopts a subtle yet fundamental change in language between the present case and its earlier jurisprudence on freedom of contract. In *Scarlet Extended*, for example, the CJEU noted that a 'fair balance' needed to be achieved between article 16 and competing fundamental rights.<sup>133</sup> In *Alemo-Herron*, on the other hand, the CJEU has moved towards the test of the 'core content'. Under the former *Scarlet Extended* test, litigants merely had to show that the outcome represented a fair compromise between two competing fundamental rights of equal value. The latter *Alemo-Herron* approach requires that the irreducible core of one right has not been affected ie there is no need to balance. Once the

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<sup>130</sup> *ibid* 167.

<sup>131</sup> Prassl, 'Freedom of Contract as a General Principle of EU Law' (n 63) 441.

<sup>132</sup> *ibid* 442.

<sup>133</sup> Case C-70/10 *Scarlet Extended* para 45.

core content of contractual autonomy has been eroded, it is irrelevant that a competing—and perhaps stronger—social right has been invoked.

It is also the case that *Alemo-Herron* is not even consistent with the CJEU’s decision in *Werhof*, which it purports to apply. The CJEU in that case interpreted the Directive as *not precluding* the fact that the transferee was *not bound* by subsequent collective agreements’.<sup>134</sup> Put differently, the Directive does not require Member States to adopt a dynamic interpretation. This is quite different from the ruling in *Alemo-Herron* that the Directive *prohibits* such dynamic interpretations and so this case pushes ‘some distance beyond *Werhof*’.<sup>135</sup> This case represents an unexpected rupture with existing jurisprudence and aptly demonstrates the potential use of the Charter to defend employer flexibility against the protection of employees. This has been described as the ‘aberrant veneration of contractual freedom’,<sup>136</sup> but has this treatment of article 16 been maintained in subsequent cases?

### 3. Subsequent use of article 16 as an interpretative tool

In *Österreichischer Gewerkschaftsbund*, a case also concerning the interpretation of article 3 TUD, the CJEU relied on the most uncontroversial elements of *Alemo-Herron* while seemingly overlooking article 16 of the Charter.<sup>137</sup> This case concerned the potential continuation, in the event of a transfer, of the effects of a rescinded collective agreement. The relevant Austrian legislation provided that ‘the legal effects of the collective agreement shall continue after its termination in respect of employment relationships which are covered by it immediately before its termination unless a new collective agreement takes effect in respect of those employment relationships or a new individual agreement is concluded with the employees concerned’.<sup>138</sup>

The referring court further clarified that under Austrian law, collective agreements do not become part of the employment contract, but rather have the same effect on that contract as legislation. The dispute in the present case arose between the Austrian Confederation of Trade Unions and the Austrian Chamber of Commerce’s sectoral transport federation which is authorised to represent its member undertakings for the purpose of signing collective agreements. A collective agreement was concluded for a parent undertaking belonging to a

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<sup>134</sup> Case C-499/04 *Werhof* para 37.

<sup>135</sup> *Weatherill* (n 101) 170.

<sup>136</sup> *ibid* 181.

<sup>137</sup> Case C-328/13 *Österreichischer Gewerkschaftsbund*.

<sup>138</sup> *Arbeitsverfassungsgesetz*, BGBl. 22/1974 para 13.

group of undertakings in the aviation sector. The agreement was to apply to all airlines in that group, provided their activity was not limited to regional transport.

A subsequent, more specific, collective agreement was concluded for a subsidiary of the group. Due to losses in the sector, the parent company decided to transfer its aviation activity to that subsidiary. Under this arrangement, the employees of the transferred business would now be subject to the less advantageous collective agreement applicable to the subsidiary's employees. The agreement applicable to the parent company was rescinded by the Chamber of Commerce and, in retaliation, the Confederation of Trade Unions also rescinded the collective agreement applicable to the subsidiary. As a result, the internal rules of the company came into force, leading to a significant reduction in wages. The unions argued that since the subsidiary was no longer subject to any collective agreement, the parent's agreement should continue to apply to the transferred employees under the domestic legislation, which seeks to remedy the absence of a collective agreement.<sup>139</sup> On the other hand, the Chamber of Commerce argued that an expired collective agreement cannot be imposed on the transferee as such an agreement could not logically 'continue' to apply if it is already rescinded.<sup>140</sup>

The Austrian Supreme Court stayed proceedings and made a preliminary reference to the CJEU asking whether article 3(3) TUD, providing for the continuation of collectively agreed terms, must be interpreted as also covering terms laid down under a collective agreement which has continuing effect indefinitely under national law, despite the termination of the agreement, until a new agreement—whether collective or individual—has been concluded. In addition, the CJEU was asked to rule on whether the term 'application of another collective agreement' that was contained in the national legislation was to be interpreted as including the continuing effect of the likewise terminated parent agreement.

The CJEU reiterated that the TUD is only a partial harmonisation measure and was not intended to create uniform protection across the Union.<sup>141</sup> The CJEU further noted that the purpose of article 3(3) TUD was not the continuation of collective agreements as such, but rather the terms and conditions of employment, regardless of their origin.<sup>142</sup> Therefore, such terms come within the scope of the Directive, 'irrespective of the method used to make those terms (...) applicable to the persons concerned', including in this case national legislation maintaining the effects of collectively agreed terms.<sup>143</sup> Such an interpretation accords with the

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<sup>139</sup> Case C-328/13 *Österreichischer Gewerkschaftsbund* para 11.

<sup>140</sup> *ibid* para 12.

<sup>141</sup> *ibid* para 22.

<sup>142</sup> *ibid* paras 23–24.

<sup>143</sup> *ibid* para 25.

purpose of the TUD, which is to avoid a sudden rupture in the terms and conditions of employment. In addition, the interpretation adopted conforms to the TUD's (contested) objectives of ensuring a fair balance between the interests of employees and the transferee employer which must, citing *Alemo-Herron*, 'be in a position to make the adjustments and changes necessary to carry on its operations'.<sup>144</sup>

The CJEU, adopting a generous approach, held that '[t]he rule maintaining the effects of a collective agreement (...) has limited effects, since it maintains only the legal effects of a collective agreement on the employment relationships directly subject to it before its rescission (...) In those circumstances, it does not appear that such a rule hinders the transferee's ability to make the adjustments and changes necessary to carry on its operations'.<sup>145</sup>

The contrast between both the tone and substance of this judgment and that adopted in *Alemo-Herron* is remarkable. In the former, the CJEU had no difficulty in concluding that the continuation of the collective agreement did not interfere with the employer's room for manoeuvre, while in the latter, an equally innocuous provision was struck down as intolerable interference. This dissonance is all the more apparent in the opinion of AG Cruz Villalón, as he too delivered the opinion in *Alemo-Herron* (although in that case he, unlike the CJEU, upheld the validity of the dynamic approach). In the present case the AG held that:

[t]he primary objective of continuing effect is that of a guarantee; it simply maintains the status quo in the interests of legal certainty. In such cases, the rights and obligations arising from a collective agreement with continuing effect, a mere extension of the pre-existing situation, are "the terms and conditions agreed".<sup>146</sup>

The AG noted that in this case, the collective agreement with continuing effect was, from the point of view of the Austrian Government, both a weaker and temporary extension of the effects of a pre-existing agreement. It was weaker in so far as the provisions of the continued agreement could always be waived by agreement of the parties and it was temporary as it would cease to apply when a new collective agreement was concluded. The AG went on to note that the most prominent feature of a collective agreement with continuing effect was its legal framework as:

[i]n Austria, as also appears to be the case of a number of Member States of the EU, a collective agreement is not converted into an agreement with continuing effect as a

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<sup>144</sup> *ibid* para 29.

<sup>145</sup> *ibid* para 30.

<sup>146</sup> AG opinion in Case C-328/13 *Österreichischer Gewerkschaftsbund*.

result of a decision of one or both parties to the employment relationship [but rather] because the legislature has expressly provided that, in exhaustively listed circumstances and with a view to maintaining legal certainty in the employment relationship, the agreement will continue to be observed on a weaker, temporary basis.<sup>147</sup>

This interpretation was according to the AG, wholly consistent with *Werhof* in which the continuing effect of the ‘dynamic clause’ was rejected on the grounds that the TUD was not intended to protect mere expectations:

[i]n other words, Directive 2001/23 is not intended to perpetuate a contractual situation, particularly where the situation perpetuated encompasses future rather than current rights. That is the kind of continuation of effects which upsets the balance of the contractual relationship between employer and employee, something which is prohibited by Directive 2001/23 and the case-law.<sup>148</sup>

In the present case, on the other hand, there was an express statutory provision in force at the time of the contract’s conclusion stipulating the continuation of collective rights, albeit in a weaker and temporary form, this was accordingly ‘far from being a “mere expectation” or a “hypothetical advantage flowing from future changes to collective agreements”’.<sup>149</sup> The contrast between the approach adopted by both the AG and the CJEU in the present case and that taken by the CJEU in *Alemo-Herron*, which relegated to the last footnote of the AG’s opinion, could not be more striking. Is it the case that the CJEU is now willing to invoke only the least controversial elements of *Alemo-Herron*, that is to say the principle of contractual autonomy stripped of the trappings of a fundamental right?

It is difficult to escape the conclusion that the CJEU viewed the contractual arrangement in *Alemo-Herron* as more invidious from a contractual autonomy point of view simply because of the absence of negotiation—that is to say the exclusion of the employer from the collective agreement machinery in the first place. Perhaps then the simplest solution to *Alemo-Herron* would have been to open up the NJC negotiating structure to private employers, or at least those which had acquired public undertakings.

In addition, the source of the continuation of collectively agreed terms seems to have played a role (despite the AG insisting that this was irrelevant). In *Alemo-Herron*, it was the contract

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<sup>147</sup> *ibid* para 46.

<sup>148</sup> *ibid* para 50.

<sup>149</sup> *ibid* para 51.

itself, via the bridging term which was the source of the continuation (although it was thought that the legislation permitted this). In the *Österreichischer* case, on the other hand, the continuation was entirely a creature of legislation. This is illogical; on the one hand, the CJEU holds that in order to preserve contractual autonomy, an agreed contractual term must be ignored while, on the other hand, holding that legislatively imposed terms are compatible with contractual autonomy. It seems that the CJEU was swayed by the fact that the continuation of collective terms in the latter case was temporary, but was it not also temporary in *Alemo-Herron* in the sense that the collective agreement could be renegotiated?

The CJEU has since then continued to give mixed signals regarding the strength of contractual autonomy as a fundamental right. We have already looked at the case of *AGET* in which AG Wahl found that articles 27 and 30 of the Charter were not relevant in a situation in which the state had to authorise collective redundancies. This was because not every irregularity in the dismissal process could be said to have fundamental rights implications.

In his opinion in *AGET*, the AG began by noting that the purpose of the Collective Redundancies Directive (CRD) was to both protect workers and to harmonise the costs involved for employers. On the question of whether the prior authorisation procedure constituted a restriction on the freedom of establishment, the AG held that this was in principle a restriction but that ‘the provisions of EU law must be interpreted in accordance with the fundamental rights as set out in the Charter. Hence Article 49 TFEU must be interpreted in accordance with Article 16’.<sup>150</sup> For the AG, the restriction on establishment ‘also amounts to a restriction on the exercise of the freedom to conduct a business. Moreover, it restricts the freedom of contract of employers, inasmuch as they are required to seek prior authorisation’.<sup>151</sup> He went on to note that ‘[t]he rule at issue applies in a non-discriminatory way. Therefore, it is necessary to consider whether the remaining criteria (...) are met, given that this exercise, in my view, is basically one and the same under Article 49 (...) and Article 16’.<sup>152</sup>

Here we can see the intermingling between article 16 and four fundamental freedoms of EU law. The effects of this relationship on the ability of the EU to regulate the employment contract are further fleshed out in the next chapter. For now, it is worth noting that the two appear to be treated as coterminous. Does that also mean that the raft of case law on the freedom of establishment, including its interaction with social norms is now also to be transposed to article 16? It certainly seems so, with the AG recognising—as has long been

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<sup>150</sup> AG opinion in Case C-201/15 *AGET* para 49.

<sup>151</sup> *ibid* para 50.

<sup>152</sup> *ibid* para 53.

held in the context of freedom of establishment—that the protection of workers is an overriding reason in the general interest. As such, article 16 had to be balanced against the Solidarity Title but this was of little use given that none of the Charter’s Employment Rights were found to apply.

Outside the context of the TUD, article 16 is also beginning to show that it may have some bite. The freedom to conduct a business has been raised in the headscarf cases – *Achbita*<sup>153</sup> and *Bougnaoui*.<sup>154</sup> In *Achbita*, the CJEU was asked whether Directive 2000/78 had to be interpreted as allowing a private employer to ban a female Muslim employee from wearing a headscarf in the workplace and whether he was allowed to dismiss her if she refused to comply. AG Kokott found that such an interpretation was possible given that ‘[i]n a Union which regards itself as being committed to a social market economy (...) and seeks to achieve this in accordance with the requirements of an open market economy with free competition (...) the importance that attaches to the freedom to conduct a business is not to be underestimated’.<sup>155</sup> As such, it could not be ruled out that the Directive does allow a derogation from the equality principle but nonetheless, as a derogation, it must be interpreted strictly with the freedom to conduct a business itself being subject to a ‘broad range of restrictions’.<sup>156</sup> The CJEU agreed that the employer’s wish to protect its image does engage its freedom to conduct a business, notably if the employee comes into contact with customers.

In the second headscarf case, *Bougnaoui*, AG Sharpston accepted that the freedom to conduct a business found in article 16 does constitute a legitimate aim, being one of the general principles of EU law enshrined in the Charter but that the freedom is not an absolute principle but must be viewed in relation to its social function. Had the discrimination at issue in this case been found to be indirect discrimination (the AG thought it was direct) ‘the interest of the employer’s business constitutes a legitimate aim and that it is not the legislation’s objective to impede that freedom any more than is appropriate and necessary’.<sup>157</sup>

What we can take from the case law on article 16 as an interpretative tool is that it is more powerful than its counterparts in the Solidarity Title in that the CJEU has been willing to overturn longstanding jurisprudence and an employee friendly reading of legislation in order to preserve the business rights of employers. Nonetheless, it is increasingly difficult to pinpoint the precise impact of article 16 arguments. In some cases, it is mentioned without being dealt

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<sup>153</sup> Case C-157/15 *Achbita*.

<sup>154</sup> Case C-188/15 *Bougnaoui*.

<sup>155</sup> AG opinion in Case C-157/15 *Achbita* para 134.

<sup>156</sup> *ibid* para 136.

<sup>157</sup> Case C-188/15 *Bougnaoui* para 115.

with in the substance of the opinion or judgment. In other cases, the CJEU comes close to accepting that *Alemo-Herron* was wrongly decided, avoiding reference to that judgment. This new-found reluctance to explicitly engage with article 16 has been more in evidence in recent case law on that provision as a standard of review.

#### 4. Article 16 as a standard of review

The case law on article 16 as a standard of review immediately following *Alemo-Herron* showed a continued commitment to contractual autonomy as a fundamental right. Later decisions may have heralded a softening of the CJEU's approach. As with the Employment Rights, it is often difficult to separate questions of review and interpretation.

##### 4.1. Continued commitment to contractual autonomy

In *AGET*, the AG had to determine whether the national legislation requiring prior authorisation for collective dismissals was compatible with the CRD as interpreted in the light of the Charter. The Greek legislation in question provided at article 3 that '[e]mployers shall notify the competent public authority in writing of any projected collective redundancies'. Article 5(3) further provided that '[i]f there is no agreement between the parties, the prefect or the [minister] may, by reasoned decision (...) after taking account of the documents (...) and assessing the conditions in the labour market, the situation of the undertaking and the interests of the national economy, either extend the consultations (...) or not authorise some or all of the projected redundancies'.

Here, a cement company considering collective redundancies submitted a request for approval to the Ministry of Labour. The employment directorate at the Ministry drew up a report taking into account (1) the conditions of the market, (2) the situation of the undertaking and (3) the interests of the economy and refused to authorise the redundancies. The company alleged that the Greek implementing legislation was not compatible with article 49 of the Treaty on the Functioning of the European Union (TFEU) read in light of article 16. As for the national court, it held that although the CRD does not foresee any authorisation period, article 5 of the CRD permits Member States to increase the level of protection granted to employees.

The question before the CJEU was whether this approach was nevertheless incompatible with the aims of the Directive read in light of the Charter and the Treaty. AG Wahl commented that the Directive 'represented a compromise reached at EU level between the need to protect

workers and the consideration to be given to employers (...) Unilaterally imposing additional obligations (...) without providing any compensatory safeguard (...) risks upsetting the equilibrium from the point of view of Article 49 (...) and Article 16'.<sup>158</sup>

The CJEU took a somewhat different approach. It started by recalling that the Directive was a minimum harmonisation measure but that 'the fact remains that the limited character of such harmonisation cannot have the consequence of depriving the provisions of the directive of practical effect'.<sup>159</sup> This would be the case with any authorisation procedure that actually prevented collective redundancies from ever taking place. As the CJEU put it, the Directive is based 'on the premise that collective redundancies must—once the procedures established by those provisions have been exhausted (...) at least remain conceivable'.<sup>160</sup>

On the freedom of establishment point, it was held that the decision to engage in collective redundancies is a fundamental decision in the life of an undertaking and that, as a result, the legislation at issue was likely to hinder or make less attractive that freedom. Consequently, the measure also hindered or limited the exercise of the freedom to conduct a business in article 16, but it could be justified on the grounds of worker protection.<sup>161</sup> The case would therefore turn on the issue of proportionality with the CJEU starting with the proposition that the authorisation procedure was not sufficient in itself to undermine the essence of article 16.

In principle, therefore, a national framework aimed at enhancing the protection of workers is proportionate and so complies with both article 49 TFEU and article 16 of the Charter. It seemed, therefore, as if the CJEU would disagree with the AG and find that the Greek legislation was compatible with the Charter. This was not the case. The CJEU found that reliance on some of the criteria upon which the decision not to authorise could be based (reasons 1 and 2, the situation of the undertaking and the labour market) was acceptable in principle but that here they were formulated in very general terms. There were no details provided as to how the power would be exercised which would inhibit any judicial review of the decision.<sup>162</sup> It followed that the Greek regime was not compatible with article 49 and 'on identical grounds' breached article 52 of the Charter and thereby article 16.<sup>163</sup>

#### 4.2. *A potential retrenchment from contractual autonomy?*

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<sup>158</sup> AG opinion in Case C-201/15 *AGET* para 63.

<sup>159</sup> Case C-201/15 *AGET* para 36.

<sup>160</sup> *ibid* para 41.

<sup>161</sup> *ibid* para 73.

<sup>162</sup> *ibid* para 49.

<sup>163</sup> *ibid* para 103.

A potential softening of the CJEU's approach to article 16 can be seen in *Vittoria Graf*.<sup>164</sup> This case is particularly interesting as it also concerned (as *Alemo-Herron* had) the interpretation of article 3 TUD. The opinion of AG Bot is remarkable for its detailed analysis of the different approaches to interpreting article 3 taken in both *Werhof* and *Alemo-Herron*.

The AG starts by explaining that the rationale for dynamic clauses, at least in Germany, is to allow employers to apply collective agreements to non-unionised employees and also to allow employers who are not (or cannot be) involved in any collective bargaining machinery to apply collective agreements to its workforce. The latter is precisely what happened in the present case but upon the transfer of the business, the transferee did not wish to honour future changes to the collective agreement. The AG found that the TUD precludes a transferee being forced to apply terms arising from future changes to collective agreements.<sup>165</sup>

The AG notes that there are two divergent approaches that can be seen in the case law. In *Werhof*, the CJEU started from the position that the transfer of dynamic clauses, as the transfer of any contractual term or condition, is indeed within the scope of the TUD. This means that the dynamic clause is transferred regardless of whether the transferee is party to the collective agreement. That having been determined, the next step in the reasoning process was to ask whether the Directive must be interpreted as transferring only those terms and conditions that existed at the time of the transfer or whether the term incorporating the collective agreement must be construed dynamically. Although under article 3(1) the term is transferred, this must be read in light of article 3(3) which provides that a collective agreement is 'to continue to be observed only until the date of its termination or expiry, or the entry into force or application of another collective agreement'. The same provision allows Member States to limit the obligation to respect collective agreements, but this period must not be less than one year. The final step in *Werhof* was for the CJEU to set the alleged dynamic interpretation of the contractual clause against the employer's freedom of association.

According to AG Bot, the reasoning in *Alemo-Herron* was different. The first step here was to recall that following *Werhof*, the TUD could not be interpreted as *requiring* a dynamic interpretation. The CJEU then observed that the TUD allows Member States to increase the level of protection given to employees and determined that a dynamic approach was more protective. The next question was the extent of the discretion left to the Member States. In making this assessment, the CJEU placed particular emphasis on the aims of the Directive

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<sup>164</sup> AG opinion in Joined Cases C-680/15 and C-681/15 *Vittoria Graff*.

<sup>165</sup> *ibid* para 12.

which sought to ensure a fair balance between the interests of employees and the transferring employer who must be in a position to make adjustments and changes necessary to carry out its operations, in particular in a transfer from the public to private sector. Next, the CJEU considered whether the dynamic interpretation of the Directive would be compatible with article 16. The CJEU found that it was not. Although Member States do enjoy some discretion, this could not be such as to undermine the essence of an employer's business freedom.

Having set out the two approaches, the AG considered that the approach adopted in *Werhof* more closely aligned to the present case. The AG sought to use this opportunity to clarify the interaction between articles 3 and 8 of the TUD. The starting point, as in *Werhof*, is to note that a contractual clause referring to a future collective agreement falls within the scope of article 3(1) and so is automatically transferred. The second step is that article 3(1) should be read in light of article 3(3). Article 3(3) 'provides a compromise intended to reconcile the interests of the transferee and those of the employees'.<sup>166</sup> The AG concluded that 'the dynamic reference clause ceases to have effect (...) where [the collective agreement] expires, terminates or is replaced and, if the Member State has so provided, where at least one year has passed since the undertaking was transferred. Those clauses do not therefore apply to collective agreements concluded after the date of transfer, unless the new employer expresses a different wish'.<sup>167</sup>

The question for the CJEU to address in the present case was whether it made any difference that the German legislation implementing the TUD allowed for both consensual and unilateral changes to be made by the transferor. The AG held that this was irrelevant as although article 8 allows for greater protection, this could not be allowed to circumvent the rules in article 3. In the end, the AG was able to reach this conclusion entirely following the approach adopted in *Werhof*. There was no need (as had taken place in *Alemo-Herron*) to rely on article 16 at all, with the AG simply noting that 'by refraining from imposing on the transferee in an unlimited and uncertain fashion obligations arising from future collective agreements over which it has no influence, the ruling I am advocating will address the concern to guarantee the transferee's freedom to conduct a business'.<sup>168</sup> The tentativeness with which both article 16 and *Alemo-Herron* are being treated in this case is notable.

The CJEU went further, choosing not to follow the AG and instead found that the German legislation in question was compatible with the TUD, holding that 'it is clear from the decision

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<sup>166</sup> *ibid* para 77.

<sup>167</sup> *ibid* para 81.

<sup>168</sup> *ibid* para 113.

to refer and, in particular, from the wording of the questions referred (...) that the national legislation at issue (...) provides for the possibility, after the transfer, for the transferee to adjust the working conditions existing at the date of the transfer, either consensually or unilaterally'.<sup>169</sup> Although the transferee alleges that in practice changes are unlikely to be achieved, this was an issue for the national court to determine. Therefore, the national rules at issue complied with the conditions set out in *Alemo-Herron*: 'the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate aspects determining changes in the working conditions of its employees with a view to its future economic activity'.<sup>170</sup> Finally, and again side stepping the Charter, the CJEU concluded that '[g]iven that the that case-law takes into consideration Article 16 (...) there is no longer any need to examine further the compatibility of the national legislation at issue (...) with that provision'.<sup>171</sup>

We can see here that, just as with article 31, article 16 is now being subsumed into existing case law without being dealt with explicitly. In other words, article 16 is being used in a more covert manner, with the CJEU simply relying on earlier case law rather than dealing explicitly with the provision itself. This has worrying implications for the future of a rights document that had the explicit intention of rendering more 'visible' the EU's human rights acquis. What does this selective approach to fundamental rights tell us about the CJEU's use of the Charter in the employment context?

#### 4.3. *Fundamental rights à la carte?*

A difference is emerging between the CJEU's use of the economic and social provisions in the Charter. Not only do the social provisions, dismissed as 'principles', appear to be weaker interpretative tools, but the CJEU seems actively to prefer the freedom to conduct a business over competing social rights. If we look at *Alemo-Herron* itself, we see that no attempt was made to engage with competing Charter provisions that may have acted as a counterweight to contractual autonomy. This is a fundamental problem. Unless the CJEU chooses to engage with a Charter provision, then it will of necessity have no impact on its approach to interpretation or review. Even within the working time context, the Charter's use has been most prevalent in paid leave cases. We also see that in cases such as *AMS* and *Dominguez*, the CJEU is very careful to avoid the Charter's social provisions becoming directly enforceable

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<sup>169</sup> Joined Cases C-680/15 and C-681/15 *Vittoria Graff*.

<sup>170</sup> *ibid* para 23.

<sup>171</sup> *ibid* para 26.

individual rights either because they are not sufficiently clear and precise, or because they are dependent on national laws and practices.<sup>172</sup> Article 16 faces no such limitations despite being worded similarly to the Employment Rights. In fact, in the context of the freedom to conduct a business, the CJEU, as we have seen, is willing to ignore precedent, including its long-standing case law on contractual autonomy as a general principle. It does so in a manner which overrides the limitations contained in the case law and which is expressly referenced in the Explanations attached to the Charter.

It is apparent from *Alemo-Herron* that the CJEU is willing to give precedence to an employer's freedom of contract over the rights of employees as expressed in legislation.<sup>173</sup> Even if a piece of employment legislation engages article 16, it is likely to have been carefully drafted to assess competing interests. In its case law on freedom of contract as a general principle, and in its early jurisprudence on article 16, the CJEU adopted this deferential approach to the will of the legislature. EU legislation was only rarely found to constitute a negation of the core content of business freedom. For Prassl, this test 'is likely to constitute the most important hurdle to the success of any action brought to vindicate an individual's economic freedoms under Article 16 CFR, especially once it is applied in combination with the Court's proportionality scrutiny against a right's social function'.<sup>174</sup> However, it is difficult to square this with the decision in *Alemo-Herron* itself. In that case, the CJEU found that what had been considered no more than an ordinary application of the common law freedom of contract did, in fact, violate the very core of contractual autonomy as a fundamental right.

Had *Alemo-Herron* involved a clash between two competing fundamental rights, one social and one economic, would the outcome have been any different? As we saw from Chapter II, the ability of the Charter's Employment Rights to counteract article 16 must be called into doubt. The question arises, therefore, whether there are any existing methods for counteracting this aggressive approach to contractual autonomy. Given that the Charter cases have been said to differ from those on contractual autonomy as a general principle, would it be possible to return to the approach adopted in that earlier case law?

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<sup>172</sup> Case C-176/12 *AMS*; Case C-282/10 *Dominguez*.

<sup>173</sup> Kenner in Peers (n 28) 805, 821.

<sup>174</sup> Jeremias Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *CYELS* 189, 197.

### C. Back to First (General) Principles?

Having set out the CJEU's aggressive vision of contractual autonomy in *Alemo-Herron*, this section questions whether a return to the concept of contractual autonomy found in the case law on the general principle may be possible or indeed desirable. What is the nature of the relationship between the Charter's provisions and the general principles? Was the Charter merely intended to codify the EU's approach to fundamental rights as they existed at the time of its entry into force, or does the Charter now replace the general principles covering the same area? If the latter is the case, can it really be said that article 16 of the Charter and the general principle of contractual autonomy overlap? Is it perhaps the case that the solution to the problems posed by *Alemo-Herron's* aggressive reading of freedom of contract as a fundamental right is to be found in a return to general principles? It is hoped, that in addressing this problem, the question of whether the approach adopted in *Alemo-Herron* is consistent with the general principles will be resolved. If the two approaches really are consistent, contrary to what was suggested above, what are the potential consequences of blurring the distinction? If they are not, then the Charter must have made all the difference.

As a starting point, it will be necessary to explore the nature and purpose of general principles, notably in the context of private employment relations. The relationship between the general principles and the Charter will then be outlined before turning to a more in-depth examination of the tension between the general principle of freedom of contract and article 16 of the Charter. The nature of the general principles and their role will be outlined. This will be followed by an examination of the applicability of the general principles to private parties before turning to the relationship between the general principles and the Charter. It will be asked whether the CJEU in *Alemo-Herron* could have relied on the already-existing general principle of contractual autonomy to achieve the same result in that case, rather than embedding the hitherto underused notion of contractual autonomy in the Charter.

#### 1. The sources and roles of the general principles

It will be recalled that the general principles of EU law are those principles that have been derived—largely by the CJEU—from unwritten rules not contained in the Treaty or secondary legislation. As Tridimas notes, 'where a reference is made to the general principles of law as a source of law (...) such reference usually connotes principles which are derived by the courts

from specific rules or from the legal system as a whole and exist beyond written law'.<sup>175</sup> In addition, although they 'provide strong arguments for a certain solution, they may even raise a presumption, but rarely do they dictate results in themselves'.<sup>176</sup> The CJEU is mandated to develop the general principles by article 19(1) TEU which provides that the CJEU 'shall ensure that in the interpretation and application of the Treaty the law is observed'. Reich points out that this wording has remained constant throughout the various treaty revisions, however, 'its "upgrading" from what is now called the Treaty on the Functioning of the EU (...) to the Treaty on European Union (...) containing the basic principles and institutions of the Union itself, shows its high standing and importance in the political and legal order'.<sup>177</sup>

### 1.1. Sources

Three principal sources of general principles have been identified, namely the constitutional traditions common to all Member States, international treaties to which the Member States are party and finally, the general principles which derive from the nature of the Union itself, as '[i]t would simply not be possible to mechanically apply human rights as recognized in one or other national legal system without taking into account the specific qualities of [Union] law'.<sup>178</sup>

Despite largely deriving from national and international law, once recognised by the CJEU, the general principles take on an autonomous EU character, becoming part of the Union's legal order. As Tridimas remarks, 'the general principles of law are children of national law but, as brought up by the Court, they become enfants terribles: they are extended, narrowed, restated, transformed by a creative and eclectic judicial process'.<sup>179</sup>

A further point to note is that even when a general principle can be said to derive from national law, it is not necessary that such a right be contained in the constitutions of all Member States. In this respect, the CJEU 'does not make a comparative analysis of national laws with a view to identifying and applying a common denominator' as in any case '[s]uch an exercise would be as impractical as it would be futile'.<sup>180</sup> Rather, the Court makes a 'synthesis seeking the most appropriate solution in the circumstances of the case'.<sup>181</sup> Nor does the CJEU necessarily engage in a maximalist approach, adopting the strongest level of protection available in the

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<sup>175</sup> Takis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn, OUP 2006) 1.

<sup>176</sup> *ibid* 2.

<sup>177</sup> Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 2.

<sup>178</sup> Tridimas, *General Principles* (n 175) 302.

<sup>179</sup> *ibid* 6.

<sup>180</sup> *ibid*.

<sup>181</sup> *ibid* 20–21.

national constitutions.<sup>182</sup> Rather, there is a ‘mutual cross-fertilisation’ which ‘creates a continuous flux of ideas and exchange of opinions between the [CJEU] and its national counterparts, giving rise to a common constitutional space defined by a dynamic dialogue’.<sup>183</sup> This multiplicity of sources has been thrown into even further confusion with the adoption of the Charter, somewhat clouding the roles of the general principles.

## 1.2. Roles

Three potential roles for the general principles have been identified, namely an aid to interpretation, a ground for review and as a guarantee of the rule of law.<sup>184</sup> EU legislation in breach of a general principle is to be held void and national law falling within the scope of EU law that contravenes a general principle must be set aside. Essentially, the general principles can be said to have a gap filling function, given the often vague nature of EU law as expressed both in the Treaty and secondary legislation.

Of course, the general principles themselves might be described as inherently vague. In any case, ‘although the general principles of law were initially invoked to cover gaps in the Treaty and the written law of the [Union], their importance has not lessened as the [Union] legal order develops’.<sup>185</sup> In addition, and perhaps more controversially, recourse to the general principles ‘enables the Court to follow an evolutive interpretation and be responsive to changes in the economic and political order’.<sup>186</sup>

A further, related task entrusted to the general principles is that of ensuring respect for the rule of law. This task is undertaken through the ‘discovery’ and ‘development’ of ‘general principles which guide the application and interpretation of EU primary and secondary law as “positive law”’.<sup>187</sup> In this respect, it becomes clear that the general principles are not themselves positive law, but are rather ‘more general concepts which guide law interpretation and application’.<sup>188</sup> Despite the inherent lack of specificity and consequent flexibility of the general principles, ‘[o]nce these principles have evolved and been recognised, particularly by repeated application, they become part of “the law”’.<sup>189</sup> In any case, and as we have already

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<sup>182</sup> The related question of the relationship between EU and national fundamental rights standards has more recently been addressed by the CJEU in Case C-399/11 *Melloni*.

<sup>183</sup> Koen Lenaerts and José A Gutiérrez-Fons, ‘The Role of General Principles of EU Law’ in Arnulf and others (n 3) 179, 180.

<sup>184</sup> *ibid* 179.

<sup>185</sup> Tridimas, *General Principles* (n 175) 10.

<sup>186</sup> *ibid* 18.

<sup>187</sup> Reich (n 177) 3.

<sup>188</sup> *ibid*.

<sup>189</sup> Reich (n 177) 4.

seen in relation to the Charter, '[t]he dividing line between "rules" and "principles" is not always easy to draw in practice'.<sup>190</sup> We have also noted the relationship between the general principles and fundamental rights, with the CJEU having recognised early on that respect for fundamental rights was one of the general principles of EU law. Having said that, '[w]hilst the fact that the Union should be bound by fundamental rights is not generally contested, the extent to which such fundamental rights might also permeate in the domestic legal systems is more controversial', particularly in relation to private law.<sup>191</sup>

The classification of fundamental rights protection as a general principle has now been codified in article 6(3) TFEU with the same provision granting constitutional status to the concept of general principles of EU law. Of course, the granting of constitutional status to the general principles as fundamental rights says nothing of their scope of application. Three possible scenarios have been suggested for the application of the general principles.<sup>192</sup> First, there is the question of the applicability of the general principles to acts of the EU institutions. This is the least controversial aspect as it has long been clear that the EU when acting as a regulator or administrative body must be bound by the general principles. Second, the general principles may be applicable to acts of the Member States while implementing EU law. Again, this application had been thought to be largely uncontroversial but, as we shall see, subsequent developments in the employment field have called this into question. Finally, the general principles as fundamental rights may apply when the matter falls within the scope of application of EU law. The latter has been particularly controversial as it has not always been apparent what precisely is meant by the 'scope of application'. A further complication is the question of whether the general principles can apply to private parties at all.

## **2. The application of the general principles to private parties**

The role of the general principles has largely been confined to the public sphere. It might have been thought that they were of no relevance to private parties. As we also saw with the Charter, this position has in recent years been called into doubt, although the question is far from resolved and remains controversial, as '[a]lthough traditionally the case law was reluctant to

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<sup>190</sup> *ibid* 5.

<sup>191</sup> Eleanor Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles' in Arnull and others (n 3) 199, 204.

<sup>192</sup> *ibid* 201–204.

accept that general principles of law bind individuals, recent cases suggest otherwise'.<sup>193</sup> The question of the applicability of the general principles to private parties can be divided into two issues. First, can the general principles be invoked in a dispute between two private parties, ie are they *capable* of being invoked? Second, there is the more normative argument as to whether the general principles, with their inherently vague nature, *should* be applicable to private disputes?

A further distinction must be made between incidental horizontal effect—notably through the interpretation of legislation and horizontal direct effect *tout court*, or true horizontal effect. The use of the general principles to guide the interpretation is now largely uncontroversial, or so it was thought. A number of particularly activist judgments from the CJEU have more recently called into question even this seemingly uncontroversial use of the general principles in the context of private parties.<sup>194</sup> This question is further complicated by a number of surrounding complex constitutional issues involving the sources of general principles and the scope of EU law.

In this regard, Spaventa has sought to distinguish between two situations in which the general principles may have horizontal effect. In the first instance, private parties may be able to invoke the general principles in a dispute involving a national rule which falls within the scope of the Treaty.<sup>195</sup> It is now beyond question that 'when a national rule falls within the scope of the Treaty, either because the rule is giving effect to one of its provisions or because it is limiting it, the national rule must also comply with the general principles of Union law, including fundamental rights'.<sup>196</sup> The same applies even in a dispute between private parties, as long as the Treaty provision in question is itself capable of direct effect. In addition, where a Treaty provision does apply horizontally—as is the case with the free movement rules—private parties have been allowed to invoke general principles to resist the application of such rules.<sup>197</sup>

The second scenario identified by Spaventa is where private parties seek to invoke general principles in a dispute involving a national rule falling within the scope of a Directive as opposed to the Treaty.<sup>198</sup> This is the very well-known and controversial *Mangold* situation, a

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<sup>193</sup> Takis Tridimas, 'Horizontal Effect of General Principles: Bold Rulings and Fine Distinctions' in Bernitz and others (n 30) 213.

<sup>194</sup> Case C-144/04 *Mangold*; Case C-555/07 *Kücükdeveci*.

<sup>195</sup> Spaventa (n 191) 206.

<sup>196</sup> *ibid.*

<sup>197</sup> *Viking* and *Laval* may be authority for this proposition, although it is far from clear whether general principles are in fact capable of true horizontal effect even when a directly effective Treaty provision is involved. See also Case C-101/08 *Audiolux* [2009].

<sup>198</sup> Spaventa (n 191) 207.

case in which the CJEU has been described as having assumed the horizontal effect of general principles without any real discussion.<sup>199</sup> A similar approach can also be seen in the more recent headscarf cases discussed above.

In *Mangold*, the CJEU found that Directive 2000/78 establishing a general framework on equal treatment did not lay down the principle of non-discrimination on the grounds of age.<sup>200</sup> Rather, the Directive was but a specific expression of the already-existing general principle of EU law. The CJEU adopted this novel and controversial approach owing to the fact that the deadline for the transposition of the Directive into national law had not yet expired and could not therefore be relied upon. Despite this, the CJEU still needed to find an element of EU law to latch on to, in order to bring the situation within the scope of Union law. In an example of adept judicial acrobatics, it did this by looking to Directive 1999/70 on the framework agreement on fixed term work.<sup>201</sup> This was sufficient to bring the issue within the scope of EU law which in turn triggered the application of the general principle.

This decision has been heavily criticised on a number of fronts. In the first instance, it has been noted that there is a paradox in that the CJEU argued that discrimination on the grounds of age is a general principle, which can be relied upon in the absence of the Directive, while at the same time going to great lengths to discuss the effects of the Directive. In other words, '[t]he role of the Framework Directive in activating the dormant general principle (...) is normatively unclear and methodologically unsound'.<sup>202</sup> In addition, it has been noted that given the CJEU appeared to treat the general principle's content as coterminous with the Directive, it may be that 'only those provisions of the Directive which can be said to reflect the pre-existing general principle can have horizontal effect'.<sup>203</sup> Despite the largely negative reaction<sup>203</sup> to this case, it was followed by the CJEU in *Kücükdeveci*.<sup>204</sup>

Although this line of case law comes close to confirming the horizontal direct effect of the general principles, the reality may not be as dramatic. Some authors have argued that far from representing 'true' horizontal effect, the CJEU 'merely instructed the national court not to apply the legislation breaching the general principle of Union law much in the same way as it would if a national rule had breached the free movement provisions', with the fact that the dispute happened to be between private parties being largely irrelevant.<sup>205</sup> In this respect, the

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<sup>199</sup> Tridimas, 'Horizontal Effect of General Principles' (n 193) 217.

<sup>200</sup> Directive 2000/78.

<sup>201</sup> Directive 1999/70.

<sup>202</sup> Tridimas, 'Horizontal Effect of General Principles' (n 193) 218.

<sup>203</sup> *ibid.*

<sup>204</sup> Case C-555/07 *Kücükdeveci*.

<sup>205</sup> Spaventa (n 191) 209.

*Mangold* ruling may have further significant consequences in the employment context given that it may be authority for the fact that it is not possible for the parties to contract out of a general principle as a fundamental right. As Spaventa remarks, ‘[r]egardless of any spillover effect on the contractual relationship between private parties, such application of Union law does not amount to horizontal effect’.<sup>206</sup> Nevertheless, it is this spillover effect that is of most concern to employers. Fine distinctions between horizontality or lack thereof are unlikely to be of interest to employers where the very practical effect on their ability to contract according to their own wishes is affected either way. It is perhaps for all practical purposes, a distinction without a difference.

In similar terms, Dougan has described the CJEU’s use of the general principle as a basis to ‘meddle in the contractual freedom of two parties’ but suggests that the decision may not have gone as far as had been thought. Rather, there is:

an easy, though unfortunate confusion between the question of whether Union law which creates (public law) duties for the Member States can also be invoked collaterally during the course of horizontal proceedings between two private parties and the issue of whether Union law instead imposes (private law) obligations directly upon an individual which may be apt for enforcement in litigation before the national courts.<sup>207</sup>

In this respect, it is suggested that the discrimination in *Mangold* did not derive from the exercise of contractual autonomy but rather had a clear public law basis. I am not so convinced. Although it was, of course, the case that the German legislation in question permitted employers to impose fixed term contracts on employees over the age of 52, it did not require it. The employer clearly exercised this choice in the present case.

In any case, arguments as to the precise scope of *Mangold/Küçükdeveci* may have become less relevant in the wake of the *Dominguez* case, again in the employment context. In that case, AG Trstenjak addressed the difficulties in infusing secondary and primary sources (Directives and general principles). She set out three alternative approaches. The first approach was to note that the Charter, at article 31(2) also provides for the right to paid leave, ie it was a right and not merely a principle. However, article 51(1) of the Charter denies horizontal direct effect to its provisions. The second option was to invoke the right to paid leave as a general principle

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<sup>206</sup> *ibid.*

<sup>207</sup> Michael Dougan, ‘In Defence of *Mangold*?’ in Arnall and others (n 3) 219, 224.

as it clearly did pre-exist the WTD. The AG rejected such an approach as it could lead to inconsistency with the Charter.

The AG considered that the right to paid leave as a general principle lacked sufficient specificity to be applied horizontally ie it was a principle and not a right. In that regard, the ‘[a]pplication of a general principle against a private party should depend on whether it grants a “subjective right” and whether it is “substantively unconditional and sufficiently precise”’.<sup>208</sup> Finally, the third potential solution contained in the *Mangold/Küçükdeveci* approach was considered. In other words, was the right to paid annual leave contained in the WTD a mere specific expression of a pre-existing general principle? This last approach was also rejected in that it risked mixing the sources of law and lacked certainty and as such ‘[i]ndividuals could not be certain if the source of a right provided in a directive could be an unwritten general principle with enhanced status and effects which would trump the specific provisions of the directive’.<sup>209</sup> Again, the AG was swayed by concerns as to allowing litigants to avoid the Charter’s lack of horizontality. As we have already seen, however, the CJEU in *Küçükdeveci* was entirely unconcerned about the Charter and instead relied directly on *Mangold*.<sup>210</sup>

The CJEU in its subsequent judgment in *Dominguez* demonstrated that it is not always receptive to fundamental rights arguments in the context of disputes between private parties. In this case, the CJEU was asked to interpret article 7(1) of the WTD which provides for an entitlement to paid annual leave. Essentially, the question at issue was whether such entitlements could be made conditional on having worked a certain number of days during a reference period. The CJEU, in contrast to the extensive analysis adopted by the AG, applied neither the general principles nor the Charter and in the absence of the horizontal direct effect of Directives, the employee was left without a remedy. Leczykiewicz remarks that this case ‘constitutes (...) an indication of the Court’s caution in using fundamental rights to review individual contracts’.<sup>211</sup>

In any event, in *Audiolux*, AG Trstenjak refuted the idea that a general principle (in this case a guarantee of equal treatment for minority shareholders) could apply to private parties.<sup>212</sup> However, the CJEU agreed that there was no such general principle and so avoided the question of its applicability to a private party. Therefore, there is ‘no authority to suggest that

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<sup>208</sup> Dorota Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’ (2013) 38 ELRev 479, 481.

<sup>209</sup> Tridimas, ‘Horizontal Effect of General Principles’ (n 193) 226.

<sup>210</sup> *ibid* 227.

<sup>211</sup> Dorota Leczykiewicz, ‘Horizontal Effect of Fundamental Rights’ (n 62) 167.

<sup>212</sup> Case C-101/08 *Audiolux*.

the application of fundamental rights as general principles in cases falling within the scope of Union law by virtue of a directive can be invoked against a private party beyond the “exclusionary” effects endorsed by the *Mangold* case law’.<sup>213</sup>

It has further been argued that the inherently constitutional or administrative nature of the general principles renders inappropriate their application to the activities of private parties.<sup>214</sup> The above discussion shows that at least to some extent, the notion that the general principles are irrelevant in the private sphere has been dispelled. Furthermore, various attempts to draw artificial distinctions between those general principles of constitutional relevance and those principles of ‘civil’ law have largely failed. Taking a step back from the above controversy, what is the justification for allowing or indeed prohibiting the horizontal applications of the general principles?

As Tridimas notes, the reality is that cases of true horizontality are always going to be extremely rare, but it may be justified on a number of grounds:

[i]t may be necessitated on functional grounds where a private entity exercises de facto public power (...) It may be justified because of the value that the principles incorporates. It may be said (...) that the prohibition of discrimination [is] of such constitutional value that they should trump the principle of private autonomy (...) Finally, horizontality may be dictated by the objectives and the effectiveness of a principle.<sup>215</sup>

What is particularly remarkable about the above is that many of the justifications for the use of the general principles in the private sphere actually have a public law connection. We can see for example, the idea that a private body exercising public power should be controlled by the general principles. We can also see the suggestion that some general principles are of a particularly important constitutional nature that they need to be protected in all spheres. In addition, there is the idea of the effectiveness of a principle, which is a rather circular example in that effectiveness is in itself a general principle of EU law. Interestingly, Leczykiewicz further notes, however, that the general principle of legal certainty, mentioned above has been ‘providing the first bulwark against the encroachment of horizontal private transactions by publicly-focused EU goals’.<sup>216</sup> Although, she also goes on to note that ‘fundamental rights

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<sup>213</sup> Spaventa (n 191) 213.

<sup>214</sup> Michael Dougan, ‘The General Principles of EU Law and Private Relationships’ in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 71, 74.

<sup>215</sup> Tridimas, ‘Horizontal Effect of General Principles’ (n 193) 215.

<sup>216</sup> Leczykiewicz, ‘Horizontal Effect of Fundamental Rights’ (n 62) 172.

offer private parties a more concrete and entrenched mechanism of resisting regulatory effects of national and EU law'.<sup>217</sup> Having set out the nature, sources and roles of the general principles, we must now turn to the question of their relationship with the Charter.

### 3. The relationship between the general principles and the Charter

Having set out the function of general principles and their applicability to private parties, we must now turn to the vexed question of the relationship between the general principles and the Charter. Determining the precise nature of this relationship may become essential to resolving the issues raised in *Alemo-Herron*. In other words, what is the relationship between freedom of contract as a general principle and freedom of contract as a fundamental right in article 16 of the Charter?

Both the general principles and the Charter are now explicitly granted constitutional status in article 6 TEU but this provision says little about the relationship between the various sources of EU fundamental rights. It will be recalled from the opening chapter of this thesis that the Charter was merely intended to codify or render more visible *existing* EU fundamental rights. This then begs the question of whether the Charter was intended to replace the general principles or whether the two sources are co-terminous and mutually dependent.

Most commentators agree that the CJEU's primary point of reference is and should now be the Charter, but this may be to overlook the fact that the general principles themselves have been explicitly recognised in the constitutional text, although whether this grants constitutional status to their content remains unresolved. Nevertheless, the CJEU's case law itself confirms that the Charter will be its primary point of reference. This is precisely what happened in *Alemo-Herron*, in which the CJEU completely overlooked its existing jurisprudence on contractual autonomy as a general principle. Given the lack of explicit reasoning in this and other judgments in which the Charter has been granted priority, it is perhaps the case that the CJEU merely uses the Charter as a starting point from a purely practical perspective. In any case, the Charter's provisions which are often indeterminate in themselves will continue to be informed by the general principles. In most cases, therefore, the general principles will 'be used to influence and morph the interpretation of the Charter rather than establish autonomous, self-standing rights'.<sup>218</sup>

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<sup>217</sup> *ibid.*

<sup>218</sup> *ibid* 378.

Furthermore, the general principles will continue to have a role outside the Charter, serving to fill lacunae in the law, promoting consistent interpretation and the development of a *ius communae*.<sup>219</sup> Finally, the CJEU confirmed in *Fransson* that both the general principles and the Charter enjoy the same scope of application, namely they apply to the Member States when acting within the scope of EU law, as opposed to merely implementing it. This approach may also have particular relevance post-Brexit given that the general principles will continue to apply, albeit in a reduced form.<sup>220</sup>

The interdependence between the general principles and the Charter is further borne out by the fact that the Charter itself may become a source of general principles. As Lenaerts and Gutiérrez-Fons note, by ‘rendering rights visible and by merging and systematising in a single document the sources of inspiration scattered in various national and international legal instruments, the Charter brings clarity for both citizens and national courts as to how fundamental rights are protected at the EU level’.<sup>221</sup> This resolves the argument raised in *Mangold* that non-discrimination on the grounds of age was not recognised by the national constitutions and so could not be a general principle of EU law. Reich considers that the ‘interpretative and review function of principles has therefore been expressly recognised by the Charter; principles may not be placed on the highest level in the hierarchy of constitutional norms, but they are still of constitutional relevance’.<sup>222</sup>

Essentially, it remains an open question as to whether the Charter was intended to act as a ceiling on the general principles if a right is covered by both. It may well be that the Charter’s provisions will ‘in the future entirely displace the general principles of Union law as the primary reference point [in this case referring to the *Mangold* jurisprudence](...) or it might be that the case law develops through some more complex combination of the general principles and the Charter’.<sup>223</sup> In summary, ‘by design Article 6 TEU recognises multiple sources of fundamental rights which are complementary and mutually reinforcing’.<sup>224</sup> The result is a rather confused relationship, a *mélange* rather than a strict hierarchy. What are the consequences of this heady mix for freedom of contract as both a general principle and as a fundamental right as expressed in the Charter? Has article 16 now colonised the field of contractual autonomy or is it possible to return to the independence of the general principles?

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<sup>219</sup> *ibid* 379.

<sup>220</sup> Case C-617/10 *Åkerberg Fransson*.

<sup>221</sup> Lenaerts and Gutiérrez-Fons (n 183) 184–5.

<sup>222</sup> Reich (n 177) 8.

<sup>223</sup> Dougan, ‘In Defence of *Mangold*?’ (n 207) 223.

<sup>224</sup> Tridimas, ‘General Principles’ (n 175) 379.

#### 4. Freedom of contract as a general principle

As mentioned, one of the criticisms levelled at the CJEU's decision in *Alemo-Herron* is that it marked a significant and unexplained departure from the general principle of contractual autonomy. It will therefore be interesting to contrast the CJEU's position on freedom of contract as a general principle with its conception of freedom of contract as a fundamental right. Can it really be said that *Alemo-Herron* marks a significant shift, or does it merely represent another step on a long journey towards a strong notion of contractual autonomy? It will be recalled that freedom of contract as a general principle of EU law has always been rather limited, particularly in the face of competing social rights. This section further unpacks the nature of contractual autonomy as a general principle before contrasting it with freedom of contract as a fundamental Charter right.

It is possible to discern a number of criteria from the case law which must be considered when examining the validity of legislative restrictions on commercial autonomy as a general principle: (a) commercial autonomy itself is not absolute but must be considered in relation to its social function; (b) the restrictions must be proportionate; (c) in the public interest; and (d) must not impair the very substance of the freedom. This rather simple formula belies a complex analysis, which is not at all apparent from a reading of the CJEU's judgments on this issue. What is meant by the social function of a right to pursue a commercial or economic activity? How is the public interest determined? What is meant by the core or substance of commercial freedom? These questions will be thrown into even sharper focus when we realise that no such limitations have been explicitly imposed on the specific freedom of contract as a general principle.

##### 4.1. *The social function of commercial freedom*

As can be seen from the above, the CJEU has consistently held that the right to pursue a commercial or economic activity is not absolute, but must rather be considered in relation to its 'social function'. In the first instance, what is meant by a social function? Does commercial or economic freedom have such a social function (the CJEU clearly thinks it does)? What does it mean to be considered *in relation* to this social function?

Despite the CJEU's apparent glossing over of the term in its judgments, the concept of the social function of property hides a controversial and far from universally accepted notion of

the limits to be placed on property rights. In their introduction to a symposium on the issue, Foster and Bonilla remark that ‘the classical liberal conception of property dominates the modern legal and political imagination. The idea that property is a subjective and nearly absolute right controls the way in which most of the modern law and politics understands this institution (...) It is common for citizens, politicians and academics to view property as an individual right that is limited only by the rights of others and the public interest’.<sup>225</sup>

An alternative to this liberal conception of property rights was put forward by the French jurist, León Duguit who argued that property is not a right but rather a social function. According to this view, ‘property has internal limits—not just external ones as in the case of the liberal right to property’.<sup>226</sup> Duguit posits three challenges to the liberal conception of property rights. The first of these is his contestation of the existence of an isolated individual, the supposition from which liberal property rights depart. Second, he argues that even if such an isolated individual did exist, such a conception is inconsistent with the right to property given that if ‘people live separately from other members of society, it does not make sense to speak of a right that imposes negative duties on third parties’.<sup>227</sup> Finally, Duguit challenges the classical notion that property exists solely to serve individual interests, a notion which ‘obscures the connections between the economic needs of the community and the wealth that is recognized and protected through the institution we know as property. It should also serve the community’.<sup>228</sup>

Even from this superficial consideration of the theory of a social function of property, it emerges that it is far from uncontested. It is also unclear whether this is the theory the CJEU had in mind when it proclaimed that property and business rights must be considered in relation to their social function. Such an absence is regrettable. If this was indeed the CJEU’s intention, then its explanations for finding that such a conception of property rights exists at an EU level is far from satisfactory. In any case, labour lawyers in particular should be satisfied with the result. Property rights and commercial freedoms are not absolute, but have an internal social function, which limit the freedom to manoeuvre available to the holders of such rights.

If this is indeed the case, then the CJEU’s decision in *Alemo-Herron* is all the more troubling. In that case, not only did the CJEU fail to consider the competing social goals which might limit the freedom of contract as a fundamental right, but it also manifestly ignored the potential

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<sup>225</sup> Sheila R Foster and Daniel Bonilla, ‘Symposium on the Social Function of Property: A Comparative Law Perspective’ (2011) 80 Fordham L Rev 101.

<sup>226</sup> León Duguit, *Las Transformaciones Del Derecho Público Y Privado* (Editorial Heliasta 1975) 179.

<sup>227</sup> *ibid* 178.

<sup>228</sup> *ibid* 237.

internal limitations on this freedom, in the form of its social functions, a conception of property rights it apparently subscribed to not long ago. The absence of a considered position on the part of the CJEU is to be regretted in both cases.

As alluded to above, the liberal conception of property rights did recognise that there were potential limits on such rights in the form of competing rights of others, or the public interest. Given the reluctance of the CJEU to even consider potentially competing rights in *Alemo-Herron*, can it be said that the CJEU has also now rejected a liberal conception of business freedom? If so, the lacuna in its reasoning is even greater. That is not to say that the social function theory is entirely incompatible with a liberal theory of property rights as it ‘is a concept with much plasticity. The idea that property owners owe affirmative obligations to the welfare of others, and to societal welfare more generally, can map onto a number of different ideological orientations, including classical liberalism’.<sup>229</sup>

This confusion in relation to the right to pursue a commercial or economic activity is thrown into even sharper focus when we consider that the case law on freedom of contract as a general principle makes no mention whatsoever of that right being restricted by any social function. Indeed, in those cases, the CJEU gave no indication as to the permissible limits on contractual autonomy. As we have already seen, in *Spain*, the CJEU merely held that ‘the right of parties to amend contracts concluded by them is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of [Union] rules imposing specific restrictions in that regard’.<sup>230</sup> The CJEU went on to note that ‘provided that the purpose of the contractual amendment is not contrary to the objective pursued by the applicable [Union] rules and does not involve any risk of fraud, such an amendment cannot be regarded as unlawful’.<sup>231</sup> In this case, the CJEU tacitly accepts the possibility of limiting the principle of contractual autonomy but provides only fraudulent activity and the Union’s objectives as specific examples of such limitations. In the second case involving contractual autonomy as a general principle, *Sukkerfabriken*, the CJEU is equally reticent. In that case, the CJEU held that the legislation in question provided no rules ‘on the prescribed procedure, the forms of the competent authorities for the action contemplated, such as would be expected if a restriction were to be placed upon freedom of contract’.<sup>232</sup>

#### 4.2. Proportionality

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<sup>229</sup> Foster and Bonilla (n 225) 107.

<sup>230</sup> Case C-240/97 *Spain* para 99.

<sup>231</sup> *ibid* para 100.

<sup>232</sup> Case C-151/78 *Sukkerfabriken* para 20.

It has been remarked that the need to balance competing interests in this context is somewhat self-evident, but the assessment of the proportionality of the imposed limitations on private freedoms became crucial in the case law.<sup>233</sup> In *Hauer*, the CJEU took as its starting point, that restrictions on the right to property on public interest grounds were lawful under both the ECHR and national constitutions. Following this initial step of holding that the restrictions could prima facie be justified, the CJEU turned to the examination of whether the restrictions were, in fact, proportionate:

[i]t is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives in the general interest pursued by the [Union] or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging on the very substance of the right to property.<sup>234</sup>

Albors-Llorens has described this as a ‘three-tiered formula’ which ‘incarnated a very high threshold for full review: only disproportionate and intolerable restrictions that affected the very essence of the right could be found incompatible with EU law’.<sup>235</sup> Subsequent case law has demonstrated that not only had the CJEU adopted a deferential approach to the EU legislature, but also that ‘the invalidity or annulment of a general measure would only follow in extreme cases of breach of an economic right or a general principle of law’.<sup>236</sup>

In *Alliance for Natural Health*, the CJEU held that ‘the [Union] legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue’.<sup>237</sup> Furthermore, there must be ‘no alternative measure suitable for achieving that objective’ which may impair the freedom to a lesser extent.

In other cases on business freedom as a general principle, the proportionality hurdle has been equally easily met.<sup>238</sup> Of course, these cases are no more than a restatement of the CJEU’s settled case law on proportionality which is itself a general principle of EU law.<sup>239</sup> In the first

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<sup>233</sup> Albertina Albors-Llorens (n 3) 250.

<sup>234</sup> Case C-44/79 *Hauer* para 23.

<sup>235</sup> Albors-Llorens (n 3) 250.

<sup>236</sup> *ibid.*

<sup>237</sup> Joined Cases C-154/04 and C-155/04 *Alliance* para 52.

<sup>238</sup> Case C-230/78 *Eridania*; Case C-200/96 *Metronome* para 26; Case C-265/87 *Schröder* para 24.

<sup>239</sup> Case C-233/94 *Germany* para 54.

*Bananas* judgment<sup>240</sup> the court ‘gave very little weight to the actual impact that the measure had on the traders, again dismissing arguments of lack of proportionality on the basis that the institution has a broad discretion to act in the field’.<sup>241</sup> Without doubt, proportionality is not a panacea to ensure the protection of the general interest.

#### 4.3. *In the public interest*

It emerges from the above case law that the CJEU takes a wide approach to defining the public interest in cases of restrictions on the right to pursue a commercial or economic activity. Justifications found to be in the public interest include the protection of human health,<sup>242</sup> the satisfactory organisation of the wine market,<sup>243</sup> preventing an over-production of milk,<sup>244</sup> the control of inland waterway transport,<sup>245</sup> the efficient operation of a levy scheme,<sup>246</sup> road safety<sup>247</sup> and the indication of geographical origins of wines.<sup>248</sup>

#### 4.4. *Must not affect the core or substance of commercial freedoms*

This is one of the most important aspects of the CJEU’s formula, and yet it is one of the most difficult to ascertain. What is meant by the ‘core’ or ‘substance’ of a fundamental right, and the right to business freedom more specifically? Perhaps understandably, the CJEU does not give a definitive answer to this difficult question which is essentially fact specific. From the case law on the general principle, it can be seen that the CJEU has consistently found that the essence or core of commercial autonomy has been left untouched. The case law is remarkable for the ease with which the CJEU finds certain measures, which on their face appear to heavily interfere with business freedoms, are compatible with those very freedoms. The CJEU has found for example that a prohibition on the marketing of a certain product was compatible with freedom to pursue an economic activity,<sup>249</sup> restricting third country imports of bananas,<sup>250</sup> the requirement to pay a levy,<sup>251</sup> interference with the employment conditions of the self-

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<sup>240</sup> Case C-280/93 *Germany*.

<sup>241</sup> *Albors-Llorens* (n 3) 252.

<sup>242</sup> Case C-210/03 *Swedish*.

<sup>243</sup> Case C-44/79 *Hauer*.

<sup>244</sup> Case C-177/90 *Kühn*.

<sup>245</sup> Joined Cases C-248/95 and C-249/95 *Schiffart*.

<sup>246</sup> Case C-265/87 *Schröder*.

<sup>247</sup> Joined Cases C-184/02 and C-223/02 *Spain and Finland*.

<sup>248</sup> Case C-306/93 *Winzersekt*.

<sup>249</sup> Joined Cases C-154/04 and C-155/04 *Alliance* para 128; Case C-210/03 *Swedish* para 73.

<sup>250</sup> Case C-280/93 *Germany* para 87.

<sup>251</sup> Case 265/87 *Schröder* para 18.

employed,<sup>252</sup> and the regulation of the use of geographical designations for food and drink products.<sup>253</sup>

What can be taken from these cases is that restrictions on the right to pursue a commercial activity are usually found to be justified despite the often severe financial impact they have on the holders of that right. The CJEU is quick to dismiss arguments based on economic freedoms, often briefly noting that ‘such a requirement has, after all, only a marginal effect upon the taxable person’s freedom to pursue an occupation’, ‘since those provisions affect only the arrangements governing the exercise of that right and do not jeopardize its very existence’, ‘they do not affect the possibility for the operators in question to engage in the production of products’. The CJEU sees such interference as restricting the modalities of the exercise of commercial autonomy as opposed to interference with the right itself, although this is a difficult distinction to maintain. Yet again, the cases dealing with freedom of contract specifically make no mention of any need to respect the core or substance of the freedom. Taking the case law as a whole, however, it may be that there is an implicit social function in both freedom to conduct a business and contractual autonomy, given the CJEU’s recognition of restrictions on those principles. Now that we have a clearer idea of the content of business freedom and freedom of contract as general principles, we can attempt to assess *Alemo-Herron*’s consistency with those principles.

##### **5. *Alemo-Herron*’s consistency with freedom of contract as a general principle**

Where does *Alemo-Herron* fit into the scheme of commercial rights and contractual autonomy as general principles? Is it really a radical departure as certain commentators have suggested or is it merely the next step in a long line of evolving case law? We have already seen that reliance on fundamental rights as general principles has long been uncontroversial. In this respect, *Alemo-Herron* presents no difficulties. Prassl notes, however, that although freedom of contract as a general principle of EU law has also long been recognised, it is the aggressive interpretation of article 16 which represents a break with established general principles.<sup>254</sup>

On a rather superficial level, it is true that *Alemo-Herron* distinguishes itself from most of the cases on the general principles in that the freedom of contract arguments in that case actually

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<sup>252</sup> Joined Cases C-184/02 and C-223/02 *Spain and Finland* para 53.

<sup>253</sup> Case C-306/93 *Winzersekt* para 24.

<sup>254</sup> Jeremias Prassl, ‘Business Freedoms and Employment Rights’ (n 174) 189.

succeeded. On a more substantive level, how different was the CJEU's approach in *Alemo-Herron* to that adopted in the cases on the general principle?

The relationship between *Alemo-Herron* and freedom of contract as a general principle must also be viewed through the intermediary of the earlier case law on article 16 set out above, but we start with *Alemo-Herron*'s relationship to the general principle on freedom to pursue economic activity and contractual autonomy. As seen from the above case law, there are a number of elements to the CJEU's assessment of commercial autonomy as a general principle. It is now proposed to contrast the approach of the CJEU in *Alemo-Herron* to each of these elements in turn.

### 5.1. *The social function of commercial freedom*

We have already seen from the case law on the freedom to conduct a business as a general principle that the concept is consistently held to be limited by its social function. Interestingly, this formulation has been entirely left out of *Alemo-Herron*. Indeed, no mention of the general principle is made in the Court's judgment, although the AG does refer to it. At a first glance this appears to mark a departure from the general principle. However, the case which is said to represent the modern statement of freedom to conduct a business as a general principle, *Zuckerfabrik*<sup>255</sup> also makes no mention of that freedom having any social function. Tellingly, this is one of the cases relied on by the AG in *Alemo-Herron*.

Again, as mentioned above, a subtle distinction emerges between the case law on general commercial freedom as a general principle and the specific freedom of contract as a general principle. Cases such as *Nold* and *Hauer* make explicit reference to the social function of commercial freedoms:

[i]n the same way as the right to property, the right of freedom to pursue trade or professional activities, far from constituting an unfettered prerogative, must be viewed in the light of the social function of the activities protected thereunder.<sup>256</sup>

However, the cases dealing specifically with freedom of contract, such as *Sukkerfabriken* and *Spain* do not. Nor is there any reference in those cases to either *Nold* or *Hauer* from which an implicit restriction on contractual autonomy based on its social function could be inferred. Rather, there is simply no assertion that contractual autonomy is not absolute. Having said that, there is a recognition in *Spain* that limitations on contractual autonomy are possible, with

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<sup>255</sup> C-143/88 and C-92/89 *Zuckerfabrik*.

<sup>256</sup> Case C-44/79 *Hauer* para 7; Case C-4/73 *Nold* para 14.

the CJEU observing that ‘the right of parties to amend contracts (...) is based on the principle of contractual freedom and cannot, therefore, be limited in the absence of [Union] rules imposing specific restrictions in that regard’.<sup>257</sup> Of course, this says nothing of the permissible extent of such limitations.

In *Sukkerfabriken*, the CJEU noted that if the Union were to restrict contractual autonomy it would need to set out the prescribed procedure and the forms or the competent authorities for the action contemplated’.<sup>258</sup> It is not quite obvious how this holding should be read. On the one hand, the CJEU may have been saying that freedom of contract can be easily limited by simply setting out a clear procedure for such limitation. On the other hand, it may be interpreted as holding that only a detailed explanation of the process and institutions involved in restricting contractual autonomy can ever justify its limitation. Either way, the case law on contractual autonomy as a general principle provides neither a strong basis for the existence of the concept nor for the Union’s ability to restrict it. Perhaps it really is a stretch therefore to say that *Alemo-Herron* marks a major departure from this case law on freedom of contract as a general principle.

Other commentators have remarked that similar limitations to those placed on the commercial activity general principle should apply *mutatis mutandis* to freedom of contract.<sup>259</sup> Prassl notes that ‘[a]s regards the content of that principle, first (...) it is very difficult to see how this could be imbued with a consistent meaning as an autonomous concept in Union law—not least given the many divergent meanings hiding behind a beguiling simple term. Even a brief survey of the case law cited in the [Charter] guidance illustrates, second, that the principle was always recognised subject to abrogation by legislation or other rules’.<sup>260</sup> This is certainly true and, as mentioned above, the case law on freedom of contract as a general principle does recognise (however tentatively) that this principle can be limited. It does not, however, provide any useful guidance as to the extent of such limits nor does it introduce the concept of a social function. The absence of any reference to earlier case law on commercial freedoms in the contractual autonomy jurisprudence, combined with the omission of the social function proviso, remains unexplained.

## 5.2. Proportionality

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<sup>257</sup> Case C-240/97 *Spain* para 99.

<sup>258</sup> Case C-151/78 *Sukkerfabriken* para 20.

<sup>259</sup> Prassl, ‘Business Freedoms’ (n 174) 197.

<sup>260</sup> *ibid.*

It will be recalled that in its jurisprudence on the freedom to pursue a commercial or economic activity as a general principle, the CJEU took as its starting point that restrictions on that right were prima facie lawful. In *Alemo-Herron*, the CJEU reversed this starting point, requiring justification for restricting business freedom from the outset, noting that ‘[i]n such a situation, such a clause is liable to undermine the fair balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other (...) the interpretation of Article 3 of Directive 2001/23 must in any event comply with Article 16 of the Charter, laying down the freedom to conduct a business’.<sup>261</sup>

What we learn from the case law on the right to pursue a commercial activity is that the CJEU tends to grant a wide margin of discretion to the Union legislature, particularly in fields involving complex and sensitive social, political and economic choices.<sup>262</sup> No such discretion is granted to the Member States in *Alemo-Herron*. In fact, in that case, the CJEU showed insensitivity towards the domestic labour traditions of the United Kingdom. This is all the more remarkable when we consider that article 8 TUD grants a certain leeway to Member States to introduce measures which are more protective of employees. Of course, such measures cannot undermine the purpose of the legislation, which is, in itself, contested. In addition, and as the CJEU held, the TUD ‘cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business’.<sup>263</sup>

One major difference between *Alemo-Herron* and the general principle case law is the nature of the measure being challenged. In the former, it was the implementation of a directive by a Member State and therefore the interpretation of that directive that was being challenged. With the latter, the general measure itself (directives, regulations) were being challenged as incompatible with freedom to pursue economic or commercial activity. Should this make a difference? The CJEU seems willing to grant a wider margin of discretion to the Union when acting in sensitive areas than it is to the Member States.

Another point of note is that in its earlier case law, the CJEU showed little concern for the actual impact of a measure on the traders’ business freedoms.<sup>264</sup> Again, this was largely based on the fact that the EU institutions need a broad discretion to act. In *Alemo-Herron* on the other hand, the CJEU shows greater concern for the effect of the interpretation of the TUD on

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<sup>261</sup> Case C-426/11 *Alemo-Herron* paras 29, 31.

<sup>262</sup> Joined Cases C-154/04 and C-155/04 *Alliance*.

<sup>263</sup> Case C-426/11 *Alemo-Herron* para 36.

<sup>264</sup> Case C-280/93 Germany.

individual traders, holding that ‘a dynamic clause referring to collective agreements negotiated and agreed after the date of transfer of the undertaking concerned that are intended to regulate changes in working conditions in the public sector is liable to limit considerably the room for manoeuvre necessary for a private transferee to make such adjustments and changes’.<sup>265</sup> The CJEU fails to set out precisely what this impact would be. Once again, we should look to the case law on freedom of contract as a general principle. In *Sukkerfabriken* and *Spain* the CJEU does not deal with the proportionality issue at all.

### 5.3. *In the public interest*

Again, it will be recalled that in its case law on commercial freedom as a general principle, the CJEU takes a wide approach to this issue, with relatively mundane restrictions of commercial autonomy being held to be in the public interest. In *Alemo-Herron*, there is no mention of a wider public interest. Admittedly, given the context, there is a discussion of the interests of employees and therefore implicitly the interests of society in regulating the employment relationship. It is on this point that *Alemo-Herron* does indeed depart from the case law on business freedom as a general principle. In this case, the CJEU treats the interests of employers and employees as being on the same level, attaching no particular weight to the public interest and remarking that:

Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.<sup>266</sup>

Again, however, if we look to the case law on *contractual autonomy* as a general principle there is no explicit mention of the public or general interest. *Spain* refers to the Union financial interest<sup>267</sup> whereas *Sukkerfabriken* speaks of the objectives of the common organisation of the market.<sup>268</sup>

### 5.4. *Must not affect the core or substance of commercial freedoms*

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<sup>265</sup> Case C-426/11 *Alemo-Herron* para 28.

<sup>266</sup> *ibid* para 25.

<sup>267</sup> *ibid* para 37.

<sup>268</sup> Case C-151/78 *Sukkerfabriken* recitals.

This is perhaps the most difficult point on which to draw a clear comparison between the general principle and the fundamental right. As we have seen, there is a difficult distinction drawn in the case law between the exercise of a right and the substance of that right. This already tentative distinction is simply no longer tenable following *Alemo-Herron*. In that case, the CJEU held that what appeared on its face merely to be an issue of how the right was exercised turned out to affect the very core or essence of that right.

The CJEU held that the Directive, whilst permitting Member States to grant higher protection to employees, ‘cannot be interpreted as entitling the Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee’s freedom to conduct a business’.<sup>269</sup> Interestingly, the AG makes no specific mention of the essence or core of freedom to conduct a business. Instead he notes that ‘although the United Kingdom may permit the parties to include dynamic clauses referring to collective agreements in their contracts of employment, this must not result in conduct contrary to the fundamental rights referred to in the Charter, including the freedom to conduct a business mentioned in Article 16’.<sup>270</sup> The reason for this rather bald statement stems from the AG’s assertion that ‘the case-law has not, in fact, provided a full and useful definition of this freedom. The judgments in which the Court has had occasion to rule in this area have gone no further than either referring to the right to property or simply citing the provisions of Article 16 of the Charter’.<sup>271</sup> What is discernible from the case law and the Explanations to the Charter is that ‘the freedom to conduct a business acts as a limit on the actions of the Union in its legislative and executive role as well as on the actions of the Member States in their application of European Union law’.<sup>272</sup>

The intermediary between freedom of contract as a general principle and *Alemo-Herron* is a raft of earlier case law on article 16. As already demonstrated, the freedom to conduct a business has largely been reserved for extreme cases, with its primary function being as a counterweight to other fundamental rights.<sup>273</sup> What we can take from the early case law on article 16 is that it very much reflects the case law on commercial freedom as a general principle, including the inconsistency in that case law. Some cases refer to the social function of commercial freedom. Others omit such a reference but nevertheless restrict the freedom through the proportionality principle. With the exception of *Scarlet Extended*, commercial

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<sup>269</sup> Case C-426/11 *Alemo-Herron* para 36.

<sup>270</sup> AG opinion in Case C-426/11 *Alemo-Herron* para 47.

<sup>271</sup> *ibid* para 49.

<sup>272</sup> *ibid* para 50.

<sup>273</sup> Oliver (n 30) 299.

activity arguments were defeated in all cases. In this respect, *Alemo-Herron* is indeed inconsistent with freedom to pursue a commercial activity as a general principle as well as the early case law on article 16 but it is not inconsistent with the case law on freedom of contract as a general principle. The question then arises as to whether *Alemo-Herron*, in departing from the general principles, represents a new interpretation of business freedoms or whether indeed it is just an isolated case to be ignored. If this is indeed the case, is a return to the general principles possible or even desirable?

As already mentioned, most commentators agree that the Charter should now become the CJEU's primary point of reference for fundamental rights. Furthermore, the general principles will continue to fill the lacunae in the Charter's provisions. It is certainly difficult to think of a more laconic Charter provision than article 16. Despite this, Oliver argues that 'Article 16 seamlessly replaced the pre-existing fundamental right to conduct a business which had existed as a general principle of Union law'.<sup>274</sup> For him, no purpose could be served by allowing the general principle to subsist alongside article 16 if the two were identical and even if they were not 'what would be the point in maintaining in existence two overlapping but slightly different fundamental rights?'.<sup>275</sup>

Oliver further argued that article 16's open-ended wording leaves it sufficiently flexible to accommodate the pre-existing general principle.<sup>276</sup> In the same breath, he points out the uncertainty that would follow if two similar, but discrete fundamental rights existed. With respect, it is difficult to square the open-ended and flexible nature of article 16 with the need for legal certainty. Oliver continues that 'in the absence of a clear ruling from the Court on this point, we shall proceed on the basis that, with the entry into force of the Treaty of Lisbon, the general principle first recognized by the Court in *Nold* has purely and simply been replaced by Article 16 of the Charter'.<sup>277</sup> This somewhat contradicts his earlier view that the general principle will continue its gap filling function if there are difficulties in interpreting the Charter.<sup>278</sup> Oliver then contends that 'in its recent judgments on Article 16, the Court continues to refer to its pre-Lisbon case law, which also suggests that this provision has taken over the mantle of the general principle'.<sup>279</sup> As already discussed, however, this is not entirely true. The

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<sup>274</sup> *ibid* 283.

<sup>275</sup> *ibid*.

<sup>276</sup> *ibid*.

<sup>277</sup> *ibid* 285.

<sup>278</sup> *ibid* 284.

<sup>279</sup> *ibid*.

CJEU continues to adopt a pick and choose approach, sometimes referring to earlier case law on the general principles and sometimes ignoring it entirely.

Finally, Oliver remarks that ‘the relatively weak language of Article 16 reflects the pre-existing case law on the right to conduct a business. In addition, this language reflects the drafting history of Article 16 which was introduced as a counterweight to (...) the social rights (...) the intention was to give Article 16 the same weight as those social rights’.<sup>280</sup> Prior to *Alemo-Herron*, it was expected that the Charter would take up where the general principles had left off, with article 16 being equally restricted. It was unforeseen that article 16 could have taken on a life of its own, departing from the existing case law. This has left litigants in the impossible position of knowing which line of case law to rely on. The negative reaction to *Alemo-Herron* demonstrates just how unpredicted this departure really was. On another level and as already stated, the pre-existing case law on the general principle, particularly those cases dealing with contractual autonomy was never entirely consistent in its approach to limiting business freedom. The real surprise is that in *Alemo-Herron* article 16 won the day, although *Scarlet Extended* was precedent even for this.

## 6. Conclusion

This chapter has shown that article 16, which contains the freedom of contract as a fundamental right, has had a much more radical effect than the Employment Rights found in the Solidarity Title of the Charter. We started by exploring the notion of contractual autonomy as both a general principle and fundamental right in EU law. It was shown that freedom of contract was a weak general principle, easily giving way in the face of competing social considerations, although there may have been a slight divergence between freedom of contract and business freedom more generally, with the latter being more explicitly connected to the notion of a social function. The Charter, just like the general principles, does not contain any comprehensive statement of freedom of contract and again espouses a complex and unresolved relationship between contractual autonomy specifically and business or commercial freedom more generally. This has meant that, until recently, freedom of contract has continued to be a weak and limited fundamental right. The CJEU was quick to recognise the right but demonstrated a readiness to limit it. This changed following the more expansive approach to contractual autonomy set out in the case of *Alemo-Herron*. In some respects, this was

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<sup>280</sup> *ibid* 285.

unsurprising given that the TUD provided fertile ground for the further entrenchment of contractual autonomy principles. The problem with *Alemo-Herron* is not that article 16 was raised and applied but that it was given such an extensive reading. The Charter, as interpreted in *Alemo-Herron*, has had the effect of disrupting the CJEU's existing balanced approach to the recognition of business freedom and contractual autonomy as both general principles and in its early case law as fundamental rights. Highlighting these problems also allowed us to contrast article 16's subsequent use as a tool of interpretation and standard of review with the effects of article 31 on the same functions as set out in Chapter II. In the CJEU's subsequent use of article 16 it has continued to give mixed signals. Sometimes, article 16 is explicitly relied on while at other times, the CJEU overlooks it entirely or adopts an approach similar to the case law on the general principles. As a standard of review, the case law immediately following *Alemo-Herron* showed a continued commitment to contractual autonomy but this was followed by cases which demonstrate a softening of the CJEU's approach. In reality, there are probably too few cases to come to a definitive conclusion, but it is clear that article 16 in cases such as *Alemo-Herron*, *AGET* and *Achbita* has shown much more bite than its Employment Rights counterparts.

It was then questioned whether a return to freedom of contract as a general principle would be possible or desirable. It is clear that the Charter and general principles will continue to have a mutually reinforcing relationship even if this is not made explicit in the judgments of the CJEU. The precise composition of the case law on business freedom and contractual autonomy as general principles was then explored in more detail. It was shown that these principles diverge in the language used to describe the permissible limitations on those principles. In reality, therefore, it is a complicated task to determine the precise extent to which *Alemo-Herron* departs from freedom of contract as a general principle. Some distinctions are, however, more evident. First, *Alemo-Herron* does not explicitly engage with the pre-existing case law. Second, the starting point is reversed, with the CJEU no longer taking it as given that restrictions on business freedom are *prima facie* lawful. Third, the CJEU places greater emphasis on the effects of restrictions on individual traders. Fourth, the distinction between the exercise and the substance of business freedom is collapsed. Finally, the CJEU gives no particular weight to the public interest. The combination of these factors shows that the Charter has already had an impact on the employment relationship through the reinterpretation of employment legislation. But, are there any broader consequences for the EU's ability to regulate the employment relationship into the future?



## IV. The Macro Level: The Charter's Implications for the Regulation of the Employment Relationship

This chapter assesses the role that the Charter has played in the EU's ability to regulate the employment relationship. It starts by asking whether *Alemo-Herron* can be considered the EU's *Lochner* moment or whether it simply marks another step in a long line of deregulatory jurisprudence prioritising the economic over the social (Section A). Section B further considers just how systemic this prioritisation may be. Is freedom of contract a cornerstone of European integration, deeply embedded in the Treaty? How has *Alemo-Herron* been treated in subsequent cases and are there any in-built mechanisms within the Charter itself that might resist the force of article 16? Failing that, Section C concludes by exploring one of the alternative regulatory techniques that the EU might deploy to avoid the reach of article 16 altogether.

### A. The EU's (second, third) *Lochner* Moment or Much Ado about Nothing?

What is the significance of *Alemo-Herron* for EU labour law? Can the case be said to be the EU's *Lochner* moment or has that (dis)honour already been taken by the much-maligned *Viking* and *Laval* line of case law? On the other hand, has the potential impact of *Alemo-Herron* simply been overstated? Has the CJEU already come to regret its expansive approach to contractual autonomy as a fundamental right and even if it were to maintain it, are there in-built safeguards in EU employment legislation and the Charter? If so, what does this tell us about the Charter's potential impact in the employment field?

It had long been thought the EU had very little to learn from *Lochner*. As one commentator put it '[i]n the perspective of a typical European jurist, *Lochner* would likely be dismissed as old news, bad news, and news that does not belong on the old Continent'.<sup>1</sup> The same commentator noted that the US Supreme Court's (USSC) 'formalist protection of individual economic freedom may appear impossibly distant from the "social" core of current European

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<sup>1</sup> Daniela Caruso, '*Lochner* in Europe: A Comment on Keith Whittington's "Congress Before the *Lochner* Court"' (2005) 85 B U L Rev 867, 869.

constitutionalism, and therefore ultimately uninteresting'.<sup>2</sup> This view is no longer tenable in the wake of *Alemo-Herron*. To what extent, then, can *Alemo-Herron* be said to reflect the earlier *Lochner* jurisprudence?

## 1. Echoes of *Lochner* in EU labour law

In the *Lochner* case, the USSC declared that a New York state law limiting working hours for bakers was incompatible with the US Constitution, notably the substantive due process clause contained in the Fourteenth Amendment. *Lochner*, the owner of a bakery who had permitted his workers to work beyond the 60-hour weekly limit argued that the Fourteenth Amendment contains freedom of contract among the rights encompassed by substantive due process.<sup>3</sup> In this case, the USSC 'developed a medley of juridical doctrines that effectively insulated the marketplace from a broad swath of governmental regulations and from collective action by laborers'.<sup>4</sup>

The majority, led by Justice Peckham accepted that the state retained certain 'police powers' which enabled it to legislate in areas such as health and safety and 'to that end, states had the power to prevent individuals entering into certain types of contract'.<sup>5</sup> At the same time, the Fourteenth Amendment prohibited the deprivation by the state of life, liberty or property without due process of law. Justice Peckham saw this clause as protecting freedom of contract by 'imposing substantive restrictions on the police power of the states, compelling the Court to question whether there had been a fair, reasonable and appropriate exercise of the police power, as opposed to an unreasonable, unnecessary and arbitrary interference with the individual's right to personal or contractual liberty'.<sup>6</sup>

The majority argued that the state should not have the power to protect individuals from their own poor decisions. Justice Peckham accepted that both parties enjoyed freedom of contract, noting that:

[o]f course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor (...) The question of whether

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<sup>2</sup> *ibid* 871.

<sup>3</sup> *Lochner v New York* (1905) 198 US 45 (SC).

<sup>4</sup> Ian H Eliasoph, 'A "Switch in Time" For the European Community? *Lochner* Discourse and the Recalibration of Economic and Social Rights in Europe' (2007) 14 *Colum J Eur L* 468.

<sup>5</sup> Daniel Nicol, 'Europe's *Lochner* Moment' (2011) 2 *Public Law* 308.

<sup>6</sup> *ibid* 309.

this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of baker.<sup>7</sup>

Particularly egregious for the majority, was that the statute did not *permit* employees to work above the threshold (as opposed to merely prohibiting compulsion). It was a mandatory provision, with no account taken of potential emergency situations. The USSC thought that contractual autonomy could not be interfered with through legislation except to the extent that the beneficiaries were incapable of active market participation.<sup>8</sup>

The minority, led by Justice Harlan agreed that freedom of contract certainly existed, but that it had to be subordinate to the police power:

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals or the public safety.<sup>9</sup>

It is scant comfort to exploited employees that their freedom to enter a contract to ‘sell’ their labour is being upheld. Both the USSC and its European equivalent failed to consider the weaker bargaining position of the employee, perhaps forgivable for the early twentieth century USSC, but certainly not for the modern CJEU. Just as in *Alemo-Herron*, the USSC accepted that neither the interest claimed by the state/employees nor that of the employer was absolute. Nevertheless, both courts went on to undermine the state’s regulatory authority without making explicit the rationale behind its balancing exercise if it even undertook such an exercise in the first place.

Unsurprisingly, *Lochner* is considered one of the most important and controversial USSC decisions of the time and would eventually lend its name to the *Lochner* era, a period of jurisprudence-led deregulation ‘spanning from the late 1890s until 1937 in which the Supreme Court developed and applied doctrines that insulated the market place from constraints imposed by legislatures or collective action’.<sup>10</sup> This decision attracted much consternation at the time and continues to do so, probably having received ‘more clearly unanimous criticism

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<sup>7</sup> *Lochner* (1905) 198 US 45 (SC) [54–56].

<sup>8</sup> Eliasoph (n 4) 472.

<sup>9</sup> *Lochner* (1905) 198 US 45 (SC) [67].

<sup>10</sup> Eliasoph (n 4) 47.

than any other [decision] of the twentieth century'.<sup>11</sup> The decision has further been described as sounding the 'Court's call to batter against social and economic regulatory legislation'.<sup>12</sup>

A key feature of the *Lochner*-era jurisprudence is that it was nearly 40 years before it began to unravel in the wake of the New Deal era. It was only in the 1937 USSC decision in *West Coast Hotel* that the notion that the Fourteenth Amendment protects freedom of contract was finally abandoned.<sup>13</sup> As Chief Justice Hughes remarked in that case, '[w]hat is this freedom? The Constitution does not speak of freedom of contract (...) freedom of contract is a qualified, not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses (...) Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community'.<sup>14</sup>

One redeeming feature of the *Lochner* decision is the dissent of Justice Holmes who held that 'a constitution is not intended to embody a particular economic theory, whether of paternalism (...) or of laissez faire'.<sup>15</sup> The reality is, however, that the USSC passed over the first opportunity 'for constitutional confirmation of the modern regulatory state'.<sup>16</sup>

### 1.1. *Translating Lochner into European law*

Although the present economic and social changes occurring in Europe pale in comparison to those faced by the United States at the turn of the twentieth century, it remains the case that in 'resolving a particular controversy a court is required to choose from a plethora of societal values those which will guide its policy foundation'.<sup>17</sup> It is certainly the case that the CJEU has a more wide ranging array of social and economic values from which to draw than the USSC had, or continues to have. Indeed, at the time of the *Lochner* Court, it was a widely held view that 'government regulation of private affairs was deemed a grave offence against citizens'.<sup>18</sup> The modern EU context is very different, but nevertheless, can echoes of the *Lochner* Court's laissez-faire policy choices be found in EU law?

Nicol, writing from a largely constitutional perspective, has described *Viking* and *Laval* as 'Europe's *Lochner* Moment'. But is he right, or has this case law been overtaken by *Alemo-*

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<sup>11</sup> Robert G McCloskey, *The Modern Supreme Court* (Harvard 1972) 279.

<sup>12</sup> D Grier Stephenson, 'The Supreme Court and Constitutional Change: *Lochner v New York* Revisited' (1976) 21 *Vill L Rev* 217–218.

<sup>13</sup> *West Coast Hotel Co v Parrish* (1937) 300 US (SC) 379.

<sup>14</sup> *ibid* 391–392.

<sup>15</sup> *Lochner* (1905) 198 US 45 (SC) [74].

<sup>16</sup> Grier Stephenson (n 12) 221.

<sup>17</sup> *ibid* 222.

<sup>18</sup> *ibid*.

*Herron*?<sup>19</sup> Of course, what is meant by a *Lochner* moment is open to many interpretations and the precise impact of the decision remains the subject of debate to this day. In any case, it is perhaps better to talk of a *Lochner* process. As we shall see, there is the risk of attributing too much weight to a single case.

Within the context of EU law more generally, authors have ascribed *Lochner*-like qualities to various aspects of internal market jurisprudence. Caruso, for example, sees *Lochner* in cases such as *Franzen*, a case familiar to internal market lawyers.<sup>20</sup> In that case, the CJEU overruled a Swedish monopoly on alcohol distribution, despite its intended public protection and human health purposes. According to Caruso, '[t]his story bears a number of analogies with *Lochner*. State legislation enacted with the aim of protecting citizens (...) was weakened by a supreme court' although not, in this case, 'in the name of freedom of contract, but due to an equally basic faith in the Common Market'.<sup>21</sup> It will be explained below how the CJEU's use of business freedom is not and cannot be neutral, given the Union's commitment to the deepening of the internal market.

Other commentators have expressed similar sentiments that the EU's free movement rules represent Europe's own version of economic due process. Eliasoph, in particular, remarks that '[w]hile the [CJEU] did not intervene with social legislation in a manner approaching the extent of the activism exhibited by the Supreme Court (...) with its Article [34] jurisprudence the [CJEU] had 'placed itself in a pivotal position to influence the pace and direction of legislative integration on matters of economic and social regulation'. Furthermore, this jurisprudence resembled liberty to contract and substantive due process'.<sup>22</sup> This is not to say that the CJEU's foray into regulating regulation has been entirely one-sided. It has been suggested that far from encapsulating the CJEU's inherent neo-liberal tendencies, its deregulatory jurisprudence actually betrays the CJEU's desire to establish Union control over national regulation, a theory which 'is further supported by the [CJEU's] fairly vigorous protection and enforcement of the few social rights provided in the original treaty' a theme which is discussed further below.<sup>23</sup>

In addition to the internal market jurisprudence, remnants of the CJEU's confused approach to economic due process can also be found in its use of competition law to prohibit collective

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<sup>19</sup> Nicol (n 5).

<sup>20</sup> Case C-617/10 *Franzen*.

<sup>21</sup> Caruso (n 1) 872–873.

<sup>22</sup> Eliasoph (n 4) 485.

<sup>23</sup> *ibid* 488.

action and most notably to invalidate state aid programmes.<sup>24</sup> Despite this, in later decisions such as *Albany*,<sup>25</sup> the CJEU ‘had for the first time responded to the perceived disequilibrium between economic and social policy in the Treaty and, on a fairly weak textual basis, read into the Treaty a definite limit to the scope of competition law’.<sup>26</sup> The CJEU has also been faced with remarkably similar case to *Lochner*. In *Oebel*, as in *Lochner*, a bakery owner was prosecuted for failing to comply with a Dutch regulation banning night time work in bakeries. In that case, the CJEU held that:

[i]t cannot be disputed that the prohibition in the bread and confectionary industry on working before 4 a.m. in itself constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty.<sup>27</sup>

This decision was reached at a time when the EU Treaties contained no equivalent to the Fourteenth Amendment, apart from the free movement rules, which did not come into play here. It is apparent, then, that the Charter’s article 16 would make all the difference, perhaps an indictment of a document that was hailed for its granting of at least nominally equal status to political, economic and social rights. Indeed, as we shall now see, in subsequent cases in the employment context, the CJEU has singularly failed to ensure the protection of social rights in the face of competing economic interests.

What then is meant by the *Lochner* process in the specific context of EU labour law? The process may be described as the development of constitutionally (judicially) imposed restrictions on the ability of the state to legislate in the employment context. In order to set the scene, however, it is necessary to outline some of the broader contextual similarities between *Lochner* and *Viking* and *Laval* while examining the place of *Alemo-Herron* within this scheme.

## 1.2. *Tracing the link between Lochner, Viking, Laval and Alemo-Herron*

The decisions in *Viking* and *Laval* are so well known that they do not need to be rehearsed in detail here. In *Viking*, the CJEU found that a company could invoke the freedom of establishment contained in article 49 TFEU against a trade union conducting industrial action.

A redeeming feature of this case from a labour law perspective is that, as we saw in Chapter II, the CJEU explicitly acknowledged for the first time that the right to strike, at least as a general principle, was a fundamental right. However, this was not of much benefit to the

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<sup>24</sup> Case C-41/90 *Macrotron*.

<sup>25</sup> Case C-67/96 *Albany*.

<sup>26</sup> Eliasoph (n 4) 496.

<sup>27</sup> Case C-155/80 *Oebel*.

litigants who were required to show that their restriction of the company's freedom of establishment was in pursuance of a legitimate aim compatible with the Treaty and was proportionate. In other words, the strike action had to be a last resort and could only be taken if the aim was to protect jobs.

In *Laval*, the CJEU had to determine whether the relevant industrial action was compatible with article 56 TFEU on the freedom to provide services, read in conjunction with the Posted Workers Directive. In that case, the CJEU once again accepted the right to strike as a fundamental right but repeated its earlier holding that restrictions on the Treaty freedoms must pursue legitimate objectives compatible with the Treaty, be proportionate, suitable to attain the objective and be justified by overriding reasons of public interest.

a. Contextual differences

It is important to point out the different political and institutional contexts between the modern EU—a sui generis organisation and the *Lochner* era US—a nation state, with the CJEU being required 'to display a certain sensitivity towards the national identities of the Member States, whereas the Supreme Court can be conceived as helping to forge a national, American identity'.<sup>28</sup> Having said that, and as we have already seen, the CJEU can hardly be accused of harbouring too much sensitivity towards national legal traditions in *Alemo-Herron*, in which it roundly dismissed the long-standing (albeit EU law-derived) English dynamic approach to collective agreements.

Despite the perceived hostility to government regulation in the US at the turn of the last century, Nicol remarks that in reality '*Lochner* was decided during the Progressive Era, an epoch in American politics during which a large section of the political and intellectual elite lost their faith in unbridled private sector power and sought state intervention in the economy and state protection of workers. The case's outcome flew in the face of this powerful and mounting national consensus'.<sup>29</sup> *Viking* and *Laval*, on the other hand, 'were decided at a time when Europe's political leaders had enthusiastically promoted EU liberalisation legislation which complemented the efforts of the [CJEU] to open up national markets, including publicly-owned ones'.<sup>30</sup> The judgments were also delivered against the backcloth of a very substantial body of EU employment legislation, thereby demonstrating that a choice was made

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<sup>28</sup> Nicol (n 5) 312.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid* 312–13.

to prioritise one over the other. Despite these differences, there are a number of parallels to be drawn between the two lines of case law.

b. Parallels between the decisions

The first of these similarities is the consternation expressed in labour law circles that in *Viking* and *Laval* (similarly to the USSC's approach in *Lochner*), 'the [CJEU] chose as the starting-point of its analysis not the right to take collective action—supposedly the fundamental right—but rather the employer's freedom of movement'.<sup>31</sup> In this respect, the CJEU:

[t]reats collective action as merely another obstacle to free movement, utilising its normal line of reasoning instead of accepting that the status of collective action as a fundamental right compels a less strict approach. Moreover, at an even more basic level the [CJEU] opted for an analysis whereby the fundamental right needed to be justified in the light of the economic freedom, rather than the economic freedom having to be justified in the light of the fundamental right. In electing to examine *Viking* and *Laval* from this standpoint, the [CJEU] made an ideological choice.<sup>32</sup>

Rather than being born purely from ideology, this approach may actually stem from the CJEU's long-standing experience of upholding the EU's free movement rules against both public and private restrictions. The CJEU's experience with human rights has been more mixed, particularly in relation to the Charter.

There is also nothing in the US Constitution or the EU's free movement rules which required the respective courts to reach the conclusions they did. As mentioned, one redeeming feature of *Viking* and *Laval* (which is absent from *Alemo-Herron*) is that 'the interests of employees were seen as a legitimate competing objective whereas in *Lochner* they were seen as impermissible class legislation'.<sup>33</sup> In addition, 'there remains quite enough material in article 3(3) TEU for the [CJEU] to have arrived at the opposite outcome in *Viking-Laval*'.<sup>34</sup> Although it has been suggested that in *Viking* and *Laval*, the CJEU did just that, prioritising the economic over the social aspects of EU integration, it did so in a more subtle way than in *Alemo-Herron*, which represents a more frontal assault on the ability of the EU to regulate the employment relationship.

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<sup>31</sup> *ibid* 313.

<sup>32</sup> *ibid* 321.

<sup>33</sup> *ibid* 316.

<sup>34</sup> *ibid* 322.

In this respect, it is *Alemo-Herron* which bears a closer resemblance to the *Lochner* case, which ‘cast into doubt virtually any law that regulated market actors’.<sup>35</sup> If *Viking* and *Laval* did not go that far, *Alemo-Herron* certainly comes close to rendering impermissible any EU intervention in the employment relationship. It is suggested therefore, that at least in so far as the *Lochner* doctrine has a chilling effect on the ability of the state to legislate in the employment context, it is *Alemo-Herron* rather than *Viking* and *Laval* which bears the closest resemblance to the USSC’s approach.

This is perhaps most evident in the conclusions as to what exactly was wrong with *Lochner*. As Strauss puts it:

[t]he *Lochner*-era Court acted defensibly in recognizing freedom of contract but indefensibly in exalting it. Freedom of contract (...) is a plausible constitutional right. It might merit careful, case-by-case enforcement, undertaken with sensitivity to the limitations of the right as well as its value. The *Lochner*-era Court went far beyond that. It treated freedom of contract as a cornerstone of the constitutional order and systematically undervalued reasons for limiting or overriding the right.<sup>36</sup>

This is precisely the approach adopted by the CJEU in *Alemo-Herron*. That *Alemo-Herron* bears closer similarities to *Lochner* is perhaps unsurprising as *Viking* and *Laval* represented a clash between fundamental social rights and fundamental Treaty freedoms whereas *Alemo-Herron* more closely aligns with *Lochner*’s contest between constitutionally protected rights and ordinary employment legislation. Having said that, *Alemo-Herron* also goes further than *Viking*, *Laval* and *Lochner*. This is largely because ‘the mode of reasoning in *Viking-Laval*—as in *Lochner*—did not represent any profound novation’, like *Lochner*, it conformed to established jurisprudence.<sup>37</sup> *Alemo-Herron*, on the other hand, is very different and all the more invidious; it marks a profound and unexpected rupture from existing case law on article 16 as a fundamental right. In addition, there are striking similarities between the USSC’s discovery of a freedom of contract stemming from the wording of the Fourteenth Amendment and the CJEU’s similar efforts in relation to article 16.

A further criticism of *Lochner*, with striking echoes in *Alemo-Herron* is that the USSC chose as the baseline of its analysis ‘the status quo, as reflected in market ordering under the common law system’.<sup>38</sup> The idea here is that the USSC defined constitutionally protected private rights

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<sup>35</sup> Eliasoph (n 4) 473.

<sup>36</sup> David A Strauss, ‘Why was *Lochner* Wrong?’ (2003) 70 U Chi L Rev 373, 375.

<sup>37</sup> Nicol (n 5) 321.

<sup>38</sup> Cass Sunstein, ‘*Lochner*’s Legacy’ (1987) 87 Colum L Rev 873, 903.

by reference to the protection the claimant would have received under the common law of property and contract.<sup>39</sup> What, then, was the baseline in *Alemo-Herron*? Given the absence of a harmonised EU contract law, it remains difficult to discern precisely what default position on contractual autonomy the CJEU should adopt. If the CJEU were to take the English common law as its lead, we have already seen that the transferability of dynamic clauses in collective agreements is entirely consistent with the common law conception of contractual autonomy. Sunstein suggests that the baseline should be altered through the prism of a theory of justice, to be derived from the ‘animating purpose behind the constitutional commitment to property rights’.<sup>40</sup> The problem in the present context is that it is far from clear what the underlying rationale was for including a freedom to conduct a business in the Charter in the first place, especially given its intimate link to the already existing Treaty freedoms, an issue fleshed out below. If the Charter is to provide the source of EU values on which the CJEU is to develop its baseline, it is currently lacking in guidance.

Given the above difficulties, it is perhaps more appropriate to await the United States’ *Alemo-Herron* moment—a sudden and unexplained rupture from existing constitutional principles to introduce (ideologically charged) deregulatory concepts into employment legislation. What are the consequences of this rupture for the EU’s ability to regulate the employment relationship?

## 2. *Alemo-Herron*’s (de)regulatory impact

What, then, has been the impact of *Alemo-Herron* on the employment relationship? In the narrow context of UK labour law, the decision has led to the revision of TUPE, which now explicitly incorporates the ‘static’ approach in the legislation.<sup>41</sup> Beyond the immediate consequences, what is the potential impact of the CJEU’s approach to contractual autonomy for the broader ability of the EU to regulate the employment relationship?

It is perhaps too early to tell, but from the largely negative reaction to *Alemo-Herron* from commentators, it is possible to ascertain some of the potential consequences of this decision from a labour law perspective. Weatherill in particular remarks that on occasion ‘a decision of

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<sup>39</sup> Michael R Antinori, ‘Does *Lochner* Live in Luxembourg?: An Analysis of the Property Rights Jurisprudence of the European Court of Justice’ (1995) 18 Fordham Int’l L J 1778, 1819.

<sup>40</sup> Cass Sunstein, ‘Naked Preferences and the Constitution’ (1984) 84 Colum L Rev 1689, 1700.

<sup>41</sup> Reg 4A of TUPE was inserted by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014. This provision reflects the static approach.

the Court of Justice (...) is so downright odd that it deserves to be locked into a secure container, plunged into the icy waters of a deep lake and forgotten about'.<sup>42</sup> The CJEU's judgment is certainly problematic on a number of fronts. In the first instance, the CJEU's reasoning is based on the false assumption that the TUD requires an explicit balancing of employer and employee interests.<sup>43</sup> Indeed, Lord Hope in the UK Supreme Court (UKSC) pointed out that '[n]o mention was made in the recitals of any need to protect employers in the event of a change in employer as against the rights that were to be safeguarded for the protection of employees'.<sup>44</sup> Rather, it could be said that the very logic behind the TUD is the restriction of contractual autonomy in order to protect employees. It is perhaps therefore 'ironic that *Werhof* and *Alemo-Herron* render the operation of the transfer of undertakings legislation potentially less favourable to the transferring employees than that which the common law interpretation exemplified by *Whent* would produce'.<sup>45</sup> This demonstrates that the approach adopted in *Alemo-Herron* is fatally to undermine the very purpose of the legislation. This hardly bodes well for the EU's ability to regulate the employment relationship into the future.

It can, however, be countered that the general trend in recent years has been to refocus legislative efforts on the need for 'flexicurity' in employment contracts.<sup>46</sup> Yet, far from constituting a continuation of the already suspect question of reinterpreting protective legislation in the light of the financial crisis and the need for flexibility, *Alemo-Herron* rather constitutes a distortion of the TUD's very purpose and a perversion of the language of the text, which after all provides at recital 3 that '[i]t is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.<sup>47</sup> What, then, will be the impact of this distortion on EU employment law more generally?

The answer may, of course, be not very much of an impact at all. We saw in Chapter III that in judgments of the CJEU immediately following *Alemo-Herron*, in cases also involving the continuation of the terms of collective agreements, has been careful to avoid restating the strong concept of contractual autonomy contained therein. In other cases, article 16 seems to

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<sup>42</sup> Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of "Freedom of Contract"' (2014) 10 ERCL 167, 167.

<sup>43</sup> Jeremias Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law' (2013) 42 ILJ 434, 439.

<sup>44</sup> [2011] UKSC 26 [7], [14] (Lord Hope).

<sup>45</sup> Charles Wynn-Evans, 'TUPE, Collective Agreements and the Static-Dynamic Debate' (2010) 39 ILJ 275, 279.

<sup>46</sup> Anne Davies, *EU Labour Law* (Elgar 2012) 234.

<sup>47</sup> As was recognised in the early case law on the Directive set out in Chapter III.

have been recharged once again by tying it explicitly to the freedom of establishment, considered in the next section.

Even if we can navigate the myriad contradictions in the case law, is it still the case that *Alemo-Herron* is as bad as some employment lawyers thought it was? Prassl has recently argued that it is not—a remarkable assertion from one of the harshest critics of the CJEU’s judgment.<sup>48</sup> He starts by accepting that article 16 will in future be easily engaged (although, as we have seen, it was not invoked in the *Österreichischer* case), given that ‘nearly all of employment law can be seen as an interference with employer’s freedom (...) with the conceptual apparatus of fundamental rights protection thus providing the basis for challenges to employment legislation’.<sup>49</sup> Taking a step back, Prassl now views the decision as not requiring ‘the Union to recognise business freedom *in the face of* employment rights’ and in any case ‘constitutional protection of economic rights (...) has always seen such freedoms as operating in tandem with social rights’.<sup>50</sup> Following Everson and Gonçalves, he distinguishes between two aspects of contractual autonomy in EU law—autonomy as an overarching constitutional concept and autonomy as a substantive individual right. The former is considered highly unlikely to ‘form the basis for challenging the role of employment law within the Union’s legal order’ largely because employment law is by now an accepted prerequisite to the exploitation of labour as a commodity.<sup>51</sup>

It is, with respect, suggested that the widespread (although not universal) agreement that a regulated labour force is necessary for a functioning market says nothing of the level of employee protection which may be more or less restrictive of business freedoms. This goes to the existence of employment legislation, not the level of protection it must entail. The potential impact of article 16 as a constitutional principle for the employment context should not be so readily discounted. In any case, the focus of the present thesis is on freedom of contract as an individual fundamental right, which Leczykiewicz has argued may provide a new way for private parties to have ‘a more concrete and entrenched mechanism of restricting regulatory effects of national and EU law’.<sup>52</sup> Again, and surprisingly Prassl rejects this, remarking that

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<sup>48</sup> Jeremias Prassl, ‘Business Freedoms and Employment Rights in the European Union’ (2015) 17 CYELS 189.

<sup>49</sup> *ibid* 191.

<sup>50</sup> *ibid* 192.

<sup>51</sup> *ibid* 193.

<sup>52</sup> Dorota Leczykiewicz, ‘Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?’ in Ulf Bernitz and others (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 171, 172.

‘this position is (...) not tenable in the light of the current state of Union law as set out in the Treaties, secondary legislation, and the jurisprudence of the Court of Justice’.<sup>53</sup>

To explain this about-turn, Prassl looks to the text of the Charter itself which provides at article 52 for the potential limitation of the rights contained therein. Article 16 itself further provides for the limitation of that right in accordance with EU law and national law and practices. For Prassl, ‘these multi-pronged qualifications, drawing on provisions of the Union legal order as well as the ‘laws and practices’ of the 28 Member States, the formulation of Article 16 CFR therefore suggests that it should be of little concern when used as the basis for an individual’s challenge against Union measures.’<sup>54</sup> As a counter to this, it could be remarked that all of these textual pre-requisites existed before the CJEU’s decision in *Alemo-Herron* and yet were of no avail to the employee’s resistance of contractual autonomy in that case. In addition, the same arguments could be used to further counter the development of the competing Employment Rights found in the Charter.

The text of the Charter is not the only hurdle to be overcome by litigants seeking to rely on their article 16 rights. The CJEU itself has placed a number of barriers in the path of litigants, notably the core content test. Under this approach, interference with freedom of contract is permissible to the extent that it does not undermine the core content of the right. This might at first sight represent a significant obstacle to reliance on article 16. Even if a piece of employment legislation engages article 16, it is likely to have been carefully drafted to assess competing interests. In its case law on freedom of contract as a general principle, and in its early jurisprudence on article 16, the CJEU adopted this deferential approach to the will of the legislature. EU legislation was only rarely found to constitute a negation of the core content of business freedom. For Prassl, this test ‘is likely to constitute the most important hurdle to the success of any action brought to vindicate an individual’s economic freedoms under Article 16 CFR, especially once it is applied in combination with the Court’s proportionality scrutiny against a right’s social function’.<sup>55</sup>

Once again, however, it is difficult to square this with the decision in *Alemo-Herron*. In that case, the CJEU found that what had been considered no more than an ordinary application of the common law freedom of contract did, in fact, violate the very core of contractual autonomy as a fundamental right. Finally, and as examined below, competing fundamental social rights might provide a legitimate and potentially powerful counterweight to article 16. As competing

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<sup>53</sup> Prassl, ‘Business Freedoms and Employment Rights’ (n 48) 193.

<sup>54</sup> *ibid* 194.

<sup>55</sup> *ibid* 197.

fundamental rights considerations are absent from the CJEU's decision in *Alemo-Herron*, this aspect provides perhaps the most compelling obstacle standing in the way of *Alemo-Herron*'s deregulatory thrust. Had *Alemo-Herron* involved a clash between two competing fundamental rights, one social and one economic, would the outcome have been any different, or has *Viking* and *Laval* already undermined any such hope?

Having outlined the hurdles standing in the way of a litigant seeking to rely on article 16, Prassl then examines three pieces of EU employment legislation for their compatibility with the provision. The three Directives examined, the TUD, the Collective Redundancies Directive (CRD) and the Working Time Directive (WTD) were found to trigger the application of article 16. On the other hand, the provisions of all three were found either to fall squarely within the definition of permissible restrictions in article 52(1) of the Charter, did not affect the core content of the contractual autonomy principle or were supported by competing fundamental social rights contained in the Charter. Therefore, and given the current understanding and application of the freedom to conduct a business, 'it is likely that *Alemo-Herron* will instead be consigned to the bottom of Weatherill's icy lake'.<sup>56</sup> I would argue that this is simply to brush aside the CJEU's judgment in *Alemo-Herron*, relegating it to the position of an anomaly, an outlier and a break with existing case law that those in favour of employee protection might prefer. As Prassl concludes, '[f]undamental rights are a legitimate review standard in EU law; the Court's peculiar interpretation of Article 16 CFR to justify the abrogation of employee's rights, on the other hand, is not'.<sup>57</sup> This may well be true, but the reality is that the CJEU adopted this very approach and may do so again. Is it really therefore time to revisit *Alemo-Herron* despite its infancy?

## 2.1. Reassessing *Alemo-Herron*

It is worth noting that even *Lochner* was only viewed with disapproval in the light of the New Deal, after which 'the historical *Lochner* was transformed into the normative *Lochner*—that is, into this symbol of judges usurping legislative authority by basing decisions on policy preferences rather than the law'.<sup>58</sup> A similar process has already begun in relation to *Viking* and *Laval*.

Drawing on Barnard's examination of the four phases of academic response to this line of case law, *Alemo-Herron* is still at the first, that is to say 'the initial reaction: understanding the

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<sup>56</sup> *ibid* 208.

<sup>57</sup> *ibid* 199.

<sup>58</sup> Howard Gillman, 'De-Lochnerizing *Lochner*' (2005) 85 B U L Rev 859, 861.

decisions and framing the debates'.<sup>59</sup> We now seem somehow to be jumping to the fourth step of 'responding to subsequent developments and reassessment of the situation'.<sup>60</sup> What of steps 2 and 3, the 'exploration: deepening and reframing the debate' and 'concept and theory building'?<sup>61</sup> Barnard describes the facts of *Viking* and *Laval* as an 'incendiary cocktail' but is it perhaps the case that *Alemo-Herron* will go out with a whimper rather than a bang?

It is by now widely accepted that *Viking* and *Laval* may not have had the profound effects on EU labour law that they were expected to have. If we were to focus on academic output alone, it could not be doubted that 'the decisions have been amongst the most high-profile judicial developments in EU law during the last decade'.<sup>62</sup> When it comes to the concrete impact of the decisions on national legal systems, the effects have been more mixed. As Christopher Unseld notes in a recent book review of *Viking, Laval and Beyond*:<sup>63</sup>

[i]n every chapter a national rapporteur tries to explain what the consequences (if any!) of *Viking* and *Laval* in the last seven years were. And according to the authors, the results are sobering (...) Most contributors had to admit that neither the national legislator nor the national courts had even discussed or cited the cases. The worrisome message of this part of the book may therefore be summarized as follows: the national legal systems generally did not really react to the supposedly landmark decisions *Viking* and *Laval*.<sup>64</sup>

Academic output relating to *Viking* and *Laval* has been noticeably sizeable in the United Kingdom which is perhaps understandable considering that the 'UK's legal system only provides for very limited legal protection of labour – none of it in the form of protection by a written constitution – and that British lawyers and judges are better prepared to pay attention to case-law'.<sup>65</sup> The level of British academic interest in *Viking* and *Laval* is certainly extraordinary and history is repeating itself with the case of *Alemo-Herron*.

The vast majority, and indeed the most critical, of the commentary has been British.<sup>66</sup> This is not to say that the decision has gone unnoticed in continental Europe. Although much of the

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<sup>59</sup> Catherine Barnard, 'The Calm after the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in *Viking* and *Laval*' in A Bogg, C Costello and A Davies (eds), *Research Handbook on EU Labour Law* (Elgar 2016) 337.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> Mark Freedland and Jeremias Prassl, '*Viking, Laval* and Beyond: An Introduction' in Mark Freedland and Jeremias Prassl (eds), *Viking Laval and Beyond* (Hart 2016) 1, 3.

<sup>63</sup> Mark Freedland and Jeremias Prassl, *Viking, Laval and Beyond* (Hart 2016).

<sup>64</sup> Christopher Unseld, 'POMFR: *Viking, Laval* and the Question if Anybody Cares' European Law Blog 22 September 2015.

<sup>65</sup> *ibid.*

<sup>66</sup> See Prassl, 'Freedom of Contract' (n 43); Weatherill (n 42).

literature emphasises the common law peculiarities of the case, it is widely criticised for having prioritised economic rights over social rights. The francophone commentary, while accepting the decision's limited impact on continental jurisdictions,<sup>67</sup> nonetheless recognises that the conflict between freedom of contract and social rights in that case may lead to the national protection of collective rights being called into question.<sup>68</sup> The commentary recognises the negative aspects of the decision, seeing it as representing a worrying interpretation of the Charter from an employment protection point of view, given the prioritisation of the employer's economic rights over the social rights of the workers.<sup>69</sup> In addition, the unexpected and novel use of the Charter to defeat social rights has also been emphasised<sup>70</sup> and it has been noted that although the CJEU's reliance on the Charter is nothing new, it is now abundantly clear that it may not necessarily represent the source of employee protection that it might have been expected to be.<sup>71</sup>

Similarly, the German literature emphasises the case's uniquely English elements, with little relevance to the German legislation.<sup>72</sup> Again, this is perhaps unsurprising given that under German law, collective agreements apply directly without any need for incorporation into the contract of employment.<sup>73</sup> This being said, as with the French commentary, the novelties of the case are recognised. Willemsen and Grau note that the decision is surprising in its granting of a particularly high status to contractual autonomy over the collective rights of employees.<sup>74</sup> Interestingly, the same authors point out that the EU-wide relevance of the decision may have been greater had the CJEU considered the compatibility with article 16 of article 3 of the Directive itself, rather than article 5 of TUPE, given the almost identical wording of the two provisions.<sup>75</sup>

Perhaps, then, labour law commentators, the present author included, have simply overstated the 'landmark' nature of *Alemo-Herron*. Of course, what is meant by a landmark judgment is open to various interpretations. It has been noted that there are a number of different ways in which the significance of a CJEU judgment can be assessed. First, there is the question of whether a topic covered by a judgment is 'of particular significance and controversy in a

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<sup>67</sup> Sylvaine Laulom, 'Une interprétation de la charte préjudiciable aux droits des salariés', *Semaine Sociale Lamy*: N° 1611 du 23/12/2013, 23/12/2013.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*

<sup>72</sup> Lehmann, *BB* 2015, 2293 (2300).

<sup>73</sup> Hessisches Landesarbeitsgericht, 8 Sa 537/13, Rn. 117.

<sup>74</sup> Willemsen and Grau, *NJW* 2014, 12 (13f.).

<sup>75</sup> *ibid.*

specific regulatory domain of EU law, be that due to the development of a novel legal point or due to a change in tack in existing approaches'.<sup>76</sup> Second, 'whether the decision has caused particular upheaval or controversy in at least some of the Member States' domestic systems'.<sup>77</sup> *Alemo-Herron* scores on both counts, albeit to a greater extent in the first category than in the second. It is certainly the case that the decision marks a departure from the CJEU's existing approach to the issue of contractual autonomy. In addition, at least as far as English law is concerned, the domestic approach to dynamic terms has been uprooted and has already led to legislative change. Another vital measure of a judgment's importance is its value as a source of law, that is to say as precedent and 'understood in this way, an important judgment establishes a legal rule or principle that is employed to resolve future issues, thereby distinguishing itself from judgments doomed to spend eternity on the ash heap of legal history'.<sup>78</sup> To what use has *Alemo-Herron* been put in subsequent cases?

## 2.2. *Alemo-Herron* as 'precedent'

*Alemo-Herron* has been mentioned in a number of subsequent judgments of the CJEU or opinions of the AGs. Unsurprisingly, many of these references have occurred in the employment context. It has already been shown that in *Österreichischer*, the CJEU relied on *Alemo-Herron* without referring to article 16 of the Charter at all. The AG relied on *Alemo-Herron* as precedent<sup>79</sup> for the fact that there is a need for a balance between the employer and the employee under the TUD, with the case merely being mentioned in a footnote.<sup>80</sup> The CJEU relied on it in the judgment to the same effect, holding that the need to balance leads to the employer having the power to make adjustments and changes necessary to carry on its operations.<sup>81</sup>

In *AGET*, AG Wahl held that following *Alemo-Herron*, even in a case of 'over implementation' ie going beyond the level of protection stipulated by the Directive, there is a need to weigh up the rights of workers and the employer.<sup>82</sup> Although the AG was able to distinguish the present case from *Alemo-Herron* in that here, the legislation fell outside the scope of EU law and so

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<sup>76</sup> Freedland and Prassl (n 63) 3.

<sup>77</sup> *ibid.*

<sup>78</sup> Mattias Derlén and Johan Lindholm, 'Goodbye *van Gend en Loos*, Hello *Bosman*? Using Network Analysis to Measure the Importance of Individual CJEU Judgments' (2014) 20 ELJ 667, 668.

<sup>79</sup> This term is used loosely here to refer to the subsequent endorsement of a case or aspects of a case rather than the common law notion of binding precedent.

<sup>80</sup> AG opinion in Case C-328/11 *Österreichischer* para 53 and fn 17.

<sup>81</sup> Case C-328/11 *Österreichischer* para 29. At fn 17 it was noted that because there was no question of the existence of dynamic clauses here, the balance as required by *Alemo-Herron* had already been struck.

<sup>82</sup> AG opinion in Case C-201/15 *AGET* para 64.

there was no need to assess its compatibility with the Charter.<sup>83</sup> The CJEU in that case placed greater emphasis on the fact that the undertaking must be able to assert its interests effectively in a contractual process to which it is party<sup>84</sup> and that national legislation cannot undermine the essence of contractual autonomy.<sup>85</sup>

We have already seen that in *Vittoria Graf*, AG Bot made extensive use of *Alemo-Herron* to illustrate the principles involved in the transfer of a dynamic clause. In the end, however, he did not rely on that judgment, preferring *Werhof*, which more closely aligned to the facts of the case.<sup>86</sup> The CJEU was more succinct in its assessment, stipulating that the employer must be in a position to make adjustments and that the employer must be able to assert its interests in a contractual process.<sup>87</sup>

It can be seen that, overall, there are remarkably few cases in the employment context mentioning *Alemo-Herron* and even those are confined to either the collective redundancies context or the transfer of dynamic clauses. It can also be noted that, as we saw in Chapter III, there are more references to article 16 in the employment context than there are to *Alemo-Herron*, perhaps surprising given that the opposite was expected following the decision of the CJEU in the above-discussed Austrian case. It is also difficult to escape the conclusion that given the contexts in which *Alemo-Herron* has had an influence, that it is the collective element of employment regulation that seems to conflict with article 16. Outside the employment context, *Alemo-Herron* has largely been relied on to define the scope of article 16.<sup>88</sup> It has also been cited as authority for the fact that the Charter acts as a standard of review of secondary legislation even in cases between individuals.<sup>89</sup>

Whether *Alemo-Herron* is indeed destined for the ash heap (or the icy lake) remains to be played out. It is abundantly clear that the adoption of the EU Charter of Fundamental Rights has not been without consequences for contractual autonomy in the employment sphere. The CJEU has been remarkably inconsistent in its use of the Charter in the employment context. In some cases, the CJEU is using the Charter to ensure the full effectiveness of worker-protective legislation, while in others it is decrying such legislation for limiting contractual autonomy. It is perhaps a symptom of the complexity and political sensitivity of this area that the CJEU had yet to adopt a consistent position on the concept of contractual freedom itself.

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<sup>83</sup> *ibid* fn 10.

<sup>84</sup> Case C-201/15 *AGET* para 58

<sup>85</sup> *ibid* para 87.

<sup>86</sup> AG opinion in Joined Cases C-680/15 and C-681/15 *Vittoria Graf*.

<sup>87</sup> Joined Cases C-680/15 and C-681/15 *Vittoria Graf* paras 22–23.

<sup>88</sup> AG opinion in Case C-314/12 *UPC*; AG opinion in Case C-336/15 *Unionen*.

<sup>89</sup> AG opinion in Case C-201/13 *Deckmyn* para 79 and fn 31; AG opinion in Case C-583/11 *Inuit* para 97.

It is not unreasonable to expect this inconsistency to continue into the future. In *Alemo-Herron*, the CJEU's deliberate decision to opt for the German autonomy model over the English market facilitative model was clearly determinative of the outcome of the case.

Undoubtedly, the approach the CJEU is adopting is to be welcomed from the perspective of employers. Labour lawyers on the other hand should be worried indeed. The best-case scenario may be that the CJEU will confine this expansive approach to the limited context of the transfer of undertakings, while preserving its employee-protective reading of legislation in other contexts.

The worst-case scenario paints a bleak picture for the future of EU regulation in both the employment context and beyond. Article 16 can now be seen as having the potential to undermine the existing balances that have been achieved in EU employment legislation. It is clear from reaction to *Alemo-Herron* that this deregulatory potential of article 16 was largely underestimated and perhaps continues to be so. A positive consequence of the controversy surrounding this judgment is that it will once again provoke a debate as to the appropriate balance to be achieved between the social and economic aspects of EU integration. This also makes the CJEU extremely wary of citing such controversial judgments again, as was clear following *Viking* and *Laval*. It is to be hoped that when the EU does come to develop its own concept of contractual autonomy that it will use the Charter to its fullest extent, embracing not just an expansive notion of article 16, but rather infusing its approach, as it has done in the past, with the plethora of social provisions at its disposal. A lingering question is just how systemic is the prioritisation of business freedom and contractual autonomy in the EU legal order?

## **B. The Systemic Prioritisation of Business Freedom?**

Following *Alemo-Herron*, the CJEU has been inconsistent in its treatment of both that case and article 16. In some cases, it refers to both, in others to one but not the other and in others still to neither. One of the most controversial judgments handed down in the wake of *Alemo-Herron* was that in *AGET* in which the CJEU linked article 16 to the freedom of establishment found in the Treaty. In that case, the CJEU, in fact, treated the two provisions as coterminous. Does that also mean that the CJEU's pre-existing jurisprudence on the freedom of establishment now also underlines article 16 of the Charter and if so, what does this mean for employment regulation? Beyond that, we must also address the issue of just how embedded in

the EU's constitutional and institutional structure business freedom and contractual autonomy more specifically actually are. The next step is to analyse some of the post-*Alemo-Herron* case law on article 16, but outside the employment context, to see what lessons we can draw from there. Finally, the potential internal restrictions on contractual autonomy to be found within the Charter itself will be explored.

## 1. Contractual autonomy as a foundational pillar of the EU

Basedow argues that 'the principle of contractual freedom has, since the nineteenth century, developed into a foundational tenet in regard to the regulation of economic activity within all European states', but how true is this of the EU itself?<sup>90</sup> Three potential roles for contractual autonomy within the EU legal order have been posited. In the first instance, the freedom to conduct a business can be seen as having an existential function for the individual European, as laid down in *Nold*. Second, it may be seen as a subjective right guaranteeing the 'unrestricted entrepreneurial spirit of the individual European'. Finally, it can be understood as 'a principle forming a part of a far wider European Union commitment to a specific form of social-economic organisation'.<sup>91</sup> Freedom of contract as an individual fundamental right has already been considered in Chapter III. The question to be addressed here is just how widespread is the rhetoric that freedom of contract is in fact an organisational principle underpinning European integration?

For Everson and Gonçalves, the willingness of the CJEU to develop the right to an occupation and to property and 'also to extrapolate a freedom of business from them, reveals its broader aspiration to institutionalise an internationalised Economic Constitution'.<sup>92</sup> The European Fundamental Rights Agency (FRA) suggests a less ambitious role for article 16: '[t]he essence of the freedom to conduct a business is to enable individual aspirations to flourish, and to promote entrepreneurship and innovation, which in turn is indispensable for sustainable social and economic development'.<sup>93</sup> The emphasis here is squarely on the benefits that economic freedom grants to the individual, with the broader societal consequences merely stemming from this. In any event, if it is to be argued that article 16 is somehow linked to a wider notion

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<sup>90</sup> Jürgen Basedow, 'Freedom of Contract in the European Union' (2008) 6 *European Review of Private Law* 901, 902.

<sup>91</sup> Michele Everson and Rui Correia Gonçalves, 'Article 16-Freedom to Conduct a Business' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 437, 438.

<sup>92</sup> *ibid* 443.

<sup>93</sup> European Agency for Fundamental Rights, 'Freedom to Conduct a Business: Exploring the Dimensions of a Fundamental Right' (2015) 7.

of the EU's economic constitution, it tells us nothing about the form that this constitution should take.

Herresthal suggests that the theory of ordoliberalism underpins the EU's economic constitution, 'with the fundamental aim of the Union being to extend market competition and freedom of contract across the borders of the Member States within the internal market. The principle of freedom of contract is one of the most important structural issues in a liberal market order'.<sup>94</sup> He further comments that the free movement rules require free choice, which in turn calls for contractual autonomy.<sup>95</sup> Others such as Rutgers disagree, noting instead that there is no evidence supporting ordoliberalism as the underpinning of the EU economic order. It cannot be concluded from the Treaty that the EU is a 'private law society nor that the fundamental freedoms guarantee freedom of contract'.<sup>96</sup> The Treaty freedoms have one aim and that is to open up national markets. Obstacles to the creation of that open market must be set aside unless justified.<sup>97</sup> Once again, this tells us nothing of the extent of contractual autonomy in EU law. How does this freedom of contract as an organisational principle expressed via the conduit of the Treaty feed back into the individual right to business freedom and what are the consequences for employment regulation?

### **1.1. Making the link between article 16 and the Treaty freedoms**

If we look again at the judgment of the CJEU in *AGET* it will be recalled that the CJEU found that the Greek legislation requiring prior authorisation for collective redundancies constituted 'a significant interference in certain freedoms which economic operators generally enjoy'.<sup>98</sup> Here, that right was to effect collective redundancies which was 'a fundamental decision in the life of an undertaking'.<sup>99</sup> The CJEU, adopting a standard freedom of establishment approach, found that this legislation constituted a restriction on article 49 TFEU in that it was likely 'to render access to the Greek market less attractive and, following access to that market, to reduce considerably, or even eliminate, the ability of economic operators from other Member States who have chosen to set up in a new market to adjust subsequently'.<sup>100</sup>

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<sup>94</sup> Carsten Herresthal, 'Constitutionalisation of the Freedom of Contract in European Union Law' in Katja S Ziegler and Peter M Huber (eds), *Current Problems in the Protection of Human Rights* (Hart 2013) 89, 90.

<sup>95</sup> *ibid* 98.

<sup>96</sup> Jacobien W Rutgers, 'The European Economic Constitution, Freedom of Contract and the DCFR' (2009) 5 ERCL 95, 102.

<sup>97</sup> *ibid* 103.

<sup>98</sup> Case C-201/15 *AGET* para 55.

<sup>99</sup> *ibid* para 54.

<sup>100</sup> *ibid* para 56.

This approach is particularly interesting in that it reflects the language of *Alemo-Herron*, where the CJEU found that the dynamic approach excessively interfered with the employer's room for manoeuvre to make adjustments. It can also be seen that in both cases, the CJEU is not susceptible to the argument that the employers entered the market or accepted the transfer knowing about the pre-existing restrictions on their contractual autonomy (dynamic clause and requirement of approval for collective redundancies). The AG was more explicit in making a direct connection between article 16 and the Treaty, finding that 'the restriction on the freedom of establishment (...) also (...) amounts to a restriction on the exercise of freedom to conduct a business'.<sup>101</sup>

The freedom of establishment is found in article 49 TFEU, which provides that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited (...) Freedom of establishment shall include the right to take up and pursue activities as self-employed persons'. This freedom enables persons to set up a primary or secondary establishment in another Member State. Although the principle of non-discrimination on the grounds of nationality forms the core of this freedom, in more recent years, the CJEU has moved towards a market access or restrictions approach, which more closely aligns to the concept of business freedom found in article 16 of the Charter.

In *Gebhard*, the CJEU held that 'national measures liable to hinder or make less attractive the exercise of fundamental freedoms' is very broad, and extends the freedom beyond directly or indirectly discriminatory measures'.<sup>102</sup> Under this 'restrictions' approach, the CJEU has held that a broad range of state measures are capable of infringing access to the market of another Member State. Just like article 16, then, article 49 is easily engaged. However, the free movement provisions are also subject to a number of derogations and justifications. It has long been held and was reaffirmed in *AGET* that derogations based on economic purposes will not be accepted. It is, in fact, in the context of derogations that the connection between article 16 and article 49 is most clearly felt in the *AGET* judgment.

Making the link between traditional Treaty derogations and article 16, the CJEU noted that any justification for restricting freedom of establishment must also comply with the Charter. The first thing to note is that any derogation from the fundamental Treaty freedoms must, by definition, be interpreted restrictively. This would appear to put social considerations on the back foot from the very outset. Having said that, the CJEU has often been open to arguments

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<sup>101</sup> AG opinion in Case C-201/15 *AGET* para 50.

<sup>102</sup> Case C-55/94 *Gebhard* para 37.

based on the protection of workers, even developing a specific worker protection derogation from the Treaty freedoms. Barnard has sought to draw parallels between the worker protection derogation/justification and that applied to consumers. She notes that some have argued that the CJEU should in fact interpret the freedoms restrictively so that consumers (workers) are granted a higher level of *protection*.<sup>103</sup> This paternalistic approach would, however, advance significantly into the contractual autonomy of market operators leading to less competition and a reduction in the *welfare* of consumers (workers). If the CJEU were to prioritise worker protection, it would be accepting that the state's paternalistic interests take precedence over the single market. If the reverse were true, the CJEU would be prioritising the market and thereby the welfare of workers.<sup>104</sup>

On a quantitative reading of the case law, she notes that the CJEU does indeed prioritise the movement of workers. If read from a qualitative perspective, however, a more nuanced picture emerges. Where there is a genuine concern for the protection of workers at national level, 'the Court will uphold the worker *protection* justification or may do so in the future if the rules are modified in some way'.<sup>105</sup> The CJEU has long recognised worker protection as a legitimate derogation allowing Member States to justify national laws providing substantive protection to the weaker party so long as the derogation respected the limits of EU law and did not render the economic freedom illusory.<sup>106</sup> Generally speaking, the CJEU is reluctant to allow Member States to invoke protective arguments but a distinction is emerging between those cases that involve traditional labour law disputes between workers and employers seeking to rely on economic freedoms and those disputes involving posted workers.<sup>107</sup>

In the cases which have dealt with worker protection in the goods context, the CJEU has in fact favoured worker protection over worker welfare. For example, we have already looked at *Oebel* in which the CJEU found that restrictions on night working were compatible with article 34 TFEU. By contrast, in the context of the other freedoms, the CJEU has been more hesitant, finding that the worker protection justification is not made out. Thus, the case law on worker protection is somewhat ambiguous from an employee protection point of view. In some cases, the CJEU has shown itself to be very sympathetic to arguments based on worker protection.

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<sup>103</sup> Catherine Barnard 'The Worker Protection Justification: Lessons from Consumer Law' in Panos Koutrakos, Niamh Nic Shuibhne and Phil Syrpis (eds), *Exceptions from EU Free Movement Law* (Hart 2016) 108.

<sup>104</sup> *ibid* 109.

<sup>105</sup> *ibid* 110.

<sup>106</sup> *ibid* 113.

<sup>107</sup> *ibid* 119.

In others, the Member State simply fails to make its case. What this does show is that the link between article 16 and article 49 need not be a disaster from a labour law perspective.

Leczykiewicz goes further, suggesting that ‘EU free movement law itself has a social dimension, which should be taken into account when “social rights” are being invoked against internal market freedoms’.<sup>108</sup> For her, the free movement provisions, guaranteeing as they do, the right of workers to benefit from employment opportunities anywhere in the Union, represent a social right. This argument seems to somewhat conflate worker welfare and worker protection and ignores that fact that any social dimension to the freedom of movement will of necessity be subject (if not subordinate) to the economic rationale inherent in the Treaty provisions. Any such economic rationale does not, however, lead to the conclusion that free movement law somehow embodies a principle of contractual autonomy. On the other hand, it is true that ‘debates about the notion of a restriction on freedom will have essentially the same form within discussion of freedom of movement and freedom of contract’.<sup>109</sup> It may be that debates surrounding the true purpose of the economic freedoms may now arise in the context of article 16. These debates arose in particular in the context of the emerging market access approach to the Treaty freedoms.

In relation to article 34 TFEU on the free movement of goods, the question was essentially how far that provision reached into the sphere of Member State regulatory autonomy. In *Hünermund*, AG Tesauro offered two alternative rationales underpinning article 34.<sup>110</sup> On the one hand, the provision may be intended to liberalise inter-state trade, in which case national measures that do not hinder trade are not caught. On the other, it may be to encourage the unhindered pursuit of commerce in the individual Member State in which case article 34 should apply.

For Davies, the freedom of movement is not to be conceived as protecting autonomy as such. Rather, it is a freedom to choose from what the internal market has to offer, but not to choose *what* is offered.<sup>111</sup> Freedland and Prassl set out three models to govern the relationship between EU internal market law and domestic employment law. The first is the ‘exclusion type’, whereby EU economic law is excluded from the employment relationship. The second model is the ‘reconciliation type’ under which employment law and market law work in tandem. The

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<sup>108</sup> Dorota Leczykiewicz, ‘Conceptualising Conflict between the Economic and the Social in EU Law after *Viking* and *Laval* in Freedland and Prassl (n 62) 307, 308.

<sup>109</sup> Gareth Davies, ‘Freedom of Movement, Horizontal Effect, and Freedom of Contract’ (2012) 3 *European Review of Private Law* 805, 809.

<sup>110</sup> AG opinion in Case C-292/92 *Hünermund*.

<sup>111</sup> Davies (n 109) 811.

third and final model is the ‘supersession type’ by which EU internal market law overrides or supersedes labour law’s role in regulating the employment relationship.<sup>112</sup> The previous case law of the CJEU has shown much greater sensitivity to the need to govern the relationship between economic and social considerations. In cases such as *Schmidberger*,<sup>113</sup> the CJEU has demonstrated that where the case is more removed from commercial considerations (in that case, the right to protest), ‘the more generous the Court is as regards the available scope for justification and also the breadth of the margin of appreciation’.<sup>114</sup> Which approach is borne out by the case law on article 16 outside the employment context since the decision in *Alemo-Herron*?

### 1.2. *The treatment of article 16 in the commercial context*

It is useful to contrast the CJEU’s use of article 16 in the employment context with its impact on the commercial sphere, given that ostensibly social considerations may be absent there. In *Starnet*, for example, the question was whether the internal market freedoms or article 16 precluded Italian legislation governing the betting and gaming sector.<sup>115</sup> AG Wahl considered that the licensing requirements were not incompatible with the Treaty and therefore no separate examination of article 16 was necessary. As the AG put it, ‘an examination of the restrictive effects of national legislation on the provision of gaming services from the point of view of, for example, Article 56 TFEU covers also possible limitations on the exercise of the rights and freedoms provided in Articles 15 to 17 of the Charter’.<sup>116</sup>

Another case in the commercial context is *Lidl*.<sup>117</sup> This case concerned the validity of EU rules establishing labelling obligations for fresh poultrymeat. The legislation required that at retail level, fresh poultry must bear an indication of the total price and price per weight unit either on the packaging or on the labelling. The question was whether these rules were compatible with articles 15 and 16 of the Charter. AG Bobek decided to consider article 16 only. He started by noting that both article 15 and 16 are very closely connected but that ‘the Court used different formulations to refer, in their quality as general principles (...) to the freedom to freely choose and practice one’s trade or profession; the freedom to pursue an occupation; the right to carry on one’s trade or profession; or the freedom to pursue an economic activity’.<sup>118</sup>

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<sup>112</sup> Freedland and Prassl, ‘*Viking, Laval and Beyond: An Introduction*’ (n 62) 15.

<sup>113</sup> C-112/00 *Schmidberger*.

<sup>114</sup> Freedland and Prassl, ‘*Viking, Laval and Beyond: An Introduction*’ (n 62) 32.

<sup>115</sup> AG opinion in Case C-322/16 *Starnet*.

<sup>116</sup> *ibid* para 61.

<sup>117</sup> Case C-134/15 *Lidl*.

<sup>118</sup> AG opinion in Case C-134/15 *Lidl* para 20.

We have also already noted in Chapter III that the CJEU has acknowledged that the freedom to conduct a business coincides with the freedom to pursue an occupation.<sup>119</sup>

Articles 15–17 of the Charter have often been invoked together, with AG Bobek noting that they can all be said to protect the economic interests of the individual.<sup>120</sup> In *Lidl*, the rules governing labelling fell squarely within article 16 given that it relates to the conduct of an already chosen business. The labelling requirements did not affect the essence of the freedom. The CJEU, adopting a slightly different approach, found that the measure was liable to hinder freedom to conduct a business since it ‘constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him and have a considerable impact on the organisation of his activities’.<sup>121</sup> Nevertheless, the measure was a justified public intervention and was proportionate.

In a line of cases concerning the regulation of tobacco products, the treatment of article 16 has been somewhat fleeting. In *Pillbox*, AG Kokott found that advertising restrictions ‘undoubtedly’ results in an interference with freedom to conduct a business but that this freedom is subject to a broad range of interventions.<sup>122</sup> In *Phillip Morris*, AG Kokott also held that freedom to conduct a business can be subject to a broad range of public interventions. She contrasted this with other fundamental rights, notably the freedom of expression, holding that ‘in view of the foundational role played by that fundamental right in a democratic society, as it enjoys with regard to interferences with the freedom to conduct a business, for example’.<sup>123</sup>

It is certainly difficult to envisage a continental internal market without some level of commitment to contractual and business freedom. The link between article 16 and the Treaty freedoms should not, therefore, be surprising. The FRA has suggested that article 16 merely ‘adds’ to the Treaty freedoms by ‘providing for an “enhanced” protection for business to conduct their affairs’, enhanced in the sense of going beyond the need for a cross border scenario.<sup>124</sup> It is tracing the outer limits of this freedom that is difficult and controversial. It is for this very reason that the EU has seen fit to embark on a project (however tentative) of

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<sup>119</sup> Joined Cases C-184/02 and C-223/02 *Spain and Finland*

<sup>120</sup> AG opinion in Case C-134/15 *Lidl* para 21.

<sup>121</sup> Case C-134/15 *Lidl* para 29.

<sup>122</sup> AG opinion in Case C-477/14 *Pillbox* para 189.

<sup>123</sup> AG opinion in Case C-547/14 *Philip Morris* 239; AG Kokott in Case C-358/14 *Poland*.

<sup>124</sup> European Agency for Fundamental Rights (n 93) 12.

harmonising private law at Union level. This is largely an admission of the fact that the scope of contractual freedom cannot be ascertained by looking to the four freedoms alone.<sup>125</sup>

### 1.3. *Harmonising contractual autonomy and its restrictions*

The Draft Common Frame of Reference (DCFR) for a harmonised EU contract law describes contractual autonomy as no more than a ‘starting point’.<sup>126</sup> Article II-1:102(1) provides that ‘[p]arties are free to make a contract or other juridical act and to determine its contents, subject to any applicable mandatory rules’. Similarly, Article 0:101 of the Principles Directeurs provides that ‘[e]ach party is free to contract and to choose who will be the other party. The parties are free to determine the content of the contract and the rules of form which apply to it. Freedom of contract operates subject to compliance with mandatory rules’.

It can be seen here that, at an EU level, the principle of contractual autonomy embraces the freedom to enter a contract, the freedom to select a contractual partner and the freedom of classification and content.<sup>127</sup> This rather innocuous make up of contractual autonomy is far removed from the expansive notion contained in cases such as *Alemo-Herron*. In addition, the DCFR itself recognises a number of permissible limitations on the contractual autonomy principle. First, third party contracting is not permitted. Second, contracts which are harmful to third persons and society in general may be invalidated, for example, if it is illegal or contrary to public policy. Third, it may not be just to enforce a contract when one of the parties is in a comparatively weak bargaining position or where consent is defective, for example, in cases of mistake or fraud. This ensures that ‘contractual freedom is genuine freedom’.<sup>128</sup> Fourth, the freedom to choose a contractual partner is curtailed where this freedom would lead to discrimination. Fifth, parties will not always be permitted to withhold information at the pre-contractual stage. Sixth, there is a need to ensure party information as to the terms of the contract, for example where the terms are not individually negotiated or accessible to one party. Finally, and most importantly in the employment context, the DCFR recognises that ‘take it or leave it contracts’ are increasingly prevalent and that the law must therefore address inequality of bargaining power.<sup>129</sup> Having said all this, the DCFR concludes that ‘the interference with freedom of contract should be the minimum that will solve the problem (...) it must be asked whether it is necessary to make a particular term mandatory or whether a flexible test such as

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<sup>125</sup> Basedow (n 90) 908.

<sup>126</sup> Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR) Outline Edition 65.

<sup>127</sup> Herresthal (n 94) 96.

<sup>128</sup> DCFR outline edition (n 128) 65.

<sup>129</sup> *ibid* 67.

“fairness” would suffice to protect the weaker party’.<sup>130</sup> Despite this, the emphasis in the DCFR, the case law and the literature has been on the restrictive nature of freedom of contract in EU law rather than its expansive or pervasive character.

Marella has sought to identify some patterns in the restriction of autonomy at EU level. She sets out three broad models, the paternalistic, the social and the perfectionist models. Under the paternalistic approach, the state is entitled to interfere with contractual freedom as long as this intervention is authorised by the law and is subject to strict limits.<sup>131</sup> This model is reflected in the case law of the CJEU on freedom of contract as a general principle. The idea underlying this model is that individuals are unable, in certain circumstances, to identify their own preferences. The state therefore intervenes to give effect to the *true* desires of the parties. The second model is the social model. This model seeks to control the formation of contracts where weak parties face strong parties. Under this approach, contractual autonomy is seen as a source of social injustice.<sup>132</sup> Therefore, parties are considered *unable* to identify their own preferences. Finally, the perfectionist model is a more stringent form of paternalism, which views the party as having the *wrong* set of preferences.<sup>133</sup> This trichotomy is evidently incomplete and ignores other reasons for impeding contractual freedom such as the removal of market distortions and externalities (such as those dealt with in the DCFR) or indeed to encourage respect for fundamental rights. The absence of protection for autonomy in EU primary law has in fact been lamented by a number of private law scholars. The limited and unsubstantiated nature of contractual autonomy in Union law has led commentators such as Herresthal to call for harmonisation.<sup>134</sup> But, as Marella has noted, any attempt at harmonising contract law in Europe would likely adopt both a common core and minimum common factor approach, leading to reductionism and thereby ‘an extremely narrow notion of freedom of contract’.<sup>135</sup>

#### 1.4. *The dual vision of contractual autonomy*

A recurring theme in the literature on business freedom is the notion that contractual autonomy has a dual purpose or that a dual vision underlines the freedom. It has already been noted that article 16 may be seen as having either an individual rights characteristic or a broader role in building an economic constitution. Similarly, Whittaker has pointed to the fact that freedom of

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<sup>130</sup> *ibid.*

<sup>131</sup> Maria Marella, ‘The Old and the New Limits to Freedom of Contract in Europe’ (2006) 2 ERCL 257, 261.

<sup>132</sup> *ibid.* 269.

<sup>133</sup> *ibid.*

<sup>134</sup> Herresthal (n 94) 97

<sup>135</sup> Marella (n 131) 260.

contract can be viewed either as an overarching economic principle underpinning all markets, the ‘market vision’ or it can be seen as a moral principle, based on the will of individuals, the “voluntarist” vision of contractual autonomy.<sup>136</sup> Both visions can be found in EU law with the fundamental freedoms representing the market vision but with EU legislation—notably in the consumer context—being concerned with the consent of the contracting parties.<sup>137</sup> In most instances, the outcome in an individual case will not depend on which of these visions prevails. Sometimes, however, focusing on the quality of consent or the will of the individual may lead to private transactions being impeded rather than facilitated.<sup>138</sup>

If we look again at *Alemo-Herron*, it could be argued that the transferee employer had consented to the transfer and under the existing terms and conditions which should have included the dynamic clause. For the CJEU, however, it seems that this consent was defective because the new employer was not capable of taking part in the negotiating process. Here, it appears that the ‘will’ and ‘market forming’ visions of contractual autonomy are indeed coinciding. It is difficult to escape the conclusion that the CJEU was concerned not to impede or discourage the acquiring of undertakings—particularly in the context of privatisation. This is perhaps unsurprising when we consider that the very rationale for the adoption of the TUD was to facilitate mergers and acquisitions—although as already mentioned, this should not be equated with the ‘protection’ of the employer.

This confused nature of contractual autonomy at an EU level should come as no surprise given that business freedom is not typically found in international rights instruments. When it came to developing business freedom in Union law, the CJEU therefore had to turn to the medley of constitutional traditions of the Member States. First, it should be noted that only one Member State, Cyprus grants a specific constitutional protection to the notion of contractual autonomy as opposed to a wider commitment to business freedom.<sup>139</sup> Looking beyond constitutional protection, different Member States adopt different approaches to conceiving the protection of contractual autonomy. As Micklitz puts it, [w]hat if this common assumption is no more than a rather superficial “gentleman’s agreement”, which allows us to communicate whilst maintaining our own preconceptions’.<sup>140</sup>

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<sup>136</sup> Simon Whittaker, ‘The Optional Instrument of European Contract Law and Freedom of Contract’ (2011) 3 ERCL 372, 373–374.

<sup>137</sup> *ibid* 375–376.

<sup>138</sup> *ibid* 374.

<sup>139</sup> European Agency for Fundamental Rights (n 93) 28.

<sup>140</sup> Hans W Micklitz, ‘On the Intellectual History of Freedom of Contract and Regulation’ (2015) 4 Penn State Journal of Law & International Affairs 1, 1.

English contract law has been described as being underpinned by contractual autonomy, with the law being used as a tool to promote free commerce. Under this model, freedom of contract ‘means first and foremost the economic freedom to voluntarily engage in economic transactions without any risk of statutory interferences’.<sup>141</sup> Such interference is only permitted to the extent that it solves concrete concerns. English law may therefore be described as liberal and pragmatic.<sup>142</sup> By way of contrast, French law sees contractual autonomy as not merely a tool to promote individual economic benefit. Rather, ‘the commitment to a contract is the product of a reasonable decision (...) a higher reason that is deeper than the individual transaction’.<sup>143</sup> This approach, which can be described as rational and political, derives from the French revolution, during which contractual autonomy and liberty more generally were seen as tools for the political empowerment of the bourgeoisie. German law is similar to English law (liberal) and to French law (political), but adopts a much stronger commitment to the social (paternalistic).<sup>144</sup> For Micklitz, it is not possible to reduce the EU approach to contractual autonomy as a sum of the component Member State approaches. Rather, contractual autonomy in EU law is ‘bound to trans-border business and European economic integration’ (functional and instrumental).<sup>145</sup> This is a similar approach to that adopted during the development of the general principles of EU law discussed above.

As such, there lies an inherent contradiction in the protection of business freedom at Union level. EU law is simultaneously protective of contractual autonomy (enables and facilitates cross-border transactions) while restricting that very autonomy through the enactment of protective legislation. This apparent contradiction falls away if we abandon a formalistic view of contractual autonomy. A more substantive view envisages intervention to ensure that the weaker party to the contract may enjoy real contractual autonomy in substance.<sup>146</sup> To achieve this, it will be necessary to end the conception of legislative intervention as an ‘exception’ or limitation to contractual autonomy.<sup>147</sup> Yet, this is precisely the approach adopted by the CJEU in cases such as *Alemo-Herron*. Business freedom is conceived as the ‘right’ to be protected, with any regulation of that right requiring justification. This tension has emerged time and again, appearing most recently in the headscarf cases, discussed above, where AG Sharpston adopts a more traditional human rights approach, prioritising religious freedom over

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<sup>141</sup> *ibid* 14.

<sup>142</sup> *ibid* 16.

<sup>143</sup> *ibid* 18.

<sup>144</sup> *ibid* 23.

<sup>145</sup> *ibid* 30.

<sup>146</sup> Aurelia Colombi Ciacchi, ‘Party Autonomy as a Fundamental Right in the European Union’ (2010) 6 ERCL 303, 303.

<sup>147</sup> *ibid* 303–304.

competing economic interests whereas AG Kokott takes the opposite approach which aligns more closely with *Alemo-Herron*. Having looked at the nature of contractual autonomy in EU law, is there any Employment Right contained in the Charter that is commensurate with article 16 and that may act as a counterweight?

## 2. Internal counterweights to contractual autonomy as a fundamental right

It was noted in Chapter III that the CJEU has shown a preference for relying on other Charter provisions in order to counter-balance economic rights. It has also been determined, however, that the Employment Rights found in the Solidarity Title have been particularly weak when compared with article 16. Faced with a clash between contractual autonomy and a competing Employment Right, it is not, at present, difficult to discern which would prevail. In which case, where might we turn to search for a counterweight to article 16 that is internal to the Charter itself? One potential avenue meriting further exploration is article 15 which governs the right to work. Article 15(1), in particular, provides that '[e]veryone has the right to engage in work and to pursue a freely chosen or accepted occupation'. The language used here is much more robust and rights-oriented than that found in either article 16 or many of the Charter's Employment Rights. It is for this reason and also for its inclusion in the Freedom Title (the same Title as article 16), that the right to work might be thought to be particularly apt to counterbalance business freedom as a fundamental right.

However, the first major difficulty standing in the way of reliance on article 15 is that there is no consensus on the nature of the right to work. For some authors such as Collins, the right to work is just that – a right and one which is destined to provide for human self-realisation (as opposed to the self-respect suggested by other commentators).<sup>148</sup> For Bogg, on the other hand, the right to work is best conceptualised not as a right at all, but rather as a series of duties placed on the state (or employers) which may in fact run in parallel with the *right* to work.<sup>149</sup> This particular view is also apt for confusion with the idea of a correlative *duty* to work.<sup>150</sup>

Beyond the nature of the right, there is also scant agreement as to the precise content that this right should be composed of. Is it aimed at achieving full employment and should, therefore,

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<sup>148</sup> Hugh Collins, 'Is There a Human Right to Work?' in Virginia Mantouvalou (ed), *The Right to Work* (Hart 2015) 17, 29.

<sup>149</sup> Alan L Bogg, 'Only Fools and Horses: Some Sceptical Reflections on the Right to Work' in Mantouvalou, *ibid* 149, 150.

<sup>150</sup> Guy Mundlak, 'The Right to Work, the Value of Work' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 341, 343.

guarantee the right of any individual to a job? Is it about a right not only to work, but to *decent* work? Is it about something broader still, being ‘more than freedom from coercion or freedom of occupation [entailing] a more positive dimension—the right to *have* work (...) and rights *in* work or *at* work’.<sup>151</sup> Hepple further points to three possible rights falling within the sphere of the right to work, namely the right to be engaged; the right to be given work once engaged and the right to be reinstated after unjustified dismissal.<sup>152</sup> Article 15, if we are to go by the Explanations, is quite firmly rooted in the freedom to choose an economic activity found in article 1(2) of the ESC.

On any of these accounts, it is not at all apparent what relevance article 15 might have in the precise context of *Alemo-Herron*. The CJEU has, after all, made it clear that the intention of the TUD was not to create any new EU right such as the right to continued employment in a particular job. Where article 15 may become relevant is if we can somehow conceptualise it as a freedom of contract for employees which may then be used to counterbalance article 16. First, we need to reconsider the relationship between articles 15 and 16.

### 2.1. Relationship between articles 15 and 16 of the Charter

Both the freedom to conduct a business and the right to work/freedom to choose an occupation have been intertwined since the earliest human rights case law of the CJEU, with the right to choose and practice freely a profession being guaranteed in the context of business freedom. In those cases, not only were the two rights recognised, but they were also subject to the same conditionality and limitations. However, as Ashiagbor points out, in those early cases, the right now found in article 15 was, in fact, used to challenge EU legislative action ie it was used in much the same way as article 16 is being used today.<sup>153</sup>

The conceptualisation of the right to work as a freedom of contract for employees is not a new idea. In fact, the right to work has been said to be ‘synonymous with unfettered freedom of contract, namely freedom from the sort of state interference which empowers trade unions to regulate terms and conditions jointly with employers’.<sup>154</sup> In other words, the right to work has been conceived as the freedom for individual employees to continue in work despite strike action ie it is a tool for the individual to resist the action of ‘powerful’ unions.<sup>155</sup> In this respect,

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<sup>151</sup> Diamond Ashiagbor, ‘Article 15’ in Peers and others (n 91) 423, 426.

<sup>152</sup> Bob Hepple, ‘A Right to Work’ (1981) 10 ILJ 65, 73.

<sup>153</sup> Ashiagbor (n 151) 424.

<sup>154</sup> Diamond Ashiagbor, ‘The Right to Work’ in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (OUP 2005) 241, 258.

<sup>155</sup> Hepple (n 152) 79.

a potential link between article 15 and the fundamental Treaty freedoms can be discerned (a link also made above between article 16 and the Treaty). It will be recalled that Leczykiewicz thought that cases such as *Viking* and *Laval*, far from undermining social rights, actually embrace them to the extent that workers have a social interest in benefiting from their free movement rights. In order to achieve this, the powerful force of strong trade unions must be resisted. It would not be a stretch to say that article 15 and the right to work could become a tool for workers to resist the power of entities other than trade unions, for example the state or employers with particularly strong bargaining power.

The main obstacle lying in the way of such an approach is the disparate nature of the right to work. First, it is drafted in vague terms but as we have seen, this has been no obstacle to reliance on article 16. Second, and more problematic, is the fact that the right is a composite right made up of ‘multiple layers and more particular rights that are intertwined and inseparable’.<sup>156</sup> For Mundlak, the freedom or liberty element of the right to work is in fact the ‘least objectionable dimension of the right’ and ‘if a constitution stops here in defining the dimensions of this right, it is actually rejecting recognition of the right to work in its broader sense’.<sup>157</sup>

A further problem is that the right to work can be seen as little more than an embodiment of or perhaps more accurately, an underpinning for, other social rights in the Charter such as the right to fair and just working conditions or the right not to be unfairly dismissed. As Collins tells us, if those rights ‘could all be derived from other, more fundamental rights, there would be little need to emphasise a further, independent right to work’.<sup>158</sup> Undoubtedly most social rights can in some way be connected with the right to work. The problem arises, however, if we are to make the leap from this connection to saying that the right to work is the normative underpinning of these social rights.<sup>159</sup> If this were indeed the case, the weakness of the Employment Rights in the Charter would not bode well for the ability of article 15 to act as a counterweight to article 16.

It can be seen, then, that not only is the nature of the right to work vague and imprecise, but that its relationship to article 16 is also far from clear. Is article 15 in some way synonymous with article 16 in that it provides workers with a right to autonomy and the freedom to choose an occupation or is it more appropriately viewed as opposing the employer’s freedom to

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<sup>156</sup> Guy Mundlak, ‘The Right to Work: Linking Human Rights and Employment Policy’ (2007) 146(3-4) *International Labour Review* 189, 192.

<sup>157</sup> *ibid* 193.

<sup>158</sup> Collins, ‘Is There a Human Right to Work?’ (n 148) 24.

<sup>159</sup> Bogg (n 149) 151.

conduct a business? As Collins puts it, ‘it is claimed that EU law confers a right on a worker that is inspired by Article 15, an employer can almost certainly match that claim by the competing argument that enforcement of the proposed interpretation of EU law would disproportionately interfere with the employer’s freedom to conduct a business’.<sup>160</sup>

If we turn again to the case law of the CJEU, we can see that, to date, it is the former interpretation that has come to the fore. In other words, article 15 and article 16 are treated as coterminous. AG Bobek has been particularly extensive in his analysis of the relationship between the provisions. For example, in *Fries*, the applicant pilot was dismissed when he reached the age of 65 as required by EU law.<sup>161</sup> This was despite the fact that his existing contract would not expire for a further two months as the statutory pension age was reached at 65 years and two months. For the AG, article 15 ‘enhances personal autonomy and self-realisation, with human dignity serving as its foundation’.<sup>162</sup> Due to the restrictive scope of the age limitation, it could not be said to adversely affect the very essence of the right to pursue a freely chosen occupation. Rather ‘[i]t affects the possibility to pursue a professional career in a certain sector with regard to a particular activity, at a limited stage: it operates in the later years of a professional career, which are close to, even if they do not coincide with, retirement’.<sup>163</sup>

The *Lidl* case has already been dealt with in some detail.<sup>164</sup> It will be recalled that the applicant alleged that poultry labelling requirements infringed both article 15 and article 16. For AG Bobek, both rights are connected, as is made clear by the CJEU’s case law on the general principles. Nevertheless, ‘the fact that the Charter today contains two separate provisions suggests that there ought to be some differentiation’.<sup>165</sup> The AG starts by looking at the wording of the two provisions and highlights that article 16, unlike article 15 is subject to Union law, national laws and practices. This meant that ‘Article 16 allows for a broader margin of appreciation when it comes to regulation that might interfere with the freedom to conduct a business’.<sup>166</sup> From the case law on the general principle it was also clear that the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.<sup>167</sup> This led the AG to conclude that there is no doubt that in terms of permissible limitations, ‘Article 16

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<sup>160</sup> Hugh Collins, ‘Progress towards the Right to Work in the United Kingdom’ in Mantouvalou (n 148) 227, 230.

<sup>161</sup> AG opinion in Case C-190/16 *Fries*.

<sup>162</sup> *ibid* 66.

<sup>163</sup> *ibid* 69.

<sup>164</sup> AG opinion in Case C-134/15 *Lidl*.

<sup>165</sup> *ibid* para 22.

<sup>166</sup> *ibid* para 23.

<sup>167</sup> *ibid*.

(...) allows for a greater degree of State intervention than Article 15'.<sup>168</sup> This statement seems to overlook the fact that the freedom to choose an occupation was equally restricted in the case law of the CJEU on the general principle.

Turning to the precise nature of the relationship between the two rights, the AG finds that both protect individual autonomy in the closely related professional and business fields and that both are linked to the performance of economic activity.<sup>169</sup> The differences are that article 15 is focused on the element of choice and personal autonomy, with the link to work emphasising a more relevant impact on natural persons and employment relationships.<sup>170</sup> Article 16 on the other hand focuses on entrepreneurial activity such as the freedom of contract.<sup>171</sup>

There may be overlap between the two, but the relationship can be summarised as follows 'Article 15(1) (...) is more likely to be applicable if the situation at hand concerns natural persons and issues such as access to work and choice of occupation. Conversely, Article 16 (...) is more relevant for legal persons and the way an already established business, or an already chosen occupation, is being carried out and regulated'.<sup>172</sup> The question is what precisely is the effect of this interrelationship for the ability of article 15 to act as a counterweight to the freedom to conduct a business? King, for example, asks whether *Lochner* might have been decided similarly on grounds of the employee's right to work.<sup>173</sup> It is certainly true that in *Lochner*, the Chief Justice emphasised that both the employer and the employee had the freedom to buy and sell labour. Would article 15 have made any difference had it been raised in *Alemo-Herron*?

## 2.2. Raising article 15 in Alemo-Herron

The first major hurdle to relying on article 15 is that as we can see, the CJEU has treated that provision and article 16 as essentially one and the same. If it were to be raised, however, which of its myriad component parts could have made a difference? If we start with the right to work as a right to continued employment, it could be argued that the very purpose of the TUD is to ensure that the entire workforce is transferred from the old employer to the new, with minimal exceptions, including the possibility of dismissals for economic, technical or organisational reasons (ETOR). But this is achieved via the Directive itself, with no reference to the right to

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<sup>168</sup> *ibid* para 25.

<sup>169</sup> *ibid*.

<sup>170</sup> Although it does also apply to undertakings. See the opinion of AG Wahl in Case C-497/12 *Gullotta* para 69.

<sup>171</sup> AG opinion in Case C-134/15 *Lidl* para 26; opinion of AG Wahl in Case C-101/12 *Schaible* para 24.

<sup>172</sup> AG opinion in Case C-134/15 *Lidl* para 27.

<sup>173</sup> Jeff King, *Judging Social Rights* (CUP 2012) 109.

work. As Wynn-Evans notes, '[t]he mischiefs which TUPE seeks to address are therefore that at common law, as a consequence of the transfer of a business (...) an affected employee: is left with no entitlement to continue employment in the business in which he or she was employed (...) has no right to be employed on his or her previous contractual terms (...) has no entitlement to any information (...) or consultation'.<sup>174</sup> Article 3 TUD addresses these concerns with one commentator describing the TUD/TUPE as forming 'a quasi labour aristocracy as far as the protection of the courts is concerned'.<sup>175</sup>

The rights granted by the TUD/TUPE do appear extensive on their face. Unless one of the exceptions applies, the transfer is liable to the employees 'for everything the transferor has done' 'under or in relation to the relevant contract' for example failure to pay wages or even discriminatory conduct.<sup>176</sup> It is not difficult to tie these elements into the right to work in the sense that, were the employee treated less favourably upon the transfer, he would be less likely to consent to it. In any event, however, the ennobled status granted by the TUD is limited in time. Following *Alemo-Herron*, it is clear that collectively agreed terms only transfer if they were in force at the time of the transfer. Although it must be admitted that the TUD itself foresees the possibility of restricting the applicability of collectively agreed terms to one-year post transfer. What difference would it make to classify transfer rights as fundamental human rights in the guise of article 15?

First, it cannot be doubted that granting fundamental rights status to a particular provision must lend increased normative weight to that provision. If it can be used to assess the validity of ordinary employment legislation, then it is by definition elevated above that legislation despite the limitations exposed in Chapter II. It is suggested that the limitation of TUPE rights in time might be a prime candidate for obsolescence in the face of a competing fundamental right.

If we look back to the approach adopted by the CJEU in *Test-Achats* we can see that in that case, limitation clauses contained in the legislation were no match for the equality principle expressed as a fundamental human right in the Charter. In *Alemo-Herron*, it might have been argued that the term 'on the date of the transfer' should have been more purposively construed to read 'in connection with the transfer' or, as happened in *Test-Achats*, could have been overridden entirely given its incompatibility with the Charter. The same is true of the possible restriction of collectively agreed terms to one-year post-transfer. So, this is the right to work in the sense of continued employment.

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<sup>174</sup> Charles Wynn-Evans, *The Law of TUPE Transfers* (2nd edn, OUP 2016) 4.

<sup>175</sup> J McMullen, 'Takeovers, Transfers and Business Re-organisations' (1992) 21 ILJ 15.

<sup>176</sup> Wynn-Evans (n 174) 4.

A second potential way to rely on article 15 is to tie it to the notion of fair and just conditions of employment or ‘decent work’, perhaps in conjunction with article 31(2) of the Charter. Could it have been argued in *Alemo-Herron* that being paid less than their public sector counterparts, despite having previously been treated the same is in some way degrading?

Perhaps the most promising avenue is, in fact, the aspect of article 15 that has been most prevalent in the case law on the general principle, ie the freedom to choose an occupation. It was seen above that the CJEU often treats this aspect of the right to work as essentially synonymous with article 16, thereby ignoring the former. In *Lochner*, the majority viewed the legislation as interfering with the worker’s right to sell his labour and this was essentially the view of the English courts prior to *Alemo-Herron* although not quite couched in the language of ‘selling’.

In *Whent*, for example, Judge Hicks held that ‘there is simply no reason why parties should not, if they choose, agree that matters such as remuneration be fixed by processes in which they do not themselves participate. The tribunal (...) accepts that that is true of some employers who are not local authorities. It must, on the agreed facts set out near the beginning of this judgment, equally be true of non-union employees’.<sup>177</sup> In other words, both parties, exercising their freedom of contract agreed that remuneration would be set externally. In denying the rights of the employees who in good faith agreed to be so bound, the CJEU in *Alemo-Herron* was interfering with their freedom of contract and thereby their right to work viewed as an expression of autonomy or freedom. In this respect, it can be seen that the English dynamic approach is more respectful of party autonomy as a whole than that adopted by the CJEU in *Alemo-Herron*. Nevertheless, this may not be enough. It is certainly difficult to see how article 15 in isolation might be an effective counterweight to article 16 as currently constituted. In addition, confining the right to work in article 15 to merely a right to pursue an occupation is to miss the core of the right.<sup>178</sup>

An alternative approach might be to rely on article 15 in conjunction with another Charter provision. Article 31(2) has already been mentioned, but other Charter provisions such as article 30 on the right not to be unfairly dismissed might equally have a bearing on the outcome of cases such as *Alemo-Herron*. There are also dangers involved in meeting article 16 on its own terms, accepting that autonomy is an overriding principle to be valued in the employment

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<sup>177</sup> [1997] IRLR 153 EAT (Hicks HHJ) [16].

<sup>178</sup> Guy Mundlak ‘Working Out the Right to Work in a Global Labour Market’ in Mantouvalou, (n 148) 291, 296.

context, with the only question being whether it is the autonomy of the employer or the worker that prevails on the day.

### 2.3. *Lessons from the right to property*

In any discussion of the influence of the Charter on the employment relation, it is useful to take a step back to consider the Charter's role in the wider framework of EU law. Outside of the employment context, article 17 on the right to property, which may also be linked to article 16 has had a growing influence in EU law. In *Ledra*, the claimants sought compensation following the Memorandum of Understanding (MoU) reached with Cyprus during the financial crisis, the terms of which led to a reduction in the value of certain bank deposits.<sup>179</sup> One of the main arguments put forward was that the bail-in constituted a breach of the right to property found in article 17. The CJEU noted that the right to property is not absolute, but may be subject to restrictions in the general interest, of which the stability of the banking system was a clear example.<sup>180</sup> In another case, *Florescu*, the CJEU had to determine whether the MoU with Romania was subject to review in light of the Charter.<sup>181</sup> Again, the CJEU found that article 17 does not preclude legislation making changes to the calculation of pension rate for public sector workers. Both cases are illustrative of how cases involving article 16 *should* develop in the future. The right is found to exist but it is subject to legitimate restrictions in the public interest. The proportionality doctrine is then applied (in a light touch manner) to determine the permissible extent of that interference. The contrast between these cases and those on article 16, which appears to act as a trump card is striking.

Given the above difficulties in assessing the relationship between various of the Charter's economic provisions, perhaps it is time to look beyond the Charter to new methods of regulating the employment relationship that can avoid the reach of article 16 in the first place. One such technique can be found in nudge theory.

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<sup>179</sup> Joined Cases C-8/15 to C-10/15 *Ledra and others v European Commission and European Central Bank* ECLI:EU:C:2016:701.

<sup>180</sup> *ibid* paras 70 and 71.

<sup>181</sup> Case C-258/14 *Florescu and others v Sibiu and others* ECLI:EU:C:2017:448.

### C. Or Much Ado about Nudging?

Having looked at some of the broader implications of granting fundamental rights status to contractual autonomy, is there any way in which the reach of article 16 can be curtailed or even avoided through the use of novel regulatory techniques? This section explores one such alternative to traditional command and control regulation, namely Thaler and Sunstein's nudge theory and its underexplored use in the employment context. There are, of course, other forms of alternative regulation, notably the Open Method of Co-ordination. I have decided to focus on nudge theory due to its explicit connection to autonomy principles. In other words, it is perhaps the form of regulation that is most likely to comply with article 16. The UK Government's Behavioural Insights Team (Nudge Unit) has also already committed itself to a behavioural analysis of the law in order to explore cheaper and more effective ways of influencing behaviour.<sup>182</sup> So far, the employment context has been off their radar. This must surely change post-Brexit, when swathes of existing UK employment legislation may be revised if not replaced. It is also far from assured that the EU will continue to regulate the employment relationship in the same manner it has done until now. Not only has the Union committed itself to securing greater flexibility in the employment relationship, but it is also seeking to ensure first 'better' and then 'smarter' regulation.<sup>183</sup>

In order to apply nudge theory to employment law, it would be necessary to determine whether that legislation (or part of it) is indeed governing an aspect of human 'behaviour'. Such an endeavour is beyond the scope of this thesis. For now, we can be satisfied that a behavioural element exists where the purpose of the legislation is to change human behaviour or where behavioural responses might hinder the purpose of legislation.<sup>184</sup> The question to be addressed here is whether alternatives to command and control regulation, such as nudging techniques are really capable of escaping the reach of article 16. Furthermore, if there are human rights implications to the employment relationship, as this thesis argues there are, are nudges really an appropriate tool for regulating such a relationship? Finally, far from avoiding the reach of article 16, might nudges eventually embrace it? Before addressing these questions, it is necessary to come to a satisfactory definition of a 'nudge'.

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<sup>182</sup> <[www.behaviouralinsights.co.uk](http://www.behaviouralinsights.co.uk)> accessed 25 July 2017.

<sup>183</sup> <[ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how\\_en](http://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en)> accessed 25 July 2017.

<sup>184</sup> Fabiana Di Porto and Nicoletta Rangone, 'Behavioural Sciences in Practice: Lessons for EU Rule Makers' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudging and the Law* (Hart 2015) 29, 31.

## 1. What's in a nudge?

The appropriate nomenclature to apply to the growing field of behavioural regulation has proven controversial. It is suggested that the most appropriate umbrella term for this field is ‘behavioural law and economics’, of which nudging is one example. Behavioural law and economics can be conceived as having two major attributes, one (social) scientific and one political. From a ‘scientific’ perspective, behavioural economics allow for the ‘proper appreciation of the actual cognitive frameworks, information-processing heuristics, and likely motivations of choice-making individuals’ in the design of legislation and other forms of regulatory intervention.<sup>185</sup> Behavioural law and economics is closely related to another concept known as ‘new governance’. The two begin from different starting points, however. New governance scholars begin by emphasising the limits of traditional regulatory tools while advocates of behavioural regulation begin with the limitations of individual choice.<sup>186</sup> New governance focuses on the role of the regulatees such as enterprises in the regulatory process. Where behavioural regulation seeks to overcome and harness individual human behaviour, new governance prioritises organisational cultures. In this respect, it may be difficult to distinguish behavioural law and economics from other forms of empirically-informed regulatory techniques. Where the difference does emerge is when we consider the political backdrop to the development of behavioural regulatory techniques.

From this political point of view, nudge ‘offers the promise of (...) consensus—built around minimalist forms of government action that preserve freedom of choice [and] cuts through today’s hyperbolized, partisan conflicts and offers a tantalizing third way between conventional ideologies’.<sup>187</sup> Although government intervention in the employment relationship is not quite as contested in Europe as it is in the United States, there is no doubt that David Cameron’s introduction of the BIT was essentially a political tool designed to encourage lighter touch (de)regulation, perhaps with the gloss of being behaviourally informed or ‘scientific’ rather than purely ideological. It is at this point that the tensions between the two aspects of behavioural regulation become obvious; a regulatory technique cannot be purely scientific if it has also to serve political or ideological ends.

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<sup>185</sup> Ryan Bubb and Richard H Pildes, ‘How Behavioral Economics Trims its Sails and Why’ (2014) 127 *Harvard Law Review* 1593.

<sup>186</sup> On Amir and Orly Lobel, ‘Stumble, Predict, Nudge: How Behavioural Economics Informs Law and Policy’ (2008) 108 *Colum L Rev* 2098, 2127.

<sup>187</sup> Bubb and Pildes (n 185) 1595.

Nudges, although a subset of behavioural law and economics, have to some extent become shorthand for it and can be defined as ‘any aspect of choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives’.<sup>188</sup> It is often presented as a cheaper and more efficient alternative to legislation but it can also be used in combination with traditional regulatory techniques, so the two are not necessarily mutually exclusive.<sup>189</sup>

Nudges are essentially interventions by the State or private actors that steer people in particular directions.<sup>190</sup> They seek to overcome human inaction by making choices easier, and this is a key point; nudges must preserve choice, or they are not nudges at all, but rather traditional mandatory regulation. The idea is that nudges should be used to steer us in a direction that will promote our welfare, as judged by ourselves. It is often easier to define a nudge by pointing out what it is not. Nudges must not entail significant material incentives.<sup>191</sup> For that reason, subsidies are not nudges, taxes are not nudges, nor are fines or incarceration.<sup>192</sup>

Nudges can work for a variety of reasons, whether that be by providing information to otherwise uninformed parties, by making it easier to make a decision or by seeking to overcome the human instinct for inertia.<sup>193</sup> All regulatory systems, including the common law, must nudge in some way, even if traditionally, such regulatory techniques have not been dressed in the language of nudging. As Sunstein puts it, ‘[a]ny government, even one that is or purports to be firmly committed to laissez-faire, has to establish a set of prohibitions and permissions’.<sup>194</sup> The difficulty with this broad conception of nudge theory is, as explored below, it may eventually collapse into standard command and control regulation. Before considering some such limitations of the theory in the employment context, it is first necessary to consider further the relationship between nudging and autonomy.

## 2. Nudging and autonomy

The starting point of nudge theory is that humans err when making choices, whether through biases, misconceptions, environmental factors or how information is presented. In other words,

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<sup>188</sup> Alberto Alemanno and Anne-Lise Sibony, ‘The Emergence of Behavioural Policy-Making: A European Perspective’ in Alemanno and Sibony (n 184) 1, 2.

<sup>189</sup> *ibid.*

<sup>190</sup> Cass R Sunstein, ‘The Ethics of Nudging’ in Alemanno and Sibony (n 184) v, vi.

<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.* vii.

there has been a failure of individual choice that nudging seeks either to overcome or indeed to exploit. Despite this, proponents of nudge theory continue to insist that nudges must ‘be choice-preserving, by always enabling the addressee to opt out’.<sup>195</sup> Sunstein and Thaler have described nudging as ‘libertarian paternalism’. It is libertarian in the sense of preserving free choice through the ability to opt out from the nudge and it is paternalistic in that it seeks to enhance welfare even when third-party effects are absent.<sup>196</sup> This is a contradiction in terms as ‘[l]ibertarians embrace freedom of choice, and so they deplore paternalism. Paternalists are thought to be sceptical of unfettered freedom of choice and so they deplore libertarianism’.<sup>197</sup> In other words, a nudge, for example a default, will always have to be chosen and because individuals due to their own lack of stable or well-defined preferences or due to the manner in which the default is presented to them are unlikely to deviate from that default. It is therefore better to set the default to be welfare-enhancing. As long as an opt out is available, allowing choosers to opt for the ‘non-sensible course of action’ there should be no concerns from a libertarian point of view.

For some commentators, libertarian paternalism is simply an oxymoron, with the paternalistic elements of nudge theory undercutting the ‘key libertarian assumption that individuals are the best judges and protectors of their own welfare’.<sup>198</sup> Even if nudges are considered inevitable, not all forms of nudge will face the same objections from an autonomy point of view. Rather, we may distinguish between various ‘degrees’ of nudging. This is a different question to that of the ‘type’ of nudge/nudging tool to select, explored further below.<sup>199</sup>

First degree nudges are the most respectful of autonomy in that they merely enhance individual reflection eg the provision of information or reminders.<sup>200</sup> Second degree nudges exploit human behavioural limitations so as to ‘bias’ a decision in the direction chosen by the regulator. Such nudges are identifiable if the chooser reflects on the matter ie the chooser will know that he has been nudged.<sup>201</sup> Finally, third degree nudges are highly intrusive, consisting of the manipulation of human behaviour, for example through framing devices (the manner in which

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<sup>195</sup> Alberto Alemanno and Anne-Lise Sibony, ‘The Emergence of Behavioural Policy-Making: A European Perspective’ in Alemanno and Sibony (n 184) 1, 3.

<sup>196</sup> Cass R Sunstein and Richard H Thaler, ‘Libertarian Paternalism is not an Oxymoron’ (2003) 70 U Chi L Rev 1159, 1161–1162.

<sup>197</sup> *ibid* 1159.

<sup>198</sup> Gregory Mitchell, ‘Libertarian Paternalism is an Oxymoron’ (2005) 99 Northwestern University Law Review 1245, 1249.

<sup>199</sup> Robert Baldwin, ‘From Regulation to Behaviour Change: Giving Nudge the Third Degree’ (2014) 77 MLR 831, 835.

<sup>200</sup> *ibid*.

<sup>201</sup> *ibid* 835–836

information is presented). The chooser does not know and cannot know that he has been nudged.<sup>202</sup>

There is a clear tension between nudging and individual autonomy but before we even get to that point, the tensions between the scientific and political on the one hand, and between libertarianism and paternalism on the other, may in fact undermine the very rationale for nudging. As Bubb and Pildes put it, ‘it would be surprising if the main policy implication of the mounting evidence documenting the failure of individual choice was a turn towards regulatory instruments that preserve individual choice’.<sup>203</sup> As such, individual autonomy is at once being presented as the cause and the cure of regulatory failings.

Using nudges to embrace autonomy principle has two additional downsides. First, nudges can be ‘slippery’, that is, easy to opt out of, thereby undermining their effectiveness and potentially necessitating remedial legislation. Second, nudges can be used by private actors, including employers to influence the behaviour of their workers. In such a situation, ‘regulation needs to become behaviourally informed not to “nudge” citizens but to offer a “counter-nudging” force against the exploitative use of behavioural insights by market actors’.<sup>204</sup> In both situations, nudging actually necessitates the introduction of legislation, thereby defeating the very purpose of using nudging techniques in the first place ie to protect autonomy while ensuring regulatory outcomes.

In addition, as Amir and Lobel have pointed out, tying nudge theory to the concept of libertarianism has the effect of selling ‘short some of the best attributes of regulation through choice architectures’.<sup>205</sup> In this respect, proponents of nudge often fail to take the implications of their theory to its logical conclusion. In some situations, the identification of behavioural deficiencies may highlight the need for traditional regulatory intervention and yet nudge proponents tend to ‘focus instead on light-touch regulatory tools that preserve wide scope for choice’.<sup>206</sup> In general, it can be seen that nudge techniques seek to preserve choice and, in that sense, appear to be respectful of individual autonomy. This belies the fact, however, that there are various types of nudges that may be more or less respectful of autonomy.

One example of a nudging technique with a potential for application to the employment relationship is the default rule. We now turn to setting out the relationship between default

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<sup>202</sup> *ibid* 836.

<sup>203</sup> Bubb and Pildes (n 185) 1595.

<sup>204</sup> Alemanno and Sibony (n 195) 3.

<sup>205</sup> Amir and Lobel (n 186) 2117.

<sup>206</sup> Bubb and Pildes (n 185) 1596.

forms of regulation and contractual autonomy (including article 16 of the Charter) before considering the implications for the employment relationship.

### 3. Default forms of regulation

Defaults are familiar to all lawyers and may appear a prime candidate to act as a tool for the introduction of behavioural insights into the regulation of the employment relationship. As Alemanno and Sibony put it, [d]efault rules are a tool of choice in the behavioural toolbox. By operationalising the power of inertia and procrastination, they induce individuals towards a pre-determined choice. Defaults, as such, are not foreign to lawyers'.<sup>207</sup> This familiarity might also increase the receptivity of employment law to other, less traditional forms of nudging. On the other hand, this same familiarity begs the question of how defaults can even be considered as a new form of regulation in the first place. Defaults have long been used in the employment context, but the introduction of behavioural insights into the design of defaults has the potential to lead to more effective outcomes. Defaults are also intimately linked to the notions of 'choice' and 'consent', both key components of the CJEU's objection to the dynamic interpretation of the TUD in *Alemo-Herron*. What, then, is a default rule?

#### 3.1. Defining a default

A default rule 'specifies the outcome in a given situation if people make no choice at all'.<sup>208</sup> Defaults are more or less effective as a regulatory device depending on both the capacity and the intentions of the individual being nudged. The first element, 'capacity' refers to the ability of the chooser to gain, receive, absorb and act on information. The second element, 'intention' asks whether the target chooser has the same objectives as the nudger.<sup>209</sup> A default is effective for those described as well-intentioned and high capacity; well-intentioned and low capacity; ill-intentioned and low capacity, but not those who are ill-intentioned and have high capacity. In other words, '[h]igh capacity individuals who are not well-intentioned and not inclined to act in accordance with a message will be quite able to adjust their behaviour so as to reject that message'.<sup>210</sup> Again, however, it is not the intention of this thesis to examine the effectiveness of defaults as such, but rather to explore how they relate to autonomy principles.

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<sup>207</sup> Alemanno and Sibony (n 195) 14.

<sup>208</sup> Di Porto and Rangone (n 184) 37.

<sup>209</sup> Baldwin (n 199) 841.

<sup>210</sup> *ibid* 841–842.

Defaults interact with behavioural insights in three ways. First, defaults can be used to exploit human inertia, ie our unwillingness to choose. In this sense, defaults can be used to achieve a regulatory aim—although as we have already seen, in order to be a ‘nudge’, defaults would have to increase welfare as judged by the individual being nudged. Second, defaults can be considered as creating an implicit endorsement over the choice set out therein. In other words, choosers consider that the default has been chosen by the legislator (or the employer) for a (good) reason. Finally, there is the ‘endowment effect’ ie choosers prefer not to have something taken away from them, even if there is a chance that what they might receive instead would be more valuable to them. This is also closely related to the notion that ‘where the potential gains or losses of making a choice are unclear, accepting the default (...) costs nothing in time and effort’.<sup>211</sup> As we shall see, these three elements have serious implications for the compatibility of default nudges with contractual autonomy.

#### 4. Compatibility with autonomy principles

First of all, it should be noted that despite their very rationale being to introduce regulatory techniques that are compatible with individual choice, nudges are in fact largely ‘covert’. If they were not, then they may not have the same ability to influence behaviour. Because of this, nudging techniques may be less ‘identifiable’ than traditional regulation and may therefore be less susceptible to legal challenge. In addition, ‘nudging is usually a strategy where end-users have neither participated nor shared’.<sup>212</sup> This may be a fatal flaw to the introduction of nudging to the employment relationship. In *Alemo-Herron*, the CJEU emphasised the employer’s ‘participation’ in the collective bargaining process as being a crucial element of consent. It is certainly true, however, that default rules may be more susceptible to identification than other forms of nudge such as debiasing or framing. Even if a default is easily identifiable it is not at all clear that it is choice-preserving even in the presence of an opt out.

Opt outs pose a major problem. If defaults are to be compatible with autonomy, at least in a libertarian sense, then they must be easy to opt out of, but this has the effect of undermining the very purpose of introducing the default in the first place. Indeed, ‘those who opt-out are not consistently the ones who are better off outside of the default’.<sup>213</sup> Nevertheless, it has already been noted that behavioural insights themselves tell us that opt outs are in fact likely

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<sup>211</sup> Di Porto and Rangone (n 184) 38.

<sup>212</sup> *ibid* 49.

<sup>213</sup> *ibid* 51.

to be ‘sticky’ ie they exploit the power of human inertia, the status quo bias and the endowment effect.<sup>214</sup> This means that in many cases the opt out only exists in theory or that it formally exists while functioning as a mandate in terms of the welfare consequences the default produces.<sup>215</sup>

For some commentators, maximising welfare should never be the aim of default in the first place, but rather the least objectionable form of default-rule paternalism from a libertarian perspective requires that the default rule be set to enhance liberty rather than welfare’.<sup>216</sup> We have already seen, however, that not all nudges are equally paternalistic and the same is true of default rules.<sup>217</sup> Mitchell gives the employment-at-will doctrine in the US as an example of a default that is compatible with individual autonomy. He comments that ‘[o]n the one hand, it maximizes the liberty of irrational individuals by preventing them from entering mindlessly into binding employment arrangements. On the other hand, since it can be overridden, rational individuals may contract around that at-will default to enter into more permanent employment arrangements’.<sup>218</sup>

It is clear, then, that default forms of regulation enjoy a complex relationship with autonomy principles. The question is whether such defaults can withstand scrutiny in light of the Charter?

## 5. Human rights scrutiny

First of all, it is uncontroversial that regulation, of whatever form, can only be reviewed in light of the Charter if it falls within the scope of EU law. As far as I am aware, there are no examples of a Member State designing legislation implementing EU employment law under the guidance of behavioural insights. In any case, it is unlikely that the Commission would consider such a measure to be adequate implementation. As already mentioned, default rules are not alien to employment law, but even these have not been couched in the language of nudging or behavioural regulation, which is understandable given their relatively recent development.

In EU employment law, one of the first defaults that has been used is the 48-hour working week found in article 6 of the WTD. This is a particularly interesting example given the close

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<sup>214</sup> Amir and Lobel (n 186) 2120.

<sup>215</sup> Bubb and Piles (n 185) 1599.

<sup>216</sup> Mitchell (n 198) 1260.

<sup>217</sup> *ibid* 1259.

<sup>218</sup> *ibid* 1263.

connection between the Directive and human rights principles discussed in chapter II. Article 22(1) of the Directive allows Member States to derogate from article 6 subject to certain conditions. The default rule is that workers enjoy the right to a working week of no more than 48 hours' duration, calculated over an appropriate reference period. This particular default rule is unusual in a number of respects.

First, the Member State in question must have provided for the default in its implementing legislation. Second, one of the conditions for the application of the opt out from the 48-hour working week is obtaining the consent of the employee. In *Pfeiffer*, the CJEU held that:

[i]f a worker (...) is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the [worker] to impose (...) a restriction of his rights without him having expressly given his consent.<sup>219</sup>

In this respect, the objection that nudges are elusive falls away and there is a double barrier to the erosion of the employee-protective default ie Member State action and the consent of the employee. Third, the ease with which the opt out can be exercised should be enough to demonstrate its compatibility with contractual autonomy. Despite the conditionality of the opt out, it is exercised widely in practice, particularly in the United Kingdom which had negotiated the derogation from the Directive in the first place.<sup>220</sup> Usually, however, defaults will not be so easy to opt out of. This is largely because, the exercise of this option both 'assumes a level of competence, rationality and volitional control that contradicts the underpinning assumptions of behavioural economics' and 'understates the extent to which opt-outs discriminate against parties who are less able to exercise them'.<sup>221</sup> The working time default is designed to ensure compliance with the law (or at the very least, the aims of the legislation) but it is not difficult to imagine a default with a less noble purpose. In such a scenario, the default may become a mandate, preventing employees from opting out.<sup>222</sup> Is it the case that defaults as a regulatory technique would withstand scrutiny under article 16?

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<sup>219</sup> Joined Cases C-397/01 to C-403/01 *Pfeiffer*.

<sup>220</sup> Catherine Barnard, Simon Deakin and Richard Hobbs, *Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK* (2003) 32 ILJ 223.

<sup>221</sup> Baldwin (n 199) 847.

<sup>222</sup> Cass R Sunstein, 'Empirically Informed Regulation' (2011) 78 *Uni Chi L Rev* 1349, 1398.

As already noted, certain commentators have overstated the importance of contractual autonomy and the notion of freedom as a cornerstone of the European project. This misconception has continued in debates surrounding the desirability of behavioural regulatory techniques. Van Aaken has been particularly sceptical about the compatibility of nudging with the notion of freedom. On the status of ‘freedom’ in EU law she remarks that ‘[a]rticle 2 [TEU] names freedom as a right to be protected directly after human dignity and thereby stresses its importance. Freedom is interpreted as a political and historical notion, as a principle on which the unification of Europe rests (...) It also follows that the individual has priority over the collective’.<sup>223</sup> The first claim is somewhat tenuous; the latter has no basis in EU law at all. What this serves to highlight though is that from the outset, the relationship between nudge theory and the value of autonomy has been delicate. Indeed, authors such as van Aaken have suggested that far from embracing autonomy, the success of a nudge is actually measured against the notion of ‘effectiveness’.<sup>224</sup> This belies the fact, however, that the classic ethical debate surrounding nudges starts with a principled defence of normative individualism’.<sup>225</sup> In other words, the very essence of nudge theory is the promotion of individualism and autonomy. This is the core contradiction within nudge theory, that in seeking to remove ideology from the debate, it tries to be all things to all people ie simultaneously preserving and yet regulating autonomy.

Perhaps this contradiction can be overcome by abandoning the formalistic notion of freedom as being the ‘freedom of choice’. A richer understanding of freedom is possible, ie freedom as the respect for individual *autonomy*.<sup>226</sup> To make truly autonomous choices, those choices must be informed, and many nudge techniques are intended to debias human behaviour to make choices truly informed. As Sunstein remarks, ‘[i]f people have to make choices everywhere, their autonomy is reduced, if only because they cannot focus on those activities that seem to them most worthy of their attention’.<sup>227</sup> Going further, it can be argued that ‘[i]f we believe in freedom of choice on the ground that people are uniquely situated to know what is best for them, then that very argument should support respect for people when they freely choose not to choose’.<sup>228</sup> In other words, defaults and nudges take complex decisions out of the hands of choosers, enabling them to focus on what really matters to them.

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<sup>223</sup> Anne Van Aaken, ‘Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU’ Alemanno and Sibony (n 184) 83, 103.

<sup>224</sup> *ibid* 87.

<sup>225</sup> Alberto Alemanno and Anne-Lise Sibony, ‘The Legitimacy and Practicability of EU Behavioural Policy-Making’ in Alemanno and Sibony (n 184) 325, 325–326.

<sup>226</sup> Karen Yeung, ‘Nudge as Fudge’ (2012) 75 MLR 122.

<sup>227</sup> Sunstein, ‘The Ethics of Nudging’ (n 190) xi.

<sup>228</sup> Cass R Sunstein, ‘Choosing not to Choose’ (2014) Duke Law Journal 1, 22.

Seeking to steer choosers in a particular direction is not the only function of the default rule. Rather, their more traditional function has been to fill gaps in incomplete contracts. In other words, ‘they govern unless the parties contract around them’ and to that extent they differ from immutable rules considered in the next chapter which ‘govern even if the parties attempt to contract around them’.<sup>229</sup>

Academic commentators have tended to advocate defaults that reflect the position that the parties to the contract would have chosen had they been given the option, thus preserving their contractual autonomy. Ayres and Gertner questioned whether this was the appropriate standard, suggesting that ‘efficient defaults would take a variety of forms that at times would diverge from the “what the parties would have contracted for” principle’.<sup>230</sup> This new form of default is the penalty default which are designed ‘to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer’.<sup>231</sup> The idea is that it is cheaper and more efficient for the parties to decide what they want rather than having a court second-guess their intentions after the fact.<sup>232</sup> In this way, penalty defaults are information-inducing; they provide the individual with sufficient information to make their own decisions.

Of course, in the employment context, defaults are often less to do with filling in the gaps in incomplete contracts and more to do with protecting the weaker party—usually the employee. Gaps in employment contracts are more usually filled by implied terms, whether in fact or at common law which may or may not be a default. The distinction between default terms and immutable terms is fleshed out more fully when we come to consider common law social rights in the following chapters. For now, it suffices to note that if default rules do not give way to the manifested assent of the parties to the contract then it ‘cannot properly be called a default rule’.<sup>233</sup>

It would seem that as long as the principle of consent is respected, then default rules may be compatible with contractual autonomy. This is even more so if we adopt the trichotomy proposed by Barnett. He suggests that the gap filling function of default rules seems to undermine the neat distinction between terms that have been assented to and those that are imposed by law. Rather, a more appropriate trichotomy can be put forward (1) terms that have

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<sup>229</sup> Ian Ayres and Robert Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ (1989) 99 *Yale Law Journal* 87, 87.

<sup>230</sup> *ibid* 91.

<sup>231</sup> *ibid*.

<sup>232</sup> *ibid* 93.

<sup>233</sup> Randy E Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent’ (1992) 78 *Virginia Law Review* 821, 825.

been assented to by the parties; (2) terms imposed by law (considered in the next chapter) and (3) a new category of terms that are supplied by law but nonetheless reflect the consent of the parties.<sup>234</sup> In other words, by entering a contract in the first place, the parties are assenting to be bound by the background rules that the courts and legislature have imposed on the contracting process. Viewed in this way, the dynamic interpretation of collective agreements could have been found to be compatible with article 16 in *Alemo-Herron*.

In addition, far from interfering with the autonomy of the parties, such an approach views gap-filling defaults as completing lacunae left in the manifested consent of the parties. As Barnett puts it, ‘the presence of consent to be legally bound is essential to justify the legal enforcement of any default rules’.<sup>235</sup> Not only that, but consent to be bound can also extend to the selection of a particular default rule eg one that reflects common sense or indeed in the employment context, a default that seeks to protect the weaker party.

In order to maintain its status as a default rule (as opposed to an immutable rule), two conditions would have to be met. First, indirect consent to a particular default cannot stem from the overall agreement to be bound by a contract if the parties have no reason to be aware of the default. Second, consent cannot be inferred if contracting around the rule is too costly.<sup>236</sup> The penalty default may run contrary to this consent principle in that, by its very definition, it is designed to leave at least one of the parties in a worse position for their failure to provide information. An additional difficulty with penalty defaults is that they can lead to unintended consequences such as inefficient decision-making.<sup>237</sup> Although, it could also be said that more conventional defaults are also essentially penalty defaults in that one party may be ignorant of the background contract law rules while the other is not. In such a scenario, a default ‘can reduce the instances of subjective disagreements arising between parties who otherwise are manifesting mutual consent’.<sup>238</sup> In other words, penalty defaults may, in fact, be consistent with autonomy in that they ensure true mutual consent between the two parties.

No doubt there is a need for a more realistic appraisal of what counts as a restriction of autonomy. Humans only have a limited capacity to make decisions and therefore, ‘how much autonomy is likely to be exercised in a given context should matter when assessing whether and how much behavioural intervention restricts autonomy’.<sup>239</sup> Traditional default rules, as

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<sup>234</sup> *ibid* 826.

<sup>235</sup> *ibid* 827.

<sup>236</sup> *ibid* 866.

<sup>237</sup> On Amir and Orly Lobel (n 186) 2117.

<sup>238</sup> Barnett (n 233) 827.

<sup>239</sup> Alemanno and Sibony (n 225) 329.

long as there is an opt out, may be compatible with contractual autonomy as expressed in article 16. Whether this is an effective or indeed realistic way in which to regulate the employment relationship is, of course, another matter altogether, as illustrated by the frequent use of the opt out to the 48-hour working week or the reality that many professionals do not exercise their full right to paid annual leave.

Beyond, the potential complexities associated with squaring default rules with contractual autonomy principles, there is the added difficulty that nudging techniques appear to be underpinned by a political agenda. Default rules are often endorsed without considering whether mandates or other more traditional forms of regulation would more effectively achieve the objective pursued. In many cases, therefore, the selection of a default or indeed of an opt out may be more of a ‘political or philosophical precommitment than empirical assessment of how to maximize social welfare (...) If opt-outs are actually used (...) we know too little about whether the “right” or “wrong” people are the ones fleeing the default’.<sup>240</sup> This leads to the further concern, that employment lawyers, in particular, should be suspicious, that ‘the shift away from traditional regulation is in fact a shift away from regulation and public action to an era of devolution and deregulation’.<sup>241</sup>

Originally, the term ‘nudge’ was merely intended to act as a contrast to the ‘shoves’ of traditional regulation.<sup>242</sup> It was not, therefore, intended to act as a conduit for broader political and economic philosophies. However, this is to overlook the fact that defaults and other forms of nudging cannot operate in a vacuum, but must be selected based on various statutory goals and underpinning values. In other words, a choice has to be made by the regulator as to the baseline to which human behaviour must be directed.<sup>243</sup> This is where human rights may play an increasingly important role.

## 6. Nudging Human Rights

We have already seen that defaults and nudges may be more or less compatible with autonomy principles, including freedom of contract as a fundamental right found in article 16. What of other human rights? Is it really appropriate to use these novel regulatory techniques in the

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<sup>240</sup> Bubb and Piles (n 185) 1598.

<sup>241</sup> On Amir and Orly Lobel, ‘Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research’ (2012) *European Journal of Risk Regulation* 17.

<sup>242</sup> *ibid* 21.

<sup>243</sup> Sunstein, ‘Empirically Informed Regulation’ (n 222) 1392.

employment field, which we have seen can be characterised as having a fundamental rights underpinning?

In the next chapter, we consider the issue of derogability. Clearly, nudging techniques that would allow for an opt out from a legislative provision with a human rights underpinning would not be compatible with the Charter. Arguably, such an opt out already exists in the form of the derogation from the 48-hour working week. Although, as discussed in Chapter II, it is unlikely that the drafters of the Charter intended that this provision could be challenged for incompatibility with article 31(2).

Despite the obvious potential of alternative regulatory tools, it is accepted that nudges are probably not an appropriate or effective mechanism for the advancement of social rights. Moreover, given the need to ensure compatibility with autonomy principles, nudges and defaults may in fact continue the erosion of other human rights. Far from avoiding the reach of article 16, might nudges also come to be seen as part and parcel of it? Might employers argue that their ability to nudge their employees is an expression of their own contractual autonomy? Such private nudging would have serious human rights considerations for employees whose behaviour may be surreptitiously manipulated by the employer. This private nudging may then need to be counter-nudged by the state, which would realistically have to take the form of mandatory regulation. It is therefore unclear, ‘whether the growing interest in nudging may trigger the enactment of more regulation or whether it should rather be construed as the continuation of the deregulatory agenda’.<sup>244</sup>

Even were it to come from the legislature, nudging may still have serious human rights implications. Thaler and Sunstein themselves recognise that there may be rights-based limitations to nudging, using the example of the design of a ballot paper. But, they nevertheless equate the importance of rights with government neutrality.<sup>245</sup> As we have seen, at least in the case of social rights, neutrality is often not enough. Nudging has clear implications for a number of human rights such as the freedom of expression, the right to privacy and self-determination.<sup>246</sup> When designing a nudge, the legislature must start from somewhere. This is the baseline. Behavioural regulation must be underpinned by conceptual and philosophical

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<sup>244</sup> Alberto Alemanno and Anne-Lise Sibony, ‘The Emergence of Behavioural Policy-Making: A European Perspective’ in Alemanno and Sibony (n 184) 1, 7.

<sup>245</sup> Yeung (n 226) 141.

<sup>246</sup> Alberto Alemanno and Alessandro Spina, ‘Nudging Legally: On the Checks and Balances of Behavioural Regulation’ (2014) 12 *International Journal of Constitutional Law* 429, 431.

choices.<sup>247</sup> It is suggested that the respect for human rights, including the Charter's Employment Rights, should be at the core of the choice of baseline.

## 7. Conclusion

This chapter has demonstrated that the Charter's article 16 may have far-reaching consequences for the EU's ability to regulate the employment relationship into the future. This provided a useful contrast with the Charter's Employment Rights which may (if used correctly) act as a break on the Union's ability to *deregulate* the employment relationship.

The deregulatory potential of article 16 was examined through the lens of the *Lochner* era jurisprudence. Although there were some contextual difficulties in translating *Lochner* into EU law, it was shown that echoes of this case can be seen in the internal market jurisprudence, competition law and more recent cases such as *Viking*, *Laval* and *Alemo-Herron*. That those cases had similar outcomes to *Lochner* is surprising given that EU law comes with a rich backcloth of employment legislation and the Charter's Employment Rights (although only *Alemo-Herron* was decided after the Charter had full legal effect).

It is perhaps too early to tell just how the reach of article 16 as interpreted in *Alemo-Herron* will reach into the employment context. From a rather narrow perspective, its impact on the employment relationship can be seen in the undermining of the purpose of employee-protective legislation and the false presumption of the need to balance employment provisions with freedom of contract. Ripples of *Alemo-Herron* can also be seen in subsequent case law. Article 16 is now easily engaged and, in certain cases, the CJEU has continued to restate its strong conception of business freedom. Having said that, there are still very few cases in the employment context and most of those are confined to the context of the TUD and CRD. It is therefore difficult to determine precisely how systemic the prioritisation of business freedom in EU law has been or might be in the future.

In *AGET*, the CJEU explicitly linked article 16 to the freedom of establishment, and found that a restriction on freedom of establishment also amounts to a restriction on freedom of contract. The link is further evidenced in the issue of permissible derogations, with any justification on the limitation of a Treaty freedom also applying to article 16. Given the existence of clearly established worker protection derogations to the Treaty, the link need not be disastrous from

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<sup>247</sup> Péter Cserne, 'Making Sense of Nudge-Scepticism: Three Challenges to EU Law's Learning from Behavioural Sciences' in Alemanno and Sibony (n 184) 279, 290.

an employee protection perspective. In any case, the Treaty freedoms cannot be said to necessarily embody any notion of contractual autonomy.

Tracing the limits of the concept of contractual autonomy in EU law continues to prove difficult in the absence of any harmonised definition. There are divergent visions of contractual autonomy among the EU Member States and within EU law itself, with its contrasting voluntarist and market visions and the varied emphasis on the quality of consent under those models. To date, attempts at harmonisation have focused on the restrictive nature of contractual autonomy. This makes the expansive and formalistic notion of autonomy found in *Alemo-Herron* all the more alarming.

A more substantive vision of autonomy would recognise that employees, via their right to work, also enjoy a degree of autonomy. Although articles 15 and 16 have tended to be conflated, raising the right to work combined with an Employment Right in *Alemo-Herron* may have lent greater normative weight to the transferred rights, overcoming the temporal issues in that case.

Attempts to circumvent article 16 through other avenues, namely the development of new forms of regulation such as nudging, may not be as respectful of contractual autonomy as they first appear or worse still, may become yet another tool of the deregulatory agenda. Nudges are covert and are susceptible to avoid legal challenge. The extensive use of opt outs also undermines their effectiveness. Judging regulatory techniques against the standard of autonomy is also problematic. A more appropriate standard is effectiveness.

It is clear that the Charter has indeed had an impact on the employment relationship from a broader regulatory perspective. Having assessed the broader consequences of the Charter for employment regulation, has there been any trickle-down effect to the level of the individual employment relationship?

## **V. The Micro Level: The Effect of the Charter on the Individual Employment Relationship**

This chapter considers how the Charter's fundamental rights might influence the individual employment contract. This question will be addressed by examining the relationship between the various sources of employment norms in the UK, ie the contract, common law and legislation. Section A looks at the relationship between sources that might loosely be described as 'internal' and 'external' to the employment contract. The external sources are legislation and the common law, while the internal sources are the terms of the contract itself ie express, implied, default and mandatory terms. Exploring how human rights concepts might influence the hierarchy between these sources will allow us to gauge the impact of the Charter on the individual employment relationship.

### **A. The Charter's Effect on the Hierarchy of Sources of Labour Norms**

To what extent has the granting of legal effect to the Charter disrupted the hierarchy of labour law sources in the United Kingdom and what are the consequences for the employment relationship? Traditionally, the relationship between EU law and national law has not strictly been viewed as hierarchical. Rather, the interaction between the CJEU and domestic courts has been seen as one of cooperation rather than confrontation. With the enactment of the Charter, a new constitutional dimension has been added.

Most civil law countries are used to conceiving of the employment relationship as consisting of a clear hierarchy of sources. This has not been true of the common law. As Deakin and Morris note, it really makes no difference in what order the sources of labour law in the UK are discussed and the hierarchy at national level, to the extent that one can be said to exist, is capable of evolution or indeed inversion.<sup>1</sup> It is useful, then, to bear in mind that there are currently a number of confused hierarchies in UK employment law (1) that between EU law and domestic law and (2) within domestic law itself. For present purposes, the latter category will be further subdivided into an external and internal hierarchy (ie sources deriving from within and without the contract of employment). What difference does the classification of the

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<sup>1</sup> Simon Deakin and Gillian S Morris, *Labour Law* (6<sup>th</sup> edn, Hart 2012) 58.

rights found in the Charter as fundamental human rights make for these already unstable hierarchies and how does this affect the individual employment relationship?

We have explored in Chapters II and III the relationship between the Charter and social legislation at both EU and national level. There, the ‘constitutionalisation’ of the rights found in the Charter has quite clearly had an effect on the hierarchy of norms. The granting of constitutional human rights status to the Charter enables its use as both a standard of review and a tool of interpretation of both EU law and Member State law falling within the scope of EU law, although as we have seen, it may not be a particularly strong standard. The question to be addressed by this chapter is whether the constitutionalisation of the Charter has had any impact on the hierarchy between *domestic* sources of employment norms.

The term ‘external’ is intended to invoke the hierarchy of sources of norms that exist outside the contract of employment. Our attention here is placed on the relationship between employment legislation and the common law. The impact of the Charter on this relationship will be assessed. The use of the word external is not intended to suggest that these sources have no bearing on the content of the terms of the contract itself. Rather, it is used to emphasise that, as mentioned, there are at least two domestic hierarchies that may be disrupted by the Charter, namely the relationship between external sources and the relationship between types of terms within the employment contract itself. Undoubtedly, the determination of the relationship between the former will, of necessity, influence the relationship between the latter. There is, therefore, no hard and fast distinction between the two.

The EU-domestic hierarchy can rather crudely be characterised as follows: (1) The Charter, as a constitutional fundamental rights document, sits at the pinnacle of the hierarchy of norms. The Charter also embodies other elements of ‘constitutionalised’ EU law, such as the internal market freedoms; (2) general EU law comes next as it must comply with the Charter but can also be used as a standard against which national law falling within the scope of EU law must comply; (3) this is followed by domestic law and it is here, which is the focus of the present chapter, that the Charter may be most disruptive for the employment relationship.

The hierarchy at domestic level has never been clear and may now be in a double state of flux due to both the Charter and Brexit (ie the Charter’s absence). Focusing in this chapter on the Charter, the question to be addressed is whether the relationship between employment legislation and the common law at domestic level is altered in the presence of fundamental human rights, including the freedom to conduct a business. We start with the relationship

between the common law and social legislation. This will enable us to understand the baseline should the Charter be removed, the topic of the next chapter.

## 1. The external hierarchy

The sources of employment norms that are external to the employment contract include the Charter, legislation and the common law. As the relationship between the Charter and legislation has already been addressed in earlier chapters, the focus here is on the relationship between the common law and social legislation. We begin by setting out the traditional relationship before considering the potential role of the Charter.

### 1.1. *The common law and social legislation*

There is no doubt that in many instances, domestic employment legislation (whether or not derived from EU law) and the common law enjoy an intimate relationship. We need only think of the fact that access to the protection contained in numerous legislative instruments is dependent on classification as an ‘employee’ or a ‘worker’, the tests for which rest almost entirely on a common law foundation.<sup>2</sup> In the words of Kahn Freund, despite legislative intervention, the common law employment contract remains ‘the cornerstone of the edifice of labour law’.<sup>3</sup> Some authors have gone so far as to say that labour law lacks autonomy from the common law in that ‘[e]mployment rights may be radically affected by common law precedents argued in an entirely different legal context’ which has the effect of linking ‘the current system inextricably with the past’.<sup>4</sup>

Indeed, the application of common law contractual principles to the employment context has often led to harsh results, a point well illustrated by the *Tanton* case.<sup>5</sup> Mr Tanton’s job was to collect newspapers and to deliver them at various points around Devon on a fixed run and in a particular order as dictated by the ‘employer’. The vehicle he drove was provided by the employer. The uniform he wore was stipulated by the employer. His remuneration was fixed unilaterally by the employer without any negotiation. It would seem a sensible conclusion that Mr Tanton was, in fact, an employee. The Court of Appeal (CoA) did not agree. The Court

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<sup>2</sup> See *Yewens v Noakes* (1880) 6 QBD 5430; *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101.

<sup>3</sup> Otto Kahn-Freund in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (1954) 44.

<sup>4</sup> Deakin and Morris (n 1) 57 and 59.

<sup>5</sup> *Express and Echo Publications v Ernest Tanton* [1999] EWCA Civ 949.

was persuaded by one clause in the contract that allowed Mr Tanton to call in a replacement at his own cost should he ever be unavailable for work. For the Court, this clause was incompatible with the common law test for employment status which required ‘personal service’. The contract outweighed the reality that the employer exercised strict control over the ‘employee’ driver. As Peter Gibson LJ put it:

[o]f course, it is important that the [Employment] Tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so. But to concentrate on what actually occurred may not elucidate the full terms of the contract. If a term is not enforced that does not justify a conclusion that such a term is not part of the agreement. The obligation could be temporarily waived. If there is a term that is inherently inconsistent with the existence of a contract of employment, what actually happened from time to time may not be decisive, given the existence of that term.

The lower tribunal had, therefore, made the mistake of focusing on what had actually happened rather than on what the contract said. This case demonstrates that the common law can be a cold house for the protection of social rights in the absence of legislation (whether or not that legislation has a Charter underpinning). As we shall see, various attempts have also been made to shield employment law from the full rigours of such ordinary contractual principles, largely because the state prescribes certain minimum conditions for such contracts to be described as ‘employment’ contracts at all.<sup>6</sup>

Traditionally, the UK courts had viewed the common law contract of employment as having primacy, with any legislative intervention being seen as ‘essentially parasitic’ on the contract.<sup>7</sup> That the common law took ‘precedence’ was again evidenced by the fact that common law tests were used as a gateway to employee-protective legislation. As Davies notes, however, this relationship has largely been inverted, with the courts recognising that it is now legislation that forms the primary focus of employment regulation, with the contract ‘playing a supplementary role where the two interact’.<sup>8</sup> Nevertheless, there are still numerous examples of common law contractual principles being used to interpret employment legislation with the effect of impeding the protective aim of that legislation.<sup>9</sup> By and large, this has been an entirely

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<sup>6</sup> Gaabriel Tavits, ‘Freedom of Contract in Labour Relations’ (1999) 4 *Juridica International* 179, 182.

<sup>7</sup> Hugh Collins, ‘Contractual Autonomy’ in Alan Bogg (eds), *The Autonomy of Labour Law* (Hart 2015) 60.

<sup>8</sup> Anne Davies, ‘The Relationship between the Contract of Employment and Statute’ in Mark Freedland and others (eds), *The Contract of Employment* (OUP 2016) 73, 73.

<sup>9</sup> See for eg definition of constructive dismissal under s 95(1)(c) ERA 1996.

domestic matter, with little consideration given to the human rights nature or Charter underpinnings of employee-protective legislation.

It would, of course, be possible post-Brexit (as it is now) to exclude the application of the common law or at least confine it to a residual gap-filling role. Clear examples of this approach can already be found in the non-derogable provisions of the Employment Rights Act 1996 (ERA), as well as the definition of direct and indirect discrimination under the Equality Act 2010 (EqA) which are granted autonomous legislative definitions and therefore depend little on contract law.

Barnard and Merrett have described the relationship between the common law and statute as lying along a spectrum. On one end of the spectrum, statute and common law enjoy a symbiotic relationship while on the other end statute has intervened with the express intention of altering the common law position—what they described as ‘full pre-emption’.<sup>10</sup> In *Johnson*, Lord Nicholls held that the crucial consideration was whether the alleged common law right ‘could “satisfactorily co-exist” with the statutory regime. That would not be the case if the alleged common law right undermined or contradicted the statutory regime or if the two could not in practice co-exist in the same sphere’.<sup>11</sup> Beatson further clarifies that in civil law systems the code or the statute is the default whereas the common law provides the default in this country. Two consequences flow from this. First, the common law, to quote Lord Bingham, ‘has over the centuries proved a shameless snapper-up of well considered trifles of foreign law (...) Why, if they are relevant, should a common law system not also snap up well considered trifles of statute law enacted by its own legislature?’.<sup>12</sup> In other words, the common law has been malleable to accepting legislative principles, including, as we shall see, social rights. Conversely, the second consequence is that statutory intervention may actually allow the common law to stick to (or return to) its roots outside of legislative intervention, with judges reassured by the fact that ‘particular problems have been addressed by the legislature’.<sup>13</sup> As explored below, given the common law’s continued commitment to freedom of contract, this may have serious implications for the interpretation of employment legislation post-Brexit.

Finally, as Atiyah notes, when legislation is adopted, it takes the continued application of existing case law for granted.<sup>14</sup> He further posits three ways in which statute interacts with the

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<sup>10</sup> Catherine Barnard and Louise Merrett, ‘Winners and Losers: *Edwards* and the Unfair Law of Dismissal (2013) CLJ 313.

<sup>11</sup> *ibid* 316.

<sup>12</sup> Jack Beatson, ‘The Role of Statute in the Development of Common Law Doctrine’ (2001) 117 LQR 247, 250.

<sup>13</sup> *ibid* 253.

<sup>14</sup> P S Atiyah, ‘Common Law and Statute Law’ (1985) 48 MLR 1.

common law (1) where statutes deliberately adopted open-textured language; (2) where statutes openly confer discretion on the courts to resolve conflicts as they think just and equitable and (3) where statutes amend a very active part of the common law. Situations (1) and (3) are particularly relevant in the employment context. The language employed in labour law statutes is often open-textured or leaves terms to be defined in accordance with existing common law concepts.

In certain circumstances, the common law has been malleable to legislative intervention leading to an absorption of social rights standards. We have already seen that in the context of the transfer of undertakings, the case law goes as far as illustrating that the common law can at times provide a higher level of protection to employees than a reading of legislation through a fundamental rights lens. The employment context is replete with examples of the common law taking its lead from statute.

This is largely due to the recognition that the employment contract is not an ordinary contract and so cannot be subjected to the full force of commercial contractual principles. In *Autoclenz*, for example, it was recognised that in order to determine employment status (in that case, the status of worker), the inequality of bargaining power between the employer and the employee must be taken into account.<sup>15</sup> In that case, the claimants carried out car cleaning services on behalf of the respondent company. Their contracts stated that they were sub-contractors (self-employed) and not employees. They had to provide their own materials and they were not obliged to provide services, nor was the company obliged to offer any work. Furthermore, they could provide substitutes to carry out the work. Nevertheless, the claimants were granted worker status after an examination of all the relevant material (and not just the written contract) showed their self-employed status to be no more than a sham. In the UKSC, Lord Clarke referred with approval to the distinction drawn in the CoA by Aikens LJ between employment cases and ordinary commercial disputes, when he said that:

the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed.<sup>16</sup>

Although a decision based on common law principles, the legislative background was pervasive given that any other conclusion would have allowed ‘employers to avoid statutory employment rights by drafting contracts to deny individuals employee status, when Parliament

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<sup>15</sup> *Autoclenz Limited v Belcher* [2011] UKSC 41.

<sup>16</sup> *Autoclenz Limited v Belcher* [2009] EWCA Civ 1046 [92] (Aitken LJ); *Autoclenz Limited v Belcher* [2011] UKSC 41 [34] (Clarke LJ).

had prohibited contracting out of such rights'.<sup>17</sup> What this means, then, is that when we talk about the operation of common law contractual rules to legislation, we really mean the common law of the *employment* contract ie contract law as modified to take into account the particular requirements of the employment context.

A particularly good example of the common law using social legislation to develop employee-protective concepts can be seen in the emergence of the implied term of mutual trust and confidence (MTC) discussed in more depth below. As Davies notes, it was the need to come to a satisfactory definition of the constructive dismissal concept found in unfair dismissal legislation that led to the courts developing the implied term of MTC in order to modify the concept of repudiatory breach found in commercial contracts.<sup>18</sup> Here, we see a common law concept (repudiatory breach) being modified by another common law concept (implied term of MTC) to ensure the effective functioning of unfair dismissal legislation in order to protect employees.

However, the relationship between the common law and statute is not always so benign. In *Johnson*, it was found that the implied term of MTC could not apply to the *manner* of an employee's dismissal because Parliament had already occupied the field through the enactment of unfair dismissal legislation.<sup>19</sup>

What the above discussion shows, is that even without considering any underlying human rights, the common law may already give way in the face of competing employment legislation, even when not strictly required by that legislation, although this is not universal and there remain examples of harsh results when the common law applies to the employment relationship. Is there any evidence, then, of the courts adopting a more stringent approach to the relationship between common law and statute when faced with legislation that is underpinned by the Charter? In other words, when interpreting and applying domestic employment law, do the courts consider the Charter or rights origins of underlying principles in legislation and does this make any difference?

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<sup>17</sup> Davies (n 8) 86.

<sup>18</sup> *ibid.*

<sup>19</sup> *Johnson v Unisys Ltd* [2001] UKHL 13.

## 1.2. *Interpreting legislation with a fundamental rights underpinning*

If the common law has at times been receptive to social standards, taking its lead from legislation, is there any additional effect, from the perspective of the common law courts, of that legislation having a fundamental rights underpinning in the Charter?

Once again, the clearest example of legislation being underpinned by the Charter is the Working Time Regulations (WTR) 1998 which implement the Working Time Directive (WTD) into domestic law. We have already seen in relation to the TUD, that legislation, when backed by the Charter, may have the effect of overturning existing common law approaches—in that field, the dynamic approach to the incorporation of collective agreements. The question to be dealt with here is how the relationship between the common law and legislation develops over time through judicial interpretation and application. For example, do the courts allow common law concepts to give way in the face of rights-based legislation even if not strictly required by the legislation in question?

We have already determined that in the context of employment legislation with an Employment Rights underpinning, the CJEU has tended to adopt a purposive approach to the interpretation of that legislation, although this may have more to do with the CJEU's general aim of ensuring that the objectives of the legislation are not undermined. Despite what we have also said about the modern relationship between common law and social legislation, with the common law giving way, Anderman has identified a tendency for UK judges to continue to exaggerate contractual tests when applied to employee-protective legislation. He argues that this stems from an unwillingness by certain judges to recognise protective employment legislation as an autonomous layer of regulation<sup>20</sup>.

It has already been suggested that the domestic courts have not always been clear about the precise extent to which common law contractual principles are displaced by statutory employment rights. The courts' approach to dealing with the relationship between contractual agreements and protective statutes has been even more confused. Here, the courts have 'experienced difficulties of a more systemic nature in deciding what weight to give the contract of employment in interpreting statutory provisions'.<sup>21</sup> This has led to the courts borrowing or adopting ordinary contractual principles and applying them to employment statutes. Thus, the

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<sup>20</sup> Steven Anderman, 'The Interpretation of Protective Employment Statutes and Contracts of Employment' (2000) 29 ILJ 223, 223.

<sup>21</sup> *ibid* 224.

courts have at times treated the provisions of the contract as the decisive factor in interpreting a statute.

We have already noted that some legislative provisions such as the definition of indirect discrimination are not dependent on the common law for further elucidation. Others refer to the common law explicitly but also seek to offset its effects by preventing derogation, for example the ERA 1996. Still other provisions are clear in their permissiveness of derogation, whether through national legislation or the individual contract of employment. The WTR is an example of the latter. As Deakin and Morris note:

[u]sing the scope for derogations allowed for in the original Directive, the Regulations devolve much of the responsibility for arriving at working time norms to agreement at lower levels, including not just collective agreements but also individual agreements. This form of devolution of law-making authority from statute to collective bargaining (and, beyond that, to individual contract) is unusual in the UK.<sup>22</sup>

In this respect, the legislation itself recognises the possibility of derogation, for example from the 48-hour working week, although we have said that this derogation is conditional and may not even be compatible with article 31 of the Charter. Given that the clearest example of rights-based legislation in the UK already permits extensive derogation through contractual arrangements, is there any scope for the common law courts to take account of the underlying human rights rationale governing the WTR? It is suggested that the area that is most open to being influenced by the Charter is the issue of the personal scope of EU employment legislation/domestic implementing legislation. Is there any evidence of the Charter influencing the interpretation of the personal scope of legislation at domestic level and what are the consequences for the ability of litigants to rely on rights-based legislation?

### *1.3. The personal scope of legislation*

Before a litigant can rely on a legislative right, including a right that is grounded by the Charter, they must first bring themselves within the personal scope of that legislation. Much of EU employment legislation leaves it to the Member States to determine the legislation's precise personal scope. As we saw above, the common law has at times had the effect of precluding reliance on employee-protective legislation. To what extent, then, might fundamental rights impede or indeed facilitate the employer's ability to avoid entering an employment

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<sup>22</sup> Deakin and Morris (n 1 ) 336.

relationship, of whatever type, and the intended protective elements that come with such status?

The two questions to be addressed here are essentially whether (1) there is any evidence of the courts modifying the tests for worker status where the relevant EU legislation rests on a Charter Employment Right, for example, the WTD and (2) whether freedom of contract in article 16 means that employers are, in fact, free to avoid worker or employment status in order to escape obligations imposed by legislation. This enables us to examine the impact of the Employment Rights and freedom of contract, discussed in earlier chapters, on the individual employment relationship. Answering these questions can also help us to further assess the Charter's current impact at domestic level and whether echoes of its provisions will continue after Brexit.

The analysis is mostly confined to those employment relationships that are considered 'contractual' rather than the related question of the extension of employment legislation to non-contractual employment relationships. Most domestic UK employment legislation defines the contract of employment as 'a contract of service or apprenticeship, whether express or implied, and (if it express) whether oral or in writing'.<sup>23</sup> As we shall see below, the broader 'worker' concept also requires the presence of a contract as a necessary prerequisite to obtaining that status.

In national law, the 'employee' is defined as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.<sup>24</sup> This definition of the employee is rather open-ended and it has been left to the courts to develop various common law tests to flesh out the meaning of the concept. We have already seen that some of these common law tests, such as the requirement for 'personal service' or 'mutuality of obligation' have been used to deny employee status to applicants. In recognition of the difficulties that this strictness was posing for the protection of employment standards, the UK legislature—largely but not exclusively in its implementation of EU law—began to extend the scope of employee-protective legislation to a new category of 'workers'. It may be that the Charter, at least if we consider the issue of personal scope, has very little relevance to the contract of 'employment' as opposed to the broader 'worker' contract dealt with below.

The EU legislature was already long-cognisant of the fact that employee-protective legislation may require a broader personal scope than merely 'employees'. For this reason, EU employment legislation is also usually stated to apply to the seemingly wider category of

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<sup>23</sup> See for eg s 230 ERA 1996.

<sup>24</sup> *ibid.*

‘workers’. The concept of the worker here should not be confused with that found at national level. In EU law, the worker concept must be given an autonomous Union definition, although this will influence the domestic definition to the extent that it is used to govern the personal scope of implementing legislation. It is, therefore, worth considering the approach of the CJEU before turning to that of the domestic courts.

a. EU level

At an EU level, Bell has recently analysed the CJEU’s treatment of the personal scope of employment legislation. He found that although there is no ‘human right’ to be treated as a worker or an employee, the CJEU does modify its approach depending on the nature of the underlying legislative rights in question (although he does not specifically consider the ‘human rights’ nature of the underlying legislation). The real difficulty is that there is no overarching status of ‘worker’ that applies across the board of EU employment legislation. Rather, each piece of legislation has its own personal scope. But, ‘[t]his variability has to be combined with the subsequent interpretative gloss from the Court of Justice’.<sup>25</sup> Long before the enactment of the Charter, the CJEU in interpreting notions such as ‘worker’ has been cognisant of the constitutional significance of concepts such as the free movement of workers.<sup>26</sup> When it came to determining the personal scope of rights-based legislation, the CJEU already had a constitutionalised starting point in the form of the definition of a worker for the purposes of free movement law. The most striking example comes from the field of equal pay.

In *Allonby*, the applicant sought to rely on the concept of equal pay, a right that was granted to ‘workers’, a term that was left undefined by the equal pay provision of the Treaty.<sup>27</sup> *Allonby* had been part time lecturer at a college. She (along with a number of other colleagues) was dismissed and reengaged via an agency. There was a stipulation that *Allonby* was to be self-employed. The number of lecturers to be employed in this way included twice as many women as men. The CJEU accepted that the worker concept could not go so far as to include independent providers of services who are not in a position of subordination, but the nature of the relationship could not entirely be left to the individual Member States to define.<sup>28</sup> As the CJEU put it, ‘[t]he formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of

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<sup>25</sup> Mark Bell, ‘Constitutionalization and EU Employment Law’ in Hans W Micklitz (ed), *The Constitutionalization of European Private Law* (OUP 2014) 137, 158.

<sup>26</sup> *ibid* 160.

<sup>27</sup> Art 157 TEU.

<sup>28</sup> Case C-256/01 *Allonby*.

Article [157 TEU] if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article'.<sup>29</sup> As Bell remarks, '[i]n so doing, the Court chose to constrain both national autonomy and party autonomy even though the contractual arrangements had been designed to reflect the domestic [in that case, the UK] legal approach to self-employment, these were supplanted by the Court's conception of what it means to be a worker'.<sup>30</sup> The CJEU was particularly persuaded by the fact that the right to equal pay contained in the Treaty was merely an expression of the general principle of equality (which is now a fundamental right found in the Charter).<sup>31</sup>

As mentioned in the Introduction, equality law has always been somewhat of a field apart when it comes to the influence of human rights concepts, but what of other rights-based legislation? Let us continue with the example of the WTD.

The WTD applies to 'workers'. The Directive does not define this concept, but we have already seen from Chapter II that the CJEU has applied a broad definition to the worker concept in this field, finding that the WTD is to be construed as bringing many contested areas and forms of work within its protective scope. Although, as already mentioned, this broad scope may, in reality, have less to do with the Charter and more to do with the CJEU's traditional teleological or purposive approach to the interpretation of legislation.

It can be seen that in the context of employment regulation, the EU has intervened by granting legislation a broad personal scope, applying to workers and not just employees. In addition, the CJEU has been sensitive to take a purposive approach to the personal scope of such legislation, defining the worker concept broadly, even though it is left undefined by the WTD itself. It is suggested that this expansive approach to the definition of personal scope is unlikely to be affected by article 16 of the Charter. The CJEU when interpreting the scope of employment legislation must be cognisant of the fact that directives largely leave it to the Member States to define precisely who falls within the protection of the legislation. Therefore, the CJEU's guidance must, of necessity, be drafted in general terms. Specific carve-outs in the name of contractual autonomy would lead to difficulties of interpretation and implementation for national courts and legislatures. Discussing autonomous concepts in the context of the ECHR, Letsas notes that their interpretation is not a mere semantic issue. Rather, 'legal interpretation faces a rich set of choices all of which have a bearing on what legal rights people

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<sup>29</sup> *ibid* para 75.

<sup>30</sup> Bell (n 25) 161.

<sup>31</sup> Case C-256/01 *Allonby* para 65.

have'.<sup>32</sup> Thus, the level of discretion granted to Member States to interpret key terms within legislation or the Charter must necessarily be curtailed. It is clear that EU employment legislation does not entirely delegate responsibility for defining the scope of the legislation to the Member States, but how far into domestic law does this expansive approach actually extend and what does this tell us about the Charter's impact on the domestic hierarchy and thereby the individual employment relationship?

b. UK level

Cabrelli remarks that 'parties may exercise their freedom of contract to draw up their relationship on some contractual basis other than that of a contract of employment', thereby avoiding supposedly mandatory employment legislation, in other words, freedom *from* the employment contract.<sup>33</sup> Even without considering any implication of fundamental rights, this proposition is not entirely true. In cases such as *Autoclenz*, the courts have been rather forceful in disallowing the negation of employee/worker status through the use of substitution or 'no obligation' clauses.<sup>34</sup>

The question to be addressed here is not that of whether new non-traditional forms of employment relationship should be brought within the definition of the employee/worker concepts if fundamental Charter rights are at stake. Rather, it is the related question of whether human rights-based legislation has the effect of broadening the personal scope of that legislation *even* in the face of competing domestic definitions of personal scope. In other words, do the common law tests used to determine worker status adapt in the face of rights-based legislation or does article 16 actually strengthen the ability of parties to avoid the employment contract altogether due to the countervailing freedom of contract?

It has already been noted, that the ability of the parties to contract out of employment status has to some extent already been negated by the broadening of the personal scope of domestic legislation to workers rather than merely employees. This has been true of the UK's implementation of EU employment legislation, including legislation that has a fundamental rights basis in the Charter. For example, the WTR applies to 'workers' which is defined in domestic law as:

an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment; or (b) any other contract,

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<sup>32</sup> George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 EJIL 279.

<sup>33</sup> David Cabrelli, *Employment Law in Context* (1<sup>st</sup> edn, OUP 2014) 65.

<sup>34</sup> [2001] IRLR 70.

whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not (...) that of a client or customer of any profession or business (...) carried on by the individual.

As with the definition of the ‘employee’, or the ‘employment contract’, the concept of the worker is left open-ended, in other words, it has been left to the common law, but here we also have the autonomous EU definition to contend with. The CJEU has already said that worker concept must be defined broadly given the importance of access to certain fundamental social rights such as paid annual leave. Here, there was very little lee-way granted to the national courts to derogate from the protection set out in the legislation by narrowing its personal scope. However, this protection has, to an extent, been undermined by the increased elision of the worker and employee concepts in the UK courts. What does this undermining of the worker/employee distinction tell us about the UK courts’ attitude to Charter rights-based legislation?

For example, in *Tomlinson*, Mr Justice Bristow remarked that ‘it is the employee’s situation as a party to a contract of employment which is the subject of protection by the legislation which it did not enjoy under the common law. Unless he was a party to a contract of employment, the statute cannot and does not give him a right’.<sup>35</sup> The same is true of a worker. If an applicant cannot bring himself within the definition of that term, he will have no right to statutory protection, regardless of whether that statute was implementing a Charter right.

There are three relevant ways in which the legislative definition of the worker is dependent on further common law elucidation and thereby three ways in which to undermine worker protection and access to Charter rights. These are (1) the requirement for personal service; (2) mutuality of obligation and (3) subordination. The first criterion derives from the legislative definition itself whereas the second two are entirely creatures of the case law. The interpretation of each of these elements may provide an opportunity for the courts to undermine the protection found in social legislation applying to workers. An analysis of the definition of the worker is interesting in that outside the scope of EU law, the common law courts are entitled to develop an entirely autonomous concept of the worker. Is there any evidence of divergence of the definition of the worker in the working time context (which is underpinned by an EU definition which we now know is supported by a Charter right) and other contexts

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<sup>35</sup> *Tomlinson v Dick Evans ‘U’ Drive Ltd* [1978] ICR 639, 642–643.

which are not dependent on the EU definition? Assessing this distinction may allow us to gain a clearer insight into the Charter's impact on the domestic hierarchy of norms.

The first thing to note is that the common law courts, unlike their EU counterpart, have taken a decidedly non-purposive, indeed outright formalistic approach to the interpretation of protective statutes. For *Cabrelli*, this preference for literal interpretation 'functions to legitimize the enterprise's inherent capacity to frustrate the operation of employment laws'.<sup>36</sup> We can see that from cases like *Tanton* that this literal approach, emphasising autonomy and the written contract, can have serious consequences for the effectiveness of employment legislation. The second point of note is that the criteria used to determine worker status are very similar to those found in the definition of the employee. First, there must be personal service and second, both concepts involve economic dependency or subordination as well as mutuality of obligation. Despite these similarities, the courts have at times been cognisant of the need to adapt common law tests in the worker context. The mutuality of obligations test was, for example, found in the *James v Redcats* to relate to the first level of mutuality ie the wage-work bargain (similar to consideration in ordinary contract law) rather than with the continuing nature of the relationship (as required for employee status).<sup>37</sup> So it seemed that certain tests are easier to meet for workers than they are for employees.

With regard to the 'personal service' element of the test for worker status, the courts have struggled to come to a coherent approach, oscillating between a test of 'integration' and 'dominant purpose'. The dominant purpose test was set out by Elias J in *James v Redcats* as follows:

the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not—if, for example, the dominant feature of the contract is a particular outcome or objective—and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.

The integration test was formulated in *Cotswold Developments* as asking whether the worker (1) actively markets services as an independent person to the world and (2) whether he is recruited by the other party to work as an integral part of his operations. Neither of these tests places any particular consideration on the fact that the worker concept was specifically designed by Parliament to be more expansive than the traditional notion of the employee.

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<sup>36</sup> *Cabrelli* (n 33) 71.

<sup>37</sup> *James v Redcats Ltd* [2007] ICR 1006.

Indeed, the very fact that both tests continue to be applied leads to increased uncertainty for workers who will have to rely on litigation to determine if they are indeed entitled to the protection of statutes. According to Maurice K LJ in *Hospital Medical*:

[t]he striking thing about the judgments in *Cotswold* and *Redcats* is that neither propounds a test of universal application. Langstaff J's "integration" test was considered by him (...) to be demonstrative in "most cases" and Elias J said (...) that the "dominant purpose" test "may help" tribunals in "some cases" (...) both were wise to eschew a more prescriptive approach.

Although it is accepted that a certain level of flexibility is to be welcomed from a worker protection point of view, it is inappropriate that the ability to rely on rights-based legislation should be so dependent on a court's interpretation of the particular factual scenario. Nevertheless, it is generally recognised that the definition of the worker in domestic law is broad enough to be compliant with the EU definition.<sup>38</sup> It can be seen that although there has been some elision between the worker and employee concepts, the courts have been sufficiently flexible that the distinction is not entirely undermined. To date, however, no specific consideration has been given to the fact that some legislation which applies to workers is also protecting a fundamental Charter Employment Right when deciding whether a litigant is a worker, an employee or neither.

It is at this point that a number of recent cases on worker status might prove illustrative of whether the courts adopt a different approach to the issue of personal scope in the face of Charter based legislation.<sup>39</sup> In most of these cases, the applicants were seeking to benefit from a number of statutory protections, including the national minimum wage, whistle-blower protection (no EU underpinning) limited working hours and non-discrimination (an EU Charter rights underpinning). This may enable us to determine whether a grounding in the Charter has an impact on how a piece of employment legislation is dealt with by the common law courts.

The starting point should be to note that the definition of the worker found in the ERA 1996 and the WTR 1998 is also found across the board of domestic employment legislation including the National Minimum Wage Act (NMWA) 1998.<sup>40</sup> *Pimlico Plumbers* is a particularly interesting case, given its consideration of the definition of the employee, the

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<sup>38</sup> Deakin and Morris (n 1) 172.

<sup>39</sup> *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459; *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51; *Aslam & Farrar v Uber* (2202550/2015) and *Dewhurst v Citysprint UK Ltd* (2202512/2016).

<sup>40</sup> S 230(3)(b) ERA 1996, s 54(3)(b) National Minimum Wage Act (NMWA) 1998 and reg 2(1) of the WTR.

worker and indeed the contract personally to do work under equality law (the latter of which is considered further below). In that case, the applicant plumber claimed that he had been unfairly and wrongfully dismissed, that he was entitled to pay during medical suspension, holiday pay and that he had been discriminated against on the grounds of disability. Both the ET and the EAT found that the applicant was not an employee but that he was a worker. He could not, therefore, claim for unfair or wrongful dismissal or pay during suspension. The question before the CoA became one of whether the applicant has the required personal service to be a worker, or whether he was really self-employed. According to that court, ‘the issue whether Mr Smith undertook to do or perform personally work or services (...) turns entirely on the terms of the contract’.<sup>41</sup> The court then goes on to look at a number of cases concerned with personal service in the ‘employee’ context, such as *Tanton*, thus demonstrating the similarity of approaches in the worker and employee status fields. Thus, the test for worker status remains essentially fact-specific, with no particular weight given to the fact that at least some of the heads of claim were supported by an EU fundamental human right, with the court simply concluding that ‘Mr Smith undertook to provide his services personally within section 230(3)(b) of the ERA, regulation 2 of the WTR and the definition of "employment" in section 83(2) of the EA’.<sup>42</sup> This approach is perhaps unsurprising given that the courts have in the past tended to treat the employee/worker distinction as one of ‘degree’ and not ‘kind’.<sup>43</sup>

In the *Uber* case, the tribunal was asked to consider whether Uber taxi drivers were workers or self-employed. Having found that they were indeed workers, the tribunal helpfully deals with the claim for limited working time and the minimum wage under separate headings.<sup>44</sup> Although the preliminary finding that they were workers already meant that they were in principle entitled to both claims, it is nonetheless useful to see if any difference of treatment is evident when it came to defining the working time of the drivers and their wage rates. Starting with working time, the tribunal set out the definition found in regulation 2(1) WTR 1998 which provides that working time is ‘any period during which he is working, at his employer’s disposal and carrying out his activities or duties’. The tribunal adopts a decidedly non-purposive approach to the interpretation of this concept in the present case, with the focus remaining largely on the technicalities of the contractual relationship between Uber and the drivers. The drivers were only to be considered as working while within their territory, with the app switched on and when they were available and willing to work. Again, there is no

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<sup>41</sup> *Pimlico Plumbers Ltd & Anor v Smith* UKEAT/0495/12/DM [73] (Sir Terence Etherton MR).

<sup>42</sup> *Express and Echo Publications v Ernest Tanton* [1999] EWCA Civ 949.

<sup>43</sup> *Byrne Bros v Baird* [2002] ICR 667 [17] (Recorder Underhill).

<sup>44</sup> *Aslam & Farrar v Uber* (2202550/2015).

reference to the purpose of the underlying regulations nor to the fact that they derive from EU law which is underpinned by a Charter right.<sup>45</sup> Adopting the same close factual (contractual) analysis, the tribunal concluded that the drivers undertook ‘unmeasured work’ for the purposes of national minimum wage legislation.<sup>46</sup>

To some extent, we should not be at all surprised that the Charter plays a very limited role in considering the personal scope of employment legislation at domestic level. It has already been noted several times that the equality field stands apart as a beacon of human rights development in the employment context. Yet, even here, the UK courts have adopted a non-purposive, literal and formalistic approach to the issue of the personal scope of equality legislation. UK equality law applies not only to employees and to workers, but also to a new residual category of those employed under a ‘contract personally to do work’.<sup>47</sup> This new category is distinct from the worker concept in that the former may be engaged in an independent business whereas a worker may not. It was thought, therefore, that the broad *Allonby* test for worker status was satisfied by the UK definition. This was called into question in *Jivraj*.<sup>48</sup> The latter case may tell us that being rooted in a human right really makes no difference to common law courts if they can escape the sanction of incompatibility with EU law.

In *Jivraj*, the UK Supreme Court (UKSC) held that an arbitrator could not receive protection from religious discrimination on the grounds that he did not, following *Allonby*, have the requisite degree of ‘subordination’ to fall within the category of ‘contracts personally to work’. Rather, he was an independent provider of a service. For Lord Clarke, equality legislation required not simply a contract ‘personally to do work’ but also ‘employment’ under that contract which implies a degree of subordination. Despite the UKSC’s putative reliance on *Allonby*, it is quite clear that there is a misunderstanding of the CJEU’s use of the subordination concept in that case. As Deakin and Morris put it, ‘[t]he emphasis in *Allonby* was (...) on ensuring that workers who passed the control test came under the protection of EU law, whether or not they would otherwise have been protected under national legislation. In *Jivraj*, *Allonby* was interpreted as deciding that only workers who passed the control test were protected by equality law’.<sup>49</sup>

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<sup>45</sup> *ibid* [122].

<sup>46</sup> *ibid* [127].

<sup>47</sup> S 83(2)(a) EqA 2010.

<sup>48</sup> *Jivraj v Hashwani* [2011] UKSC 40.

<sup>49</sup> Deakin and Morris (n 1) 177.

There are two difficulties with *Jivraj* from a human rights perspective. First, the interpretative approach adopted is overly formalistic and runs counter to the EU court's purposive approach in cases such as *Allonby*. Second, and potentially more problematic is the elision of the contract personally to do work with the worker concept which as we have already seen, has itself at times been drawn closer to the traditional employment contract.<sup>50</sup> In the quartet of worker status case identified above, this elision has continued.

The confusion in *Pimlico* between the contract personally to do work under the EqA 2010 and the worker concept also stands in stark contrast with the decision in *van Winkelhof*, where the court does appear to adopt a more purposive approach to the definition of the contract personally to do work. In that case, Lady Hale commented that 'the question of whether [individuals] can also be workers (...) would be a very different question from whether they can be employees'.<sup>51</sup> Again, in that case, the court was clear that in determining whether an applicant fell within the extended categories, the dedicated *statutory tests* rather than the common law must be applied. To that extent, the common law tests for employee status should have no role to play here.<sup>52</sup> The emphasis here is squarely on the intention of the legislature, ie a purposive approach to interpretation. This means, then, that although the common law continues to play a role, it needs to be modified in the face of legislative rights.

The above discussion shows us that common law tests such as those governing employment statuses do not necessarily yield in the face of legislation with a Charter rights underpinning. This is not to say, however, the common law courts have not been receptive to legislative standards (which in turn might be underpinned by the Charter). Clearly though, the Charter has had very little impact on the external hierarchy of norms at domestic level, beyond the role the Charter has in the implementation of EU employment legislation. Does that also suggest that the Charter has had a limited role on the internal hierarchy, ie the relationship between contractual terms?

## 2. The internal hierarchy

The question here is whether the Charter might have an effect on the relationship between the various types of terms found within a contract of employment. The employment relationship,

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<sup>50</sup> *ibid.*

<sup>51</sup> *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32 [26].

<sup>52</sup> Jeremias Prassl, 'Pimlico Plumbers, Uber Drivers, Cycle Couriers, and Court Translators: Who is a Worker?' (forthcoming LQR) 8.

perhaps more so than any other field governed by contract law, is necessarily incomplete by design. It simply is not possible to set out the entirety of the rights and obligations of the parties in advance. The ability of the external norms set out above to influence the employment relationship may be helped or hindered by the hierarchy of sources of terms within the employment contract itself. In other words, just how much of the employment relationship is governed by the express contractual agreement between the two parties?

Incompleteness in the employment context is to some extent resolved by granting the employer wide discretionary powers. These powers do not take the form of contractual terms and so are not considered here. Rather, we are interested in the relationship between the express terms of the agreement and terms implied at common law as ‘necessary incidents’ of the employment relationship. The express terms have traditionally taken precedence over the implied terms which are only ever dispositive (derogable). To what extent do human rights concepts embolden the courts’ use of common law implied terms to preserve social standards, even in the face of express agreement to the contrary and do the Employment Rights or article 16 have any role to play here?

Implied terms are only ‘binding in the absence of manifested assent to the contrary’.<sup>53</sup> As such, they can easily be excluded by express agreement of the parties to the employment contract. As Cabrelli notes, ‘whether and if so how, a rule of law ought to emerge whereby implied terms are treated by the common law as mandatory and so impervious to disapplication’ is a contentious issue.<sup>54</sup> He points to public policy as a potential source of such inderogability but recognises that there is little judicial or legislative appetite for such an approach. It may be the case in the future than only those implied terms that are seen as ‘fundamental’ might become inderogable. MTC is arguably a candidate for such fundamental status. Other authors, such as Collins, have described this idea as ‘legal heresy’, marking a rupture with the ordinary principles of contract law under which implied terms are ousted by the express contractual provisions.<sup>55</sup>

A final issue is the extent to which the development of implied terms in the common law contract of *employment* is dependent on the existence of a background of legislative concepts. We have already seen that the implied term of MTC was conceived in legislation and born of the common law, but has it now taken on a life of its own, becoming truly autonomous and

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<sup>53</sup> Randy E Barnett, ‘The Sound of Silence: Default Rules and Contractual Consent (1992) 78 Virginia Law Review 821, 825.

<sup>54</sup> Cabrelli (n 33) 232.

<sup>55</sup> Hugh Collins, ‘Legal Responses to the Standard Form Contract of Employment’ (2007) 36 ILJ 2.

not dependent on the pre-existence of protective legislation? Would the common law return to ordinary contractual principles, thereby abandoning the notion of an *employment* contract? There is no doubt that the existence of a written list of rights whether contained in the Charter or ordinary legislation has had the effect of emboldening the courts to develop implied terms. In their absence, it is likely to be seen as a matter best left to the legislature.

This issue leads to a broader question of whether the private agreement between the parties to an employment contract should be allowed to oust legislative protection ie the distinction between *ius cogens* (non-derogable) and *ius dispositivum* (derogable) rights.<sup>56</sup> Cabrelli argues that in the case of conflicts between the parties, with each raising competing contractual claims, ‘the judges will (...) choose between them. If there is a core minimum of employment principles which are (...) inderogable, the judges can consider the most relevant underlying principle (...) and need not concern themselves as to whether the principle has been ousted by (i) the agreement or (ii) some other medium’.<sup>57</sup> The problem with the current judicial approach is that ‘whether the right operates as a ‘ceiling’ or a ‘floor’ of employee protection really depends on the source of the derogation being considered’.<sup>58</sup> For example, legislation will generally prevail over competing common law concepts. There are, of course, different forms of derogation. First, there is derogation within the contract itself, ie an employment right is disapplied (for example, an express derogation, an exclusion of liability clause, an acknowledgement of non-reliance clause).<sup>59</sup> Second, an external document (eg a company handbook) which is incompatible with an employment right may be incorporated into the contract by reference.<sup>60</sup> Third, an express term of the contract may not be compatible with an implied term.

It is clear that the Charter has not had the effect of introducing any notion of inderogability in the employment context. The hierarchy of norms may be disrupted, or at least modified in the presence of human rights, but this phenomenon was already in evidence when it came to the changing relationship between common law and employment legislation. There is no particular consequence of invoking the notion of human rights. To date, the courts have addressed the preservation of the core content of the employment relationship through ordinary contractual principles such as implied terms.

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<sup>56</sup> Bernard Rudden, ‘Ius Cogens, Ius Dispositivum’ (1980) 11 *Cambrian Law Review* 87, 88.

<sup>57</sup> David Cabrelli, ‘Towards a Prohibition of the Derogation of Employment Rights’ 2007, available at SSRN: <<http://ssrn.com/abstract=1011171>> 2 accessed 29 December 2017.

<sup>58</sup> *ibid* 16.

<sup>59</sup> *ibid* 19.

<sup>60</sup> *ibid*.

Article 16 will not change things either. The maximum extent of the parties' ability to avoid core employee-protective terms while still holding a contract of *employment* has probably been reached. It is by now clear that there cannot be an employment contract without mutual trust and confidence, for example. The jurisprudence on sham contracts also demonstrates that the ability of the parties to avoid an employment contract altogether is also largely restricted. It is perhaps better to view the derogability issue as consisting of a spectrum rather than in absolutes. There is no absolute right to avoid the employment contract or to disapply employee-protective terms, nor is there an absolute right to insist on the application of a term due to its human rights underpinning. For the foreseeable future, this is precisely how the relationship between employment norms will continue to be viewed. This is despite the fact that as Freedland put it, 'the distinction is a particular way, not just of classifying legal norms, but also of talking about one of the deepest ideological debates about the making and interpreting of laws, namely the debate about freedom of contract'.<sup>61</sup> Given the weak influence of the Charter at the micro level of the employment relationship, there may be no added value in raising the Charter in this context.

### 3. Conclusion

This chapter has demonstrated the influence (or lack thereof) of the Charter on the individual employment relationship. It has done so by assessing the role of the Charter in disrupting the hierarchy of sources of employment norms at domestic level. The common law and employment legislation have a long history of interaction and it can be seen that the common law has, at times, been modified in the wake of competing social rights contained in legislation. Having said this, the role of the common law (of contract) in the employment context remains prevalent given the continued contractual underpinnings of the employment relationship. This has meant that access to the Employment Rights is policed by common law concepts such as employee and worker status, meaning that legislation, even with a connection to fundamental rights, may not act as an autonomous source of regulation. As such, the British courts have not given any real consideration to the fact that a piece of legislation was linked to the Charter when it came to interpreting and applying that legislation. It is clear that the Charter has not resulted in any rapprochement between the common law and the civil law systems, with the

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<sup>61</sup> Mark Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law in Honour of Bernard Rudden* (OUP 2002) 165, 167.

latter having a clear notion of an employment law hierarchy and the former continuing to prioritise flexibility.

We should not really be surprised that the Charter has played such a limited role in the domestic hierarchy given that the Charter strictly only applies when Member States are acting within the scope of EU law. Outside of that context, national interpretive methods apply and can be used to blunt the employee-protective aims of legislation. British judges continue to (over) emphasise contractual tests in the employment context. Even when a piece of legislation is within the scope of EU law, and is indeed underpinned by the Charter, the wide margin of discretion left to the national courts can still have the effect of limiting access to those rights. It is less surprising, therefore, that the Charter has had an even more limited role within the internal hierarchy between the contractual terms themselves. Neither the Charter, nor human rights concepts more generally, are likely to lead to the introduction of a stronger notion of inderogability into the employment context, although in future, some terms such as MTC may be viewed as fundamental to the employment relationship and therefore inderogable. In terms of contractual autonomy, there are already significant limitations on the ability of employer's to avoid the employment relationship altogether. Overall, then, the impact of the Charter on the individual employment relationship has been minimal. What then might be the consequences (if any) of the Charter's absence for the employment relationship?

## **VI. Brexit and the Consequences of the Charter's Removal**

Having looked in the previous chapters at the Charter's impact on the employment relationship, both in general and on the individual contract, we are now in a better position to begin to assess the impact of the Withdrawal Bill and consequences of the Charter's *removal* for the employment relationship. An understanding of what the UK might lose in the Brexit process can also help us to understand the Charter's current reach. We begin by setting out the provisions of the Withdrawal Bill before considering how retained EU employment law will fit into the existing hierarchy of norms (Section A). This is followed in Section B by a consideration of the future roles of the Employment Rights and freedom of contract in the absence of the Charter altogether.

### **A. The Withdrawal Bill and the Employment Relationship**

This section deals with the key provisions of the Withdrawal Bill before assessing whether it really makes any difference whether or not the Charter applies.

#### **1. The Withdrawal Bill**

The UK Government has made it clear that, in its opinion, there can be no real Brexit without removing the UK from the somewhat ambiguously termed 'direct jurisdiction' of the CJEU. There are currently ongoing attempts in Parliament to ensure that the Charter is codified in UK law but as it stands, the Bill makes clear that the Charter will no longer apply. In that case, it will fall on the UK courts to take on the full range of tasks associated with the interpretation and application of (former) EU employment legislation.

Clause 2(1) of the Bill provides that EU-derived legislation applicable before Brexit will continue to have effect in UK law. Clause 5(1) makes clear, however, that the principle of supremacy of EU law will no longer strictly apply, although it will, according to clause 5(2) continue to govern the 'interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'.

This may have continued significance for the ability of litigants to enforce their EU-derived employment rights. In *Benkharbouche*, workers at the embassies of Sudan and Libya were found to be entitled to have their EU-derived employment law (discrimination and working time) claims heard in a UK Employment Tribunal despite the presence of a conflict with the State Immunity Act 1978.<sup>1</sup> Preventing reliance on these EU rights would breach article 47 of the Charter, which guarantees access to justice. This judgment should also remind us of the protection that will continue to be provided by article 6 of the ECHR, the Convention right to a fair trial. Lord Sumption held that ‘a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility’.<sup>2</sup>

The effect of clause 5(2) is to create a new category of ‘retained EU law’ that must, somehow, fit into the existing hierarchy of norms. For employment law purposes, this may not be an immediate issue. As we saw, much of the existing EU employment acquis has already been implemented in domestic legislation. However, there still remain serious doubts as to the precise status of post-Brexit CJEU case law (clause 6 retains that court’s pre-Brexit case law, with more flexibility to amend that case law) and whether this can be applied or departed from by the domestic courts. Lady Hale, the newly appointed President of the Supreme Court has called for clarification in this area. Most importantly, for our purposes, the Bill is clear that the Charter will not apply.

Clause 5(4) of the Bill provides that ‘the Charter of Fundamental Rights is not part of domestic law on or after exit day’. This presents some major practical difficulties. First, we know that it is often impossible to pinpoint precisely the influence of the Charter in CJEU decisions. Sometimes, the Charter is front and centre in employment law decisions. In others, it is barely mentioned (if at all). In earlier cases, the CJEU may simply have been reticent in its use of the Charter, recognising the sensitive nature of social rights and grappling (as it continues to do) with the distinction between rights and principles.

It has also been argued that incorporating the Charter into domestic law post-Brexit would be undemocratic. This is because the interpretation of the Charter rights is entirely a matter for the CJEU. Eduardo Gill-Pedro argues in a recent blog that the CJEU interprets the Charter in

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<sup>1</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

<sup>2</sup> *ibid* para 78.

the light of the objectives of the Union.<sup>3</sup> Once the UK leaves the Union it will no longer share those objectives and so it would be undemocratic to rely on the Charter.

I would argue that the Charter does not merely serve as an overarching political guide to the future direction of the Union. Certainly, in the employment context it has a less ambitious remit, steering as it does, the interpretation and review of employment legislation. If the Government is committed to preserving the existing employment law *acquis* it should have nothing to fear from retaining the Charter. In any case, stripped of its constitutional status into the future, the Charter may prove little threat to the amendment or repeal of domestic employment legislation, save to the extent that the supremacy principle continues to apply on a limited basis. There would, therefore, be no ‘intrusion’ of external values into the legislative process.

Finally, it could be argued that whether the Charter applies or not really makes very little practical difference. First, as was noted elsewhere in this thesis, the effect of the Charter’s Employment Rights, largely dismissed as mere ‘principles’, has been somewhat disappointing. Second, and more significantly, the Withdrawal Bill itself, at clause 5(5) preserves fundamental rights that exist autonomously of the Charter and ‘references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles’.

It is clear, then, the Charter will continue to play a role in the guise of those provisions that are already reflected in the general principles of EU law (although Schedule 1 to the Withdrawal Bill will limit the legal effect of those general principles). In many areas, but notably the equality field, it was the general principles that opened the way to the application of fundamental rights in employment law, although I accept that the adoption of the Charter had an emboldening effect even prior to its granting of full legal effect. Although, admittedly the status of the Employment Rights as general principles remains unclear and the Withdrawal Bill provides in any event that the general principles cannot act as a standard of review for retained EU law. Separating the role of the Charter and the general principles will in any case be difficult, as discussed below regarding the relationship between the EFTA Court and the CJEU.

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<sup>3</sup> Eduardo Gill-Pedro, ‘Learning to let go – the Charter of Fundamental Rights after Brexit’ EU Law Analysis Blog 7 September 2017.

Given the impending absence of the Charter, we now turn to consider how the UK courts might, in future, interpret legislation that was once underpinned by a Charter Employment Right.

## 2. Interpreting employment legislation with a former rights underpinning

What does the future hold for employment legislation that was once supported by a fundamental Charter right? The irony is that Brexit may require the common law courts to explicitly consider social rights requirements in their reasoning, including where the Charter might have fit into that reasoning.

Not all existing British employment legislation derives from EU law. The minimum wage, collective bargaining and unfair dismissal are largely domestic creatures. The latter is a particularly interesting example of an area in which the Charter does not currently apply but could potentially apply to EU employment legislation in the future. This is because the Charter tells us that unfair dismissal protection is a fundamental right. Article 30 of the Charter provides that ‘every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices’. Article 153 TFEU provides the Union with a legal basis for the adoption of legislation intended to protect ‘workers where their employment contract is terminated’. Despite this, there is no specific EU Directive dealing with unjust dismissal. With the Charter’s clear indication that protection from unjustified dismissal is a fundamental right (albeit in the Solidarity Title), how have the UK courts dealt with the concept as it arises in national legislation?

The ERA 1996 provides for certain types of dismissal which may be ‘potentially’ fair. In order for a dismissal to be potentially fair it must first fall under one of these legislative categories of potentially fair reasons.<sup>4</sup> It should be noted that this category of potentially fair reasons is construed very broadly and ‘only a completely unreasoned or arbitrary dismissal (...) is likely to fall outside the scope’.<sup>5</sup> In addition to the specified potentially fair reasons for dismissal there is an additional ‘catch all’ category of some other substantial reason (SOSR). This residual category has the effect of increasing the possibilities for the employer to escape liability under the legislation, but it also renders the other reasons for dismissal largely redundant.

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<sup>4</sup> S 98 ERA 1996.

<sup>5</sup> Deakin and Morris, *Labour Law* (6<sup>th</sup> edn, Hart 2012) 504.

In addition to the reason for dismissal being potentially fair, the employer's behaviour must also have been 'reasonable'. In other words, did the employer act reasonably in the circumstances in treating the reasons as sufficient for the dismissal?<sup>6</sup> This formulation suggests that 'the standard here is more procedural than substantive, that is to say, concerned less with the fairness of the outcome than with the fairness of the procedure by which it was arrived at'.<sup>7</sup> In this respect, the employer is protected as long as he acts within a 'band of reasonableness' or a 'band of reasonable responses' ie 'whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted'.<sup>8</sup> This test has been heavily criticised. In *Haddon, Morrison J* held that 'the mantra "the band of reasonable responses" is not helpful because it has led tribunals into applying what amounts to a perversity test (...) The moment one talks of a "range" or "band" of reasonable responses one is conjuring up the possibility of extreme views at either end of the band or range. In reality it is most unlikely'.<sup>9</sup> In other words, it is only in extreme outlying cases in which the employer's behaviour will be found unreasonable, thereby undermining the protection of employees in this context.

Despite recognition from the courts of the harshness of this test, they nonetheless feel bound by existing jurisprudence. In *Foley*, the court took the view that authority which had 'been followed almost every day in almost every employment tribunal and on appeals for nearly 20 years [should] remain binding' until Parliament decides otherwise.<sup>10</sup> As Deakin and Morris remark, '[t]he courts may be thought of as having adapted to the employment context an approach of the common law of tort and contract to the assessment of the standard of care expected of professionals in negligence cases'.<sup>11</sup> They further point out the failure of the UK's domestic unfair dismissal regime to protect employees from dismissals which may have implications for their ECHR rights.<sup>12</sup> It is suggested, for example, that 'the "band of reasonable" responses test should not be applied in its existing form where an employee's Convention rights have been violated, although to date judicial comments to this effect have been *obiter*'.<sup>13</sup>

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<sup>6</sup> S 98(4)(a) ERA 1996.

<sup>7</sup> Deakin and Morris (n 5) 504.

<sup>8</sup> *Iceland Frozen Foods v. Jones* [1982] IRLR 439, 442 (EAT).

<sup>9</sup> *Haddon v Van den Bergh Foods* [1999] IRLR 672 (Morrison J).

<sup>10</sup> *Post Office v Foley; Midland Bank plc v Madden* [2000] IRLR 827, 829 (Mummery LJ).

<sup>11</sup> Deakin and Morris (n 5) 529.

<sup>12</sup> A rare example is the abolition of the requirement for continuity of employment before dismissal which was a result of the ECtHR decision in *Redfearn v The United Kingdom* HEJUD [2012] ECHR 1878.

<sup>13</sup> Deakin and Morris (n 5) 546. See *Pay v UK* [2009] IRLR 139.

We can see here that domestic legislation in the unfair dismissal context has been largely unreceptive to fundamental rights concepts despite the obvious implications of dismissal for the human rights of workers and the fact that protection from unfair dismissal is itself a fundamental right contained in the Charter. This example serves to highlight that often employee-protective legislation may lose much of its potency when it comes into contact with the common law of contract, with the British courts granting a large margin of discretion to employers exercising their managerial prerogative. In any case, this should not be surprising, given that we have already seen that legislation such as the WTR with a clear Charter basis is still interpreted by domestic courts in a manner which largely ignore its fundamental rights implications. This also does not bode well for the future interpretation of employment legislation that had a former fundamental rights underpinning prior to Brexit.

Having addressed the manner in which the Government intends to remove the Charter from domestic law and the potential consequences for employment legislation, we now turn to consider how the Employment Rights and freedom of contract might continue to have an influence in the absence of the Charter and the effect this might have on the employment relationship.

## **B. Mapping the Charter Rights onto Domestic Law**

We now know that the Charter is likely to be removed from domestic law post-Brexit. Are there any alternatives to the Charter that could continue to preserve the Employment Rights and what will be the future role for the principle of contractual autonomy? We start by exploring the ability of the common law to protect social rights by first examining the relationship between the common law and human rights concepts.

### **1. Human rights and the common law**

The adoption of the Charter, the Human Rights Act 1998 (HRA) and, indeed, Brexit, have ironically led to a resurgence of interest in the development and protection of human rights at common law. As Dickins notes, the common law (rather than legislation) is once again being viewed as the primordial source of protection of human rights in this country:

Ever since the 17<sup>th</sup> century the common law has been a hugely important factor in the UK constitution. Today, its role is as great as ever, the more so given that previous faith in the omniscience and incorruptibility of Parliament is not as strong as it used to be. In the UK it is judges who are increasingly viewed as prime protectors of human rights.<sup>14</sup>

Proponents of common law human rights argue that it has to some extent been hamstrung by the enactment of the HRA. As Fordham puts it, ‘the common law is not limited to, but rather liberated from, the incidence and scope of those rights which happen to be found in the ECHR’.<sup>15</sup> This overlooks the fact that the HRA is a mere twenty years old, while the common law has had centuries to develop human rights standards. For Fordham, this can be explained away by the fact that ‘[t]he inhibitors on the development and power of common law rights protection are matters of historical and considered judicial self-restraint. They are always open to re-evaluation’.<sup>16</sup> If the HRA has led to the courts ignoring or overlooking the development of common law rights, this too can be explained by judicial inaction. There is nothing in the enactment of the HRA that prevents the simultaneous development of the common law. Indeed, this is a development that many human rights lawyers would welcome. I am more sceptical. The reason, it is suggested, that the courts have tended to rely on the HRA even where the common law may have provided a similar outcome, is for the very fact that the HRA is more readily accessible to both the judiciary and the general public. In addition, and unlike the common law, there are clear, predetermined remedies available for the breach of a right contained in the HRA, for example a declaration of incompatibility. Of course, the effectiveness or indeed appropriateness of such a remedy may be challenged. There are also a number of obstacles preventing litigants from enforcing common law rights.

The first major obstacle to relying on the common law as a source of human rights protection is that it developed piece-meal, over time and therefore cannot contain an ‘authoritative catalogue’ of rights at any one time, although proponents of common law rights might point to this flexibility as a positive element. Nevertheless, and as Elliot comments, although common law rights existed, or at least could be inferred from case law, they ‘appeared to occupy a terrain substantially narrower than that occupied by the Convention rights. Indeed, it was the failure of domestic law to protect the full range of such rights that underpinned the

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<sup>14</sup> Brian Dickson, ‘The United Kingdom’ in Patricia Popelier, Catherine van de Heyning and Piet van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Intersentia 2010) 343.

<sup>15</sup> Michael Fordham QC, ‘Common Law Social Rights’

<[www.blackstonechambers.com/documents/215/Common\\_Law\\_Rights](http://www.blackstonechambers.com/documents/215/Common_Law_Rights)> 2 accessed 29 December 2017.

<sup>16</sup> *ibid* 5.

desire of the Blair administration to legislate so as to see “rights brought home”<sup>17</sup>. This is a key element undermining the argument that the common law provides adequate human rights protection. It was the very failure of the common law to act as a clear standard against which human rights violations could be assessed that necessitated the enactment of the HRA in the first place.

Even more fundamentally, because of the relationship between the common law and statute, the common law must give way in the face of competing legislation, although as we have seen, it may retain a residual role. As Lord Hoffman put it in *Simms*:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights (...) The constraints upon its exercise by Parliament are ultimately political, not legal (...) Fundamental rights cannot be overridden by general or ambiguous words.<sup>18</sup>

It is clear that in English law, there is not much added value in attaching the term ‘constitutional’ or ‘fundamental’ to a particular right in the absence of a written text.<sup>19</sup>

For Elliot, there are two ways of looking at the relationship between the common law and the HRA. First, common law ‘dynamism’ might extend beyond the mere negative assertion that the HRA has not precluded the common law’s continued development. Second, the HRA has in fact been used to inform and inspire the development of the common law and common law human rights, bringing out the common law’s latent unfulfilled potential.<sup>20</sup> Fikfak further notes that if the common law, as informed by international human rights were to become an increasingly important source of rights protection in this country, ‘[i]nstead of treating international law as politics, courts will have asserted its legal nature’, bypassing controversial debates about the appropriateness of adopting ‘foreign’ human rights standards’.<sup>21</sup> She concludes that ‘English judges have therefore taken the initiative to divorce the understanding of human rights protection as exclusively international in character and to strengthen the domestic, autonomy basis on which rights protection can be ensured in the UK’.<sup>22</sup> With respect, it is suggested that far from divorcing international human rights from political debate,

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<sup>17</sup> Mark Elliot, ‘Beyond the European Convention: Human Rights and the Common Law’ (2015) CLP 1, 4.

<sup>18</sup> *Simms* [2000] AC 115 [131] (Lord Hoffmann).

<sup>19</sup> Richard Clayton, ‘The Empire Strikes Back: Common Law Rights and the Human Rights Act’ (2015) Public Law 3, 8.

<sup>20</sup> Elliot (n 17) 10.

<sup>21</sup> Veronika Fikfak, ‘English Courts and the “Internalisation” of the European Convention of Human Rights?—Between Theory and Practice’ Legal Studies Research Paper No. 37/2015 2.

<sup>22</sup> *ibid* 15.

this is rather a recognition by the judiciary that the application of international, or at least ‘European’ human rights domestically, has become a rather toxic issue.

The repeal of the HRA may now be a distant prospect. The abolition of the Charter, however, is an altogether more imminent danger. If there is some hope that public law rights may be replicated by the common law, is the same true of the Charter’s Employment Rights? Is the common law capable of protecting employment rights or does it remain wedded to the ‘libertarian paradigm’ often exalted by proponents of common law rights?<sup>23</sup> Can the common law act as a conduit through which the Charter’s Employment Rights might be reflected?

## 2. The common law as a conduit for the Employment Rights

In chapter V, we considered the manner in which the common law interacts with employment legislation. There is a clear potential there for the courts to take account of the nature of an underlying right when interpreting and applying legislation. But, if that legislation is removed post-Brexit, to what extent can the common law itself step into the breach to ensure the continued (autonomous) protection of the Charter’s Employment Rights? As we saw, a similar exercise has already been carried out in relation to the HRA/common law relationship. It has been suggested that, at least in some instances, the common law is just as capable of protecting human rights standards as the Convention/HRA.<sup>24</sup> Is the same true of the common law and the Charter’s Employment Rights and what are the consequences for the employment relationship?

### 2.1. *An autonomous source of employment ‘rights’*

Perhaps we need to extend to the social context the distinction that according to Elliot ‘can—and needs to be—drawn between values associated with the common law and rights protected by it. It is true that the Convention embodies rights that amount to specific manifestations of values that, at some level of abstraction, are reflected in the English common law tradition’.<sup>25</sup> It is perhaps a futile exercise to embark on a search for employment ‘rights’ contained in the common law. A more fruitful exercise may to look for its underlying values, as contemplated in chapter II.

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<sup>23</sup> TRS Allan, ‘In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law’ LSE Working Papers 5/2009.

<sup>24</sup> Elliot (n 17) 1.

<sup>25</sup> *ibid* 5.

There is a certain irony in the fact that the CJEU considers (at least some) of the Charter's Employment Rights to be too vague/incomplete to act as autonomous standards while at the same time they may be too specific to be incorporated as rights in the common law. It is suggested that one such expression of the underlying values of the common law of the *employment* contract will be the continued development of the above-mentioned term of mutual trust and confidence (MTC), which will be implied as a 'necessary incident' of the contract of employment, ie a term implied in law, regardless of the intentions of the parties.<sup>26</sup> The test for the implication of a term at common law is therefore one of 'necessity' ie based on wider considerations of public policy rather than necessity in terms of efficacy.<sup>27</sup> The implied term of MTC performs two functions. First, it prevents the disappointment of the employee's legitimate expectations. Second, it subjects the power and discretion of the employer to a measure of meaningful control.<sup>28</sup>

Since its inception in the unfair dismissal context, the implied term of MTC has expanded to other areas. In *Malik*, the term was formulated as the employer shall not 'without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.<sup>29</sup> To what extent, therefore, is this implied term capable of reflecting the content of the Charter's Employment Rights?

As already mentioned, the common law is incapable of transposing the level of detail contained in the Charter's provisions and accompanying Explanations. It will be recalled that article 31, for example, guarantees workers a right to limited working hours, daily and weekly rest as well as paid annual leave. The accompanying legislation, the WTD, fleshes out this provision with quantitative guarantees for each right (eg four weeks' annual leave). It is clear that common law implied terms will not be able to bear the weight of such a specific provision, but what about the more general principle that employees should be protected from over-work?

A potential approach might be found in *Johnstone*.<sup>30</sup> In that case, a junior doctor sought damages for ill-health brought on by working excessive hours. His employment contract specified that he was to work a basic 40-hour week and to be available for an additional 48 hours' overtime. Browne-Wilkinson VC argued that 'express and implied terms (...) have to

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<sup>26</sup> Edwin Peel (ed), Treitel, *The Law of Contract* (14<sup>th</sup> edn, Sweet & Maxwell 2016) 255.

<sup>27</sup> David Cabrelli, *Employment Law in Context* (1<sup>st</sup> edn, OUP 2014) 156.

<sup>28</sup> *ibid* 185.

<sup>29</sup> *Malik v Bank of Credit and Commerce International SA* [1997] UKHL 23 (Lord Nicholls).

<sup>30</sup> *Johnstone v Bloomsbury Health Authority* [1992] QB 333.

be capable of co-existence’.<sup>31</sup> He reasoned that the express term of the contract simply gave the employer the *option* of requiring the employee to work overtime. This was an option that had to be exercised in accordance with implied terms. In other words, the employer had to act reasonably and with regard for the health of the employee. This case demonstrates that at least to some extent, implied terms are capable of preserving employment ‘standards’ but there are a number of obstacles standing in the way of the development of common law employment ‘rights’?

First, although a common law concept, we have already noted that the implied term of MTC developed largely as a result of the common law’s interaction with legislation and so it is not an autonomous right. In addition, it is perhaps a stretch to require common law concepts to perform functions for which they were never intended. More problematic still for the common law’s ability to act as a rights source is the issue of derogation already discussed above. Given these difficulties associated with replicating the Charter in domestic law, it is perhaps a good opportunity to ask whether it is all worth it. What is the added value of relying on the Charter?

## 2.2. *The added value of the Charter*

Before we begin lamenting the Charter’s absence, it may be worth taking a step back and asking what added value continuing to apply the Charter might actually give. It has already been remarked that having a written statement of fundamental rights is beneficial, in terms of legal certainty and public accessibility. The focus of this section will rather be on cases in which the Charter could have been raised but was not, with the case being decided entirely on domestic legal principles to achieve a human rights-compliant approach. The most remarkable of these cases has been the recent decision handed down in *Unison*.<sup>32</sup>

This case concerned the validity of the UK Government’s introduction of fees for access to Employment Tribunals in 2013. These fees had led to a significant reduction in the number of claims being brought to tribunals. In quashing the fees, the UKSC relied heavily on the common law right of access to justice noting that ‘the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to justice’.<sup>33</sup> This decision has been heralded as signalling the ability of the

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<sup>31</sup> *ibid* [351] (Browne-Wilkinson VC).

<sup>32</sup> *UNISON v The Lord Chancellor* [2017] UKSC 51.

<sup>33</sup> *ibid* [64].

common law adequately to protect rights post-Brexit or indeed that the relevant fundamental right—here access to the courts has been ‘Brexit-proofed’. But this is to overlook the significant engagement undertaken by the Court with article 47 of the Charter which guarantees the right to access justice. The UKSC concluded that ‘the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law’.<sup>34</sup> So, while it is broadly to be welcomed that the courts are engaging with multiple human rights sources, particularly in the run up to Brexit, the underlying EU rights continued to play a significant role in this case. It should also be borne in mind that the right guaranteed in this case, access to justice, is a classic human right protected in most Western democratic constitutions. What will not be protected post-Brexit, are the underlying Employment Rights that the litigants would want to ‘access’ the courts to defend. The UKSC itself was cognisant of this fact, remarking that ‘[t]he Court of Appeal identified 24 of the rights enforceable in ETs as having their source in EU law’.<sup>35</sup>

In other cases, the Charter has made no appearance at all. *Walker* concerned access to a pension scheme following the death of a same sex partner. The employer in this case refused to guarantee that the applicant’s spouse would receive payments following his death as the marriage had occurred post-retirement. UK legislation provided an exception to the equal treatment principle. This allowed for continued discrimination in relation to benefits that had accrued prior to the entry into force of the same sex marriage legislation. The question was whether this exception was compatible with the Framework Directive. The main focus of the decision is on the non-retroactivity principle in both EU and domestic law.<sup>36</sup> Thus, the case turned on the compatibility of the derogation found in UK equality law with the Framework Directive, with no mention of the Charter or the fundamental rights aspects of the case beyond the retroactivity issue. For the court, it was entirely foreseeable that Walker would get married at some point (to a woman), even after retirement.<sup>37</sup> His spouse, whether male or female, was therefore entitled to the benefit of the pension scheme upon his death. To hold otherwise would be irreconcilable with the ‘plain effect of the Directive’.<sup>38</sup>

In two other cases, there is wide discussion on human rights issues, mostly relating to the Convention (and not the Charter), but these arguments were not determinative to the outcome of the case. The first of these is the case of *Bull v Hall*.<sup>39</sup> In that case, a gay couple had been

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<sup>34</sup> *ibid* [117].

<sup>35</sup> *ibid* [105].

<sup>36</sup> *Walker v Innospec* [2017] UKSC 47 [22]–[23].

<sup>37</sup> *ibid* [58].

<sup>38</sup> *ibid* [72].

<sup>39</sup> *Bull v Hall* [2013] UKSC 73.

denied a double room at a B&B on account of the owners' deeply held religious conviction that Christian marriage should be defined as that between a man and a woman. They would equally refuse a double room to an unmarried heterosexual couple. According to Lady Hale, '[t]he issues in discrimination law are difficult enough, but there are also competing human rights in play [religious belief v the right to a private life]'.<sup>40</sup> EU human rights did not come into play as the UK regulations 'are not implanting a right which is (as yet) recognised in EU law [access to services based on sexual orientation]' but 'as the same concepts and principles are applied in the Equality Act 2010 both to rights which are and rights which are not recognised in EU law, it is highly desirable that they should receive interpretations which are both internally consistent and consistent with EU law'.<sup>41</sup> Again, however, the focus of the judgment was not so much on the human rights issue, but rather on the application of the legislation as '[t]o permit someone to discriminate on the ground that he did not believe that persons of homosexual orientation should be treated equally with persons of heterosexual orientation would be to create a class of people who were exempt from the discrimination legislation'.<sup>42</sup> This would defeat the purpose of the legislation despite the fact that 'Parliament was very well aware that there were deeply held religious objections to what was being proposed and careful consideration had been given as to how best to accommodate these within the overall purpose'.<sup>43</sup>

In *Ashers*, the 'gay cake case', the judge made similar remarks, noting that "[t]he law in Northern Ireland prohibits the defendants from acting as they did and, in relation to the requirement to balance competing interests, I find that the extent to which the 2006 Regulations and/or the 1998 Order limit the manifestation of the defendant's religious beliefs, those limitations are necessary in a democratic society and are a proportionate means of achieving the legitimate aim which is the protection of the rights and freedoms of the plaintiff".<sup>44</sup> In other words, there was no need to read down the legislation for its compatibility with the Convention.

It seems from the above that the common law is simply not stable enough a foundation upon which to rebuild the protection of the Employment Rights post-Brexit. The Employment Rights will, of course, continue to be found in the implementing legislation, but even that is vulnerable to repeal. We know, however, that a role for at least some of the Charter's

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<sup>40</sup> *ibid* [5].

<sup>41</sup> *ibid* [22].

<sup>42</sup> *ibid* [37].

<sup>43</sup> *ibid* [38].

<sup>44</sup> *Lee v Ashers Baking Co Ltd* [2015] NICty 2 [91].

provisions will be preserved in the form of the general principles. In that respect, there may be some lessons to draw from the relationship between those countries not in the EU, but which might never the less be influenced by the Charter.

### 3. The view from Norway: back to general principles again?

Should the UK eventually adopt the Norway model of joining EFTA/the EEA, the Charter will formally cease to be of application in the UK. That is not to say that the Charter will become irrelevant.<sup>45</sup> As Wahl remarks, ‘[f]rom the absence of incorporation one cannot just assume that the Charter does not have any effects of a secondary and/or indirect nature. Such ancillary effects can be significant and should in any event not be underestimated’.<sup>46</sup> Such effects can in particular, be achieved via the principle of homogeneity which governs the relationship between the EEA Agreement and EU law. Article 6 of the EEA Agreement provides that ‘[w]ithout prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of [the EU Treaties] and to acts adopted in application of [those Treaties], shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the [CJEU] given prior to the date of signature of this Agreement’. Article 3(2) of the Surveillance and Court Agreement further provides that ‘[i]n the interpretation and application of the EEA Agreement and this Agreement, the EFTA Surveillance Authority and the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the [CJEU] given after the date of signature’. In practice, however, the EFTA Court has not distinguished between EU case law arising prior to and after the adoption of the EEA Agreement.<sup>47</sup> The Court has, in fact, stated that ‘the objective of establishing a dynamic and homogenous European Economic Area can only be achieved if EFTA and EU citizens, as well as economic operators enjoy, relying on EEA law, the same rights in both the EU and EFTA pillars of the EEA’.<sup>48</sup> The homogeneity principle extends to fundamental rights, with the Court referring to judgments of the European

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<sup>45</sup> Iceland has relied on the social provisions of the Charter in infringement proceedings brought against it, but the EFTA Court did not engage. See Case E-12/10 *ESA v Iceland* para 92. However, the Court went on to confirm the relevance of the Charter in Case E-15/10 *Posten Norge v ESA* and in Case E-4/11 *Arnulf Clauder*.

<sup>46</sup> Nils Wahl, ‘Uncharted Waters: Reflection on the Legal Significance of the Charter under EEA law and Judicial Cross-Fertilisation in the Field of Fundamental Rights’ in The EFTA Court (ed), *The EEA and the EFTA Court: Decentred integration : to mark the 20th anniversary of the EFTA Court* (Hart 2014) 281, 282.

<sup>47</sup> Carl Baudenbacher, ‘The Relationship Between the EFTA Court and the Court of Justice of the European Union’ in Carl Baudenbacher (ed), *The Handbook on EEA Law* (Springer 2016) 179, 184.

<sup>48</sup> Case E-18/11 *Irish Bank Resolution Corporation v Kaupping* para 122.

Court of Human Rights (ECtHR) and CJEU as well as AG opinions in fundamental rights cases.<sup>49</sup>

Specifically, in the employment context, the EEA Agreement incorporates all of the EU Directives on health and safety, equality law and labour law. Having said that, ‘most of the principles have been developed by the Court of Justice and the EFTA Court has faithfully applied them’.<sup>50</sup> As such, the EFTA Court has closely shadowed the CJEU’s interpretation of employment legislation, notably in the context of the transfer of undertakings.<sup>51</sup> In *Deveci*, the EFTA Court noted that the Charter was formally of no application. Nevertheless, it went on to rely on *Alemo-Herron* without mentioning article 16 of the Charter.<sup>52</sup> According to the Court, ‘[t]he EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union. The actors of a market are, *inter alia*, undertakings’. The freedom to conduct a business lies therefore at the heart of the EEA Agreement and must be recognised in accordance with EEA law and national laws and practices. Thus, the freedom to conduct a business seems to have become a general principle of EEA law.

Even without adopting the Norway model, it has already been noted that the Government intends to codify the existing general principles of EU law via the Withdrawal Bill. It will be recalled that the Charter essentially concretises pre-existing general principles. Even if neither the Charter nor the general principles were formally to apply, the UK courts may nevertheless rely upon them, even indirectly. The CJEU has long referred to ECtHR decisions even prior to the recognition of the Convention as a source of EU rights in the Treaty. Indeed, the EU has still not completed its accession to the Convention, yet this has not impeded the Court’s reliance on Convention-inspired rights.<sup>53</sup> In addition, private litigants are likely to point to relevant CJEU judgments relating to the Charter in order to bolster their arguments. The very same phenomenon has been witnessed before the EFTA Court.<sup>54</sup>

In any event, it will be recalled from earlier chapters that it has often been the general principles, rather than the Charter that have led to the most significant developments in the employment field, although it is accepted that the adoption of the Charter had an emboldening effect on the Court even prior to its granting of full legal effect.<sup>55</sup> Separating the precise role

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<sup>49</sup> Case E-2/03 *Asgeirsson and Others* para 23; Case E-8/97 *TV 1000* para 26; Case E-2/02 *Bellona*.

<sup>50</sup> Catherine Barnard, ‘Social Policy Law’ in Baudenbacher (n 47) 809, 809.

<sup>51</sup> Case E-2/95 *Eidesund v Stavanger Catering* para 24; Case E-3/96 *Tor Angeir Ask and Others v ABD Offshore Technology AS*.

<sup>52</sup> Case E-10/14 *Deveci v Scandinavian Airlines System Denmark-Norway-Sweden*.

<sup>53</sup> Opinion 2/13 ECLI:EU:C:2014:2454.

<sup>54</sup> *Wahl* (n 46) 289.

<sup>55</sup> Case C-144/04 *Mangold*; Case C-555/07 *Kücükdeveci*.

of the Charter as opposed to the general principles is therefore a difficult task. As the example of article 16 shows, it is altogether possible for the general principles and the Charter to diverge, despite the Charter's purported codification of those general principles. Going forward, the question of whether the Charter and the general principles can actually develop in tandem remains unanswered. In any event, it cannot be denied that the codification of human rights in a written text lends itself to the increased visibility and accessibility of those rights. This is important not only from the point of view of litigants, but also of the courts. The imprimatur of the legislature should never be underestimated in its emboldening of the courts to rely on fundamental rights. To what extent, though, can this approach be maintained in the face of the competing principle of contractual autonomy at common law? In what ways does this concept differ from article 16 of the Charter and what are the consequences for the employment relationship?

#### 4. The continued role of contractual autonomy

This section compares the notions of freedom of contract in article 16 of the Charter and at common law before considering some of the potential consequences for the employment relationship post-Brexit.

##### 4.1. *Freedom of contract at common law*

As we saw in chapter III, freedom of contract is considered one of the cornerstones of the common law, with the English conception of contractual autonomy being based largely on the facilitation of market transactions, in contrast to the German autonomy model. Despite its supposed underpinning of the common law, it is remarkable how briefly the concept of freedom of contract is dealt with in the leading contract law text books. This may be a symptom of the fact that contractual autonomy is, in fact, pervasive throughout the common law and it is easier to demonstrate concrete examples of the concept in action rather than to set out any principled vision of the notion. It would, however, be wrong to assume that this is the only founding principle of the common law. Rather, the common law has at times shown concern for other values such as fairness and protecting the weaker party.<sup>56</sup>

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<sup>56</sup> Ewan McKendrick, *Contract Law* (7th edn, OUP 2016) 11.

In the nineteenth century, the ideal of freedom of contract was simply that ‘persons of full capacity should in general be allowed to make what contracts they liked’.<sup>57</sup> The classic statement of contractual autonomy was made by Sir George Jessel when he said:

[i]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.<sup>58</sup>

Two more precise concepts are embedded within freedom of contract. First, there is the freedom of a party to choose to enter a contract and on whatever terms, thereby placing contractual obligations firmly within the will of the parties.<sup>59</sup> Second, there is a negative aspect of freedom of contract. This is the idea that there can be no liability without consent.<sup>60</sup> Although these elements remain the core of freedom of contract at common law, it is now widely recognised that they must give way in the face of competing legislative intervention, as discussed above. Andrews has suggested four overarching restrictions on contractual autonomy at common law. These are (1) public policy; (2) the parties’ ability to exclude liability for fraud; (3) personal capacity and the most important for our purposes; (4) statutory regulation.<sup>61</sup>

In the modern context, therefore, freedom of contract is still recognised but it is ‘generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large’.<sup>62</sup> Employment legislation is now extensive, at times going so far as to impose terms on the individual contract of employment. As we have seen, terms are also increasingly being implied at common law. Such terms are considered to be legal incidents of the employment relationship from which the parties are not free to deviate without undermining the existence of that relationship.

Despite the recognition that legislative intervention has essentially eroded the notion of contractual autonomy, at least in the employment context, the problem remains that ‘English law and English judges still to a great extent proceed on the assumption that the parties are

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<sup>57</sup> Jack Beatson, Andrew Burrows and John Cartwright (eds), *Anson’s Law of Contract* (30th edn, OUP 2016) 3.

<sup>58</sup> *Printing & Numerical Registry Co v Sampson* (1875) LR 19 Eq 462, 465.

<sup>59</sup> Beatson, Burrows and Cartwright (n 57) 4.

<sup>60</sup> *ibid.*

<sup>61</sup> Neil Andrews, *Contract Law* (CUP 2015).

<sup>62</sup> *ibid.*

free to choose whether or not they will enter a contract and on what terms (...) the law does still rest on the assumption of freedom of choice, and where a relationship is entered into in which there is no choice, a Court may hold that it is not contractual'.<sup>63</sup> Thus, it seems that contractual autonomy as a common law concept continues to operate as the background rule, with regulation building 'on the foundation laid by the general principles of the law of contract'.<sup>64</sup>

It is certainly true that the domestic legal systems of the EU Member States have largely developed a concept of the employment contract which has a certain degree of autonomy from general private law principles, being 'treated as a special kind of contract that is analysed and regulated in a different way from other types of market contracts'.<sup>65</sup> At an EU level, it is interesting to note that the architects of the Draft Common Frame of Reference (DCFR) for the harmonisation of EU contract law regarded the employment contract as being excluded from their remit.<sup>66</sup> This has been described as 'an operation of isolating (...) employment law into its own enclave in which it is accepted that "general private law" does not rule, and in which a general notion of freedom of contract is specially subordinated'.<sup>67</sup> As a result of this separation, 'the law of and about the contract of employment is thus located in a special place, as if it were in private law but not of private law'.<sup>68</sup>

Indeed, the classification of the employment relationship as contractual at all is not entirely uncontested, with many commentators categorising employment as a 'relationship' which is characterised by a 'mixture of status and contract and which is 'not subject to the exigencies of the freedom of contract doctrine'.<sup>69</sup> It is suggested, however, that the special considerations surrounding the employer/employee relationship do not undermine the fact that the contract of employment remains key to employee protection. As Deakin and Morris have pointed out, although 'protective labour legislation frequently provides for "inderogable rights", it also assumes the prior existence of a contract of employment'.<sup>70</sup> Indeed, worker-protective

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<sup>63</sup> *ibid* 7.

<sup>64</sup> McKendrick (n 56).

<sup>65</sup> Hugh Collins, 'Social Dumping, Multi-level Governance and Private Law in Employment Relationships' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 223, 224.

<sup>66</sup> Mark Freedland, 'The Involvement of EU Law in Personal Work Relations: A Defining Issue for European Private Law?' in Leczykiewicz and Weatherill *ibid* 279, 284.

<sup>67</sup> *ibid* 284.

<sup>68</sup> *ibid*.

<sup>69</sup> Cabrelli (n 27) 65.

<sup>70</sup> Deakin and Morris (n 5) 134.

legislation can only be applied if the parties ‘have first voluntarily entered into a contract of employment’.<sup>71</sup>

It is apparent that the special considerations surrounding the employment contract do not mask the fact that the ‘equilibrium’ between general private law principles and employment law is ‘decidedly fragile and that the ‘employment relationship is still primarily a “private law relationship” even if it is regulated in a distinctive way’.<sup>72</sup> In other words, although it is true that employment contracts are subject to greater limitations than general contract law, freedom of contract is still considered a fundamental aspect of such contracts. On the other hand, the recognition that freedom of contract does indeed apply in the employment field does not mask the fact that the concept is not without its limits.

It is perhaps unsurprising that freedom of contract is particularly limited in the employment context given that parties with equal bargaining power usually ‘best know their preferences and are best equipped to determine the ways of protecting their interests’.<sup>73</sup> Employment contracts on the other hand, are characterised by the inequality of bargaining power due to the differing positions of the parties. Of course, it might be argued that in such cases, the contractual autonomy of the stronger party is being limited so that the weaker party may also fully enjoy their own freedom of contract. The debate is still on-going therefore as to ‘how far a general function of upholding freedom of contract and giving effect to the intentions of parties to contracts is qualified by, or combined with, elements of social balancing or redistribution or controlling the abuse of contractual power’.<sup>74</sup> This is largely because of the fact, that much like article 16, there are competing visions of contractual autonomy underlying the concept at common law.

#### 4.2. *Contrasting visions of autonomy?*

Collins uses the example of *Schroeder* to illustrate the value placed on autonomy by common law judges.<sup>75</sup> In that case, a music composer was contracted to hand over all works to a publisher for five years in return for royalties but with no promise that the music would in fact be published. The House of Lords found the contract to be void for restraint of trade. The Lords were persuaded that the composer’s weak bargaining position meant that the agreement

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<sup>71</sup> Cabrelli (n 27) 66.

<sup>72</sup> Freedland (n 66) 284.

<sup>73</sup> Dorota Leczykiewicz and Stephen Weatherill, ‘Private Law Relationships and EU Law’ in Leczykiewicz and Weatherill (n 66) 1, 4.

<sup>74</sup> Freedland (n 66) 280.

<sup>75</sup> *Macaulay v Schroeder Music Publishing Co Ltd* [1974] 1 WLR 1308.

had been unfair even in the presence of a competitive market. For Collins, the Lords actually overlooked what he terms the ‘real objections’ to this type of contract, namely notions of power, fairness and cooperation rather than market efficiency.<sup>76</sup> Because the composer’s career was entirely in the hands of the publisher, there was an unwarranted degree of domination and subordination.

Collins uses this case to illustrate his own conception of the law of contract which is based on a new understanding of the market order, oriented around the values of unjustifiable domination, equivalence of exchange and cooperation which ‘merely represents a revised understanding of the market order and its justificatory principles, not a wholesale rejection of markets as the most efficient system for the satisfaction of wants’.<sup>77</sup> As such, liberty remains the core principle for interpreting the market order, but it is a revised notion of liberty one that recognises that not all choices are worthy of protection and ‘deserving of approbation’. What Collins shows us is that freedom of contract is capable of being moulded and utilised for different ends. This is largely because the notion was not originally a legal concept as such but rather ‘an economic and even political ideal, which probably had its roots in the personal, religious and intellectual freedoms which had their origins in the Reformation’.<sup>78</sup> It was only in the nineteenth century that freedom of contract as a *legal* rather than a political or philosophical principle began to emerge.

We have already seen that continental conceptions of contractual autonomy also recognise its value as a tool of political or constitutional rhetoric. At the same time, civilian legal systems, unlike their common law counterparts, have long recognised that there are different categories of contract underpinned by a more or less pervasive vision of contractual autonomy. This is considered anathema to the common law of *contract* ie there is only one contract law as opposed to the law of *contracts*.<sup>79</sup> In practice, however, the distinction has never been that strong. First, the common law courts themselves have refused to enforce certain types of agreement, whether that be because of the ‘perceived moral or social value of a contracted-for activity (...) the alternatives available to the contracting parties (...) the intelligence, sophistication, and independence of the contracting parties (...) the fact that circumstances have changed since the contract was made (...) and, perhaps most importantly, the basic fairness of contractual terms’.<sup>80</sup> Second, and most importantly, the legislature has intervened

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<sup>76</sup> Hugh Collins, *The Law of Contract* (4th edn, CUP 2003) 10–29.

<sup>77</sup> *ibid.*

<sup>78</sup> Patrick S Atiyah, *Essays on Contract* (OUP 1986) 355.

<sup>79</sup> Stephen A Smith, *Atiyah’s Introduction to the Law of Contract* (6th edn, OUP 2006).

<sup>80</sup> *ibid.* 6.

to limit freedom of contract. In the first instance, the contracting process has been modified when weak parties (consumers for example) face stronger parties. Another technique has been the regulation of the *content* of certain contracts. The latter technique has been particularly prevalent in the employment field, to such an extent that, as we have seen, the question must be asked whether the employment contract is really a contract at all. In what way, then, does the vision of autonomy at common law compare to that found in article 16 and what does this tell us about the potential future effects on the employment relationship?

#### 4.3. *The relationship between article 16 and common law contractual autonomy*

One similarity between contractual autonomy at common law and that found in article 16 is that both concepts lack a clear definition. As Atiyah puts in in his seminal treatise on freedom of contract at common law, '[o]ne of its principal characteristics was its abstractness, its lack of particularity, and its attempt to treat all contracts as being of the same general character'.<sup>81</sup> We know from *Alemo-Herron*, though, that freedom of contract in article 16 and that found at common law must be different.

It will be recalled that Lord Hope in the UKSC remarked that 'had this issue been solely one of domestic law, the question would have been open only to one answer'.<sup>82</sup> In the EAT, Judge Hicks said that 'there is simply no reason why parties should not, if they choose, agree that matters such as remuneration be fixed by processes in which they do not themselves participate'.<sup>83</sup> In other words, being bound by dynamic clauses was no more than an ordinary application of the principle of freedom of contract. Everything turns on the interpretation of the words used in the contract itself, ie on the intention of the parties as expressed in the contract. In *Alemo-Herron*, the expressed intention was to be bound by pay determinations negotiated externally from time to time.

Of course, the TUD is a somewhat unusual example in that at common law, the transfer of an employment contract actually had the effect of terminating the contract. Here, we see the common law concept of freedom of contract in its interaction with employment legislation. As Rimer LJ put it in the CoA, decisions such as *Whent* amount to no more than a conventional application of ordinary principles of contract law to the statutory consequences apparently created by regulation 5 of TUPE.<sup>84</sup> This is a clear articulation of the fact that contractual autonomy as a common law principle is subject to legislative intervention, more clearly so

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<sup>81</sup> Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 402–405.

<sup>82</sup> *Parkwood Leisure v Alemo-Herron* [2011] UKSC 26 [7].

<sup>83</sup> [2009] ICR 703 [16].

<sup>84</sup> *Parkwood Leisure v Alemo-Herron* [2010] EWCA 24 [46].

when that legislation derives from the EU. What we can see, then, is that at common law, it is precisely freedom of contract that allows for the dynamic approach, whereas as a fundamental right, it is that very freedom that prevents a dynamic interpretation. Nonetheless, it is important to emphasise the role that the legislation plays in steering the common law in an employee-protective direction. Outside the scope of legislative protection, the common law has continued to demonstrate a strong commitment to contractual autonomy, with often harsh and unexpected results.

a. Expansive approach to autonomy outside of legislative protection

The effects of common law contractual autonomy outside the protective influence of legislation can be seen in the case of *Arnold v Britton*.<sup>85</sup> This case concerned the interpretation of a service charge contribution in the lease of a number of chalets in a caravan park. Clause 3(2) of the lease contained a covenant to pay an annual service charge. The lessee was required to pay a fixed sum of £90 in the first year which increases at a compound rate of 10% in each succeeding year. The contention was that this resulted in an absurdly high annual service charge in the later years of the lease. According to Lord Neuberger, when it comes to interpreting a written contract, the court ‘is concerned to identify the intention of the parties (...) by focussing on the meaning of the relevant words’.<sup>86</sup> In other words, what the court thinks should have been agreed is not a relevant consideration. As Lord Neuberger put it, ‘[e]xperience shows us that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice’.<sup>87</sup> This was despite the fact that for a lease taken out in 1980, the annual service charge would amount to £2500 by 2015 and to £550,000 by 2072. Lord Carnwath dissented, noting that the lessor’s interpretation was ‘so commercially improbable that only the clearest words would justify the court in adopting it’.<sup>88</sup> This may be an extreme example, but it serves to demonstrate the consequences of the full force of the application of freedom of contract at common law in the absence of statutory intervention.

An interesting discussion of the courts’ continued commitment to freedom of contract can also be seen in recent cases concerning non-variation clauses. In *Rock Advertising*, MWB operated managed office space in London. Another company, Rock, provided marketing services and

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<sup>85</sup> *Arnold v Britton* [2015] UKSC 36.

<sup>86</sup> *ibid* [15].

<sup>87</sup> *ibid* [20].

<sup>88</sup> *ibid* [158].

occupied premises managed by MWB.<sup>89</sup> Rock decided to expand the office space that it used, but was soon unable to meet this financial commitment as business did not develop as hoped. MWB exercised its right under the license to lock Rock out of the premises and gave notice to terminate the agreement.

Rock argued that an oral agreement had been made to reschedule the licence fee payments under which it would pay less in the beginning and more in subsequent months to cover the arrears. Of particular relevance for our purpose was that MWB referred to the original written agreement which provided that '[t]his licence sets out all of the terms as agreed between MWB and the licensee. No other representation or terms shall apply or form part of this licence. All variations to this licence must be agreed, set out in writing and signed on behalf of both parties before they take effect'. For Kitchin LJ, this was a clear clause which precluded an oral re-negotiation of a core term of the agreement. The question for the court was essentially whether a written agreement containing an anti-oral variation clause could be varied other than in accordance with that clause.

The law in this area was inconsistent. In an earlier case, *Globe Motors*, the trial judge had found that it was indeed possible for the parties to agree to vary or waive a requirement that an agreement be amended only in writing, as to decide otherwise would have been inconsistent with the principles of freedom of contract.<sup>90</sup> Beatson LJ held that 'as a matter of general principles, parties have freedom to agree whatever terms they choose to undertake, and they can do so in a document, by word of mouth or by conduct'.<sup>91</sup> In *MWB*, the judge relied on *Globe* to find that 'the most powerful consideration is that of party autonomy'.<sup>92</sup> He referred to the judgment of Cardozo J in the New York Court of Appeals in *Alfred C Beatty v Guggenheim* where he commented that '[t]hose who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived'.<sup>93</sup>

In a more recent case, however, the courts have shown themselves willing to restrict contractual autonomy. In *Parking Eye*, the UKSC had to determine whether penalty clauses should be permitted at common law.<sup>94</sup> Traditionally, penalty defaults, ie a charge incurred for

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<sup>89</sup> *MWB Business Exchange v Rock Advertising Ltd* [2016] EWCA Civ 553. The UKSC disagreed with this holding, find that contracts with 'No Oral Modification' clauses cannot be varied orally *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

<sup>90</sup> *Globe Motors and others v TRW Lucas* [2016] EWCA Civ 396.

<sup>91</sup> *ibid* [22].

<sup>92</sup> [2016] EWCA Civ 553 [34].

<sup>93</sup> (1919) 225 NYC 380.

<sup>94</sup> *Cavendish Square Holding BV v Talal El Makdessi (El Makdessi) and ParkingEye Ltd v Beavis* [2015] UKSC 67.

non-performance of a contractual obligation, were not enforceable if they consisted of an exorbitant amount when compared with damages. *Parking Eye* concerned a parking fine of £85 incurred for overstaying the time limit at a private car park. The car's owner argued that this was a penalty and was unenforceable. The UKSC said the question to be asked was whether 'the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'.<sup>95</sup> Here, the fine was not out of proportion to the competing interests of preserving traffic management and space. This case nevertheless demonstrates that there are limits to the courts' willingness to allow parties to any contract to decide the terms between themselves.

#### b. Consequences for the employment relationship

It is becoming apparent that freedom of contract at common law and that found in article 16 diverge in a much more profound way than might previously have been imagined. At common law, rather than being an overarching ideological principle, freedom of contract may be no more than a pragmatic starting point which is more or less neutral when it comes to determining how the individual conducts their business. Article 16 on the other hand, comes not only with the human rights label, but also with the entire baggage of market integration, removing barriers to trade and more lately deregulation (although as we have seen, an individual right to contractual autonomy is not inherent in the free movement provisions). The EU is not neutral and indeed cannot be neutral when it comes to regulating the manner in which business is conducted. The very rationale for the EU's single market is to prevent state or business behaviour that might hinder access to the market for other commercial operators or indeed consumers. It must be concluded that the confusion surrounding the purpose of freedom of contract in EU law stems from its elision with the business freedom concept. Although the Charter has not modified the concept of contractual autonomy at common law, as such, we have seen that it has displaced it due to the position of EU law in the hierarchy of norms.

Having said all this, it is suggested that outside the commercial context, notably in the employment field, scholars have tended to be wary of notions of contractual autonomy, seeing the concept as being inherently deregulatory, allowing the employer to avoid employee-protective obligations found in legislation. Perhaps, then, there are simply many perspectives on freedom of contract and it is not possible to pinpoint a core 'principle' and its effect on

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<sup>95</sup> *ibid* [32].

various regulatory fields. The problem with dressing contractual autonomy in the garb of fundamental rights is that this diversity of perspectives is somewhat lost, with freedom of contract becoming a fulcrum, a value to be promoted and protected.

## 5. Conclusion

This chapter has shown that it is still much too early to gain a full grasp of the consequences of Brexit and the Charter's impending absence for the employment relationship. This may largely be due to the fact that, as this thesis demonstrates, the current impact of the Charter on the employment relationship is far from clear. The Withdrawal Bill itself is still undergoing significant changes, with the Lords having voted on its retention. Even at this juncture, the Charter's precise fate remains uncertain.

It is equally clear that difficult questions lie ahead as to the future status of existing employment legislation as interpreted by the CJEU. This issue is further complicated by the Bill's simultaneous removal of the Charter while preserving (at least to some extent) a role for the general principles. As the example of unfair dismissal shows, the courts are unlikely to have consideration of Charter rights when legislation is no longer underpinned by such a right or when it is outside the scope of EU law.

Finally, it was shown that it will be difficult to replicate the provisions of the Charter via the common law. The common law is simply not capable of bearing the weight of the specificity of the Charter's Employment Rights. In any event, it was shown that in many cases in which the Charter could have been relied on, it was not and to no detriment for the litigants. In addition, Brexit (or indeed the public suspicion of 'foreign' rights standards) has led to the courts considering domestic sources of such rights instead.

The message from the analysis of common law contractual autonomy is more mixed. In some respects, it can be seen that freedom of contract at common law is simply not as radical as its cousin in article 16 of the Charter. Common law autonomy is largely neutral, whereas article 16 comes with the baggage of human rights and Treaty freedoms. At the same time, labour lawyers have been long-suspicious of autonomy principles and with good reason. The common law, although at times malleable to legislative intervention can still lead to the watering down of employment legislation. Having said that, there are examples from the case law showing that even outside the scope of legislative protection, there is room for the courts to deny parties the right to decide contractual terms between themselves. The impact of the Charter's absence

on the employment relationship clearly remains to be played out but may not be as significant as many employment lawyers fear.

## VII. Conclusion

The research question set out by this project was whether the EU Charter has had an impact on the employment relationship. The thesis has shown that it is not possible to talk about the Charter's 'impact' in any global sense as, in reality, the Charter influences various aspects of the employment relationship in different ways. This thesis opened with a discussion on the 'variable geometry' of the Charter, emphasising the widening gap in the treatment of the Employment Rights and article 16. In reality, it might be more appropriate to talk about 'variable geometries'. It makes little sense to talk of the 'impact' or the 'implications' of the Charter in the abstract. It is quite clear from the above, that the Charter's reach is heavily dependent on the particular context. The Charter is not an autonomous legal tool to be exploited by litigants as they see fit. Rather, it is constrained by rules both internal and external to the text of the Charter itself. These varied geometries can be conceived of through the notion of divergence. First of all, it has been shown that the Employment Rights and the freedom to conduct a business found in article 16 have had diverging impacts on the employment relationship. Indeed, even within each of those provisions, the case law has shown that the CJEU relies on the Employment Rights and contractual autonomy to varying degrees. Second, the Charter has a different effect depending on whether we look at it from a macro or a micro level. Finally, post-Brexit, contractual autonomy will continue to have a role via the common law (albeit in a different form), while it may not be possible to replicate the Employment Rights.

### 1. The diverging impact of the Employment Rights and freedom of contract

The assessment of the impact of both the Employment Rights and freedom of contract on the employment relationship has been funnelled through the Charter's constitutional functions. The Charter can act as a tool of interpretation of employment legislation and a standard of review against which the adoption or amendment of employment legislation at EU level or Member State level can be assessed. The Employment Rights have yet to be raised as a standard of review of EU employment legislation. The discussion of their impact at this stage must remain largely speculative. As tools of interpretation, the Employment Rights appear not to have had much of an impact. The CJEU has simply continued its purposive approach to the

interpretation of EU employment legislation such as the Working Time Directive. The CJEU continues to repeat its mantra that legislative rights such as paid leave are ‘particularly important principles of EU social law from there can be no derogation’. Here, the Employment Rights merely reinforce an interpretation that could be achieved using existing approaches, with the Charter simply acting as a new point of reference.

Clearly, the extent of the Charter’s influence on the employment relationship, if viewed through the lens of the Employment Rights alone, has been rather disappointing. And yet, it is possible that we simply expected too much from this document that was explicitly intended to codify the existing piecemeal and cautious approach to fundamental rights in the employment field. This was to be expected given the myriad barriers impeding the effectiveness of the Employment Rights. And yet still, it is possible to be too sceptical. The reality is that the case law has shown, and continues to show, that the Charter’s Employment Rights do have the potential to act as a bulwark against legislation that might undermine the rights of workers. To this extent, the CJEU has been emboldened in that its long-held approach to interpreting provisions of legislation as important social rights has now been codified in the Charter. In addition, the Employment Rights have been most frequently invoked as a tool of interpretation. Lessons from the equality field show that the Charter’s true potential lies in its role as a standard of review of EU legislation.

As a contrast to this ‘potentiality’, article 16 has already been used in a much more radical way. Freedom of contract has long existed as a concept in EU law yet it has always been limited, both because it was infrequently invoked and because it was constrained by competing social or economic interests. Even when the concept was included in the Charter, the early case law showed a continued reluctance on the part of the CJEU to invoke it. There was nothing inevitable, therefore, about the CJEU’s subsequent aggressive reading of business freedom in *Alemo-Herron*. The Charter, just like the general principles, does not contain any comprehensive statement of freedom of contract and yet in *Alemo-Herron*, the CJEU was able to interpret that concept in such a way as to disrupt the CJEU’s existing balanced approach to the recognition of business freedom and contractual autonomy as both general principles and in its early case law as fundamental rights. Although, in the CJEU’s subsequent use of article 16 it has continued to give mixed signals. Sometimes, article 16 is explicitly relied on while at other times, the CJEU overlooks it entirely. It is now clear that the Employment Rights and freedom of contract have had differing degrees of impact on the employment relationship. That being said, there is evidence of divergence within the Charter provisions themselves.

In the context of the Employment Rights, we have seen that article 31 on fair and just working conditions has been the most prevalent both as a tool of interpretation and a standard of review. This is probably because of its close connection to the Working Time Directive, a piece of legislation that has been subject to much litigation. Similarly, the impact of article 16 has largely been confined to the context of the transfer of undertakings. The other Employment Rights have largely been overlooked. Article 30 is usually dismissed as the case is outside the scope of EU law. Article 27 is disregarded as a mere principle and article 28 is usually deployed as a rhetorical hook on which to hang the CJEU's recognition of the importance of collective bargaining. The consequences of the rights/principles distinction can be seen here. Article 31 is clearly a right and therefore has the strongest impact. Article 28 is a right, but collective bargaining is not governed at Union level. Articles 27 and 30 are principles and so their potential impact on the employment relationship is heavily constrained.

## 2. The divergence between the micro and macro perspective

Clearly, it is too early to determine whether, what are only a small number of cases, will lead to the EU's *Lochner* moment. There is nothing inherent in the Charter that necessarily leads to the conclusion that the economic freedoms must be prioritised over the Employment Rights. Nevertheless, drawing parallels with *Lochner* allowed us to consider some of the potentially far-reaching consequences for the EU's ability to regulate the employment relationship into the future. From a rather narrow perspective, its impact on the employment relationship can be seen in the undermining of the purpose of employee-protective legislation and the false presumption of the need to balance employment provisions with freedom of contract. This makes the expansive and formalistic notion of autonomy found in *Alemo-Herron* all the more alarming. A more substantive vision of autonomy would recognise that employees, via their right to work, also enjoy a degree of autonomy in the guise of this competing fundamental right in article 15. Attempts to circumvent article 16 through other avenues, namely the development of new forms of regulation such as nudging, may not be as respectful of contractual autonomy as they first appear, or worse still, may become yet another tool of the deregulatory agenda.

Beyond the broader consequences for employment regulation, it was shown that the Charter has had a much more limited impact on the individual employment relationship. The method chosen to examine this question was the influence of the Charter on the hierarchy of norms at domestic level. The common law and employment legislation have already had a long history

of interaction and it can be seen that the common law has, at times, been modified in the wake of competing social rights, but access to the Employment Rights continues to be policed by common law concepts such as employee and worker status. As such, the British courts have not given any real consideration to the fact that a piece of legislation was linked to the Charter or other human rights concepts.

We should not really be surprised that the Charter has played such a limited role in the domestic hierarchy given that it strictly only applies when Member States are acting within the scope of EU law. On its face, article 16 is more powerful than the Employment Rights and yet it is equally constrained by the notion of the ‘scope of EU law’. Outside that scope, article 16 has no influence. This has particular consequences for the employment relationship. The scope of EU employment legislation (and therefore national implementing legislation) is rather narrow. It does not cover the whole raft of employment rights that are granted to workers under both legislation and case law. Outside of that protective scope of EU law, the UK legislature will be further free to amend or to repeal existing employment legislation regardless of whether it was once underpinned by a Charter and even if that Charter right derived from a pre-existing general principle. It is less surprising, therefore, that the Charter has had an even more limited role within the internal hierarchy between the contractual terms themselves. Neither the Charter, nor human rights concepts more generally, are likely to lead to the introduction of a stronger notion of inderogability into the employment context. In terms of contractual autonomy, there are already significant limitations on the ability of employer’s to avoid the employment relationship altogether. Overall, the Charter has had very little impact on the level of the individual employment relationship.

Having said that, the hierarchy of norms in the employment context is now in flux and we do not yet know where the pieces may fall. What we do know, is that the Charter is unlikely to be included among them. It was demonstrated that the Charter’s absence is likely to effect the continued influence of employment rights and business freedom in different ways.

### **3. Continued divergence post-Brexit**

Post-Brexit, the Employment Rights will continue to exist, but only as ordinary legislation or in the case of articles 31 and 28, potentially as general principles (albeit with a reduced

function). This legislation will be easy to amend, thereby undermining that status of those rights even further. Attempts to replicate the Employment Rights via any concept of common law constitutionalism are unlikely to be successful. Given the historic hostility of successive British governments to the Employment Rights found in the Charter, it is altogether possible that they will not survive long after the Brexit process, unless the EU insists on their continued application in return for a future trading relationship. By contrast, freedom of contract has a long pedigree at common law and will continue to apply in this guise post-Brexit. As we have seen, contractual autonomy at common law and the concept found in article 16 may be different. What this means for the future regulation of the employment relationship is unclear. Certainly, article 16 has presented significant challenges for employment law and is likely to continue to do so. Even if common law contractual autonomy does not come with the added complications of being a fundamental right attached to the Treaty freedoms, it is still a concept of which most employment lawyers will remain rightly suspicious.

Without doubt, the instincts of both labour lawyers and Charter (euro) sceptics have been wrong. Far from representing a Trojan horse, bringing in its wake alien social rights to disrupt the common law's traditional flexibility, the Charter has had the effect of reinforcing or even emboldening the development of countervailing business freedom and contractual autonomy. One really must question the motivation lying behind Conservative hostility to the Charter. If anything, the free-marketeer, libertarian Brexiters should welcome, indeed celebrate, its commitment to business freedom. Labour lawyers, by contrast, should lament both the Charter's simultaneous ineffectiveness in protecting Employment Rights and its juxtaposition, indeed confrontation of these same rights with business freedoms. For Charter sceptics, it may be a case of not knowing what we had until it is gone. There is no doubt that without the Charter, the human rights landscape in the employment field will be somewhat impoverished. The Charter, if nothing else, provides the clearest articulation of the most fundamental values of the European Union and should act as a sign post or a guiding star for the courts, legislatures and peoples of Europe. With this protection gone, it is likely that UK employment law will travel in a different and altogether more deregulatory direction.

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