

Institution: University of Bristol		
Unit of Assessment: 18 Law		
Title of case study: Fundamental Rights from Europe: Protecting UK Workers' Rights		
Period when the underpinning research was undertaken: August 2015 – March 2018		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s): Michael Ford	Role(s) (e.g. job title): Professor of Law	Period(s) employed by submitting HEI: August 2015-present
Period when the claimed impact occurred: January 2016 – December 2020		
Is this case study continued from a case study submitted in 2014? N		

1. Summary of the impact

Research by Ford at the University of Bristol has had two major impacts on protecting UK employment rights.

(1) He produced a key Report in 2016 for the TUC setting out the threat to workers' rights from Brexit. This strongly influenced the stance of the TUC, major trade unions and the Labour Party in the Brexit referendum and demonstrably affected political debate in the media and Parliament. The Report continues to underpin the position of the TUC, Labour and major unions on Brexit and workers' rights.

(2) Ford's research underpinned key lines of argument advanced before the Supreme Court in the successful *UNISON* challenge to the introduction of hefty claimant fees to access employment tribunals. The Court decision has required reimbursement of up to GBP30 million in past fees and meant around 20,000 additional workers are able to bring claims each year.

2. Underpinning research

Ford's research at the University of Bristol has addressed both substantive and procedural deregulation of employment rights. His work on Brexit and labour rights was one of the most significant scholarly interventions on this issue during the Brexit debate, identifying the precise risks posed to substantive domestic labour protections by a 'hard' Brexit. It took the form of a written Advice for the Trades Union Congress (TUC) [3.1], produced between January and March 2016, drawing on many years of research in the area. It demonstrated the crucial importance of the complex array of EU laws protecting key employment rights, contrasting them with the weaker and more fragile protections in domestic law. Through an analysis of recent government policy papers and consultations, it was able to provide evidence-based predictions of the EU law-based rights that would be most vulnerable to being watered down in the event of Brexit, including holiday entitlements, worker health and safety and protections from some forms of discrimination. That research underpinned two further articles which analysed the issues in more detail [3.2, 3.3].

In 2013, UNISON, the UK's largest trade union, launched a challenge against the introduction of large fees for workers accessing employment tribunals, a form of procedural deregulation. Between February 2016 and February 2017, Ford researched and drafted the Written Case produced for the Intervenor in the Supreme Court, the Equality and Human Rights Commission (EHRC). [3.4]. There were two key elements to the research. First it analysed the correct legal test for when an interference with access to the courts would be unlawful as a matter of domestic law, EU law and under the European Convention on Human Rights (ECHR); this involved extensive research into every decision of the European Court of Human Rights and European Court of Justice on court fees. The Written Case argued that, under the ECHR and EU law, an individual's ability to pay was a relevant but not a determinative factor. Second, it analysed empirical evidence

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to demonstrate that tribunal fees breached the standard required by the ECHR and EU law. Ford analysed sources, such as the official tribunal statistics, large-scale surveys of Employment Tribunal applications and empirical work on tribunal conciliation. He was assisted with the statistical analysis by Stuifzand, also of the University of Bristol. This analysis led to the striking finding that, even on the Government's own assumptions, around 18,000 individuals did not bring claims each year owing to fees.

The UNISON challenge was successful: in 2017, the Supreme Court ruled that the fees were unlawful and unconstitutional. Following this judgment, Ford wrote up the research that underpinned the written Case, in an article which also considered the broader implications of the *UNISON* judgment, for a leading peer-reviewed journal [3.5]. The article exposes the vulnerability of the theoretical assumptions used by the UK Government to justify fees and distils the legal principles under domestic and international law relevant to assessing whether a fees scheme is unlawful, exploring the distinction between systemic delivery of rights and individual access to the court under EU law and Article 6 ECHR. It was described by the President of the Employment Tribunals, 2014-2020, as “*required reading for any politician, minister, policy-maker, civil servant and legislative draftsman concerned with protecting (or, conversely, restricting) access to justice in courts and tribunals*” [5.7]. The article explains the legal threshold any future fees scheme in employment tribunals would need to cross and how the position differs pre- and post-Brexit. It is therefore likely to be highly relevant to any future fees scheme. It also provides some indication of the huge importance of the *UNISON* judgment for access to justice in general.

3. References to the research

- 3.1 **Michael Ford**, ‘Workers Rights from Europe: The Effect of Brexit’ (March 2016). Available: <https://www.tuc.org.uk/research-analysis/reports/workers-rights-europe-impact-brexit>
- 3.2 **Michael Ford**, ‘The Impact of Brexit on UK Labour Law’ (2016) 32 *International Journal of Comparative Labour Law* 473. <https://kluwerlawonline.com/journalarticle/International+Journal+of+Comparative+Labour+Law+and+Industrial+Relations/32.4/IJCL2016024>
- 3.3 **Michael Ford**, ‘The Effect of Brexit on Workers’ Rights’ (2016) 27 *Kings Law Journal* 398. DOI: 10.1080/09615768.2016.1250477.
- 3.4 **Michael Ford**, Mark Whitcombe and Spencer Keene, *R (UNISON) v Lord Chancellor: Case for the Intervenor* (February 2017) Supplied on request: it was publicly available.
- 3.5 **Michael Ford**, ‘Employment Tribunal Fees and the Rule of Law: *R (UNISON) v Lord Chancellor* in the Supreme Court’, *Industrial Law Journal* (2018) 47(1) 1-45. DOI: 10.1093/indlaw/dwx032.

4. Details of the impact

Over the last forty years, the UK has witnessed an erosion of labour rights through national policies of substantive and procedural labour market deregulation. A key brake on that process of deregulation has been the guarantee of fundamental rights through the Council of Europe and the EU. Ford's work has been pivotal in supporting the continued role of this European 'floor of rights' in resisting substantive and procedural deregulation. First, Ford's work had a substantial impact on the stance of the TUC (representing 48 UK trade unions), major trade unions and the Labour Party on the substantive deregulation of workers' rights threatened by Brexit. Second, Ford's research underpinned key arguments made before the Supreme Court, which successfully challenged procedural deregulation in the form of draconian Employment Tribunal fees.

(1) Informing political debate around Brexit and workers' rights. Ford's Advice for the TUC on the substantive threat to workers' rights from Brexit [3.1] directly influenced the TUC's stance of supporting 'Remain' in the referendum, as reflected in the General Council Report for 2016 [5.3] and a letter to the Financial Times from TUC General Secretary, Frances O'Grady, the latter stating: “*Last week the TUC published an independent legal opinion on Brexit and workers' rights ... Michael Ford QC's opinion makes it abundantly clear that no EU-derived workplace right would be completely safe post-Brexit.*” [5.4]. As O'Grady later commented: “*The quality of the analysis*

contained in the opinion, combined with Professor Ford's standing in the legal profession, ensured that the opinion carried significant weight with both journalists and policymakers" [5.1]. The TUC disseminated Ford's Advice to its member unions and referred to it in press releases, Twitter, and a video on YouTube, resulting in wide coverage in the press, including in the *Independent*, *Financial Times*, and *New Statesman* [5.4]. A House of Commons Library briefing paper for MPs referred to it as "*the best discussion of the potential employment law consequences of Brexit*" and it was cited in parliamentary debates [5.5]. As well as the TUC and its members, it influenced the approach of the Labour Party in the referendum. As Sir Keir Starmer, now Labour Leader, then Shadow Brexit Secretary, comments:

"The Advice...had a significant impact on Labour Party policy running up to the Referendum, and the warnings we issued of a potential "bonfire" of workers' rights in the event of a leave vote. It provided the background material to substantiate that claim, and I referred to it in speeches I gave prior to the Referendum. The warnings in the Advice also prompted a Private Members' Bill, promoted by the Labour MP Melanie Onn and supported by me, which attempted to give a measure legal protection to EU-derived rights after Brexit, but which was predictably talked out by Conservative MPs" [5.2].

The Onn Bill, however, helped keep pressure on the Government on the issue and provisions protecting workers' rights post-Brexit were included in the Government's original EU (Withdrawal Agreement) Bill in October 2019. Moreover, as promised in the revised Political Declaration between the UK and EU, the Trade Agreement between the EU and the UK reached in December 2020 [5.6] contains pledges 'to strive to increase' protection for labour rights and not to 'weaken or reduce' current levels of protection for labour and social rights in a manner affecting trade' (Article 6.2). Subsequently, the British Government stated that it had no plans to dilute workers' rights, post-Brexit [5.6].

Ford's work continues to be seen as the key reference point for trade unions and the Labour Party on these issues. As O'Grady puts it: "*The quality and importance of Professor Ford's work*" means his research "*continues to form the bedrock for TUC analysis of workplace rights in the context of the UK's exit from the European Union... it is 'regarded as the "go-to" document for staff at all levels of the TUC, and in the wider trade union movement and beyond, when working on issues relating to Brexit and workers' rights*" [5.1]. Starmer confirms that "*Michael's Advice remains highly relevant whenever there are policy discussions and political debates about workers' rights after Brexit. Its high quality of analysis means it remains the key text to refer to in this area*" [5.2].

(2) Resisting procedural deregulation: protecting access to justice in the UNISON case

UNISON relied solely on EU law in the initial stage of its judicial review challenging fees of up to GBP1,200 for workers wishing to take their employers to court. However, a senior EHRC lawyer confirms that it was Ford's submissions for the EHRC which originally argued that fees could also interfere with the right of access to a court enshrined in Article 6 of the ECHR and the analogue but undeveloped common law right [5.7]. These arguments in the event proved decisive before the Supreme Court (SC), which, in 2017, overturned three courts below, upheld the arguments and declared that employment tribunal fees were unlawful.

Ford's Case for the EHRC [3.4] was described by a QC involved in the case as "*of the highest quality and well-researched, meaning that [its arguments] were particularly convincing. This proved to be especially helpful to the Claimant, UNISON, in what was a difficult case, but one of great constitutional importance*" [5.7]. Ford's Case had three impacts on the way the case was reasoned and argued. First, it was a significant reason why the arguments based on the common law and Article 6 ECHR could be raised before the SC in the first place, as confirmed by lawyers for EHRC and UNISON [5.7]. Second, as the solicitor for UNISON explains, Ford's arguments in the Case "*were picked up and developed by Dinah Rose QC*", the lawyer acting for UNISON, in her submissions to the SC [5.7].

Third, the judgment of the SC adopted or drew on Ford's EHRC Case in several places. For example, Lord Reed in his leading judgment drew on material in the Case at paras 42-44 to explain

the low level of awards made by Tribunals and the claims before a Tribunal that often result in nil or very low damages (judgment, paras 31-34) [5.7]. In other places, Lord Reed's judgment lifted material directly from the EHRC Case as follows: para. 33 of the judgment echoed para. 45 of the Case; paras 35-37 of the judgment (discussing the low level of tribunal awards) is drawn from paras 47-48 of the Case; para. 40 of the judgment, on the drop in claims of small value, largely echoes para. 44 of the Case; paras 43-44 of the judgment, setting out how few claimants obtained remission from the fees, draws on paras 35-36 of the Case. Moreover, in the words of the solicitor for UNISON, paras 47-48 of the judgment, giving Lord Reed's assessment of the ACAS valuation survey evidence on the effect of fees, "*drew heavily*" on Ford's Case (paras 23-26) and "*formed the basis of* [Lord Reed's] *second reason for holding that fees were an unlawful interference with access to justice (judgment para. 93)*" [5.7].

Finally, an important section of the judgment found that the fees were in breach of Article 47 of the EU Charter of Fundamental Rights, which is closely modelled on Article 6 ECHR (paras 105-117). In making this finding, Lord Reed accepted the argument made in the Case at paras 8-9 and 30-38, also advanced by UNISON, that ability to pay was not the sole relevant factor. In particular, Lord Reed relied at para. 115 on the decision in *Kniat v Poland* as demonstrating this point, which is the very case cited and explained in Ford's Case for the EHRC at paras 9 and 30. As a senior solicitor for EHRC summarises: "*in several respects Lord Reed in his judgment drew directly*" on arguments in the Written Case "*on the low levels of awards in the tribunal, the poor record on enforcement, the limited effect of exceptional remission and how ability to pay is not the sole relevant legal factor*" [5.7].

The impacts of *UNISON* itself were momentous: it is generally agreed to be the most important employment law decision of the past 50 years, since it directed affected the ability to seek effective redress for almost every statutory employment right in the UK. First, all Tribunal and Appeal Tribunal fees paid from when fees were introduced on 29 July 2013 until the date of the judgment had to be repaid. These amounted to 74,000 fees repaid, at an estimated cost of GBP33 million [5.10]. Second, a very significant number of employment tribunal cases that had been dismissed because of non-payment of fees were reinstated [5.10].

Third, and most significant of all, fees ceased to be payable from the day of the SC judgment. This led directly to a dramatic increase in claims. According to the official statistics, in the three years from 2014/15 to 2016/17, when fees were payable, the mean number of single claims per year was 16,787 (an average of 1,398 per month). After the judgment, from August 2017 to June 2020, the average was 3,067 single claims per month – more than double [5.8]. Therefore, more than 20,000 workers a year now bring tribunal claims which, but for the SC judgment, would never have been brought. Fourth, the effects of the decision extend beyond employment: it is being relied on in other cases concerned with access to courts or tribunals, such as *R (Law Society) v Lord Chancellor* [2018] EWHC (Admin) 294 (a challenge to restrictions on criminal legal aid). It will constrain and guide future government policy in relation to fees and other impediments to tribunals or courts in all jurisdictions, as the former Lord Chancellor Dominic Raab explained to the Justice Committee of the House of Commons on 19 December 2017 [5.9].

The research underpinning Ford's Case, as summarised in output [3.5], was referred to by Shantha David, the solicitor for UNISON, when she gave her evidence to the House of Commons Justice Committee. Pointing out how Ford's arguments directly resonated with Lord Reed in the Supreme Court, she said: "*I recommend* [his] *article... in the Industrial Law Journal ... He points to the fact that employment tribunal claims promote labour standards. In the rush to reduce costs, the Government lost sight of the benefits of individual [employment tribunal] claims as a means of promoting labour standards. Lord Reed, as you will recall, identified that as important and said that individual tribunal claims had public benefits, not just for those individuals but for society as a whole.*" [5.9]. David concludes that the *UNISON* decisions "*had enormous implications for the thousands of claimants denied access to the employment tribunal because of fees, for the upholding of labour standards in all workplaces, and for impediments to access to the courts in all spheres.*" [5.7].

5. Sources to corroborate the impact

5.1 Letter from Frances O'Grady, 16 September 2020

5.2 E-mail from Sir Keir Starmer MP, 2 December 2020

5.3 Trades Union Congress, *General Council Report* (2016)

www.tuc.org.uk/sites/default/files/Congress_2016_General_Council_Report_Digital.pdf

5.4 F. Grady 'Rights would be at risk in a post-Brexit workplace', *Financial Times*, 11th April 2016, <https://www.ft.com/content/88c29e60-fcea-11e5-b5f5-070dca6d0a0d>; TUC, 'Brexit could risk "legal and commercial chaos" and would cause years of uncertainty for employers and workers, says leading QC', 7th April 2016, www.tuc.org.uk/news/brexit-could-risk-legal-and-commercial-chaos-and-would-cause-years-uncertainty-employers-and-workers; TUC, 'Priti Patel reveals Leave campaign agenda to reduce workers' rights, says TUC', 17th May 2016, www.tuc.org.uk/news/priti-patel-reveals-leave-campaign-agenda-reduce-workers%E2%80%99-rights-says-tuc; TUC (@The_TUC), "Employment law expert Michael Ford QC says workers' rights are at risk if we leave the EU. <http://dontriskit.uk>", 28th May 2016, https://twitter.com/the_tuc/status/736338061886267392; TUC 'Michael Ford QC on risk to workers' rights from a Brexit', 27 May 2016

<https://www.youtube.com/watch?v=XCzNTrlLEsE>, 27th; Cowburn, Ashley, 'EU Referendum: Workers' rights will be watered down if Britain leaves EU, claims TUC', *Independent*, 3rd May 2016, <https://www.independent.co.uk/news/uk/politics/workers-rights-will-be-watered-down-if-britain-leaves-eu-claims-tuc-a7010381.html>; Jenkins, Siona, 'Is Brexit bad for women?', *Financial Times*, 7th July 2017, <https://www.ft.com/content/a1ec120c-6307-11e7-91a7-502f7ee26895>; C. Criado-Perez, 'The choice for women is obvious – vote Remain', *New Statesman*, 21st April 2016, www.newstatesman.com/politics/feminism/2016/04/choice-women-obvious-vote-remain

5.5 D. Pyper, 'Brexit: Employment Law', House of Commons Library, Briefing Paper CBP 7732, 10th November 2016, available at <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7732>; Chris Stephens, MP, House of Commons, *15th June 2016 Debate: EU Membership: Economic Benefits* (vol 611, col 1832), available at <https://hansard.parliament.uk/commons/2016-06-15/debates/16061542000001/EUMembershipEconomicBenefits> and *7th November 2016 Debate: Exiting the EU and Workers' Rights* (vol 616, col 1342), available at <http://www.parliament.uk/debate/7-november-2016/exiting-the-eu-and-workers-rights>

<http://www.parliament.uk/debate/7-november-2016/exiting-the-eu-and-workers-rights>

5.6 Trade and Cooperation Agreement between the EU and the UK (24 December 2020), Chapter 6 - Labour and social standards, Article 6, available at [EU-UK Trade and Cooperation Agreement 24.12.2020.pdf](http://europa.eu/external_relations/uk_trade_cooperation_agreement_24.12.2020.pdf), pp.200-201; 'Brexit: No plans to dilute workers' rights, minister says' (15 Jan 2021) www.bbc.co.uk/news/business-55656593; 'UK workers' rights at risk in plans to rip up EU labour market rules' *Financial Times* 15 Jan 2021.

5.7 E-mail correspondence from QC for UNISON Matrix Law, 7 June 2018; Email correspondence from senior solicitor for the Equality and Human Rights Commission, 27 June 2019; Email correspondence from solicitor for UNISON, 25 June 2019; Email correspondence from former President of Employment Tribunals, 27 October 2020.

5.8 The Tribunal and Gender Recognition Statistics Quarterly July to September 2020, Annexe C (2020), available at <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2020>

5.9 Dominic Raab and Shantha David evidence to Justice Committee, 19 December 2017. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/employment-tribunal-fees/oral/76269.html>

5.10 Written Answer in Parliament, 9 October 2017 <https://questions-statements.parliament.uk/written-questions/detail/2017-10-09/HL1770>; Case Management Order (no 2) of the President of Employment Tribunals (18 August 2017): <https://www.judiciary.uk/wp-content/uploads/2015/03/case-management-order-no-131-president-employment-tribunals-e-and-w-re-unison-2-20170818.pdf>