Beyond the General Election

> Maternity, Paternity and Parental leave

**Question:**

I am aware that paternity leave will change this year. Can you confirm what these changes are and what possible effect the election will have on maternity, paternity and parental leave/pay in general?

**Answer:**

**Existing rights**

Since 6 April 2003 employees subject to qualifying conditions have been entitled to either one whole week or two consecutive weeks’ paternity leave and statutory paternity pay for up to two weeks.

Currently, paternity leave must be taken within 56 days beginning with the date of childbirth/adoption placement.

**(Rights coming into force**

The Work and Families Act 2006 provides for a new right for fathers, civil partners or partners to take leave from work. This Act does not come into force until April this year and will only affect parents of babies due or in the case of adoption, are notified of a match, in April 2011 or later.

In essence, under the new laws a father will be permitted to take a maximum of 26 weeks’ additional leave before the child’s first birthday. However, the right will only arise where the employee’s spouse, civil partner or partner has returned to work with some of their statutory maternity/adoption leave untaken. A father will not be able to take their additional leave at the same time as a mother takes their maternity leave. The earliest a father, civil partner or partner will be able to take the additional leave will be 20 weeks from the birth/date of placement for adoption.

Fathers will be required to give their employer eight weeks’ notice of intention to take additional leave. The father’s rights under their contract remain the same when on leave with the exception of remuneration.
The Government have decided to adopt a 'light touch' when it comes to the question of how entitlement to leave and pay will be verified by the employer. Rather than involving the HMRC or the mother’s employer in the verification process in every case, the Government has chosen a system which relies upon self-certification. As a result, when giving notice of an intention to take additional leave, a father must give their employer a leave notice, an 'employee declaration' and a 'mother declaration'.

http://www.berr.gov.uk/

What are the other political parties’ positions?

Conservatives:

Theresa May, the Shadow Minister for Women, has called the implementation of the new provisions a “pale imitation” of their own policies.

The conservative’s position is that they would (i) double the initial statutory paternity pay to four weeks; and (ii) allow parents to split the 52 week entitlement to maternity leave whichever they liked. This could lead to parents taking time off simultaneously (for example the mother and father both taking the first six months’ of a child’s life off work).

http://www.conservatives.com/Policy/Where_we_stand/Women.aspx


Liberal Democrats:

The Liberal Democrats Children’s spokesman David Laws has previously indicated that they would introduce fully flexible parental leave which could be shared between the parents as they see fit. In this respect maternity leave would be replaced with parental leave which would be increased to 19 months (subject to neither of the parents taking more than a year off).


http://www.libdems.org.uk/women.aspx

Maternity pay

It should be noted that in the last election in 2005 Labour pledged in their manifesto as a ‘goal’ to increase maternity pay to 12 months instead of 9. The Government have not implemented this to date and have not said that this is going to happen in the near future. However, it is possible that the commitment may be repeated in this year’s election manifesto, as an aspiration for when the economic recovery allows.
Effect of the changes?

The Business Department has estimated that they only expect 4-8 per cent of those entitled to take the new leave entitlement. However this is based on a survey taken in 2005 and the differential between male and female salaries, along with people’s opinions on whether they would like to take paternity leave, may have changed since then and so I think these figures might be lower than what will occur in practice.
> Minimum wage

**Question:**

I know that there is currently a national minimum wage. What is likely to happen to this after the election?

**Answer:**

At the time of its introduction, the national minimum wage was £3.60 (for those aged 22 or over). This has steadily been increased and is now £5.80. Neither the Conservative Party nor the Lib Dems have committed to providing a rise to National Minimum Wages post the 2010 election. This may be provided for in their manifestos.

Under the terms of the National Minimum Wage Act 1998, it would be entirely possible for the UK’s minimum wage to be frozen or even reduced by an incoming government.

It is right that when the national minimum wage was reduced in 1998, a majority of the Conservative Party voted against its introduction, but they no longer propose to remove it. They have since changed their policy position on this.

The current Conservative London Mayor Boris Johnson, has, however, supported the so-called London Living wage since coming to office, ensuring that all city hall employees and subcontracted workers earn at least £7.60 an hour and promoting the wage to employers across the city.

At their conference last year, the Lib Dems spoke in favour of increasing the income tax threshold so that workers on minimum wage would not be taxed. The Lib Dems have also supported the campaign for the equalisation of minimum wage for those aged 16 or over on the basis that the tiers of the minimum wage can open up younger workers to exploitation.

If the Labour Party wins the 2010 general election, according to Gordon Brown in his speech to the Labour party conference in Brighton last October, **the national minimum wage will rise each year between 2010 and 2014**.

John Cridland, Deputy Director General of the Employer Group at the Confederation of British Industry (“CBI”) has spoken out against this proposed commitment to an increase given the current economy.
Trade Unions / Industrial Relations

Question:

In light of recent industrial relations issues and the ongoing dispute at British Airways, have the parties given any indication as to how they intend to deal with industrial relations if they win the election?

Answer:

The parties have not been forthcoming as to how they intend to approach industrial relations issues. To date there have been no policy statements with regard to the right to strike or to associate or with regard to the various protections for trade unionists. I feel it is safe to say therefore that these protections will be around for the foreseeable future. It is interesting however to look at recent disputes from an industrial relations/employment law perspective.

British Airways

BA is very interesting as this confirmed that trade unions have to get the ballot process “technically” correct otherwise they will find themselves falling foul of the courts and the proposed action being declared illegal. At the time BA had balloted employees who had already accepted voluntary redundancy and would therefore no longer be employees at the time of strike. The union tried to argue the ballot was as accurate as reasonably practicable and that the numbers affected had no effect on the outcome. However the court held that Unite had failed to meet the technical requirements of the law on strike ballots and granted the injunction.

The members have now been re-balloted correctly and industrial action is due to commence on 20 March. Last Friday (12 March) Gordon Brown called for a resolution of the ongoing dispute over pay freezes and staff cuts as have the other parties. The Conservatives however accused the Labour Party of not doing enough because of their close ties with Unite. Then Lord Adonis, the transport secretary, declared on the Andrew Marr show on Sunday morning (14 March) that the strike is unjustified and disproportionate and GB joined in by calling it deplorable on Radio 4’s Woman’s hour on Monday morning (15 March). This is a rare intervention in an industrial dispute involving a large political donor.

There was an offer on the table but this was withdrawn by BA on Friday as it was conditional on strike action being averted. BA is proposing to use 1,000 volunteers from BA’s non cabin crew staff to help in the event of industrial action. Moving staff to provide cover for other staff taking part in an industrial action is acceptable but employing agency workers to do so is prohibited.

The Royal Mail

The Royal Mail action was particularly interesting with regard to the debate on employing agency workers to cover staff taking part in an industrial action when the Royal Mail employed extra temporary workers over the Christmas period to ensure service delivery and to “outfox” the striking workforce. However, use of agency workers to replace an individual taking part in an official strike or any other official industrial dispute is specifically prohibited by legislation. Conversely it
was argued that it was not illegal for the Royal Mail to employ temporary workers directly thus getting round the prohibition. The issue was not tested in the courts as legal action was put on hold following a last minute deal before Christmas.

The CWU and the Royal Mail have this month brokered a deal over pay and working practices. The CWU said that the deal delivered on major issues. Also, the deputy General Secretary of the Union (Dave Ward) said “We have always said that we can’t back away from change. The agreement recognises the reality of automation, competition and financial challenges facing the company.” This, I believe, underpins the realisation amongst the parties and the unions that there will be changes.

**The Civil Service**

There was also the recent civil service strike over the reduction in redundancy terms. The Guardian reported on 8 March 2010 “that the government insists that it has already compromised with the unions to protect low paid workers and preserve higher payouts.” This could symbolise that the labour party may be willing to take the public sector unions on in the event of future reductions of terms and conditions.

**Political Levies**

One tangible announcement to mention in this area is that David Cameron has said that his party intends to stop the unions’ automatic political levies to the Labour Party by ensuring that every member has to sign up to the political fund individually.

**Recent legislation**

Also, it is worthwhile mentioning the most recent change to industrial relations law is the Employment Relations Act 1999 (Blacklists) Regulations 2010 which came in on 2 March 2010. The regulations received cross-party support and prevent the blacklisting of workers from employment as a result of their union membership or activities. The new regulations prohibit the compilation, use, sale or supply of a blacklist, and enable individuals to complain to an employment tribunal if they are refused employment, are dismissed or suffer any other detriment for a reason related to a prohibited blacklist. The Regulations are a response to a case last year in which the Information Commissioner closed a database containing the union activity of over 3,000 construction workers.

In any event whatever the outcome of the election, I believe that parties and businesses will continue to support partnership employee relations to resolve industrial relations issues.
Question:

Is it true that employees are to have a new right to request to take time off work to train or study? Can you confirm the extent of the new rights?

On a related theme, what are the political parties proposing in terms of apprenticeships?

Answer:

On 6 April 2010 the Employee Study and Training Regulations come into force. The regulations implement a new right for employees to request time off from work for training or to study.

Who has the right to request time off for training?

Employees with a minimum 26 weeks of service will have the right to request time off. The right will initially only apply to employees of businesses with over 250 employees but should be extended to all employees from April 2011.

Requesting time off

Employees will have the right to request time off to undertake training or study which they believe would improve their effectiveness as an employee and would improve the performance of their employer’s business.

This is a broad objective and covers a wide spectrum of training or study, from accredited study leading to a degree, to worksite training on a specific task, to general study to improve literacy. There are no limits on when, where or for how long the employee can undertake the training or study and the request may be for more than one course.

An employee may make as many requests as he/she wants, but the employer is only required to consider one request in a rolling twelve-month period.

No entitlement to time off

Employees are not entitled to be given the time off; they are only entitled to make a request. It is also not a right to take a 'training holiday'. Furthermore, employees are not entitled to be paid whilst they are taking the time off.

What does the employee have to do?

For the request to be valid, it must be in writing and dated and contain certain information including the training provider, the content of the training and importantly how he/she believes it would improve their effectiveness as an employee and the performance of the business.
If the request is granted, the employee must also inform the employer if he/she does not undertake the study or training, fails to complete it or if the study or training differs from the description in the request.

**What does the employer have to do?**

The obligations imposed on employers will no doubt look familiar to many employers and HR directors who have experience with requests for flexible working arrangements.

The employer must consider the request seriously and reply to the employee within 28 days of receiving it and, if the employer requests a meeting, respond with a final decision within 14 days of holding that meeting. The employee’s right to be accompanied at that meeting, to postpone the meeting if their companion cannot attend and to appeal must all be communicated to the employee.

The grounds on which a request can be refused are substantially the same as those for a flexible working request and include such business concerns as the burden of additional costs, detrimental effect on ability to meet customer demand and inability to reorganise work among existing employees. An additional ground for refusing requests for training which is not relevant to flexible working is the employer not agreeing that the training or study would improve the employee's effectiveness and/or the business's performance.

If an employee is unhappy with the result of a request, they will have a valid tribunal claim if the employer failed to follow the correct procedure or refused the request based on incorrect facts or because of a discriminatory reason.

**Overview comments:**

Employers should update any relevant policies to account for the right to request time off for training or study. Larger employers may want to set out a specific policy on this indicating the procedures and providing templates that employees can use to request such time off.

The statutory right and its limitations are the bare minimum required, but there is nothing to prevent an employer and employee coming to an agreement for the employee to take time off for training which is not covered by this new regime.

It remains to be seen whether their introduction will contribute towards the post-recession challenge of greater employee engagement and ultimately lead to better performing businesses.

In terms of apprenticeships, given the economic conditions all of the main political parties have set out their stall on the benefits of job creation, with a great deal of focus being placed on trying to create and maintain apprenticeships.

**Labour – “Going for Growth”**

On 11 November 2009 the Government published its “Skills for Growth: a national strategy for economic growth and individual prosperity” report. As part of this report the Government announced plans to cull badly performing college courses and training quangos to pay for 35,000 new ‘advanced’ apprenticeships and create a class of trained technicians. The “Skills
for Growth” is a ten year plan to refocus adult education towards practical skills training which the country will need now and in the future, for example focusing on training people to be able to assist the implementation of the UK’s high speed internet.

http://www.bis.gov.uk/policies/skills-for-growth

In the Government’s “Going for Growth Our Future Prosperity” report produced in January 2010 Lord Mandleson confirmed the intention to create 35,000 new advanced apprenticeships for 19-30 year olds over the next two years to “fill the gap” of technicians we are currently short of in key areas.

This is in addition to a pledge of £7 million to support other training models which Labour say in their report could deliver up to 15,000 new 16-18 year old apprenticeships within the next five years and a subsidy for businesses taking on apprentices in 2010.

The Government aims as a result of this reform that three-quarters of people should participate in higher education or complete an advanced apprenticeship or equivalent technician level course by the age of 30.

http://www.bis.gov.uk/growth/going-for-growth

Conservatives

The Conservatives outlined their “Get Britain Working” commitment in October 2009. The aim in their view was to simplify the programmes that Labour had put into place into one single back to work programme for everyone on out of work benefits. They say that the number of young people taking up apprenticeships is falling.

As part of this programme they will refer young unemployed people by referring them on to the work programme after 6 months of unemployment rather than a year under Labour’s Flexible New Deal programme.

At their conference in October 2009 they announced 100,000 additional apprenticeships and training places each year and expansion of the Government’s Young Apprenticeship scheme from the current 10,000 to over 30,000 each year. According to their website they plan to give a bonus of £2,000 for each apprenticeship at a small or medium enterprise.


Liberal Democrats

The Liberal democrats have stated since their Spring conference in April 2009 that they would fully fund the off-the-job training costs of apprenticeships. It is difficult to ascertain whether this approach has changed recently.

The Scottish perspective

The Scottish Education Secretary Mike Russell launched a £4 million scheme in January to encourage businesses to hire apprentices. All businesses across Scotland were offered £1,000 to take on a new apprentice from 11 January to 26 March
2010. The scheme is part of a Scottish Government program called “ScotAction” which aims to help businesses and individuals through the recession.

So clearly, whoever wins the election, it appears that employers will have the opportunity of being incentivised for taking on apprentices.
Agency staff

Question:

I read on Personnel Today that laws are going to be introduced which will mean that agency staff must be treated in the same ways as employees. Is this happening soon?

Answer:

These Regulations are due to come into force from 1 October next year, 2011. These laws are set out in the Agency Workers Regulations 2010.

In brief, these Regulations propose that qualifying agency workers will have the right to be employed on the same basic contractual terms they would have ordinarily received had they been recruited as an employee from the start of their assignment. Anyone who thinks they have suffered a detriment as a result of being an agency worker will be able to bring a tribunal claim within 3 months of the alleged detriment.

The right to equal treatment will not apply until an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous weeks.

For it not to be the same role, the new role must be substantially different. This suggests businesses will not be able to avoid the Regulations applying by moving a worker between different roles on an assignment. The Regulations also contain a specific provision which is designed to prevent businesses from avoiding the application of the Regulations by splitting the work up into separate short term assignments. This provision gives a worker the right to be treated as if they were entitled to equal treatment if a structure of assignments develops, within either the hirer or between that hirer and connected businesses.

Additionally, Tribunals will have the power to award up to £5,000 extra compensation if businesses are sued for discrimination against an agency worker and are found to have tried to avoid the application of the Regulations.

"Equal treatment" covers pay (including overtime and bonuses linked to individual’s performance), paid holiday, working hours, maternity and anti-discrimination provisions.

The right to equal treatment does not extend to participation in share option and profit sharing schemes, occupational pensions and occupational sick pay.

The government has committed to providing much needed guidance on the introduction of these new laws before the end of July 2011.

In terms of the likely impact of the election, the Conservative Shadow Minister for corporate governance and business regulation, told the Conservative Party conference last year that the Conservatives would delay the implementation of the Directive until the last possible moment (which is December 2011) because of the cost to British businesses. On 4 February this year, the same Shadow Minister spoke out again against the Regulations saying that they discouraged a flexible
workplace and that agency work can be an attractive avenue for workers themselves: “flexible hours, without the pressure of long term commitment, offer a method of re-entry into the workforce for many who do not have the time to work a full time job”.

He went on to say: “Accordingly, we shall not only be opposing the early adoption of these regulations but also making it clear that we reserve the right to reassess them in the event of a Conservative victory at the forthcoming Election.”

In practice, repeal is unlikely given that these Regulations derive from the EU’s Temporary Workers Directive and that the UK is required to implement this Directive into UK law by 5 December next year. A limited degree of amendment (for example, limiting what is regarded as “pay”) may be possible whilst maintaining compliance with the Directive.

The Lib Dems have spoken out in support of the agency workers regulations. It is not, however, clear whether they would propose to go further still and increase protection, for example by removing or shortening the qualifying period.
Employee Engagement

Question:

Given the economic challenges of the last 18 months, how do the parties intend to engage the workforce and are they proposing any new ways of working?

Answer:

In order to answer this it may be useful to consider the party slogans which are perhaps indicative of changes in working practices. These are:

- A future fair for all (Labour)
- Year for change (Conservative) and an amalgamation of both
- Change that works for you. Building a fairer Britain (Lib Dems)

Employee Engagement

There is an emphasis on engaging the workforce generally as only 25% are now members of unions. Engagement has very much become a business objective following the government’s Macleod Report in 2009. Employee engagement is seen as particularly effective in increasing service provision, motivation, productivity and financial performance. I think that as a result there will be an increase in the sharing of information and in employee consultation.

Small businesses

All of the parties are also intent on supporting small businesses in setting up.

With this in mind the conservatives have promised to reduce regulation and "simplify employment law." George Osborne has announced that new businesses will not pay NI on the first 10 workers they hire for the first 2 years of a conservative government. Corporation tax is also to be cut for small businesses.

Therefore with an emphasis on business and job creation and who an employer can hire (and fire) it could be that small business exemptions may creep back into employment legislation, for example in equality legislation, flexible working, information and consultation obligations and protection for part time; fixed term and agency workers.

This may have to involve re-negotiating the European dimension but the Conservatives appear more bullish about that than the other parties. It is difficult to imagine an opt out of employment rights for such a large % of the population however, particularly given the expansion of equal treatment over the last decade.
Potential new ways of working

With regard to new ways of working, Gordon Brown promised to put mutualism and cooperatives such as the John Lewis Partnership at the heart of Labour’s election manifesto whereby public sector bodies, including leisure centres, housing organisations and social care providers – schools and hospitals - would be allowed to take control of their own affairs if staff and users voted in favour. Employees will therefore have a share in the company’s ownership.

The Conservatives are also advocating Public Sector Workers Cooperatives whereby workers are to be allowed to club together to take over a public service as a not for profit social enterprise – within certain national standards. This follows on from their earlier commitment to create partnership models in the NHS. This could see millions of nurses, primary school staff and call centre workers setting up independent legal associations that agree contracts to deliver services like GP practices do currently.

If these proposals gain any momentum, this will probably lead to a radical shake up of employment practice in the public sector in terms of pay, pensions and other conditions.

The Liberal Democrats believe that businesses have been burdened by taxes and red tape. They too have said they will consult with businesses to identify regulations for repeal, reduction or simplification.

There is clearly an increasing emphasis from all the parties on consultation and worker participation.
> Flexible working

**Question:**

I am aware that the main political parties currently have different stances on flexible working. Can you confirm what these are and do you think that any potential changes to the way in which flexible working operates at present would have any impact in practice anyway?

**Answer:**

**Existing rights**

The right to request flexible working was introduced in April 2003.

At first, only carers of children under the age of six (or disabled children under the age of 18), qualified for the right to request working flexibly.

Then in May 2008 an independent review, undertaken by Imelda Walsh, recommended that the right to request flexible working be extended to those responsible for children up to and including the age of 16. The Government accepted the recommendation and the extension to the right to request took place on 6 April 2009.

Employees caring for dependent adult spouses, partners or adults have also been eligible to make a statutory request to work flexibly since 6 April 2007.

**Will the result of the election change anything?**

Labour had indicated that they were considering increasing the right to request to those parents with children below the age of 18. However, this has not happened and Labour are not presently planning to change things as they stand.

The Conservatives have said that they wish to extend flexible working rights to parents of under 18s. Again, they have stated this is a first parliament commitment.

http://www.conservatives.com/Policy/Where_we_stand/Women.aspx

The Liberal Democrats have said that all employees would have the right to request to work flexibly if they came to power.

http://www.libdems.org.uk/women.aspx

The question must be asked, what real effect would such a change have?
It should be remembered that the right to request legislation does not create a right to work flexibly or part-time. It simply provides a statutory framework through which a request from an eligible employee to work flexibly must be considered.

The introduction of the right to request was not well received by employers initially, many of whom expressed concern that large numbers of employees would apply and that it would be difficult to refuse a request. To date it seems that the practical experience of employers has not substantiated these fears. In practice, the right to request appeared to act as a catalyst for employers to offer flexible working to wider categories of employees which has removed the focus from the detail of the statutory procedures.

Many employers have gone way past the statutory requirements and now offer the right to request flexible working to all of their employees. Not only that, many of the big companies now have a large majority of their workforce working flexibly.

Therefore, I would suggest tweaks to the system won’t make such a difference - no parties it seems at the minute are proposing tinkering with the right to request procedure itself – that would perhaps represent a more significant shift than the ones proposed by the Conservatives and Liberal Democrats at the present time.

In reality is it likely that many requests will be made by employees to care for their 17 year olds? Given the UK’s ageing population I think it is more likely than not if flexible working requests are made they will be made in respect of those caring for elderly relatives.
Question:
I have seen e-bulletins and segments on BBC news about the Equality Bill going through Parliament, what impact will this have in practice?

Answer:
There is a lot of legalese associated with the Equality Bill given its primary aim is to simplify anti-discrimination legislation by unifying all of the UK’s discrimination legislation into one Act.

The plan is for the majority of the provisions in the Bill to be brought into force by Autumn of this year.

Some aspects of the Bill which are likely to have more or at least a more readily noticeable practical impact once it is brought into force are:

- The Bill includes a clause which will allow the government to enforce mandatory gender pay gap audits on employers (who have over 250 or more employees) from 2013 if organisations do not voluntarily disclose their pay gaps before then. However, the position regarding gender pay reporting and the public sector is different. The government envisages that from 2011, public bodies with 150 or more employees will be required to publish annual details of their gender pay gap, ethnic minority and disability employment rates;

- The Bill also proposes to ban secrecy clauses on pay in employment contracts, a further way in which the Bill will push pay transparency;

- The Equality Bill proposes to widen the scope of positive action. This means employers will be permitted (but not required) to pick someone for a job from an under represented group when they have the choice between two or more equally suitable candidates provided that the employer does not have a general policy of doing so in every case. The permission will not extend to the selection of a less qualified candidate. In other words, this does not go as far as positive discrimination. A difficulty with this provision that has already been foreseen is how will a business be able to tell when candidates are equally suitable?

- The Bill also proposes that Employment Tribunals will be able to make recommendations following findings in discrimination claims;

- Finally, the Bill will prohibit discrimination by association. This means those associated or linked to someone covered by a protected strand of discrimination e.g. an employee married to an Asian man or the carer of a disabled son will be able to bring discrimination claims.
> Equality Bill:

**Question:**

I understand from the news coverage of the Equality Bill that the political parties don’t agree with what the Bill should cover, election impact?

**Answer:**

It is true that the Bill has not always had cross party support. At its second reading stage in the House of Commons last May, the Conservatives introduced a motion rejecting the Bill. This was defeated 322 votes to 139. A majority of the Labour Party and Lib Dems voted in favour of the introduction of the Bill.

Subsequently, Labour’s Minister for Equality, Michael Foster, stated last December that the Bill should be passed before the 2010 election.

In terms of what stage the Bill is currently at, the Bill has made it through the House of Commons and amendments have recently been proposed by the House of Lords. Its progress appears to indicate that the Bill should be passed and become an Act of Parliament before the election. This means it will be harder and a longer process for any incoming party to amend the Bill because any amendment will have to be by the passage of further legislation.

Personel today reported last October that the Conservative Party is likely to scrap the plans for mandatory gender pay audits after Theresa May, Shadow Minister for Women and Shadow Secretary of State for work and pensions was quoted at the Conservative Party conference last year as saying “We don’t think mandatory pay audits are the way forward. We think companies found guilty at tribunals of discriminatory practices should have to do a mandatory pay audit”.

At the Conservative Party conference, Theresa May did also say the Conservative Party would not repeal the Equality Bill if they came into power and described the Party as “broadly supportive” of the Bill in that “it is very sensible to bring all equalities legislation into one Act”. This suggests whilst the Conservative Party may seek to repeal parts of the Bill, they are not suggesting they would repeal it completely.

In terms of the Lib Dems position, Nick Clegg said last year to Personnel Today that he supported the principles in the Equality Bill because it was “astonishing” that pay gaps persisted. This suggests the Lib Dems are supportive of the pay audit provisions. Nick Clegg has, however, criticised the timing of the Bill saying that he feared that introducing these proposals now would hinder employers struggling with the recession. There is no policy statement about what this timing criticism means in terms of whether the Lib Dems are proposing to stagger the implementation of the Bill or halt its progression should they win this year’s election.
Question:

I have read that European employment law is trumping national employment law in the private sector - is this correct?

Answer:

This question could occupy us for the rest of the day and beyond.

However, in a nutshell! You will all no doubt be aware of the recent UK decisions on holiday pay – Stringer and Shah - and also the Malcolm case on associative discrimination. In these cases the UK courts have appeared increasingly willing to interpret UK law in light of the original European directive or in light of case law emanating from Europe. This has often led our courts to impute into the UK statute or regulation additional words that are just not there in the domestic legislation. For example in Shah:-

The working time regulation state that holidays may only be taken in the leave year when they are due but the Leeds Employment Tribunal implied into this, following a European case (Pereda), that a worker can be permitted to take holidays in the next leave year if s/he has been prevented by illness from taking the holidays in the current leave year.

This has gone some way to allowing the original directive/European case law to, not exactly having direct effect as it does in the public sector, but effectively coming in through the back door and trumping national law when judges choose to interpret the domestic statute or regulation in this way in the private sector. Also as a result of these recent decisions the government has been looking at amending the working time regulations and has amended the equality bill, as Hayley has already mentioned, to take on board these judicial changes.

The debate will no doubt rage on and there will always be appeals to national sovereignty. We have heard before that there are always great aspirations to make employment law simpler and to end the so called tyranny of Europe, particularly for the small employer. However the reality is that it is very difficult to do so particularly given that much of modern UK employment law has come either directly from or via Europe. To do so would involve renegotiating our position in Europe and none of the parties are realistically seeking to do this.

The Lib Dems have declared that they want to remain at the heart of Europe.

Labour is also committed to dedicated engagement with Europe.

The conservatives often appear to be the dissenting voice however unless they want us to withdraw form Europe, which Ken Clarke, the Shadow Business Secretary, is clearly opposed to then they will have to settle with trying to temper what they see as its excesses.
The Conservative Party’s website states that there will be no further treaties without a referendum and that they will introduce a UK Sovereignty Bill. They state that they will also restore national control over social and employment legislation, e.g. seek guarantees over the application of the Working time Directive in the public services – the fire service and NHS.

Ken Clark has suggested that David Cameron’s promises to bring powers back from Brussels as nothing more than warm words of reassurance. In any event, this to a great extent is outwith the control of government, whatever its political hue, as we cannot contract out of the Social Chapter’s employment rights, unless we renegotiate the Lisbon Treaty.