

Employment Rights Post Brexit

On the 28th of March 2017 ROTA held a seminar on ‘Employment Rights Post Brexit’. This was particularly poignant as Article 50 to exit the EU was triggered the next day. The Prime Minister Theresa May emphasised that ‘workers rights will be protected’. From a government that introduced employment tribunal fees and repealed the statutory discrimination questionnaire one must question how much of these promises can be taken at face value? Since the introduction of tribunal fees, claims brought to the tribunal have dropped by 70%. This government has done little, if anything at all to instil confidence that it will protect the rights of workers (labour) as opposed to protecting the interests of employers (capital), in particular the rights of BAMER and migrant workers who are often the most vulnerable. In this context the seminar focused on raising awareness amongst voluntary and community sector organisations working with BAMER and migrant communities about existing employment / labour rights; how much of these rights are underpinned by EU law; are we at risk of losing hard fought for rights; and finally how to work in collaboration to ensure we protect and strengthen existing rights as well as work collectively to enforce them.

The seminar began with a presentation by Michael Reed, Principal Legal Officer at the Free Representation Unit. Michael gave an introduction to Employment Law, such as employment contracts, employment status, working time, TUPE, pay and national minimum wage, dismissal etc. One of the most important points stressed was the power imbalance in employment relationships. Law is a form of power as it gives one rights that can be enforced. In an employment contract if something is agreed with the employer, the employer is bound to that agreement. However, employment law is about relationships and one party is quite vulnerable and requires protection, unlike contract law which is based on two equal parties contracting on equal terms. For example, workers on zero hour contracts are not obliged to work for the employer if they do not want to and the employer is not obliged to give them work. Yet in reality, in the case of a single mother on low income, or a migrant worker with a family to support, it is not about the agreement or employment but the weight of the circumstances bearing down on them that forces them to be available for the employer any time the employer requires.

Hannah Reed the Senior Employment Rights Officer at the TUC spoke on the subject of ‘Enforcing Employment Rights Post Brexit’ and emphasised the importance of not letting Britain become the cheap labour capital of the EU. EU employment rights provide vital protection to workers, including rights for pregnant women from day one; reversed burden of proof for race discrimination cases; no cap on compensation for discrimination cases; and over 2 million people have the right to paid holiday, which includes part-time workers, agency workers, and those on 0 hour contracts. These rights were secured as a result of campaigning across the EU and these rights must not be placed at risk. In spite of the government promise to protect workers’ rights, we cannot be complacent given the former Secretary for Work and Pensions, Ian Duncan Smith’s call for a ‘bonfire’ of all EU regulations, including the working time directive for which he has a particular dislike. The working time directive is an EU regulation preventing employers from requiring their workforce to work excessively long hours, with implications for health and safety. Priti Patel, one of May’s cabinet ministers has called for getting rid of half of EU Social and Employment legislation, which she has claimed are a “burden”, but in fact provide vital protection for workers.

The TUC is calling for 3 key commitments from the government. Any trade deals with the EU should have a guarantee written into it as workers deserve common standards and EU rights should be anchored into future trade agreements:

- Better protections for posted workers – migrant workers posted to another EU country;
- Improved rights for working parents – flexible working, maternity / paternity pay;
- EU wide standards on rights relating to dismissal.

Furthermore, UK citizens should have a court to go to ensure common standards of rights. It should not be left to the will of the government or parties and UK courts should ensure similar standards to EU courts.

Following Hannah Reed, Rosa Crawford the Policy Officer for Europe and International Relations spoke on the subject of 'Tackling Exploitation of migrant workers'. Rosa emphasised that people's rights are not up for bargaining and should not be part of the Brexit negotiations. The key threats in legislation for migrant workers is the different rights for different immigration statuses. The immigration Act 2016 criminalises undocumented workers. This increases the exploitation undocumented migrant workers already face. Workers are less likely to challenge the unlawful behaviour or discrimination by employers if they are under threat by the authorities. It also has implications for other areas of personal and public life. For example undocumented workers are unlikely to access ante natal care, resulting in critical conditions. This costs public services more in the long run as it costs more to provide critical care, but more importantly it is a human rights concern. The Act places further restrictions on non- EU citizens and turns workers into border guards – i.e. banks, DVLA, health services. To address this the TUC is building campaigns with public sector unions. Migrant workers play a significant role in leading the campaigns for workers rights as they are often at the sharp end of the stick. As a result migrant workers improve the rights for all workers. However, this is a fight that requires the solidarity of all workers and the TUC is keen to work with community groups to get this message out.

Nigel Mackay, Associate at Leigh Day Solicitors speaking about the Impact of Brexit on Employment Rights made clear what the government would be permitted to do, what the government say they will do and what the government would try to do post Brexit. What the government would be permitted to do post Brexit depends on the relationship negotiated with the EU. The majority of our employment rights are guaranteed by EU law, and a 'Hard Brexit' would mean the government would have the freedom to revoke all employment rights protected by EU law i.e. maternity rights, working time directive, TUPE. Even after Brexit the UK will still be signatories to the European Convention of Human Rights (ECHR) and will have recourse to the European Court of Human Rights. However, the ECHR does not cover socio-economic rights. Certain exceptions include article 11 (trade union related rights) and article 14 (anti-discrimination), but this is only if it engages one of the other convention rights i.e. article 8 (right to family and private life). Ultimately employment rights could be reduced to what is agreed with the employer within the employment contract, with the employer dictating the terms. The government has continuously stated that it will protect workers' rights. Yet, on the 8th of February 2017 in the Article 50 vote the government voted against Labour's amendment to ensure the government prioritises worker's rights in Brexit deal negotiations. Even whilst the government was constrained by membership to the EU the government did much to constrain and revoke workers' rights, such as the weakening of unfair dismissal law, introduction of tribunal fees, removing the discrimination questionnaires etc.

The Great Repeal Bill will repeal the European Communities Act 1972 and transfer all EU law and CJEU decisions at the time of Brexit into UK law. However, subject to the future relationship with the EU the government can review existing legislation and repeal those which it does not like without consulting parliament. Former cabinet ministers John Whittingdale and Michael Gove have reportedly suggested to the CBI to draw up a list of regulations they would like to get rid of, including the 'Agency Workers Directive', the 'Acquired Rights Directive' and the 'Working Time Directive'. Post Brexit the government could introduce conditions to existing rights. For example the government may attempt to introduce a length of service condition to the right to anti-discrimination. Currently protection from discrimination is a right that exists from day 1 of employment. Although such a condition would be contrary to EU law it is something the government could do post Brexit.

Wilf Sullivan, the Race Equality Officer at the TUC speaking about 'Employment Rights and Race Equality' highlighted that the divisive debate on Brexit and 'free movement' is that it also undermined the rights of immigrants not entitled to 'free movement', including asylum seekers. Similarly limiting access to justice and attaching costs to access to justice and equality began with the asylum process and has now extended to the employment tribunal – 'those who want equality must pay for it'. The general direction of travel for BAMER and migrant people is impoverishment. BAMER and migrant people are over represented in 0 hour contracts and fixed term contracts. The deregulation of the labour market to maximise profits for businesses and people's ability to be exploited is linked to people's lack of power and organisation collectively. People's ability to enforce employment rights depend not only on what the government does but what we do collectively. This became even more apparent with Michael Reed's presentation on the Tribunal procedure, which highlighted the difficulties in taking a claim to the employment tribunal. The Race Relations Act and many other rights came from people organising. If we have rights we must fight to keep them. This cannot be done individually, it must be done collectively.