

Brexit and Employment Law – 28 March 2017

Nigel Mackay, Leigh Day

1. What will UK government be permitted to do following Brexit in relation to employment regulation and worker protection?

- Depends on future relationship with EU.
- If “hard Brexit”, then future government would have almost unconstrained freedom to revoke employment rights currently protected by EU law or otherwise. Includes discrimination protections, maternity rights, working time, TUPE and agency workers’ rights.
- From a legal (rather than political) perspective, the UK government would be required to give effect to almost no rights in this area.
- Other treaties, e.g. European Social Charter and ILO Conventions give workers little protection or enforceable rights.
- ECHR does not generally cover socio-economic rights.
- Exceptions include Article 11, which provides trade union related rights, and discrimination under Article 14 if the treatment falls within ambit of another convention right (e.g. right to a private and family life under Article 8). If Human Rights Act 1998 replaced by Bill of Rights, then even weaker protection.
- Ultimately, employment protection could be based on the rights/obligations in the employment contract, with the employer generally dictating those terms.

2. What is government’s stated position?

2 October 2016: Theresa May, Conservative party conference:

“And let me be absolutely clear: existing workers’ legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.”

5 October 2016: Theresa May, Conservative party conference:

“we are the party of workers...Workers’ rights – not under threat from a Conservative government. Workers’ rights – protected and enhanced by a Conservative government.”

17 January 2017: Theresa May’s plan for Brexit speech:

“And a fairer Britain is a country that protects and enhances the rights people have at work. That is why, as we translate the body of European law into our domestic regulations, we will ensure that workers rights are fully protected and maintained.

Indeed, under my leadership, not only will the government protect the rights of workers set out in European legislation, we will build on them. Because under this government, we will

make sure legal protection for workers keeps pace with the changing labour market – and that the voices of workers are heard by the boards of publicly-listed companies for the first time.”

2 February 2017: Brexit White Paper

“As we convert the body of EU law into our domestic legislation, we will ensure the continued protection of workers’ rights.

... this Government has committed not only to safeguard the rights of workers set out in European legislation, but to enhance them.”

8 February 2017: Article 50 vote – government votes against Labour amendment to ensure government prioritises workers’ rights in Brexit deal negotiations.

3. What else has government/Conservative party said/done relating to employment rights?

- Previous government’s actions (whilst constrained by membership of EU and presence of Liberal Democrats in government):
 - o Weakening of unfair dismissal law – two year service requirement, new salary cap on compensation
 - o Tribunal fees
 - o Removal of discrimination questionnaires
 - o Beecroft report - extreme deregulation in relation to areas not governed by EU law, supposedly not implemented due to Liberal Democrats

- 1 October 2016: Introduction of Matthew Taylor review on Modern Employment Practices – unrelated to Brexit but demonstrating commitment to workers’ rights.

- 7 December 2016: Former cabinet ministers, John Whittingdale and Michael Gove, reportedly suggested to CBI business group that companies should start drawing up a list of regulations they want to see abolished or reformed, including the agency workers directive, the acquired rights directive and the working time directive.

- 15 January 2017: Phillip Hammond, Die Welt,

“We are now objectively a European-style economy. We are on the U.S. end of the European spectrum, but we do have an open-market economy with a social model that is recognizably the European social model that is recognizably in the mainstream of European norms, not U.S. norms. And most of us who had voted Remain would like the U.K. to remain a recognizably European-style economy with European-style taxation systems, European-style regulation systems etcetera. I personally hope we will be able to remain in the mainstream of European economic and social thinking. But if we are forced to be something different, then we will have to become something different.”

- 20 March 2017: Matthew Taylor says he expects Theresa May to support changes to rights of self-employed workers.

4. What are most vulnerable protections after Brexit?

Discrimination

- Politically, protection from discrimination protection unlikely to be subject to wholesale revocation. Sex, race and disability discrimination pre-dated EU law.
- But government could weaken protection by:
 - o Introducing cap on awards – removed by ECJ in *Marshall No 2*. Government previously reduced cap on unfair dismissal awards.
 - o Removing “unpopular” strands of discrimination – e.g. age discrimination.
 - o Subjecting discrimination claims to conditions, e.g. length of service.

Pregnancy/maternity

- Domestic law currently goes further than EU law in some areas – e.g. Statutory Maternity Pay(SMP) period.
- But Commission currently considering strengthening these rights – UK workers won't benefit.
- Cost of some of these rights high to state and disliked by business – e.g. SMP but controversial to weaken these rights.
- Technical changes to weaken protections, e.g. currently no requirement to have male comparator.

Protection for Part-time workers/fixed-term employees

- Two areas introduced as a result of EU law.
- Less controversial to remove –employers previously able to exclude part-time workers and fixed-term employees from protection.
- But – Matthew Taylor review to consider “modern” working arrangements in order to improve protections.

Agency Workers Directive

- UK protested the Temporary Agency Workers Directive until implementation.
- Agency Workers Regulations offer lowest possible level of protection to comply with Directive but do provide right to same basic working and employment conditions after 12 weeks and right to amenities or collective facilities from day one.
- Business always opposed to AWR – very vulnerable to repeal. Beecroft report previously suggested government should simply refuse to implement Directive in breach of EU law.

Working Time

- UK government consistently opposed to Working Time Directive.
- Recent decision in *Bear Scotland*, which said that holiday pay must include overtime, was immediately limited in effect by government.
- In the first instance, government could remove limits to weekly hours, obligations to pay for holidays, whether on call time counts as work.
- At worst – no protection against long hours or requirements for rest or holiday.

Collective rights

- Collective consultation relating to redundancy and TUPE required by EU law.
- Potential further watering down.

TUPE

- Protection for employees on transfer of undertakings.
- Could be repealed and return to situation where employment terminated by the transfer.
- But, some support from business to retain.

5. What will happen to current EU derived laws that are not repealed?

- Great Repeal Bill to come into effect on Brexit: European Communities Act 1972 repealed and EU law transposed into UK law, wherever practical. Will include all current worker protections, including CJEU decisions.
- Primary legislation (e.g. Equality Act 2010) and some secondary legislation (e.g. Fixed Term Employees Regs) not impacted by Great Repeal Bill, as independent of ECA 1972.
- Government can then decide what to keep (subject to future relationship with EU).
- Domestic courts required to consider Directives to interpret national law – *Marleasing* duty gone? Will courts read domestic statutes to comply with EU law – including reading words into them, as this is parliament's intention in Great Repeal Bill? Or, revert back to reviewing legislation from perspective of what parliament intended, based on words used by parliament.
- No referral to CJEU to interpret EU rules. No purposive interpretation? e.g. in *Webb v EMO*, requirement of comparator in pregnancy discrimination.
- Courts will continue to refer to previous ECJ decisions, as these will form the EU law converted into domestic law.
- Future decisions may be persuasive but unlikely to be binding – should UK courts continue to consider ECJ's decisions until UK government says not to?
- UK government can simply change the law if they disagree with a court decision.

6. Softer Brexit?

- EEA membership likely to be require compliance with EU social law which concerns EEA activity.
- Other deal involving access to single market/free trade – require some level of compliance with EU employment rules?
- Cause for optimism – if Theresa May's current position is to protect workers' rights, then could be something offered in negotiations, potentially binding future governments.