Brexit and human rights project briefing No.2: Protecting employment and equality rights

October 2017

Executive Summary

This briefing considers the effect of Brexit on the UK's employment and equality protections. It analyses which rights may be most under threat, as well as how they could be amended or repealed without appropriate parliamentary scrutiny by using so-called Henry VIII powers. In addition, some of the key judgements made by the European Court of Justice (ECJ) which have advanced protections are considered, while also investigating the future role for the Court given the Prime Minister's insistence that any jurisdiction post-Brexit would be a red line for her, except during a transition period.

Consequently, the Labour Campaign for Human Rights (LCHR) recommends that:

- The Government's 'Great Repeal Bill' should state that existing employment and equality protections will be maintained after exit day.
- The Repeal Bill should not exclude the EU Charter of Fundamental Rights from UK domestic law.
- The Bill should explicitly restrict the utilisation of Henry VIII powers to making only technical revisions to legislation, not significant changes. Moreover, a more robust process to eliminate the potential for misuse, such as that proposed by the House of Lords Constitution Committee, could also be implemented.
- EU case law, which has improved employment and equality rights, must be protected by primary legislation.
- Statutory guidance on post-Brexit ECJ rulings ought to be issued, together with greater clarity on transitional arrangements for the ECJ and 'pending cases'.

Rights Under Threat?

The Conservative manifesto for the 2017 general election pledged that "workers' rights conferred on British citizens from our membership of the EU will remain". However, it would be understandable if one took such a commitment with a pinch of salt. Indeed, the Prime Minister herself has previously attacked Labour for signing up to the EU's social chapter, which has enhanced employment rights, and spoken out against the Part-time Work Directive, which ensures equal treatment of part-time and full-time staff.[1]

Moreover, her predecessor, David Cameron, was purportedly seeking to opt out of both the Working Time Directive and the Agency Workers Directive, which limit the length of the working week and award agency workers the same pay and conditions as direct company employees, as part of his EU renegotiation prior to the referendum campaign.[2]

Meanwhile, other senior Tories have danced to a similar tune. Only a month before the vote, Priti Patel, now the International Development Secretary, expressed a desire to cut EU employment protections, claiming it would bolster the economy.[3] In addition, Michael Gove and former Culture Secretary John Whittingdale have asked companies to establish a list of EU legislation that ought to be diluted – for instance, directives pertaining to pregnant workers and collective redundancies.[4] Other rights that experts believe could be under threat include receiving equal pay for work of equal value, taking parental leave to look after a child, and having no upper limit on compensation in employment discrimination cases.[5]

---

[1] Rowena Mason, 'Doubts cast on Theresa May's pledge to protect workers' rights post-Brexit', The Guardian, 7th November 2016. https://www.theguardian.com/law/2016/nov/07/doubts-cast-on-theresa-mays-pledge-to-protect-workers-rights-post-brexit

[2] Patrick Wintour, 'Cameron to include employment law opt-out in EU membership negotiations', The Guardian, 11th July 2015. https://www.theguardian.com/politics/2015/jul/11/david-cameron-employment-law-opt-out-eu-membership-renegotiation

[3] Emma Clark, 'Brexit would boost UK economy by £4.3bn claims Patel', Belfast Telegraph, 18th May 2016. http://www.belfasttelegraph.co.uk/business/news/brexit-would-boost-uk-economy-by-43bn-claims-patel-34723908.html

[4] Nigel Nelson, 'Theresa May warned to protect workers over fears their employment rights could be scrapped under Brexit', Daily Mirror, 10th December 2016. http://www.mirror.co.uk/news/uk-news/theresa-warned-protect-workers-over-9431612

[5] Equality and Diversity Forum, Written Submissions to the LCHR

The Government has also proposed not to transpose the EU Charter of Fundamental Rights into domestic law. In the 'Great Repeal Bill' White Paper that was published in March, it was explained that this move "will not affect the substantive rights that individuals already benefit from in the UK" as many of these "exist elsewhere in the body of EU law which we will be converting into UK law."[6]

While this rationale is inherently disputable in any case[7], the implication is that, without one all-encompassing document to safeguard all rights, it would be significantly easier to revoke an individual right by simply abrogating the appropriate piece of legislation.[8] Indeed, there can be no certainty whatsoever as to whether existing protections or remedies will be maintained by a future (or perhaps, the current) executive. And although there may not be a mass bonfire of rights post-Brexit, it is thought likely that the strength and efficacy of existing protections will be gradually eroded. This could happen through smaller alterations that will restrict the extent of rights, affect the ability to enforce them, and see an end to their ongoing improvements (a role performed by the ECJ).[9]

Thus, the Women and Equalities Select Committee[10] and pressure group Liberty[11] have argued for an addition of a clause to the Repeal Bill – formally known as the European Union (Withdrawal) Bill – that unequivocally commits to upholding the present equalities protections after exit day. Liberty has also called for amendments that would ensure the retention of relevant aspects of the EU Charter of Fundamental Rights after Brexit.

Henry VIII Powers

One of the intractable challenges relating to Brexit is the transposition of EU-derived law into domestic law. This is an issue where contemporary UK legislation makes reference to EU law or the potential involvement of an EU institution.

As a solution, the Brexit White Paper proposes the use of secondary legislation to change primary legislation – known as 'Henry VIII powers'. To justify this, it is claimed that, otherwise, a "prohibitively large amount" of primary legislation would be required to correct the statute book, with an estimate of "between 800 and 1,000" legislative changes set to be made.

However, Henry VIII powers are immensely controversial. Since secondary legislation typically receives much less parliamentary scrutiny than its primary counterpart, the House of Lords Constitution Committee has remarked that their use would likely involve "a massive transfer of legislative competence from Parliament to Government", so raising "constitutional concerns of a fundamental nature" about the balance of power between the legislature and the executive.[12]

Furthermore, one may express scepticism towards the Government's assertion that Henry VIII powers will only be deployed to handle deficiencies in EU-derived law, not to make policy changes. For instance, in 2013, then-Justice Minister Chris Grayling sought to introduce a residency test for access to legal aid via a Henry VIII clause – yet the Supreme Court adjudicated that he had no power to decide who could acquire these services.[13]

The White Paper also states that Henry VIII powers will be time-limited. This can be achieved through so-called 'sunset clauses', with expiration due to be two years after exit day. But the Bill itself is worded

---

[6] Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union', March 2017. https://www.gov.uk/government/publications/the-repeal-bill-white-paper

[7] Eric Metcalfe, 'The fate of Charter rights under the Great Repeal Bill', Monckton Chambers, 31st March 2017. https://www.monckton.com/the-fate-of-charter-rights-under-the-great-repeal-bill/

[8] As discussed at the LCHR's Brexit and Human Rights Policy workshop, 18th July 2017.

[9] Usdaw (Union of Shop, Distributive and Allied Workers), Written Submission to the LCHR

[10] House of Commons Women and Equalities Committee, 'Ensuring strong equalities legislation after the EU exit', 28th February 2017. https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/799/799.pdf

[11] 'Liberty's Briefing on the White Paper on the Great Repeal Bill', April 2017. https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%27s%20Briefing%20on%20the%20White%20Paper%20on%20the%20Great%20Repeal%20Bill.pdf

[12] House of Lords Constitution Committee Report, 'The Great Repeal Bill and delegated powers', 7th March 2017. https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/12302.htm

[13] Barney Thompson and Jim Pickard, 'Concerns remain over how 'Henry VIII powers' will affect Brexit', Financial Times, 12th September 2017. https://www.ft.com/content/3e667c06-93d4-11e7-a9e6-11d2f0ebb7f0

such that Ministers could name a different exit day (hence commencing this two-year countdown), which is different to the actual day of the UK leaving the EU. Therefore, the delegated powers could last for many years.[14]

While it may be acceptable to make necessary, technical adjustments to legislation with Henry VIII powers, there is an overarching consensus among parliamentary committees and interested groups that they should not be misused to make substantive alterations, including to amend or repeal employment or equality rights. Moreover, this restriction ought to be clearly stated in the Bill. If rights were to be changed, both Houses must have the opportunity to debate and vote on such proposals.

To ensure the powers are utilised for a "very limited number of purposes", the Lords Constitution Committee advocates a declaration being signed by the Government, whenever a law is to be revised, stating that the modification is no more than necessary to ensure the operation of the legislation post-Brexit or to implement the outcome of negotiations with the EU. In addition, Ministers should provide detail on the effect of the amendment and why it is required, with a parliamentary committee(s) examining whether the amount of scrutiny suggested by the Government is sufficient.

EU Case Law

As well as EU directives (and treaties), decisions made by the ECJ have influenced employment and equality rights in the UK as a member state. By interpreting EU law so that it is applied correctly and consistently across EU countries, the ECJ has thus improved these rights via its judgements.

Case 1 – Gender Identity (P v S and Cornwall County Council, 1996)

The unnamed applicant, a trans woman, was sacked from her role with the council after informing her employers that she intended to undergo gender reassignment. It was ruled that the provisions of the Equal Treatment Directive 1976 are the expression of the fundamental principle of equality, and so preclude such a reason for dismissal.[15] As a result, discrimination against transsexual people was prohibited, with 'gender reassignment' becoming a protected characteristic in UK law.

Case 2 – Disability Discrimination (Coleman v Attridge Law and another, 2008)

Sharon Coleman, the primary carer for her disabled son, brought a claim for unfair dismissal against her former employers, arguing that she had been treated less favourably than staff members without her personal circumstances. The ECJ upheld her case, clarifying that the Employment Equality Framework Directive not only proscribes discrimination in the workplace against someone who is disabled, but also those who are associated with a disabled person.[16]

Case 3 – Equal Pay (Enderby v Frenchay Health Authority and another, 1993)

Dr Pamela Enderby, a speech therapist, believed herself to be a victim of sex discrimination, since her mainly-female profession was being paid much less than those in comparable professions, where there are more men than women. In an important ruling for equal pay, the Court found that, in such scenarios, the burden of proof passes to the employer to demonstrate the discrepancy is explicable by an objectively justified factor unrelated to sex.[17]

[14] Joe Watts, 'Brexit: Tory Government could keep new sweeping powers to change laws for years', The Independent, 15th September 2017. http://www.independent.co.uk/news/uk/politics/brexit-latest-news-theresa-may-power-grab-withdrawal-bill-years-laws-a7949241.html

[15] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61994CJ0013

According to its White Paper, the Government intends that "any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the ECJ's case law as it exists on the day we leave the EU." Furthermore, pre-Brexit case law will be given "the same binding, or precedent, status in our courts as decisions of our own Supreme Court."

However, the inevitable repercussion is that, whereas a UK court cannot presently diverge from a pre-Brexit ECJ ruling, the Supreme Court may be able to in the future, since it can overrule a decision made by itself or its predecessor, the House of Lords, when "it appears right to do so".

Despite the Conservative calls for the Supreme Court to adopt a "similar, sparing approach" to EU case law, advancements in rights from crucial cases could be lost, regardless of the wishes of Parliament – a risk described by the Equality and Diversity Forum as "significant".[5] In response, Liberty have called for these cases "to be protected by way of primary legislation."[13]

Future Role of the ECJ

In her Lancaster House speech at the start of 2017, the Prime Minister pronounced that the UK "will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice." [18] If this were to become a reality, then domestic courts would no longer be able to solicit an interpretation of EU law from the ECJ, nor obliged to abide by its rulings after exit day. Moreover, the Court would cease to be the court of appeal in cases (for instance, relating to employment or equality rights) where there is an alleged breach of EU law.

Another issue is the possible status of post-Brexit ECJ rulings on pre-Brexit EU law and the extent to which UK courts should pay heed. For consistency purposes, having the requisite awareness would appear to be logical. Indeed, British judges regularly refer to reasoning and judgements in cases from international courts (such as those in Australia, Canada, France, Germany and the United States), where the facts and legal principles are related – otherwise, the ECJ would be granted a lesser ranking than these courts, despite often interpreting the same laws as domestic courts.[19] Moreover, a parallel exists in section 2 of the Human Rights Act 1998, which includes the provision that courts 'must take into account' decisions made by the European Court of Human Rights (without them being necessarily binding) pertaining to a matter that has arisen in connection with the European Convention on Human Rights.[20]

Consequently, the Great Repeal Bill contains a clause, somewhat incongruous with the Government's stated objective, specifying that a UK judge 'may' have regard for anything done by this court post-Brexit if it considers it 'appropriate to do so'. Together with the Government now claiming that only the "direct jurisdiction" of the ECJ will be terminated and not necessarily during any transition period, one could be forgiven for concluding that Theresa May's red line has become significantly more blurred.[21]

Further, the nebulous language used in the Bill about the ECJ has drawn the ire of Lord Neuberger, the outgoing President of the Supreme Court. In an extraordinary intervention, he said: "If [the Government] doesn't express clearly what the judges should do about decisions of the ECJ after Brexit, or indeed

[16] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-303/06
[17] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61992CJ0127
[18] https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech
[19] Institute for Government (Raphael Hogarth), 'Brexit and the European Court of Justice', June 2017. https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf
[20] House of Commons Briefing Paper (Jack Simson Caird), 'Legislating for Brexit: the Great Repeal Bill', 2nd May 2017. http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf
[21] Charlie Cooper, 'UK government hints at ECJ climbdown', Politico, 22nd August 2017. http://www.politico.eu/article/uk-government-hints-at-ecj-climbdown/

any other topic after Brexit, then the judges will simply have to do their best. But to blame the judges for making the law when parliament has failed to do so would be unfair." [22]

Other legal commentators concur with Lord Neuberger's inference that the Government is passing the buck to the judiciary. As it stands, the danger is that individual judges would be left in a difficult position when attempting to take over the ECJ's role of interpreting EU-derived law. Moreover, given the necessity of justifying the use (or otherwise) of EU judgements in innumerable cases, their judicial burden would increase. And with resultant inconsistencies arising from different interpretations, there could be an augmentation in appeals, so slowing the legal process.[23]

Thus, Lord Neuberger's appeal for the Government to issue statutory guidance on post-Brexit ECJ rulings for judges to follow seems sensible. One option is to instruct courts that such judgements are persuasive. Indeed, decisions of foreign courts and the Judicial Committee of the Privy Council (final court of appeal for the UK Overseas Territories and Crown dependencies) are already afforded 'persuasive authority'. Hence, judges would have no new legal paradigms to interpret.[24]

There is also an apparent discrepancy between the UK and EU on 'pending cases', i.e. those before the ECJ prior to exit day, but unresolved by then. While Brussels expects these cases to continue and the domestic courts to be bound by the ultimate rulings, the UK has been more ambiguous, believing that this approach 'may well be right' in appropriate circumstances, but the 'detailed technical issues' would need to be agreed with the EU.[25]

Recommendations

To remedy these concerns, the Labour Campaign for Human Rights (LCHR) recommends that:

- The Government's 'Great Repeal Bill' should state that existing employment and equality protections will be maintained after exit day.
- The Repeal Bill should not exclude the EU Charter of Fundamental Rights from UK domestic law.
- The Bill should explicitly restrict the utilisation of Henry VIII powers to making only technical revisions to legislation, not significant changes. Moreover, a more robust process to eliminate the potential for misuse, such as that proposed by the House of Lords Constitution Committee, could also be implemented.
- EU case law, which has improved employment and equality rights, must be protected by primary legislation.
- Statutory guidance on post-Brexit ECJ rulings ought to be issued, together with greater clarity on pending cases.

[22] Clive Coleman, 'UK judges need clarity after Brexit - Lord Neuberger', BBC, 8th August 2017. http://www.bbc.co.uk/news/uk-40855526
[23] Anneli Howard, 'Status of EU law and ongoing role for the Court of Justice?', Monckton Chambers, 24th August 2017. https://www.monckton.com/status-and-ongoing-role-for-the-court-of-justice/
[24] Raphael Hogarth, 'How to answer Lord Neuberger's call for clarity on the ECJ', Institute for Government, 10th August 2017. https://www.instituteforgovernment.org.uk/brexit-ecj-european-court-justice-lord-neuberger
[25] HM Government Position Paper, 'Ongoing Union judicial and administrative proceedings', 13th July 2017. https://www.gov.uk/government/publications/ongoing-union-judicial-and-administrative-proceedings-position-paper