What Will Happen to Workers' Rights after Brexit?

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- The risks of Brexit to employment rights are real. Not to all rights, but to a substantial body of rights currently in force. The government's promise to protect these rights is hollow: it is binding on no one, and is undermined by the fact that CJEU jurisprudence will not be binding on British courts in their application of EU derived law, which will become ›British law‹.

- There is a real danger of divergence not only in the development of new standards but also in the application of existing standards. Unless a radically different free trade arrangement is negotiated between the EU and the UK, free trade will offer no solution if current best practice is any guide.

- The risks of Brexit depend to some extent on electoral outcomes, which are now very unpredictable.

1. Introduction

This paper addresses the question of employment rights in the United Kingdom after Brexit. British employment law is already in crisis with growing concerns about new forms of flexible working having the effect of denying workers entitlement to the most basic rights, such as the minimum wage and paid holidays. The legal status of workers in the so-called gig economy is the subject of intensive litigation, and has been the subject of a high profile government appointed review (Taylor, 2017), which in turn has been examined by an inquiry by two parliamentary committees (HC, 2017). It is widely agreed that there is a need for change, the only real dispute being about how much change.

In addition to this question of the denial of employment rights because of narrowly drawn legal definitions about who qualifies, there are continuing concerns about other features of flexible working, notably the growth in recent years of zero hours contracts, whereby people have no fixed working hours or only a small number of fixed working hours and are expected to work as and when required by their employer, often at short notice. So although there are high levels of employment in the United Kingdom, the Office for National Statistics data are said to show that 3.3 million people are underemployed and want to work more hours, with almost 900,000 people on zero-hour contracts (ibid).

As many British workers are already thus excluded from employment rights, questions now arise about the impact of Brexit on employment rights for those who do currently enjoy the privilege of legal protection. Although it is important not to exaggerate the impact of EU law on employment rights, it is nevertheless the case that as in other EU member states, a great deal of British law is infused by EU obligations. The pages that follow assess

- the government's promise that EU based rights will be preserved;
- the multiple risks to workers' rights that Brexit entails; and
- the compensating effect of free trade agreements post-Brexit.

2. Promise to Protect Workers' Rights

The British government has given undertakings on several occasions that EU sourced workers' rights will be protected after BREXIT. In the White Paper on Brexit published on 2 February 2017, it was said that

> *As we convert the body of EU law into our domestic legislation, we will ensure the continued protection of workers' rights. This will give certainty and continuity to employees and employers alike, creating stability in which the UK can grow and thrive (HM Government, 2017, para 7.1).*

In fact, the document is punctuated with commitments to the effect that ›we will protect and enhance existing workers rights‹, and that the government is committed to ›maintaining our status as a global leader on workers' rights and will make sure legal protection for workers keeps pace with the changing labour market‹ (ibid, para 7.6)

What rights are we referring to? There are effectively two categories of employment rights in the United Kingdom: (i) those which are largely unaffected by EU law, and (ii) those which were introduced as a result of EU membership or which have been heavily influenced by EU membership. The first category would include individual employment rights such as the national minimum wage (rebranded as the National Living Wage by George Osborne when Chancellor of the Exchequer and raised to £7.20 an hour); the law relating to the payment of and deductions from wages; and the law relating to redundancy compensation and unfair dismissal (to which EU has made only a limited contribution).

So far as collective labour law is concerned, this is largely a home grown effort, reflecting the organic nature of trade union and legal development. There is legal protection against discrimination for trade union membership and activities, and a statutory right of a trade union to ›trade union recognition‹, designed to stimulate enterprise based collective bargaining, where there is support from a majority of workers. There is no support for sector wide collective bargaining which has largely collapsed. Otherwise, there is a substantial body of uniquely restrictive British legislation dealing with trade union internal governance on the one hand and the right to strike on the other.

As for the rest, this is largely EU inspired at least to some degree if not entirely. So, the areas based on EU law would include the following

- Transparency of the employment relationship
- Working time and paid holidays
- Equal rights for fixed term, part time and agency workers
- Maternity, paternity and parental rights
- Health and safety
- Equal pay, equal opportunities and discrimination
- Redundancy consultation
- Transfer of undertakings
- Protection in the event of employer insolvency
- Information and consultation procedures and European Works Councils
- Data protection

In all of these cases legislation has been passed to give effect in domestic law to EU obligations, which in the field of employment law are typically underpinned by directives (though in some cases – such as equal pay – by the treaties). The significance of this is that the directives (and other EU law sources) provide minimum standards below which British law cannot fall. As is widely understood, where there is a failure by the government to comply with these obligations, the matter can ultimately be referred to the Court of Justice of the European Union (CJEU) for a ruling that will require standards to be raised.

Returning to the promise to protect and enhance workers' rights, this was repeated in the Conservative party election manifesto in 2017 (Conservative Party, 2017) – Although clearly enough expressed, it is nevertheless no more than a *political* promise that has no *legal* foundations, and is no *legal effects*. It binds no one, and certainly not future governments. Conceivably, the promise could form the basis of a non-regression clause in a future EU-UK trade deal, and this may well be what British trade unions will demand. But it is far from clear that the United Kingdom government could accept any such obligation.

3. Threats to Workers' Rights

It is not only an unsecured political promise that leaves employment rights vulnerable. So does the principle of parliamentary sovereignty, a legal principle of the British constitution which means that no Parliament can be bound by its predecessors (Bradley, Ewing and Knight, 2015). Once out of the EU, there is nothing that can be done constitutionally to cement employment rights, whether EU sourced or otherwise. This is not to say that there is likely to be a bonfire of employment rights in the immediate aftermath of Brexit. The danger is much insidious, the need now being to assess the risks to employment rights in 5, 10 or 15 years time.

3.1 Ossification of EU-based standards in UK

First and most obviously, Brexit will lead to an ossification of British law in the sense that any new developments that take place in the EU will obviously not apply in the United Kingdom (including those parts – Scotland and Northern Ireland – that voted Remain). It is true that European social policy has stalled since 2008, with reports of its death in the face of new liberal economic principles of governance; the global financial crisis and the currency crisis in the Eurozone; and free trade agreements (Ewing, 2015). Yet there are nevertheless suggestions that Lazarus – like, something is beginning to stir in the Brussels' sarcophagus (Bogg and Ewing, 2017).

Thus, there are now proposals (admittedly weak) for a new European Social Pillar, which will build upon existing social policy with a new framework of rights. There is a lot of reasons to be critical of this initiative, which seems designed mainly to address questions of so-called ›labour market‹ failures. Nevertheless, early iterations of the European Social Pillar documents make a number of commitments, including:

- Regardless of the type and duration of the employment relationship, workers are to have the right to fair and equal treatment regarding working conditions, with the transition towards open-ended forms of employment to be fostered;

- Employment relationships that lead to precarious working conditions are to be prevented, including by prohibiting abuse of atypical contracts, while any probation period should be of reasonable duration; and

- Workers are to have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including on the probation period (European Commission, 2016).

Whatever happens to this agenda, it will not apply in the United Kingdom, which is not to say that there will be no parallel British developments. As pointed out above, the government initiated a review of working practices in the ›gig economy‹ with a view to dealing with abuses. While this may overlap to some extent with the issues addressed by the European Social Pillar, the British focus seems to be much narrower: it is about giving greater clarity to legal definitions rather than eliminating discrimination to any significant extent, as the authors of the review appear to acknowledge (Taylor, 2017). The British solution to the problem of precariousness looks likely to be different – and less effective.

3.2 Loss of UK access to the Court of Justice of the European Union (CJEU)

Post – Brexit, the CJEU will have no jurisdiction to deal with complaints that EU derived employment rights are in breach of the EU legal instruments on which they are based. There will be no enforcement action by the European Commission, and no references by British courts for guidance on the meaning of EU obligations. This will be a significant loss not least because (i) Commission action against the United Kingdom, and (ii) CJEU references from British courts have helped not only to improve the way in which EU derived law applies in the United Kingdom, but also to enrich the quality of the rights derived from EU instruments.

There are thus a number of areas where CJEU intervention has helped to raise the standard of British law:

- On equal pay, it was the CJEU that established in the UK the principle of equal pay for work of equal value;

- It was the CJEU that held that there could be no discrimination in the application of employer travel benefits to partners in a same sex relationship;

- On holiday pay, it was the CJEU that:
  - established the universal right of all workers to holiday pay, removing the denial of holiday pay to workers employed on short term contracts;
  - addressed the problem of employers basing holiday pay entitlement on part rather than all of the worker's normal wages;
  - enabled workers in some cases (notably illness and maternity) to carry over holiday pay from one year to the next;
  - prevented employers from paying holiday pay on the ground that it was already rolled up in (inadequate) monthly or weekly wages;

- On redundancy consultation, it was the CJEU that swept away restrictions denying workers the right to be consulted; and

- On discrimination, it was the CJEU that swept away the arbitrary and artificial limit on damages that had been imposed in domestic law.

But apart from removing the opportunity to seek an ›uplift‹ on EU based rights, the EU Withdrawal Bill now before Parliament presents a number of other dangers, relating to the status of the jurisprudence of the CJEU. In the first place, although CJEU jurisprudence in place on Brexit-day will continue to be binding, it will now be treated as ›British law‹, which can be overruled by the UK Supreme Court. Secondly, the jurisprudence of the CJEU decided post-Brexit will not be binding on the British courts – even where it relates to EU based rights. So any future decisions expanding the frontiers of legal rights in place on Brexit day will not be applicable in the UK.

3.3 Erosion of EU-based standards in UK

The government's promises in the Brexit White Paper to protect and enhance employment rights is all the more surprising for the fact that it runs against the grain of policies pursued by Conservative led governments since 2010. It is true that the government promoted an increase in the national minimum wage, but the policy of government generally has been in the direction of deregulation. Under the Cameron-led Coalition between 2010 and 2015 redundancy consultation periods were reduced, the protection of agricultural wages was abolished, and prohibitive fees were introduced for workers wishing to bring claims in employment tribunals.[1]

EU membership imposed a brake on the deregulatory impulses of employers and government, After Brexit,

1. These were ruled unlawful by the UK Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51.

these brakes will be no longer be engaged and EU derived employment rights will be vulnerable to employer pressure for their amendment, dilution and erosion. As already suggested, a political promise made in a White Paper and a political party election manifesto in 2017 will have no bearing on a government elected in 2021 or thereafter. Parliamentary sovereignty means that there are no legal constraints on what Parliament can do. To that end, we can expect employers to begin lobbying to change those provisions of EU derived employment rights that they find most difficult and for legislation to reverse CJEU decisions they find most unpalatable.

There is thus a high risk in the UK of amendment to legislation if not repeal in response to pressure from business. For example:

- There is nothing to stop a UK government chipping away at EU derived employment rights, while retaining the basic structure. There are no legal limits to stop majority governments in the future from restoring the restrictions on holiday pay that were ruled unlawful by the CJEU.

- The government can keep the temporary agency workers' regulations which British business strongly opposed, but respond to business demands that they should be amended to provide even more flexibility. They can keep redundancy consultation, but limit still further the obligations on employers.

Similarly, it will be open to the United Kingdom at an early stage post-Brexit to restore a cap on compensation for unlawful discrimination.

4. Free Trade Agreements – Not a Solution

So what are the safeguards? It is impossible to predict what will happen on 29 March 2019 (Brexit day), or what kind of relationship the United Kingdom will have with the EU27 in the future. At this stage, however, it seems more likely than not that there will be a transition period of at least two years; more likely than not that the United Kingdom will not retain membership of the Single Market or the customs union; and more likely than not that the United Kingdom will be offered a free trade agreement with the EU similar to that negotiated recently between the EU and Canada.

The British government's plans for bilateral free trade agreements are global and do not apply only to the EU. As a first step in this process, a new Trade Bill has been published by the government, though it seems designed mainly to ensure the continuity of EU-third party free trade agreements in which the UK is currently engaged. The extent to which legislation will be necessary to negotiate and implement free trade agreements in the future is not yet clear. Treaty-making is an executive power under British constitutional arrangements (Bradley, Ewing, and Knight, 2017), though it seems likely that the controversial content of free trade agreements will require primary legislation before they can be implemented.

But while there are nice constitutional questions lining up to be considered, there is also the question about the extent to which free trade agreements can adequately protect workers' rights and replace what is about to be lost by Brexit. It is here that we encounter a toxic combination of wildly inflated expectations and profound ignorance about what bilateral trade agreements can achieve (JCHR, 2017). The stark reality of labour chapters in bilateral free trade agreements is that they are largely symbolic and have little regulatory effect, particularly on the labour law systems of developed countries. There is no free trade agreement as effective in advancing social rights as the Treaty on European Union.

In the first place, the standards of bilateral free trade agreements are set very low, requiring the parties to ›embody and provide protection‹ for the four core ILO principles: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) elimination of all forms of forced or compulsory labour; (c) effective abolition of child labour; and (d) elimination of discrimination in respect of employment and occupation. These are largely meaningless undertakings typically included in EU trade agreements with third countries. The reason why they are meaningless is that

- after the *Viking* and *Laval* cases,[2] the EU is itself in breach of ILO freedom of association principles, unable it seems to do anything about it unless the CJEU were to reverse its decisions (Ewing, nd);

2. Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2007] ECR I-10779, and Case C-341/05, *Laval v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767. In these decisions, the Court infamously subordinated the fundamental rights of workers to the fundamental freedoms of employers (Ewing, nd).

- several member states are in breach of the same principles (which the Commission is undermining still further by its economic governance agenda being driven through TFEU, chapter VIII) (Ewing, 2015); and

- several if not most if not all the countries with which these agreements are made – notably Korea (and even Canada) – are in breach, with little indication of any real expectation of improvement.

Apart from a commitment to the ILO core principle, more recent free trade agreements include additional commitments, with the EU – Canada agreement requiring the parties to ensure that their labour law and practices ›promote‹ objectives included in the ILO Decent Work Agenda, notably:

> *health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and; and (c) non-discrimination in respect of working conditions, including for migrant workers.*

Note: the duty is (i) to ›promote‹, (ii) ›acceptable‹ ›minimum‹ standards. It is not a ›guarantee‹ of ›defined‹ ›rights‹ even on the limited range of matters addressed.

These provisions are a poor substitute for range of rights currently guaranteed by EU social policy, with a range of effective remedies under EU law to ensure that States and employers comply. Quite apart from the foregoing multiple shortcomings, the other weakness of free trade agreements is the absence of any effective method of enforcement, other than the matter being raised by one State against the other. But if everyone is in breach, where is the incentive in raising the matter save in extreme circumstances, if it is simply to lead to retaliatory complaints by the State against which the initial complaint was lodged? There is no court to supervise or enforce these undertakings.

5. Conclusion

The risks of Brexit to employment rights are real. Not to all rights, but to a substantial body of rights currently in force. The government's promise to protect these rights is hollow: it is binding on no one, and is undermined by the fact that CJEU jurisprudence will not be binding on British courts in their application of EU derived law, which will become ›British law‹. There is a real danger of divergence not only in the development of new standards but also in the application of existing standards. Unless a radically different free trade arrangement is negotiated between the EU and the UK, free trade will offer no solution if current best practice is any guide.

That said, the risks depend to some extent on electoral outcomes, which are now very unpredictable. It is true that Mrs May lost her majority at the general election in June 2017, but she did so while winning the biggest percentage of votes for the Conservative party since 1983. It is also true, however, that the Labour party was greatly emboldened by the general election and its leadership strengthened. Labour fought the election on a progressive manifesto which included radical plans for labour law (Labour Party, 2017). Under a Labour government in the future there would be no threat to EU derived employment rights but a strengthening of workers' rights generally.

At the heart of Labour's programme is the restoration of sector wide collective bargaining, in order to increase the level of coverage of collective agreements, and to increase pay and improve the conditions of employment generally. This would represent a major re-focusing of labour law, with legislation being a fall back rather than the principal source of regulation as it is now. Ironically, it would also represent a major break with the current direction of EU policy being driven through the TFEU, Title VIII, which has seen Commission pressure directed at member states to deregulate employment standards and decentralize collective bargaining arrangements (Ewing, 2015).

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Annex

Conservative Party Manifesto (2017)

We will not only guarantee but enhance workers' rights and protections… Under the strong and stable leadership of Theresa May, there will be no ideological crusades (p 7).

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In the modern economy many people choose jobs like driving, delivering and coding, that are highly flexible and can be mixed with other employment. This brings considerable advantages to millions of people but we should not ignore the challenges this kind of employment creates. These workers are officially classed as self-employed and therefore have fewer pension entitlements, reduced access to benefits, and no qualification for sick pay and holiday pay. Yet the nature of their work is different from the traditional self- employed worker who might be a sole trader, a freelancer or running their own business.

We will make sure that people working in the ›gig‹ economy are properly protected. Last October, the government commissioned Matthew Taylor, the chief executive of the Royal Society of Arts, to review the changing labour market. We await his final report but a new Conservative government will act to ensure that the interests of employees on traditional contracts, the self- employed and those people working in the ›gig‹ economy are all properly protected (p 16).

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Workers' rights conferred on British citizens from our membership of the EU will remain… This approach means that the rights of workers and protections given to consumers and the environment by EU law will continue to be available in UK law at the point at which we leave the EU (p 36).

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