

The Civil Society Brexit Project: *Information*

EMPLOYMENT RIGHTS AFTER UK WITHDRAWAL FROM THE EU

The Civil Society Brexit Project is a collaboration between the Scottish Universities Legal Network on Europe (SULNE) and the Human Rights Consortium Scotland, funded by the Legal Education Foundation.

www.civilsocietybrexit.scot

civilsocietybrexitscot@gmail.com

What areas of rights does this briefing cover?

This briefing covers employment rights derived from EU law. There is some overlap with equality rights which apply to employment and these are covered in a separate briefing available at <https://www.civilsocietybrexit.scot/>

Which legal rights that particularly affect employment protection in Scotland are currently reserved to the UK Parliament and which parts are devolved to the Scottish Parliament?

Employment is a reserved area which means that employment rights are decided at Westminster. In addition, the EU had some competence to legislate on employment rights which it used to adopt a broad range of individual rights, collective rights, and health and safety rights. These EU-derived rights were introduced into English and Scots law by the UK Parliament, either through primary legislation

(e.g. the Equality Act 2010) or secondary legislation (e.g. the Working Time Regulations 1998).

Individual rights introduced by the EU include:

- Rights to equal treatment on the grounds of age; disability; gender reassignment; marriage or civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation and the right to equal pay on the ground of sex. These rights are covered in detail in a separate briefing on Equality Rights.
- Rights for part-time workers to pro rata treatment with their full-time counterparts.
- Limits on the scope of fixed term contracts which make it more difficult for employers not to offer permanent contracts where appropriate.
- Rights relating to working time, including maximum working hours, rest periods, paid holidays and working patterns.
- Rights providing temporary agency workers with the same terms and conditions that would have

EMPLOYMENT RIGHTS AFTER UK WITHDRAWAL FROM THE EU

applied if they were recruited directly.

- The right for employees to receive written confirmation of the terms and conditions of their employment contract.
- The protection of pregnant women at work, including rights to paid maternity leave, breastfeeding, risk assessments, time off for ante natal care and the right not to be dismissed or discriminated against on the grounds of pregnancy or maternity.
- The right to unpaid parental leave following birth or adoption and the right to time off for family emergencies.

Collective rights introduced by the EU include:

- The right to protection against dismissal when a business is bought or sold (a so-called transfer of undertaking) and the right to information and consultation before a sale takes place.
- Protection for workers in the event of ‘collective redundancies’ (i.e. where 20 or more people are to be dismissed as redundant within a certain period) by requiring consultations with employee representatives
- Rights for employees to be informed and consulted about proposed changes to their workplaces in certain circumstances.

Health and safety protection introduced by the EU provides guaranteed minimum requirements covering:

- Specific tasks (e.g. manual handling of loads)
- Specific hazards at work (e.g. exposure to dangerous substances or physical agents)
- Specific workplaces and sectors (e.g. temporary work sites, extractive industries, fishing vessels)
- Specific groups of workers (e.g. pregnant women, young workers, workers with a fixed duration employment contract)
- Certain work-related aspects (e.g. organisation of working time)

Following Brexit, the power to legislate on employment rights returned to the UK Parliament.

What has changed/is new as a result of Brexit?

Very little has changed so far. The status quo for employment rights was maintained during the transition period which ran from exit day on 31 January 2020 until 31 December 2020. The UK had to continue to conform with all EU-derived rights during that period. Existing EU-derived employment rights (at the point of the end of the transition period) have since been preserved by the EU Withdrawal Act 2018 as ‘retained EU law’. This means that those rights (e.g. the Working Time Regulations 1998) will continue to have effect regardless of Brexit. **From now on though, the UK Parliament has the power to amend or repeal EU-derived employment rights.**

What remains unclear or unknown?

- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU Withdrawal Act 2018 to **amend or repeal ‘retained EU law’ protecting employment rights.** Retained EU law can be amended by virtue of s 8 of the EU Withdrawal Act 2018 to correct deficiencies which arise as a result of Brexit. Any amendments would have to go through an enhanced scrutiny procedure. This means that amendments would have to be actively approved by both Houses of Parliament, although the extent to which there is time during parliamentary proceedings for meaningful scrutiny is questionable. The power to make amendments using the powers in the EU Withdrawal Act 2018 is time-limited to two years from 31 December 2020.
- We also do not yet know **how the UK courts will interpret** employment rights which are now retained EU law.
- We do not know how the rights outlined above will be affected by either new EU legislation and policy or by case law developed by the EU Court of Justice in the future, i.e. **the rights protections there might have been if the UK had remained in the EU.**

- **We do not know what effect the Trade and Co-operation Agreement (TCA) signed between the UK and the EU will have on employment rights in the UK.** The TCA contains a number of level-playing field provisions which in principle could restrict the UK's ability to weaken EU-derived employment rights. The TCA prohibits regression on existing employment laws in a manner that would affect trade and investment. This covers the following areas:

- o (a) fundamental rights at work;
- o (b) occupational health and safety standards;
- o (c) fair working conditions and employment standards;
- o (d) information and consultation rights at company level; and
- o (e) restructuring of undertakings.

Enforcement would take place through a general dispute mechanism which involves first the UK-EU Partnership Council (a political body) and then arbitration.

In addition, there is scope within the TCA – in the case of significant future divergence in areas of employment law which has a material effect on trade and investment – for either side (UK or EU) to invoke so-called **rebalancing measures**. This means that, in the absence of agreement between the parties, the matter will be referred to a dispute resolution process which involves a panel of experts. There is also scope to impose tariffs, and to review and potentially suspend trade-related parts of the TCA, although measures must be restricted in scope and proportionate to remedy the situation.

There is little precedent on when and how rebalancing measures may be appropriate and how they might apply in the case of employment law/labour standard divergence. **This means it is difficult to anticipate which situations may trigger the rebalancing measures but it is clear that any attempt by the UK to substantially weaken employment rights may have serious consequences for trade between the UK and the EU.**

What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?

Employment is a reserved area and so the Scottish Parliament cannot take any direct action to protect the rights outlined under the current devolution settlement.

What are future concerns?

- **A key concern is regression compared with current protections.** In January 2021, a fortnight after the end of the post-Brexit transition period, the Financial Times reported that the government was proposing a review of employment rights. The post-Brexit plans for review were initially dismissed by Ministers, just to be confirmed by the Business Secretary, and then formally scrapped on 28 January 2021. While a wholesale repeal of legislation, such as the Working Time Regulations 1998, seems highly unlikely for now, that is not to say that EU-derived employment laws will not be amended in future.

In particular, there is a danger that rights and protections could be rolled back over time. This is a matter of specific concern because many of the relevant employment rights outlined above are currently provided for in Regulations rather than in Acts of Parliament, leaving them particularly vulnerable to repeal or amendment with limited parliamentary scrutiny. This includes the working time rights and those applicable to part-time, temporary and agency workers and transfers of undertakings as well as some maternity and parental rights and health and safety provisions.

- **A parallel concern is that the UK might not follow rights developments at the EU level:** this relates to both legislative developments and associated policy as well as developments in the case law of the Court of Justice of the EU which has been of great importance in interpreting and extending

employment rights, particularly those relating to discrimination and equality (see the separate briefing on Equality Rights). Three Directives of note are currently under discussion for adoption at EU level. These are a Directive on Work-life Balance; a Directive on predictable and transparent working conditions; and a Directive on minimum pay. While the UK could adopt these Directives or aspects of the Directives which are more progressive than the current law, it is not obliged to do so. As employment is a reserved matter, there is little that Scotland could do to 'keep pace' with these developments unilaterally.

Rebecca Zahn
University of Strathclyde
July 2021



WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at civilsocietybrexitscot@gmail.com

There is also information available online at www.civilsocietybrexit.scot