

Employment Law and Brexit in Scotland

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Introduction

In the run-up to the ‘Brexit’ referendum, workers’ rights were invoked repeatedly by both sides of the campaign as either a reason to back or oppose a British exit from the EU. Following the referendum, the debate over workers’ rights and their continuing protection once the UK leaves the EU, has been reignited. The Scottish Government has expressed particular concern about Brexit’s potential impact on social rights, including the rights of workers, and is considering how Scotland can maintain protection of EU-derived rights in this area once the UK leaves the EU. What then is Brexit’s potential impact on employment law in Scotland?

The Devolution Settlement

Employment and industrial relations, health and safety, and most aspects of equal opportunities are reserved matters under Schedule 5 Part 2, Head H of the Scotland Act 1998. Although the Scotland Act 2016 gave the Scottish Parliament greater powers in the field of equal opportunities and devolved employment tribunals, the key European rights are implemented almost exclusively through UK legal sources. While there are some minor differences between the employment laws applicable in Scotland and England – including common law rules on the formation of contract, the treatment of third party rights and rules on prescription/limitation – these do not touch upon areas impacted by EU-derived employment laws.

EU-derived Employment Laws

EU-derived employment laws have bestowed a number of individual – including substantial equality and health and safety rights – and collective employment rights on workers in the UK and have led to the establishment of a floor of social rights which limit the UK Government’s legislative capabilities. In addition, EU law provides guarantees for the protection and enforcement of employment rights, and the Court of Justice of the European Union (CJEU) has used the general principles of EU law to progressively widen the scope of protections and rights granted to workers under EU law.

Brexit’s Potential Impact

The impact of Brexit on employment law is, for obvious reasons, difficult to predict. Much depends on the future relationship between the EU and the UK. Potential options that have been discussed include participation in the European Economic Area (EEA) and/or the

European Free Trade Association (EFTA); a series of bilateral deals with the EU; or a ‘hard’ Brexit whereby the UK exits both the single market and the customs union. Should the UK negotiate membership of the EEA, then most EU laws on workers’ rights would continue to apply and future EU laws in this area would need to be implemented by the UK government, and would therefore apply in Scotland. The case law of both the EFTA Court and the CJEU would be of relevance. The ‘bilateral’ option could take one of a number of different forms. Closest to the status quo would be a ‘Swiss’ style agreement under which it is likely that the UK will continue to have to abide by EU employment laws so as to prevent distortions of competition. However, in both scenarios, the UK would be subject to EU law from a position of non-membership which does not bring with it the ability to shape those same laws in a cooperative way with the UK’s nearest neighbours, nor to access the remedies and state accountability checks that the EU offers to individuals and businesses such as access to the Court of Justice.

In addition, there is the option of a deep and comprehensive trade deal via, for example, an association agreement or a free trade agreement. If existing EU trade agreements (such as with Canada or Korea) are to serve as a template for a future EU-UK post-Brexit relationship then it is probable that a labour clause may be inserted which would include a commitment to the non-lowering of domestic labour protection for the purpose of attracting investment or increasing trade. However, the EU has taken a soft law approach to enforcement of such labour clauses and labour violations are excluded from the general dispute settlement procedures of the agreements. A future trade deal, if at all sophisticated, may well also include (separate) provisions on investment, trade in services and public procurement which could constrain the ability of the UK government to support higher labour standards.

In the event of a ‘hard’ Brexit, ie an exit from both the single market and the customs union, and in the absence of an obligation to abide by any EU rules under a trade agreement, the UK government could seek competitive advantages by implementing labour standards that are less onerous for employers than those required of their counterparts in the European Union.

The European Union (Withdrawal) Bill

Brexit will have consequences for the majority of EU employment laws which have been implemented into UK law by virtue of secondary legislation made under the framework of the European Communities Act 1972. An example can be found in the Agency Worker Regulations SI 2010/93. The Government, on 13 July 2017, therefore published the European Union (Withdrawal) Bill (EUW Bill) which repeals the European Communities Act 1972 (ECA) with effect on ‘exit day’ (clause 1), ends the (future) supremacy of EU law in UK law, and converts EU law as it stands at the moment of exit into domestic law. The main provisions of the EUW Bill provide for the creation of a new distinct body of law (‘retained EU law’); the creation of broadly-framed delegated powers for Government to amend this body of law; new instructions to the courts on how to interpret retained EU law; and

amendments to the legislation that underpin devolution. At the time of writing (October 2017), the Bill raises two particular concerns for EU-derived employment laws.

First, the EUW Bill raises concerns over the future interpretation of EU-derived employment laws by UK courts and does not clarify how UK courts are to approach cases which deal with EU-derived employment laws that are pending on 'Brexit day'. Clause 5(2) retains the principle of supremacy of EU law but only as it applies to the interpretation of retained EU law. A post-Brexit Act of Parliament which conflicts with or overturns EU-derived employment laws would therefore take precedence. It is also not clear which would prevail in the event of a clash between the common law and retained EU law post-Brexit. Clause 4 of the Bill includes any remaining 'rights, powers, liabilities, obligations, restrictions, remedies and procedures' as part of 'retained EU law' which are available in domestic law through section 2(1) of the ECA prior to 'exit day'. This will include rights under EU treaties and directly effective provisions of directives. This presumably means that directives that have not been properly implemented pre-Brexit could be relied upon directly post-Brexit, presuming that direct effect had been established by exit day. In addition, clause 6(3) provides that all relevant case law of the CJEU decided before Brexit day, including general principles of EU law, should be used by British courts to determine the 'validity, meaning and effect' of retained EU law. An example of where the CJEU relied on a general principle in order to grant rights to workers (in relation to age discrimination) can be found in Case C-144/04 *Mangold v Helm* [2005] ECR I-09981. However, clause 6(1) clarifies that British courts will not be bound by post-Brexit CJEU judgments and Schedule 1 of the Bill states that there is no right of action based on a breach of the general principles. It is not clear therefore whether direct effect will continue post-Brexit in relation to retained EU law and what status is to be given to general principles. Any unilateral interpretation by UK courts of EU-derived employment laws post-Brexit in line with future jurisprudence of the CJEU (which is permissible under clause 6(2)) could also be overturned by an Act of Parliament.

Second, the so-called Henry VIII clauses contained in clauses 7-9 of the EUW Bill raise particular concerns. Henry VIII clauses have been extensively used in the past in relation to social legislation and it would not be surprising to see government take avail of these powers in relation to some EU-derived employment laws which have proved to be controversial. These include laws on information and consultation on collective redundancies; rules on working time; some of the EU-derived health and safety regulations; parts of the regulations which protect workers in the event of a transfer of undertaking; legislation protecting agency workers; and, some elements of discrimination law to which businesses object most strongly such as liability for equal pay. Particularly the working time rules and the agency workers' regulations have been criticised by successive UK Governments and some form of amendment or repeal without adequate parliamentary scrutiny or oversight is possible especially if the extremely broad wording of clauses 7-9 is maintained.

Conclusioin

In the context of the current devolution settlement there is little scope for Scotland to unilaterally preserve EU-derived employment laws in the face of Westminster opposition. Although there is some overlap with areas that are devolved, such as health, private international law or public procurement, any attempts to affect employment law through such related areas would require a high degree of legislative creativity. However, with the pending devolution of the management and operation of employment tribunals to the Scottish Parliament coupled with the concerns outlined above, it seems at least likely that the Scottish Government will seek greater powers over substantive employment and equality rights and duties in a post-Brexit UK, for example in the field of health and safety where the reserved nature of the matter has long been contentious and where practical enforcement already takes place through the Scottish criminal justice system. Calls for the devolution settlement to be re-visited in the field of employment law may well therefore resurface.