



UCL INSIGHTS: RESEARCH BRIEFING

Brexit and Labour Rights: Challenges and Perspectives

Workshop Report

The process of withdrawing from the EU poses a number of formidable challenges for UK employment legislation. A large number of UK workers' rights hinge on the substantial body of EU primary and secondary instruments, and have been bolstered by the interpretative activity of the Court of Justice of the European Union (CJEU). Severing our ties with the EU could therefore potentially cause serious disruption to British workers' rights.

On 28 February 2017, a panel of distinguished speakers convened at University College London, under the aegis of the **UCL Labour Rights Institute**¹, and explored what Brexit could mean for labour rights, including:

- How are the rights of workers in the UK likely to be affected by the UK's withdrawal from the EU?
- How are the labour rights of British citizens working, on a temporary or permanent basis, in other EU countries likely to be shaped by Brexit?
- Finally how are EU labour rights likely to develop once the UK is no longer a Member State of the Union?

Summary of key points

The relationship between labour rights in the UK and EU law: Many employment rights are derived through EU law (such as maternity pay, health and safety laws, and rights for workers in non-standard forms of work, such as part-time, fixed-term and agency work). The UK Government has suggested that it wishes to guarantee labour rights for workers in the UK but it is not yet known how this will be achieved in practice.

Potentially vulnerable labour rights include: **TUPE rights for employees** when their organisation is transferred to another employer (from the Acquired Rights Directive); **Working Time Regulations** protecting working hours (from the Working Time Directive); and **equal-treatment rights for agency workers**.

Key areas of uncertainty around the impact of Brexit on labour rights include:

- Whether rights guaranteed by EU Regulations and

Directives will remain in force in the UK after withdrawal from the EU is completed, or whether future Parliaments (or even Governments) will be able to amend them at will;

- A lack of clarity as to **the importance of Court of Justice of the European Union precedents** post-Brexit, and whether they will continue to have binding effect²
- **Whether the UK legal system will be completely isolated from the interpretative activities of the CJEU**, particularly considering the latter's role as the main engine for developing, in a worker protective sense, most of the labour and equality rights contained in EU legislation.
- The extent to which any agreement on the future relationship between the UK and the EU, may be able to retain a certain degree of connection between UK and (existing and developing) EU labour rights.

Equality and discrimination rights: whilst the Equality Act 2010 protects rights in domestic legislation, it is sustained by and expanded upon by CJEU jurisprudence and **may be vulnerable once the rights derived from the CJEU's *acquis* no longer apply**. A principle of 'non-regression' should be upheld for equality legislation derived from EU law. There are also concerns **about future divergence between domestic and EU law**; any new rights established by the CJEU may not apply to the UK, and UK regulation and legislation will be less able to respond to discrimination issues or the enhancement of rights (such as rules on access to goods and services for the disabled, for example) in line with EU developments.

Trade agreements and labour rights: Trade negotiations have significant implications for labour rights and for overall employment in the UK. **Securing substantive labour rights in future trade agreements could be very complex**. Existing 'labour clauses' in free trade agreements are likely to offer little in the way of protection – for example the EU-Canada FTA only contains an obligation to uphold "acceptable minimum employment

¹ The views expressed in this report are the speakers' own and not that of UCL.

² For example, s 18 of the EqA 2010 prohibits pregnancy discrimination, but you need to know EU jurisprudence to understand the full reach of this right, as the CJEU's decisions provide more robust protections than the rest of the world. Another example is the current prohibition of caps on discrimination awards, that is primarily reliant on the ruling of the CJEU in Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority*

standards”, with no enforcement mechanism for this obligation. Trade regulations (and compliance with them) will also affect the UK’s ability to trade with the EU.

Overview of the Panel Discussions

Professor Nicola Countouris Professor of Labour Law and European Law, UCL

This event explores some of the challenges (and potential opportunities) that may arise from Brexit, particularly: free movement; labour rights for UK and EU workers; and some idea of what these rights will look like after the Brexit process. If hindsight is 20/20, foresight is short-sighted, as we know little about the negotiating objectives of the EU and the UK. Negotiations will be complex and unpredictable, with practical concerns and ideological pressures playing a large role in them (e.g. with issues such as citizenship rights and free movement). The Government’s White Paper on Brexit suggests that it wishes to guarantee labour rights for workers in the UK: and though it may make ‘business sense’ to retain the status quo for now, so as to avoid a deregulatory cliff-edge for companies and employers, rights such as TUPE, agency workers’ rights, and working time could be hostage to fortune when EU law no longer applies, their fate determined by ideological and practical concerns.

Stephen Timms MP Labour MP, Member of the Select Committee on Exiting the European Union

While there may have been honourable reasons to vote to leave the EU, the economic cost of leaving is high. The UK government wants free trade but no free movement, and it is unlikely they will be able to ‘cherry pick’ the elements of membership that they like. The economic damage caused by WTO trade rules would be huge, with one estimate suggesting that they could cost 70,000 jobs in financial services alone; not to mention the knock-on effect of those job losses.

Many employment rights are derived through EU law. The proposed ‘Great Repeal Bill’ (GRB) will translate this corpus into secondary legislation, and though the Prime Minister has promised that these rights will be guaranteed, there are suggestions that to leave these rights untouched would be “intellectually unsustainable” (Liam Fox). Moreover, CJEU rulings will no longer apply to the UK, and if it delivers new rights, the UK will not benefit from them.

Hannah Reed Senior Employment Rights Office, TUC

The government’s white paper raises more questions than it answers. The TUC was pro-remain, but will accept the result and campaign to ensure working people do not pay the price for a leave vote. Britain cannot become the cheap labour capital of Europe, and the TUC’s main campaign is

to maintain the rights derived from EU law in their entirety for the millions of people they help. Though the rights will be part of English law in the short-term, the business lobby are producing lists of rights they wish to reform, and a future Prime Minister could easily begin a process of deregulation. The EU sets a common floor of labour rights to prevent competition based on lowering standards, and we should seek a guarantee of that this floor will not be affected in the UK. Furthermore, leaving the CJEU will allow the UK to deviate from CJEU decisions: and the rights derived from the CJEU’s *acquis* could be at risk.

The TUC wants three things: firstly, assurances that future trade agreements will contain a commitment to conform to EU labour rights, existing and future; secondly, that any labour provisions in trade agreements should be enforceable and overseen by a judicial body; and finally that during any transitional period, the government should conform to EU law and make references to the CJEU. However while labour rights are a key section of negotiations, there are other concerns: the need to protect EU-linked jobs in the UK; the protection of public services; guaranteeing rights for EU nationals in the UK and vice versa; and proper and full consultations with devolved governments. In the long term, it will be vital to anchor *inter alia* labour rights in trade agreements, and have measures to ensure ongoing free trade.

Esther Lynch Confederal Secretary, ETUC

It’s important to remember that we’re talking about real people when talking about law in abstract. Once the UK leaves the EU, there are questions about what rules will continue to operate. The debate also needs to recognise that trade regulations (and our compliance with them) affect our ability to trade with the EU. After Brexit, it is unclear who will mediate problems with these rules. Right now, it is the CJEU; and if we continue to use the CJEU post-Brexit, the reasons to leave become less and less. Unions need to work out what standards will exist to protect jobs, and acknowledge that EU workers’ interests are intimately linked to those of UK workers in that respect. Furthermore, you cannot talk about collective agreements without talking about free trade. In the UK, we lack sectoral collective agreements, with no idea of the ‘going rate’ for work. Comparatively, in Sweden and Ireland, where the sectoral ‘going rate’ is set in law, undercutting produced by free movement is much less of a concern.

Professor Colm O’Cinneide Professor of Constitutional and Human Rights Law, UCL

There are short-term and long-term effects for EU equality and anti-discrimination law rights. While in the short-term, the damage may not be as significant as the Equality Act 2010 guarantees these rights in primary legislation there are three areas of vulnerability: whether rights guaranteed via EU Regulations will remain in force in the UK; a lack of clarity as to the importance of CJEU decisions post-Brexit and whether they will continue to have binding effect;

and whether the CJEU will be eliminated as a long-stop protection for these rights. In the long term, there is the phenomenon that equality and anti-discrimination rights enjoy a sort of 'third rail' status in the UK. However, Brexit will cut the UK off from any further developments in the EU (such as rules on access to goods and services for the disabled, for example). Perhaps more significantly, in the event that patterns of discrimination shift and change post-Brexit, will a regulatory scheme that is cut off from EU developments be able to cope as well with these changes?

Professor Mark Freedland
Emeritus Professor of Employment Law,
University of Oxford

There is a concern that UK anti-discrimination rights could be eroded, so there is a need for a safeguard to protect those rights, with particular attention being paid to ensure the Equality Act 2010 remains embedded in UK primary legislation. The GRB could threaten this. This Bill aims to 'de-Europeanise' English law through a raft of secondary legislation, and this could threaten the Equality Act 2010 because the latter is sustained by and expanded upon by CJEU jurisprudence. We must therefore recognise a principle of non-regression for equality legislation vis-à-vis EU law. Other potentially-vulnerable rights, post-Brexit, are: TUPE rights (from the ARD); Working Time Regulations (from the Working Time Directive) given how useful they are for national minimum wage rights and on-demand work; and the parity rights for part-time work, fixed-term work etc.

Furthermore, 'de-Europeanisation' is likely to be closely tied up with an underlying drive towards deregulation. Even if the Prime Minister has given an undertaking to protect existing rights, that undertaking may involve an assertion that what the Government has been doing in recent years (for example, in the field of Modern Slavery rights) provides equivalent rights to EU law. Therefore, the promise to protect existing rights could prove to be hollow, because the government may assert that EU-derived rights are adequately protected by pre-existing domestic rights. Much will turn on how the pre-existing level of rights is defined; and particularly what constitutes a 'right'.

Finally, both the Government and opposition have failed to recognise the continuing case for remaining, even though the truly disastrous consequences of leaving become more obvious as the negotiations go on. It is still hoped that the damage to jobs and livelihoods, and the consequential

damage to labour rights done by an adverse labour market, could form part of the case for reconsidering Brexit.

Professor Keith Ewing
Professor of Public Law, KCL

Brexit will be a disaster for labour rights; especially when we appreciate how many of these rights are derived from EU directives. Much of the impact upon labour rights will depend on the nature of the Brexit we have; but given the myopia over sovereignty and the CJEU's influence, these red lines might only be satisfied by a 'hard' Brexit. If we do have a 'hard' Brexit, the Great Repeal Bill will, at best, freeze all the rights we have, and a gulf will start to open up between domestic and EU law². Moreover, the lack of access to the CJEU will have an adverse effect on rights; great progress has been made for workers' rights through CJEU decisions, and we will now lose this.

The promise that 'existing rights will be protected' is not particularly valuable. Post-Brexit, employers' groups will revisit old battles and start to chip away at these existing labour rights³. And what can replace what we're losing? The ECHR also looks to be on the chopping block in the legal cleansing of the remnants of European law from domestic law. Moreover, labour clauses in free trade agreements (FTAs) will also offer little in the way of protection: even the EU-Canada FTA only contains an obligation to uphold "acceptable minimum employment standards", with no enforcement mechanism for this obligation. FTA labour clauses are meaningless platitudes enforceable in practice by no one. Brexit is therefore a likely disaster for labour rights and working people.

² This is especially the case as there is talk in the EU of expanding the Social Pillar through greater transparency, unfair dismissal protections, etc.

³ See the **Beecroft Report** to see the sort of deregulation employers sought, but were blocked from pursuing because of EU law obligations.

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