

## **1. Introduction**

In its White Paper on the Future Relationship between the United Kingdom and the EU, the government proposed to make two commitments in the draft withdrawal agreement in relation to labour standards:

- ‘...that the UK and EU commit to the non-regression of labour standards’; and
- ‘The UK and EU should commit to uphold their obligations deriving from their International Labour Organisation commitments’.

Labour has its well-known six tests for the acceptability of the draft withdrawal agreement, the fourth of which is:

- ‘Does it defend rights and protections and prevent a race to the bottom?’

The labour standards provisions of the draft withdrawal agreement set out the commitments between the United Kingdom and the EU so far as labour standards after the end of the transition period are concerned.

Do they achieve what the government proposed in its White Paper, and do they meet the fourth of Labour’s tests?

## **2. Labour standards in the draft withdrawal agreement**

In relation to non-regression of standards, the draft withdrawal agreement provides:

1. *With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure **that the level of protection provided for by law, regulations and practices is not reduced below the level provided for by the common standards applicable within the Union and the United Kingdom at the end of the transition period** in the area of labour and social protection and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and company restructuring’. (Article 4 of Annex 4).*

In relation to ‘multilateral labour and social standards and agreements’, the draft withdrawal agreement provides:

1. *Taking into account the importance of international cooperation and agreements on labour affairs and of high levels of labour and social protection coupled with their effective protection, the Union and the United Kingdom shall protect and*

*promote social dialogue on labour matters among workers and employers, and their respective organisations and governments.*

2. *The Union and the United Kingdom **reaffirm their commitment to implement effectively in their laws, regulations and practices the International Labour Organisation Conventions, and the provisions of the Council of Europe European Social Charter, as ratified and accepted by the United Kingdom and the Member States of the Union respectively.***

.....'. (Article 5 of Annex 4).

Article 6 of Annex 4 also provides that '*.....the United Kingdom shall ensure effective enforcement of [the non-regression of labour standards] and of its laws, regulations and practices reflecting those common standards in.....*'.

The application of these provisions will also be governed by the general provisions of the draft withdrawal agreement, which include that:

1. *Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement **which meet the conditions for direct effect under Union law.***
2. *The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation'. (Article 4).*

This is important because commitments contained in the withdrawal agreement can only be enforced effectively by individuals and trade unions where they can be relied on directly.

### **3. Non-regression of labour standards (Article 4 of Annex 4)**

'Non-regression' clauses are reasonably common in EU employment law. A typical example is contained in the social partner agreement annexed to the Directive on Fixed-Term work: 'Implementation of this Agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the Agreement'.

'Non-regression' clauses of this type have not provided substantial protection for five reasons, as pointed out by a prominent commentator<sup>1</sup>:

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<sup>1</sup> See 'Non-regression clauses: the fig leaf has fallen', Steve Peers 2010 ILJ 436.

- (a) **Scope:** the Court of Justice of the European Union has found that the non-regression clause in the Fixed Term Work Directive applied to reduction in standards relating to Fixed-Term work which were not central to the Directive. However, it has also ruled that the ‘non-regression’ clause in the equality Directive could not be relied on to argue that the time limit in an age discrimination claim breached the ‘non-regression’ clause because of a previous longer time limit for a sex discrimination claim;
- (b) **‘Implementation of this agreement shall not....’:** the CJEU has confirmed that there is no breach of such a ‘non-regression’ clause where the reduction in standards is not in any way connected with the implementation of the Directive. In other words, a subsequent policy decision to reduce standards would be likely to dis-apply such a ‘non-regression’ clause;
- (c) **‘Reduction in the general level of protection’:** the CJEU has held that ‘only a reduction on a scale likely to have effect overall on national legislation.....’ will be sufficient to trigger such a non-regression clause. Such a non-regression clause would also not apply where the reduction only applied to a limited category of persons;
- (d) **Indirect effect only:** ‘non-regression’ clauses are capable of having indirect effect. This means that the UK law in question must be interpreted in light of the Directive so far as possible provided that does not contradict the UK legislation. National courts do not have to dis-apply **domestic** legislation that infringes ‘non-regression’ clauses;
- (e) **Purpose:** it has been argued that the purpose of ‘non-regression’ clauses is not to prevent reduction in standards of protection, but is instead to provide transparency as to the reasons for any reduction – ie whether the reason for any reduction is on account of implementation of an EU obligation, or for the purpose of implementing domestic policy.

Similar principles are likely to be applied to Article 4 of Annex 4. The purpose of the non-regression clause is expressly ‘....ensuring the proper functioning of the single customs territory..’. There is every chance that only a demonstrable reduction in the general level of overall worker protection would be sufficient to invoke Article 4 of Annex 4. Furthermore, Article 4 of Annex 4 would be unlikely to be found to be capable of being relied on directly by individuals and trade unions, which would mean that it wouldn’t be legally enforceable by trade unions and their members.

There is an effective way of providing for non-regression, in the form of a ‘standstill’ clause, which is a legal obligation entered into by the contracting parties which amounts

to a legal duty not to act in a particular way. Such a clause is capable of being relied on directly, and can be enforced legally<sup>2</sup>.

#### **4. 'Reaffirming' commitment to implementing ILO and European Social Charter commitments (Article 6 of Annex 4)**

The UK does not have a history of compliance with its international law obligations under ILO Conventions or the European Social Charter. For example, criticisms and concerns have been raised by the supervisory bodies of the ILO over the UK's industrial action legislation including in relation to the notification requirements<sup>3</sup>, the narrow definition of a 'trade dispute'<sup>4</sup> and the outright ban on sympathy action<sup>5</sup>.

Most recently, the ILO's Committee on the Application of Conventions and Recommendations requested the UK Government '.....to provide information on the progress made and the measures taken to facilitate electronic balloting in the context of the new requirements of the Trade Union Act'; and '.....to review section 3 of the Trade Union Act with the social partners concerned and take the necessary measures so that the heightened requirement of support of 40 per cent of all workers for a strike ballot does not apply to education and transport services'<sup>6</sup>.

The United Kingdom's record of non-compliance with the European Social Charter is shocking. Of the 13 'Labour Rights' accepted by the United Kingdom (mainly Articles 2 to 6), the European Social Rights Committee (which supervises the implementation of the treaty), in its conclusions of 2014, determined that the United Kingdom was not complying with 10.<sup>7</sup> By way of illustration, even before the Trade Union Act 2016, the Committee concluded that the United Kingdom's industrial action legislation was not in conformity with Article 6(4) of the European Social Charter on the grounds that:

- 'The possibilities for workers to defend their interest through lawful collective action are excessively limited';
- 'The requirement to give notice to an employer of a ballot on industrial action is excessive'; and
- 'The protection of workers against dismissal when taking industrial action is insufficient'.<sup>8</sup>

The withdrawal agreement's reciprocal commitments on compliance with international labour standards are very unlikely to meet the existing requirements for direct effect, meaning they probably could not be relied on directly by trade unions and individuals.

<sup>2</sup> see Soysal and Savatil v Germany [2009] CMLR 47

<sup>3</sup> Direct Request (Committee on the Application of Conventions and Recommendations), 102<sup>nd</sup> ILC session (2013).

<sup>4</sup> Direct Request (Committee on the Application of Conventions and Recommendations), 91<sup>st</sup> ILC session (2003).

<sup>5</sup> Observation (Committee on the Application of Conventions and Recommendations), 100<sup>th</sup> ILC session (2011)

<sup>6</sup> Observation (Committee on the Application of Conventions and Recommendations), 106<sup>th</sup> ILC session (2017)

<sup>7</sup> European Committee of Social Rights, Conclusions XX-3 (2014).

<sup>8</sup> Council of Europe, Social Rights Committee, Conclusions XX-3 (2014), p24.

## **5. 'Effective system of labour inspections' and 'effective remedies'**

Article 6 of Annex 4 also provides:

*'The **United Kingdom** shall maintain an effective system of labour inspections, ensure that administrative and judicial proceedings are available in order to permit effective action against violations of its laws, regulations and practices, and provide for effective remedies, ensuring that any sanctions are effective, proportionate and dissuasive and have a real and deterrent effect'.*

This may provide some additional protection beyond what is already available. This obligation on the United Kingdom is to apply after the end of the transition period and, so far as administrative and judicial proceedings and effective remedies are concerned, to violations of the United Kingdom's laws. (It might be possible to make similar arguments in relation to the 'protection and promotion of social dialogue' provided for by Article 5(1) of Annex 4).

## **6. Conclusions**

It is therefore abundantly clear that the commitments on non-regression of labour standards and compliance with International Labour Organisation and European Social Charter obligations will be ineffective and will not achieve what the government set out in its White Paper. In particular, it will almost certainly be impossible for trade unions and workers to rely directly on these commitments anyway.

It is even more abundantly clear that these commitments do not begin to meet Labour's fourth test of 'Does it defend rights and protections and prevent a race to the bottom?'.

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16 November 2018