

# Brexit: Guaranteeing Workers' Rights

18 January 2019

## Introduction

Following the comprehensive rejection by Parliament of her Withdrawal Agreement, Theresa May says that her government will engage in cross party talks in an effort to find a way forward with sufficient parliamentary support. One possible area which may be considered is the protection of workers' rights.

So far in the Brexit debate, scant regard has been paid by the government to workers' rights. The government has not consulted with trade unions about the terms or implications of Brexit and only when facing certain defeat in Parliament did the Prime Minister belatedly pick up the phone to some trade union leaders. This is not genuine engagement with trade unions, nor a genuine desire by the government to protect workers' rights.

Instead, very serious concerns have arisen on multiple fronts such as (i) the government's ability to use its unparalleled powers in the European Union (Withdrawal) Act 2018 to dismantle EU workers' rights in the UK, (ii) the entirely ineffective and unenforceable non-regression provisions in Theresa May's Withdrawal Agreement, and (iii) the positioning of social and employment standards as subordinate to 'open and fair competition' in the (non-binding and purely aspirational) Political Declaration.

If there is to be consideration of workers' rights, it is essential to be clear about what is required to provide adequate protection. It is also important to distinguish between the measures that would require negotiation with the EU, and those that can be agreed to unilaterally by the government.

In this note, we set out our suggestions in outline as to the minimum protections required.

# Brexit: Guaranteeing Workers' Rights

18 January 2019

## Minimum Acceptable Standards

We suggest that the minimum acceptable standards of protection – the ‘workers’ guarantees’ – are as follows:

- 1) preservation of existing domestic legislation which implements EU workers’ rights (including employment and health and safety rights), and directly effective EU workers’ rights, with a guarantee that they could only be amended, repealed or revoked by primary legislation;
- 2) a binding, effective ‘standstill’ clause, which may be enforced by individuals in UK Courts or Tribunals, prohibiting the application to individuals and trade unions of any provision that is less favourable than any of the workers’ rights derived from EU law applicable immediately before the UK’s departure from the EU;
- 3) a binding obligation, which may be enforced by individuals in the UK Courts or Tribunals, requiring the UK government to introduce measures (by legislation where necessary) mirroring in the UK any workers’ rights introduced by the EU after the UK’s departure from the EU;
- 4) the application of the principle of supremacy of EU law, as provided for in the European Union (Withdrawal) Act 2018, to EU workers’ rights so far as relevant to the interpretation, disapplication or quashing of any new domestic law made before, or after, exit day;
- 5) confirming the retention of the EU Charter of Fundamental Rights in UK law;
- 6) reinstatement of the right of action in domestic law on, or after, exit day based on a failure to comply with any of the general principles of EU law; and

# Brexit: Guaranteeing Workers' Rights

18 January 2019

7) the application in UK law of the principles of promotion of the role of the social partners and consultation with them before making proposals for legislation.

## **Preservation of EU workers' rights; amendment or repeal only by primary legislation**

Currently EU workers' rights will be imported and retained as 'retained EU law' under sections 2 and 4 of the European Union (Withdrawal) Act 2018. However, the Act contains wide powers of 'modification' exercisable by Ministers, and the concern is that those powers may be used to dismantle such rights. The Act should therefore be amended to provide that EU workers' rights can only be amended, revoked or repealed by primary legislation and the relevant legislation and instruments should be listed in a schedule to the Act.

This would be an entirely domestic measure. It would not require negotiation with the EU.

## **'Standstill' clause for EU workers' rights, capable of direct enforcement by individuals**

The clause would prohibit the application to individuals and trade unions of any provision that is less favourable than any of the workers' rights derived from EU law applicable immediately before the UK's departure from the EU.

A 'standstill' clause would be much more likely to be capable of being enforced by individuals and trade unions than a non-regression clause. The Court of Justice has been reluctant to find that non-regression clauses provide substantial protection, holding them to be capable of indirect effect only (and not therefore enforceable by individuals), only to apply to a general reduction of overall standards and only to provide a means for ensuring transparency as to the reasons for any reduction.

# Brexit: Guaranteeing Workers' Rights

18 January 2019

Such a 'standstill' clause would be a substitute for the reciprocal non-regression of labour standards clause contained in the Withdrawal Agreement. It would therefore need to be negotiated with the EU.

## **'Keep pace' provision for workers' rights introduced in the EU after the UK's departure**

The government should guarantee that it will, by legislation where necessary, implement measures that mirror in the UK any new EU workers' rights introduced in the EU after the UK's departure. This will ensure that UK workers' rights will continue to be equivalent to those in the EU after Brexit.

This would be an entirely domestic measure. It would not require negotiation with the EU.

## **Extended application of the supremacy of EU law for EU workers' rights**

As matters stand, the Act provides that the principle of supremacy of EU law does not apply to 'any enactment or rule of law passed or made on or after exit day'. However, the principle of supremacy of EU law will apply so far as relevant to UK laws passed before exit day (see section 5(1) and (2) of the Act).

In order to protect EU workers' rights against subsequent repeal or amendment, the Act should provide for the application of the principle of supremacy of EU law in so far as any enactment in respect of EU law on workers' rights is concerned, whether passed before, or after, exit day. It is accepted that the effect of the Act in this area is uncertain, and will require interpretation by the courts. This measure is proposed based on the literal meaning of section 5 of the Act.

This would be an entirely domestic measure, not requiring negotiation with the EU.

# Brexit: Guaranteeing Workers' Rights

18 January 2019

## **Continued application in the UK of the EU Charter of Fundamental Rights**

As matters stand, the EU Charter of Fundamental Rights will not form part of 'retained EU law' in the UK after exit day (see section 5(4) of the Act).

Although fundamental rights or principles which exist irrespective of the Charter will be retained, and fundamental rights are intended to fall within the category of 'general principles', rights under the Charter are downgraded by the Act. It will not be possible to rely on 'general principles' as grounds for invalidating domestic law. And it is only those fundamental rights that are recognised in pre-exit date decisions of the Court of Justice of the European Union (CJEU) that will be preserved.

A guarantee is needed that the EU Charter of Fundamental Rights will form part of UK law after the UK's departure.

Not least because of options for enforcement mechanisms, this measure may require negotiation with the EU.

## **Reinstatement of right of action after exit day based on 'general principles' of EU law**

'General principles' of EU law are not defined in the Act. However, the explanatory notes accompanying the Act provide that 'examples of general principles include proportionality, non-retroactivity, fundamental rights and equivalence and effectiveness rights'. 'Fundamental rights' are clearly intended to be within the category of 'general principles' of EU law.

As matters stand, these 'general principles' will not be available as 'rights of action in domestic law' and will not be available as grounds for invalidating domestic laws or

# Brexit: Guaranteeing Workers' Rights

18 January 2019

executive conduct which would otherwise be unlawful (see paragraph 3(1) of Schedule 1 to the Act).

These protections have been important to the protection of EU workers' rights in the UK (particularly in the field of discrimination), and they need to be guaranteed after Brexit, including as rights of action which can be used to invalidate incompatible domestic legislation or executive conduct.

This would be an entirely domestic measure. It would not require negotiation with the EU.

## **Promotion of the role of social partners, and consultation with them before making proposals for legislation**

Title X 'Social Policy' of the Treaty on the Functioning of the European Union provides for the recognition and promotion of the role of the social partners, and the facilitation of dialogue between them whilst respecting their autonomy (Article 152) and consultation with the social partners before legislative initiatives (Article 154).

The recognition and status of the social partners, and the responsibilities towards them, should be replicated in UK law.

This would be an entirely domestic measure. It would not require negotiation with the EU.

## **Direct enforcement**

At each stage, it will be essential to analyse whether the intended mechanism for implementation of any measure proposed by the government provides a sufficient level of enforceability. It is likely that commitments will be needed for each of these measures

# Brexit: Guaranteeing Workers' Rights

18 January 2019

within primary legislation (and any future agreement with the EU where the need for further negotiation is indicated). It will not be sufficient for these commitments simply to appear in Motions, or amendments to Motions, for Parliamentary debate.

**Thompsons Trade Union Law Group**