

'No deal' would be the worst possible outcome for workers' rights

Briefing by Thompsons Solicitors LLP

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I. Introduction

EU law has set minimum standards with which the UK has had to comply across a wide range of workers' rights. Theresa May's government told us that those rights are protected when the UK leaves the EU because, at the point of the UK's departure, they will be preserved and converted into UK law by the European Union (Withdrawal) Act 2018.

But that wasn't telling the truth (even when and if the relevant provisions of the Act are brought into force). The Act does provide for the retention after exiting the EU of many (but by no means all) of the protections for workers' rights derived from EU law (in the form of 'retained EU law') *for the time being*. But it doesn't prevent those rights being dismantled by new UK legislation after Brexit.

The protections in Theresa May's withdrawal agreement and the draft political declaration, which were rejected three times by the House of Commons were (and remain) completely meaningless and unacceptable. But she at least talked of a level playing field in areas such as the environment and workers' rights. Boris Johnson has demanded that the EU rewrite the terms of the UK's future relationship with it to allow the UK to diverge substantially from EU standards.

It is important to be as clear as we can be about what the future holds for workers' rights derived from EU law in the event of 'no deal'. In the event of 'no deal' there would be no transition period during which EU workers' rights would continue to apply in the UK and the UK would trade on World Trade Organisation ("WTO") terms, at least until Free Trade Agreements had been put in place. What would this mean for workers' rights derived from EU law in the UK?

2. EU workers' rights: minimum standards of protection

EU law has set compulsory minimum standards of protection across a wide range of workers' rights, including the following:

- discrimination on grounds of sex, race, disability, religion or belief and sexual orientation;
- pregnancy, maternity and parental leave;
- part-time, fixed-term and agency working;
- working time and paid holidays;
- collective consultation rights (in relation to collective redundancies, business transfers and health and safety) and individual consultation;
- acquired rights on transfers of undertakings;
- health and safety;
- insolvency;
- written terms of employment; and
- data protection.

But it's not just the existence of these minimum EU law standards and their applicability in the UK that has been so influential. It is also the additional protections provided by:

- (i) the unique force to be given to those standards in the UK by means of the European Communities Act 1972;
- (ii) the extensive mechanisms by which individuals can rely on EU law minimum standards;
- (iii) specific requirements for procedures and remedies; and
- (iv) the protection of fundamental rights, including under the EU Charter of Fundamental Rights.

3. The limited protection of the European Union (Withdrawal) Act 2018

Many of these workers' rights and additional protections derived from EU law (whether in the form of 'EU-derived domestic legislation', 'direct EU legislation', other 'directly effective' EU rights or 'general principles' of EU law) will be converted into, and preserved in, UK law as 'retained EU law'.

There are some notable exceptions. The EU Charter of Fundamental Rights will not form part of 'retained EU law' (although fundamental rights recognised in pre-exit date decisions of the CJEU will be preserved). It will no longer be possible to rely on 'general principles' as grounds for invalidating domestic laws or executive actions. There will also no longer be a right to damages under the 'Francovich rule' (available in certain circumstances where a Member State has failed to implement an EU Directive properly or otherwise acted in breach of EU law) after exit day.

After exit day, where a conflict arises between pre-exit domestic legislation and 'retained EU law', the principle of supremacy of EU law will continue to apply so that the 'retained EU law' will prevail. The duty to interpret domestic law in accordance with pre-exit EU law will also continue to apply after exit day to laws passed before exit day. Broadly, workers' rights derived from EU law will, after exit day, have the same status as before: those contained in Acts could only be amended by future Acts; those contained in subordinate legislation could be amended by future subordinate legislation.

However, there are three important limitations on these protections.

First, although these protections are on the statute books, the Commencement Orders necessary to bring the relevant provisions of the Act into force have not (yet) been laid before parliament. As such, these protections are not yet in force.

Secondly, the government has reserved extensive 'Henry VIII' powers, which enable Acts to be changed by secondary legislation, entailing a substantial reduction in the opportunity for parliamentary scrutiny. The government may seek to use these powers to 'modify' 'retained EU law'.

Thirdly, the Act places no restrictions on the content of future legislation after exit day (and, indeed whether in fact it could do so is in any event very questionable). This means that, after exit day, a UK government is free to introduce laws for the purpose of dismantling the workers' rights derived from EU law and the very significant additional protections which make those rights so effective, which would otherwise have been preserved as 'retained EU law'.

4. Theresa May's withdrawal agreement

The contents of the withdrawal agreement relating to labour standards were contained in the chapter concerning the Northern Ireland back-stop. They provided that 'the level of protection provided by law, regulations and practices is not [to be] 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'. The aim expressed was to ensure the proper functioning of the single customs territory. There was also a 'reaffirmed commitment' to implement ILO Conventions and the Council of Europe Social Charter.

The non-regression clause provided no substantial protection whatsoever, being neither effective in principle nor enforceable by individuals and trade unions. The reaffirmations relating to international labour standards, again not enforceable by individuals, sat against a history of regular non-compliance by the United Kingdom.

The political declaration said that, to ensure 'open and fair competition', there should be provisions covering 'social and employment standards' 'commensurate with the overall economic relationship'. There was also to be a 'continued commitment to respect the framework of the European Convention'. These provisions provided no effective protection for individuals at all. However, Boris Johnson now wishes to renege even on these.

5. No deal: no transition period and no commitment to the EU as to the future of workers' rights in the UK

We certainly don't recommend revisiting Theresa May's totally inadequate agreement and political declaration. However, two important features of it will be missing in a 'no deal' situation.

First, there will be no transition period during which EU law would continue to protect workers' rights. Assuming the relevant provisions of the European Union (Withdrawal) Act 2018 are brought into force, workers in the UK would have to go straight to the situation of having to rely on the less effective protections of 'retained EU law' provided by the Act.

Secondly, as at exit day, there would be no agreement at all with the EU regulating the UK's future workers' rights legislation in any way. It is only through such a commitment (which should provide for an effective standstill, enforceable by individuals and trade unions) that there is any prospect of imposing an effective restriction on a future government's ability to dismantle EU-derived workers' rights in the UK. In the absence of such a commitment, a UK government will be free to legislate according to its own policies. Indeed, that is what Boris Johnson is signalling that he intends to do.

Further, to protect workers' rights in the UK in light of post-Brexit developments in EU workers' rights, there would need to be a system of dynamic alignment to provide for the automatic replication in UK domestic law of (i) then existing EU workers' rights; (ii) new EU workers' rights subsequently created; and (iii) modifications to either. Those replicated EU workers' rights should be capable of being relied on directly by individuals and trade unions in domestic courts and tribunals. The only way to achieve those protections in a way which means that they can't be taken away by UK government legislation is through binding and enforceable Treaty commitments with the EU.

Current indications are that Boris Johnson proposes a diametrically opposite outcome – with the UK having minimal obligations of non-regression with the EU.

6. No deal: WTO rules and Free Trade Agreements

WTO rules make no mention of labour rights (the only exception being imports produced with prison labour). Indeed, the long-running debate in the WTO is as to whether its rules should include any regulations as to labour rights and core ILO Conventions at all. When Brexiteers speak of the freedom for the UK to trade on WTO terms that means without recognition of labour rights and standards.

Free Trade Agreements provide little more. Agreements may provide for respect for core international labour standards such as freedom of association, collective bargaining and prohibition of compulsory labour. But the practical effect of such provisions remains largely cosmetic. A particular concern is enforcement, with violations only being actionable at State level.

7. Conclusions

A 'no deal' Brexit carries with it no prospect of binding commitments with the EU, which could be enforced by individuals and trade unions, to ensure the preservation of existing EU workers' rights and the important additional protections provided by EU law, and the dynamic alignment of future rights. It also means no prospect of a transition period. Binding commitments with the EU, enforceable by individuals and trade unions, are the only effective way to prevent the dismantling of EU workers' rights by a UK government – which is exactly what Boris Johnson is signalling that he intends to do. 'No deal' would therefore be the worst possible outcome for workers' rights in the UK.

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