

# WORKERS' RIGHTS AND BORIS JOHNSON'S AGREEMENT

Briefing by Thompsons Solicitors LLP

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# 1. The importance and breadth of EU workers' rights in the UK: what's at stake

EU law has set minimum standards across a wide spectrum of workers' rights in the UK, in many cases for more than 40 years. These include:

- protection from sex, race, disability and other types of discrimination;
- pregnancy, maternity and parental leave rights;
- part-time, fixed term and agency working rights;
- working time and paid holiday rights;
- rights on transfers of undertakings;
- consultation rights; and
- health and safety rights.

It's not just the existence of these minimum standards that has been so important. It's also the extensive enforcement mechanisms given to those standards through individuals being able to rely on them directly, specific requirements for enforcement and effective and dissuasive remedies, and the protection of fundamental rights (including under the EU Charter of Fundamental Rights).

The UK is required to implement these minimum standards and enforcement mechanisms by virtue of its membership of the EU. If there is no sufficient protection for those standards and enforcement mechanisms derived from EU law they can be dismantled by any future Conservative government at any time.

# 2. Theresa May's withdrawal agreement and political declaration

Annex 4 to the Northern Ireland Protocol contained commitments on non-regression of labour and social standards. 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'.*

There was also a *'reaffirmed commitment'* to implement ILO Conventions and the Council of Europe Social Charter.

The 'level playing field' provisions of May's political declaration said that to ensure *'open and fair competition'* there should be provisions covering *'social and employment standards'*. These were to *'...build on the level playing field obligations of the withdrawal agreement'* and were to be *'commensurate with the overall economic relationship'*. There was also to be a *'continued commitment to respect the framework of the European Convention'*.

These provisions failed to offer effective protection. But, the text agreed with the EU by Boris Johnson is significantly worse.

### 3. Boris Johnson's withdrawal agreement and political declaration

Boris Johnson's withdrawal agreement offers no protection for EU workers' rights or labour standards. The new Northern Ireland Protocol is silent on maintenance of current standards. Boris Johnson has made clear in his reference to the 'divergence' of UK and EU labour standards as his government's policy that he intends the opposite.

The only references to workers' rights are contained in the 'level-playing field' provisions of the political declaration, which is not legally-binding.

The workers' rights provisions relegated to Boris Johnson's political declaration are even weaker than the corresponding provisions in Theresa May's text. In Boris Johnson's political declaration, there is no cross reference to any protections in the withdrawal agreement (because there aren't any). There is an *'intention'* to *'uphold the common high standards applicable in the Union and the UK at the end of the transition period'* in fields including social and employment law, but apparently only for the purpose of preventing distortions of trade and unfair competitive advantage. And there is increased prominence given to commitments being *'commensurate with the economic connectedness'* of the UK and the EU.

Flaws from Theresa May's text over the ineffective nature of non-regression clauses are retained. In particular, there continues to be no mention of effective enforcement by individuals and mechanisms for enforcement are downgraded from *'adequate'* to *'appropriate'*. The remit of the Court of Justice of the European Union is also reduced, which is likely to mean a weakening of enforcement.

### 4. Conservatives' track record on employment rights

The history of Conservative governments shows that when they talk of autonomy in respect of workers' rights it is cover for the regulation of economic activity in order to achieve what they regard as legitimate public policy objectives. And recent history tells us what Conservative governments do to labour standards, when they are not held in check by EU law. Examples (among many) include:

- the introduction of Employment Tribunal fees (a move ruled unlawful by the Supreme Court);
- increasing the qualifying period in unfair dismissal claims from one year to two years;
- imposing a cap on unfair dismissal compensation of one years' pay; and
- the Trade Union Act 2016, which severely restricts trade freedoms.

The Queen's Speech reveals no intention to introduce any workers' rights legislation at all, at a time when there is a desperate need for measures to address issues such as zero hours' contracts.

## 5. What would be needed in any Brexit deal to protect EU workers' rights in the UK?

If there was going to be sufficient protection for EU workers' rights in the UK, there would need to be two minimum requirements:

- a legally enforceable 'standstill' to prevent regression below current standards; and
- a system for guaranteeing dynamic alignment so as to provide for the automatic replication in UK domestic law of (i) existing EU workers' rights; (ii) new EU workers' rights subsequently created; and (iii) modifications to either.

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, entered into at the time the UK leaves the EU.

## 6. Conclusions

Boris Johnson's withdrawal agreement and political declaration provide no protection whatsoever for workers' rights that emanate from the EU but which many workers take for granted as part of the suite of rights that they enjoy. In fact, they do the exact opposite and either actively or implicitly undermine workers' rights in the UK.

Boris Johnson's deal is significantly worse for workers' rights in the UK than Theresa May's withdrawal agreement and political declaration. It is for workers as bad as 'no deal'.

The texts before parliament are a green light for a Conservative government to dismantle workers' rights in the UK at will, and history (let alone the political make-up of the Cabinet) suggests that they intend – unfettered by any EU minimum standards or enforcement mechanisms – to do just that in the pursuit of deregulation and to achieve the 'divergence' that they seek.

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