

The Brexit Papers



Employment Law

Paper 11



Bar Council Brexit
Working Group
June 2017

**THIRD
EDITION**



Brexit Paper 11: Employment Law

Summary

The UK has played a central role in bringing about law reform at an EU level in the area of equality and employment rights. Currently, principles of CJEU jurisprudence prevent individual EU member states from overriding these rights with their own laws; protection which will fall away for UK workers in the event of a Brexit, and which the WTO rules will not replace. This is particularly the case for rights arising from UK secondary legislation, and in CJEU case law.

The effect of this for individual rights is set out in the table contained within this paper. Specifically, compensation for discrimination, maternity and pregnancy rights, working time and holiday pay, and agency workers' rights are areas of particular risk. We therefore urge the Government to:

- Guarantee employment and equality rights in any bilateral treaty with the EU.
- Post-Brexit, the *acquis* (body of EU law) must be given an enhanced status in the interpretation of UK employment law. Particular regard should be given to the *acquis* in the context of: compensation for discrimination, maternity and pregnancy rights, and working time.
- Finally, we urge the Government to retain existing domestic legislation which relates to agency workers.

The Impact of Brexit on Employment Law

Current position: How are EU workers' rights guaranteed at present?

1. Employment and equality rights in the UK which derive from EU law are currently protected by the ECA 1972, while principles of CJEU case law stop conflicting national law trumping such rights. Once the ECA 1972 itself is repealed, Parliament will be able to remove or legislate contrary to working and equality rights which are currently guaranteed by EU Treaties, directives and regulations and which comprise a minimum 'floor' under which the UK cannot sink.¹

How could workers' rights be guaranteed outside the EU/EEA?

EFTA or a bespoke Bilateral Agreement

2. If the UK is neither a member of the EEA nor the EU, it will be under no obligation to adhere to EU law on employment (or any other) matters a priori. The UK may opt for a "Swiss" model: European Free Trade Association (EFTA) membership without EEA membership, or a new agreement model with the EU. The UK may decide to enter into bilateral agreements which incorporate an obligation to give effect to EU social law, including EU employment and equality rights. It is worth noting that a trade deal under World Trade Organisation rules will not guarantee employment rights whatsoever as WTO rules are silent on social rights.

Through domestic legislation: The Great Repeal Bill (the 'Bill')

3. The aim of the Bill is to repeal the 1972 EU Communities Act and to incorporate existing EU law (the *acquis*) into domestic law. The *acquis* has been important in the development of key concepts concerning equality and workers' rights in English Law.

How could rights presently guaranteed by EU Law be changed post Brexit?

Primary Legislation

4. Rights bestowed by primary legislation, such as prohibitions on discrimination provided by the Equality Act 2010 and rights protecting employees and workers under the Employment Rights Act 1996, will not require modification by new Acts of Parliament since such already form part of English Law.

¹ This long established constitutional principle was nonetheless encapsulated in s 18 European Union Act 2011: "Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act."

Secondary Legislation

5. Secondary legislation made under Acts other than the ECA (such as the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 made under the Employment Rights Act 1999) can be changed by other secondary legislation. Secondary legislation made under the ECA 1972 will cease to have effect when the ECA is repealed, unless such secondary legislation is 'saved' by provisions in primary legislation or by provisions in the Bill.

CJEU Case Law

6. Pre-Brexit: Up to the point of Brexit, pre-Brexit employment rights will continue to be interpreted by the courts in light of the *acquis* by virtue of the Bill.

7. Post-Brexit: There is no certainty that the *acquis* will be afforded a particularly protected status with regards to the interpretation of UK employment law. This may impact on the development of UK law particularly in relation to the protection of workers' rights and in the context of equality law.

8. The table below exemplifies the effect that removing the current status of CJEU judgments may have on some aspects of UK employment law:

Case	Act	Effect of removal
<i>Stringer v HMRC</i> C-520/06	Working Time Regulations 1998	Right for annual pay to accrue during sick leave may no longer apply.
<i>Marshall's Clay v Coulfield</i> C-131/04	Working Time Regulations 1998	Employers could designate part of the pay that a worker receives for work already done as holiday pay.
<i>Williams v British Airways</i> C-155/10	Working Time Regulations 1998	Employers may only be required to provide workers with their basic pay for the purposes of holiday pay.
<i>Dekker</i> C-177/88	Equality Act 2010	Discrimination on grounds of pregnancy may not also be on grounds of sex.
<i>Tele Danmark A/S v Handels</i> C-109/00	Equality Act 2010	Employers may not have to assume the risk of the economic and organisational consequences of the pregnancy of employees.
<i>Chez Razpredelenie Bulgaria</i> C-83/14	Equality Act 2010	The concept of direct discrimination by association may be narrowed again and may not apply to claims of indirect discrimination as well as those of direct discrimination.
<i>Webb v EMO</i> C-32/93	Equality Act 2010	It may be permissible to compare the situation of a woman who finds herself incapable, by reason of pregnancy, of performing the task for which she

		was recruited with that of a man similarly incapable for medical or other reasons.
<i>Enderby Frenchay HA</i> C-127/92	Equal Pay Act 1970	Where statistics show an appreciable difference in pay between men and women between jobs of equal value, the burden may no longer pass to the employer to objectively justify the disparity.

Employment rights susceptible to change post Brexit

Compensation for discrimination

9. The principle, derived from EU law, that financial compensation must be adequate in order to achieve equality (set out in *Marshall No (2)*² means that, at present, compensation is potentially unlimited. However, this principle may be vulnerable post-Brexit and the limit on compensation for discrimination may be capped.

Maternity and Pregnancy Rights

10. EU law has developed important principles in this area such as the importance of substantive equality between men and women and the protection of the special relationship between mother and child. These principles may be vulnerable to erosion post-Brexit.

Working Time

11. The common law provides very little to workers with respect to working time and holiday pay. If ECJ decisions are no longer binding post-Brexit, workers will be left with weak protection. For instance, Claimants will no longer be able to rely on the principles set out by the CJEU in *Williams v British Airways PLC*,³ followed in *Bear Scotland v Fulton*,⁴ that calculations of holiday pay must include particular types of overtime in the definition of “normal pay”.

12. UK employees could also lose the EU-derived ability to take annual leave accrued during sick leave and maternity leave outside those periods: see *Merino Gomez v Continental Industrias del Caucho SA* (C342/01) [2004] E.C.R. I-2605 and *Stringer v Revenue and Customs Commissioners* (C-520/06) [2009] All E.R. (EC) 906.

Agency Workers' Rights

² C-271/91, [1993] ECR I-4367 [1994] QB 126

³ (C-155/10) [2012] ICR 847

⁴ [2015] ICR 221

13. Agency workers may not be able to rely on the equal treatment rights contained in the Temporary Agency Work Directive (2008/104/EC) if the Agency Workers Regulations 2010 are removed.

Recommendations

Any post-Brexit arrangement with the EU should, at the very least:

- Guarantee employment and equality rights in any bilateral treaty with the EU
- Give the post-Brexit acquis an enhanced status in the interpretation of UK employment law
- Have particular regard to the pre-and post-Brexit acquis in the context of: compensation for discrimination, maternity and pregnancy rights, and working time. and
- Retain domestic legislation regarding agency workers.

Brexit Working Group

February 2017

For further information please contact:

*Philip Robertson, Director of Policy or
Luke Robins-Grace, Senior Public Affairs and Communications Adviser
The General Council of the Bar of England and Wales
289-293 High Holborn
London WC1V 7HZ
Direct line: 020 7242 0082
Email: PRobertson@BarCouncil.org.uk
LRobins-Grace@BarCouncil.org.uk*