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Brexit and labour rights – a personal viewpoint

Professor Michael Ford QC of the University of Bristol and Old Square Chambers offers a perspective on Brexit and its potential consequences for employment rights in the United Kingdom.

Employment rights in the UK are already under siege. The latest tribunal statistics, for the quarter October to December 2015, confirm a consistent pattern since the introduction of fees for bringing claims in the employment tribunal, of a drop of over 70% in the number of single claims received. The Government's promise of a review into tribunal fees, first made as long ago as 2012 in its response to the consultation on the fees regime, is now awaited as forlornly as the burial shroud woven by Penelope for her father-in-law.

But so far this Government and its Coalition predecessor have largely left intact the employment rights themselves. Many such rights cannot be attacked for one simple reason – they are underpinned by EU law, with the consequence that national legislation must give full effect to the rights, remedies must be effective and dissuasive, and compensation must fully reflect the loss to a worker. For example, when in its *Employment Law Review* the last Government indicated its intention to review discrimination compensation because of 'business concerns about the uncapped nature of awards', it conceded that its policy options were restricted by EU law. Little wonder that the Government dropped a proposal in the consultation on fees to cap discrimination awards if a fee of the appropriate level were not paid – the original Option 2 – after many respondents argued that this was incompatible with EU law. Similarly, when the Beecroft *Report on Employment Law* recommended not implementing the EU Temporary Agency Workers Directive (No.2008/104), reflecting the long-standing hostility of the UK Government to protecting this vulnerable category of worker, its proposals went no further.

Instead, the Coalition Government turned to softer targets without an EU underpinning. It increased the qualifying period for unfair dismissal from 12 months to two years, for instance, and capped the compensatory award at 12 months' pay – not because in fact awards were high (the median compensatory award was only about £5,000) but because, as it was put in the consultation *Ending the Employment Relationship*, of 'unrealistic perceptions among both employees and employers about the level of tribunal awards'. After all, why let the facts get in the way of a decent pro-business reform?

Even in areas governed by EU law, the last two Governments have done their level best to reduce the impact of labour rights on what they euphemistically celebrate as one of the most 'flexible' labour markets in the OECD. After two judgments of the European Court of Justice, *British Airways plc v Williams and ors* 2012 ICR 847 and *Lock v British Gas Trading Ltd* 2014 ICR 813, led to successful claims for underpaid holiday pay under the Working Time Regulations 1998 SI 1998/1833 (see *Bear Scotland Ltd v Fulton and anor* and other cases 2015 ICR 221), the Government immediately acted to limit the financial impact on businesses by restricting future claims to a maximum of two years' loss. In doing so, it tiptoed carefully around the EU principles of effectiveness (whereby the procedural requirements for domestic actions must not make it 'virtually impossible or

excessively difficult' to exercise rights conferred by EU law) and equivalence (whereby procedures for enforcing EU law rights should be no less favourable than those applicable to similar rights under domestic law). Fees are part of this story. Many objections to the introduction of fees in the preceding consultation were based on potential infringements of the EU principle of effectiveness or EU indirect discrimination law, and similar submissions have been deployed in UNISON's judicial review challenge to the fees regime, to be heard by the Supreme Court in December. So far, of course, the fees system has survived, even though Lord Justice Underhill in the Court of Appeal was 'troubled' by the statistics; but without the principles of EU law, there would be almost no restrictions on what the Government could do. Whatever its limitations, EU law on effectiveness is a much more powerful means of protecting access to justice than the Human Rights Act 1998 or the common law.

Which brings us to the substantive rights themselves. The list of workers' rights guaranteed by EU law is long, growing and mostly well-known, including all forms of discrimination law; equal pay; pregnancy rights, and maternity and paternity leave; protection of fixed-term, part-time and agency workers; rights on the transfer of an undertaking; rights to information and collective consultation about collective redundancies, transfers, health and safety, and under the Transnational Information and Consultation of Employees Regulations 1999 SI 1999/3323 and the Information and Consultation of Employees Regulations 2004 SI 2004/3426; the most important health and safety regulations; the right to a written statement of terms of employment; and almost all the working time rules, including paid annual leave and limits on daily and weekly working time.

Less familiar protections include those derived from the EU Insolvency Directive (No.2008/94), which led to important extensions to the state guarantee of pension benefits and which requires other state protection of employees' claims where the employer is insolvent; the EU Data Protection Directive (No.95/46) (soon to be replaced by a new General Data Protection Regulation), which was the driving force behind the Information Commissioner's Employment Practices Code; and the provisions of the EU Charter of Fundamental Rights, which in some cases have horizontal direct effect in disputes between private individuals (see *Benkharbouche v Embassy of the Republic of Sudan* 2015 ICR 793). New proposals include a 'European Pillar of Social Rights' aimed at upwards convergence in labour standards, albeit restricted to the Eurozone area, and proposals to strengthen the rights of parents and those with caring responsibilities. Further details of these rights and proposals are set out in an Advice I wrote recently for the TUC, available at www.tuc.org.uk/sites/default/files/Brexit%20Legal%20Opinion.pdf.

The difficult question is which of these rights are vulnerable in the event of Brexit. None is in the sights of the Labour Party. Almost none would prevent a future Labour Government from enacting provisions that are more favourable to workers because almost all are a floor, not a ceiling – with the notable exception of giving effect to collective agreements negotiated and adopted after a transfer of an undertaking (see *Alemo-Herron and ors v Parkwood Leisure Ltd* 2013 ICR 1116, in which the ECJ held that the EU Acquired Rights Directive (No.2001/23) precludes such 'dynamic' effect

where the transferee does not have the possibility of participating in the negotiating process). From Labour's viewpoint, the most significant constraints are likely to be those derived from EU anti-austerity policies, rules limiting public ownership and State aid, and the unresolved tension between workers' rights and the economic freedoms in the Treaty on the Functioning of the European Union. Those freedoms have so far mostly operated as restrictions on collective action aimed at increasing wage rates as well as on fair wage provisions in public contracting (although see most recently *RegioPost GmbH and Co KG v Stadt Landau in der Pfalz* 2016 IRLR 125, in which the ECJ held that EU law did not preclude legislation that required tenderers to undertake to pay a minimum wage). These considerations, not worker rights, inform the divisions in the Labour Party on Brexit.

But what about a Conservative Government? I do not share some the view of some commentators that few EU-derived workers' rights are vulnerable following Brexit because there is little business appetite for their repeal. The Coalition displayed its preference for deregulation in the publication *Flexible, Effective, Fair: Promoting Economic Growth Through a Strong and Flexible Labour Market* (Department for Business, Innovation and Skills, October 2011), which envisaged legal protections 'limited to the minimum necessary', based on 'minimal intervention by the Government'. The current Conservative Government has shown that it is perfectly prepared to introduce reforms under the name of reducing burdens on business, even though there was little demand from businesses for them (notoriously, as part of the *Red Tape Challenge*, the repeal of the pre-claims discrimination questionnaire procedure and the tribunals' power to make recommendations affecting not just the individual claimant but the wider workforce, both formerly found in the Equality Act 2010). Where, after all, were the calls from businesses for many of the restrictive provisions in the Trade Union Bill? Post-Brexit it will be the Right of the party who will be in the ascendancy, so the Conservatives will be free to give full expression to their vision of a 'light touch' (for which read unregulated) labour market. They will no longer be restricted to making submissions against any extension of social rights in the ECJ, as they invariably do.

For a glimpse at the sort of ideas a liberated and energised Right of the Conservatives might draw upon, read the Beecroft report; or the Policy Exchange report *Modernising Industrial Relations*, the free market ideology of which was the unacknowledged source of the Trade Union Bill, questioning whether workers should have the right to collective bargaining or strikes save under special conditions. Or – purely for entertainment at present, but not if Brexit happens – read the Private Members' Bill currently before Parliament, the Working Time Directive (Limitation) Bill, sponsored by Christopher Chope MP, which states baldly in the first clause that the Working Time Regulations 1998 and the EU Working Time Directive (No.2003/88) 'shall not apply to any employee [sic – I think he means worker] who with the agreement of the employer has chosen to opt out of the provisions of the Directive and the Regulations'. Or read the article in the *Daily Telegraph* on 18 April, in which a representative of the campaigning group 'Economists for Britain' explains that Brexit would provide an economic boost because the UK 'could cut back on employment law and health and safety rules'.

David Cameron complained of ‘complex rules restricting our labour markets’ in his ‘big European’ speech of January 2013, and in the course of its *Employment Law Review*, the last Government repeatedly boasted of the fact that among developed countries only the US and Canada have lighter overall regulation than the UK, making clear its desire to go further. Freed from the burdens of EU social law and a coalition partner, perhaps a future Conservative Government emboldened by Brexit could promote the UK from the bronze medal position to gold. Without the possibility of references to the ECJ, there will be no curbs on action: if the Government doesn’t like a court ruling, it will simply reverse it by legislation.

We already know some of the current Government’s likely targets. If its past record is anything to go by, early items on the Government’s shopping list will be working time rights (a constant source of complaints); protection for agency workers and other ‘atypical’ workers (ditto); and rights to collective information and consultation. Health and safety protection was once the subject of a broad political consensus – after all, it was a Conservative administration that enacted the Health and Safety at Work etc Act 1974 – but no longer. To tackle what it described in its impact assessment as a ‘perception of a “compensation culture”’, the last Government reversed the position which had stood since at least the mid-Nineteenth Century, whereby a worker injured as a result of a breach of health and safety regulations could bring a civil claim for damages. This reform – introduced by S.69 of the Enterprise and Regulatory Reform Act 2013 – went beyond the recommendations of the Government’s own independent expert, Professor Löfstedt. Freed from the shackles of EU law, the Government could simply have repealed the EU-derived health and safety regulations, which are no doubt perceived as unduly prescriptive burdens.

The removal of civil rights to damages for breach of health and safety regulations illustrates a common theme of the policies of the previous and present Governments, of resistance to any rights which cost (or, more accurately, are perceived as costing) businesses significant sums: hence the as yet unrealised opposition to uncapped discrimination awards, the cap on unfair dismissal compensatory awards, and the speedy response to limit liability for holiday pay claims. Without the EU requirement of an effective remedy, limits on compensation may become a familiar feature of employment law, just as they were in the past before EU law required their removal (see the original caps on damages in S.65 of the Sex Discrimination Act 1975 and S.56 of the Race Relations Act 1976, and the two-year limitation on recovery in S.2 of the Equal Pay Act 1970, all swept aside by EU law).

There is an even more cynical response. It is that none of this matters because the practical effect of tribunal fees has been to render many employment rights illusory in practice. It is not especially surprising, for example, that there have been few cases brought under the Agency Workers Regulations 2010 SI 2010/93. Precarious workers, typically paid low sums of money, are just the type of potential claimants who are likely to be strongly deterred by fees, as a growing body of evidence now shows. Improving access to justice is fundamental to real and practical employment rights, as the EU principle of effectiveness recognises much more clearly than does the common law. But limits on damages will make the position much worse. At the moment, it is predictable

that the lower the value of a claim, the more liable it is to be deterred by fees. Couple fees with limits on liability and you can achieve the perfect unvirtuous circle: legal rights on the statute book but a deregulated labour market in fact.

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