



THE UNIVERSITY of EDINBURGH
Edinburgh Law School



Scottish Universities Legal Network on Europe

Employment Law

Written by
Dr Rebecca Zahn, University of Strathclyde
Contact: Rebecca.zahn@strath.ac.uk
@Zahn_RL

With contributions from
Dr Justin Borg-Barthet, University of Aberdeen
Professor Nicole Busby, University of Strathclyde
Mr James Murphie, University of Abertay
Dr Michelle Weldon-Johns, University of Abertay

In your allocated sector:

- 1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.

Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).

The EU has an impact on workers in a number of different ways. First, Article 45 of the Treaty on the Functioning of the European Union (TFEU) guarantees the free movement of workers. This includes the principle of equal treatment as between EU workers and national workers. Second, European employment laws underpin key aspects of UK employment law. These include substantial equality rights and protections for individual and, to a lesser extent, collective rights. The EU does not have competence to legislate in the areas of, for example, pay, unfair dismissal protection¹ or most areas of collective labour law.

This section first provides an overview of the key rights that are protected and are therefore at risk following the UK's exit from the EU. It also identifies the main EU and implementing legal sources. The section then considers how Scotland may continue to protect these rights.

Equality rights

The TFEU contains a number of Articles relevant to equality and non-discrimination, in particular Article 18 (nationality); Article 19 (equal treatment); Article 45 (free movement of workers) and Article 157 (equal pay). There are also a number of Directives on gender equality (further discussed in the Roundtable Paper on equality) which have been consolidated and updated in the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006/54/EC). This Recast Gender Directive is now the key directive setting out the requirement for equal treatment between women and men in the employment context, and is now implemented in the UK through the Equality Act 2010 (Parts 2,5,9 and 10).

Other European Union measures of significance to equal treatment in employment in particular (and which have required amendments to domestic law) have also been adopted:

- Pregnant Workers Directive² addressing the treatment of pregnant women at work (including provisions addressing maternity leave, breastfeeding, time off for ante natal care,

¹ Unfair dismissal protection may fall within EU competence in Art 153(1)(d) TFEU "protection of workers where their employment contract is terminated", however, under Art 153(2) TFEU the adoption of a measure requires unanimity in the Council which is unlikely to be secured.

² 92/85/EEC

risk assessments and prohibiting dismissal³). There are links however with the Recast Directive, which makes specific reference to it. It is implemented largely through the Employment Rights Act, the Health and Safety at Work Act, and related regulations in particular the Maternity and Parental Leave etc Regulations 1999 (MAPLE), as well as the Equality Act 2010

- Parental Leave Directive⁴ requiring provision for parental leave on birth or adoption, and for time off for family emergencies. This is implemented through the Employment Rights Act and MAPLE

Individual rights

There are a number of EU Directives which deal with individual employment rights, including the organisation of working time and the protection of fixed and part-time work:

- Part-time Workers Directive⁵ requiring pro rata treatment of part-time workers (implemented through the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2002)
- Fixed-Term Workers Directive⁶ limiting the scope of fixed term contracts (implemented through Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002)
- Working Time Directive⁷ which regulates working time, rest periods, paid holidays and working patterns (principally implemented through the Working Time Regulations 1998 and the Working Time (Amendment) Regulations 2003).
- The Temporary Agency Workers Directive⁸ aims to ensure the protection of temporary agency workers. It provides that the basic working and employment conditions (duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay) of temporary agency workers should be, for the duration of their assignment at a hirer, at least those that would apply if they had been recruited directly by that hirer to occupy the same job (implemented through The Agency Workers Regulations 2010).
- The Proof of Employment Contract Directive⁹ obliges an employer to inform employees in writing of the conditions applicable to the employment relationship. In addition, any change to the terms of the contract or employment relationship must be recorded in writing (implemented by the Employment Rights Act 1996).

³ This is primarily a health and safety measure enacted through Directive 89/391 and (now) Article 154 TFEU.

⁴ 94/34/EC now replaced by CD 2010/18/EU

⁵ 97/81/EC

⁶ 99/70/EC

⁷ 2003/88/EC

⁸ 2008/104/EC

⁹ 91/533/EC

Collective rights

The EU has limited competence to legislate in the area of collective employment rights. There is provision for information and consultation in some health and safety Directives.¹⁰ In addition, a number of Directives provide for collective rights:

- The Transfer of Undertakings Directive¹¹ provides protection against dismissal due to a transfer of undertaking (although certain exceptions apply). It also makes provision for information and consultation proceedings before a transfer is to take place. It has been implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 1981 and subsequent amendments.
- The Collective Redundancies Directive¹² introduced greater protection to workers in the event of 'collective redundancies' (ie where 20 or more people are to be dismissed as redundant within a certain period) by requiring consultations with employee representatives (implemented by the Trade Union and Labour Relations (Consolidation) Act 1992).
- The Works Council Directive¹³ provides that employees of large transnational companies are to be informed and consulted in corporate decision-making (implemented by The Transnational Information and Consultation of Employees Regulations 1999 and The Transnational Information and Consultation of Employees (Amendment) Regulations 2010). Employee participation schemes also enjoy some protection in the event of cross-border mergers¹⁴ (implemented by the Companies (Cross-Border Mergers) Regulations 2007).
- The Information and Consultation Directive¹⁵ establishes a general framework setting out minimum requirements for employees' rights to information and consultation in undertakings above a certain size (implemented through the Information and Consultation of Employees Regulations 2004).

Health and Safety

A wide variety of measures in the field of safety and health at work have been adopted on the basis of Article 153 TFEU. Apart from the provisions on equality law, it is this area of employment law that has been most comprehensively regulated through EU law. It is useful to note that this is largely because its history stretches back further than many other fields of employment-related EU law. In total, 24 Directives set out minimum requirements and fundamental principles, such as the principle of prevention and risk assessment, as well as the responsibilities of employers and employees.¹⁶ There is also a Directive on the Protection of Young People at Work¹⁷ which lays down minimum requirements for the protection of young people at work. In addition, a series of European

¹⁰ See Directive 89/391

¹¹ 2001/23/EC

¹² 98/59/EC

¹³ 2009/38/EC

¹⁴ Directive 2005/56 on cross-border mergers of limited liability companies, Art 4(2).

¹⁵ 2002/14/EC

¹⁶ A full list can be found here: <https://osha.europa.eu/en/safety-and-health-legislation/european-directives>.

¹⁷ 94/33/EC

guidelines aims to facilitate the implementation of European directives as well as European standards which are adopted by European standardisation organisations.¹⁸

The European Framework Directive on Safety and Health at Work¹⁹ guarantees minimum safety and health requirements throughout Europe while Member States are allowed to maintain or establish more stringent measures. In addition to the Framework Directive, a series of individual directives focusing on specific aspects of safety and health at work have been adopted. Nevertheless, the Framework Directive continues to apply to all areas covered by the individual directives. Where individual directives contain more stringent and specific provisions, these special provisions prevail. Individual directives tailor the principles of the Framework Directive to:

- Specific tasks (e.g. manual handling of loads)
- Specific hazards at work (e.g. exposure to dangerous substances or physical agents)
- Specific workplaces and sectors (e.g. temporary work sites, extractive industries, fishing vessels)
- Specific groups of workers (e.g. pregnant women, young workers, workers with a fixed duration employment contract)
- Certain work-related aspects (e.g. organisation of working time)

The individual directives define how to assess these risks and, in some instances, set limit values for certain substances or agents.

Pension and Social Security rights

Regulation 883/2004²⁰ coordinates social security systems across the Member States of the EU and deals with the application of social security schemes to employed persons and their families moving with the EU. The EU provisions on social security coordination do not replace national social security systems with a single European one (the EU does not have competence to legislate to this extent). Instead, the coordination provisions establish common rules and principles which have to be observed by all national authorities, social security institutions, courts and tribunals when applying national laws. By doing so, they ensure that the application of different national legislations does not adversely affect persons exercising their right to move and to stay within EU Member States. In order to avoid a situation where migrant workers are either insured in more than one Member State or not at all, the coordination provisions determine which national legislation applies to a migrant worker in each particular case.

As EU Regulations are automatically applicable within the UK by virtue of the European Communities Act 1972, there is no specific UK implementing legislation.

¹⁸ These are the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI) which set and update European standards on a regular basis.

¹⁹ 89/391/EC

²⁰ This is complemented by Implementing Regulation 987/2009.

Additional protections

The Posted Workers Directive²¹ which was adopted under the provisions on the free movement of services (articles 53 and 62 TFEU) aims to establish a legal framework of minimum labour rights which regulates the working conditions of workers sent temporarily to work in another Member State. There is no single piece of legislation implementing the Directive. The government made only minor changes to existing UK legislation to implement the Directive in the UK because most existing legislation relevant to the Directive already applied to all employees or workers whether working permanently or temporarily in the UK and therefore applied to posted workers. This included the Working Time Regulations, the National Minimum Wage Act 1998 and associated Regulations, the Employment Agencies Act 1973 and associated Regulations, the Health and Safety at Work Act 1974 and associated Regulations, and legislation governing the employment of children and young people.

Case law

In addition to the legislation listed above there is a substantial body of case law developed by the Court of Justice of the European Union (CJEU) which generally widens the scope of protections and rights granted to workers under EU law. Examples include the case law around the Working Time Directive (such as Case C-155/10 *Williams*) which has progressively extended the definition of 'working time' and decisions on parental leave which have established that fathers' rights should not be dependent upon mothers' rights (C-104/09 *Roca Alvarez* and C-222/14 *Maistrellis*). The CJEU's case law can be contrasted with the approach of UK courts which have tended to give a narrow interpretation of employment rights. Following Brexit, there will no longer be access to the CJEU for individual claimants (currently through the preliminary rulings procedure) and EU law provisions (such as article 19 TFEU) which require Member States to provide effective procedures and remedies for the enforcement of employment rights will cease to have effect. Finally, decisions of the CJEU progressively interpreting EU legislation will not be applicable in the UK.

The implications of Brexit

A transition period after the UK exits the EU is likely during which the UK's rights and obligations as an EU Member State are phased out. EU law may therefore continue to apply to pending employment disputes which began before UK withdrawal from the EU. It is difficult to predict the future relationship between the UK and the EU. Should the UK choose to leave the EU completely, a UK government would be free to apply- in the sense of mirroring in UK law and practice – any future EU employment laws where it agrees on its content.²² However, as employment relations are a reserved matter, the Scottish government would not have any power to legislate in this area.

Leaving the EU would entail the amendment and possible repeal of the European Communities Act 1972 (the national legal basis of the UK's membership of the EU). This would have consequences for the majority of EU employment laws which have been implemented into UK law by virtue of secondary legislation made under the framework of the 1972 Act. An example can be found in the Agency Worker Regulations. Repeal of the Act would leave the status of these regulations unclear. The Prime Minister has indicated that a bridging solution will be found by incorporating all EU

²¹ 96/71/EC. See also Directive 2014/67/EU which aims to facilitate enforcement of the Posted Workers' Directive in the Member States.

²² See A. Lazowski, 'Withdrawal from the European Union and Alternatives to Membership' (2012) 37 *EL Rev.* 523 and House of Commons, 'Leaving the EU', Research Paper 13/42, SO, London, 2013.

legislation in force on 'Brexit' day into national law. EU employment laws contained in primary legislation (such as the majority of equality laws contained in the Equality Act 2010) would be unaffected by any repeal of the 1972 Act. In addition, some regulations introduced to implement EU law were not introduced under the 1972 Act but under other primary legislation such as the Fixed-Term Regulations adopted under the Employment Act 2002.

Following Brexit, the UK government is likely, subsequently, to embark on a lengthy review exercise, with a view to deciding whether to repeal, adjust or preserve existing EU-derived laws and whether to follow EU regulation in the future.²³ Based on long-standing opposition of some past UK Governments to certain EU social rights, one independent legal opinion commissioned by the TUC in the run-up to the referendum vote²⁴, identified a number of EU-derived employment laws which would be especially vulnerable to repeal and/or amendment. These include laws on information and consultation on collective redundancies; rules on working time; some of the EU-derived health and safety regulations; parts of the regulations which protect workers in the event of a transfer of undertaking; legislation protecting agency workers; and, some elements of discrimination law to which businesses object most strongly such as liability for equal pay. In the absence of an obligation to abide by harmonised EU rules, there is also a risk that the UK will seek competitive advantages by implementing labour standards that are less onerous for employers than those required of their counterparts in the European Union.

²³ For an overview of the complexities of this process see <http://blogs.lse.ac.uk/brexit/2016/10/07/on-your-marks-get-set-leave-the-great-repeal-act-is-symbolically-significant-and-legally-not-unimportant/>.

²⁴ M. Ford QC, *Workers' Rights from Europe: The Impact of Brexit* available at <https://www.tuc.org.uk/international-issues/europe/eu-referendum/workers%E2%80%99-rights-europe-impact-brexit>.

2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.

Although the EU institutions have limited competence in the field of employment law, EU legislation had had a substantial impact on workers' rights in the UK and it covers a patchwork of laws within UK employment law. The field of health and safety law stands out as being largely regulated at EU level. However, legislation originating from the EU level has given individual and collective rights to workers which did not previously exist in the UK. The individual effects of each piece of legislation are listed under 1. above. In particular in the field of collective rights, employee participation schemes act as a check on managerial excess. They also ensure a degree of social harmony by internalising employee concerns in corporate decision-making, rather than opposing employee interests to those of management as in the traditional UK industrial model.

3. What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).

In March 2016, the European Commission put forward a first, preliminary outline of what should become the European Pillar of Social Rights. This initiative is targeted at the euro area, while allowing other EU Member States to join if they want to do so. A public consultation on the content of the Pillar will remain open until the end of 2016. It is likely that the Pillar will focus on measures to enhance equal opportunities and access to the labour market, fair working conditions, and adequate and sustainable social protection.

On 8 March 2016, the European Commission issued a set of proposals as part of its mobility package which included a proposal for a Directive amending the Posted Workers' Directive. The proposed Directive is to complement the Enforcement Directive rather than to replace it. The proposed Directive has the same legal base as the Posted Workers' Directive – firmly locating the regulation of posted work within the free movement of services – but focuses on three main areas of revision: rules on temporary work agencies; rules applying to long-term posting; and, the remuneration of posted workers where it introduces the principle of equal pay for equal work. It is not yet clear whether the proposed Directive will be adopted.

In transnational company law, it is expected that the Commission will propose legislation concerning the governing law of companies. This may include provision for the protection of employee participation in cross-border company transformations to mirror the provisions on cross-border mergers.²⁵

How might this be found out and explored further (contacts in Brussels/Strasbourg?)

[Redacted]

²⁵ See DG-Justice, Open call for tender JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter Contract notice in 2014/S 149-267126 of 06/08/2014, 12.

4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)

You may wish to consider: a) current devolved position;

Under the current devolved position, there is very little scope for Scotland to progress/lead in this area, given that employment relations are a reserved matter. Private International Law is devolved and certain collective rights could therefore be preserved, but this may be subject to those rights being classified as PIL issues, as opposed to substantive company/employment law. Thus at least as far as private employment law relationships are concerned, Scotland cannot, for the most part, legislate.

b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);

Equality and employment law would require to be devolved to enable Scotland to be a leader. Some respondees, most notably the STUC, proposed in their submission to the Smith Commission that employment and equality law should be devolved. The STUC recommended at paragraph 4 that:

- “employment law and equality law not be separated with respect to further devolution proposal
- The full devolution of equality law, provided that employment law is also devolved.
- In the case that employment law is not devolved, the STUC favours the devolution of equality enforcement along with the industrial tribunals and health and safety enforcement.
- There should be no impediment under a devolved settlement to the Scottish Parliament legislating for mandatory 50-50 gender representation in the Scottish Parliament and local councils, or for gender equality on company boards”.

Devolution of employment law would allow Scotland to adopt legislation which it perceives as important to become a leader in the field of employment protection.

c) as an independent nation.

An independent Scotland would have full legislative competence to progress/lead in this area. However, other international treaties such as the European Social Charter, the European Convention on Human Rights and some Conventions of the International Labour Organisation (all of which the UK is currently a member) give workers far less legal protection than EU law.