

The Economic Impact of Leaving the European Union

Thompsons Solicitors

SUMMARY

1. With the current devolution settlement and the very clear attitude of the current government at Westminster to workers' individual and collective rights, Brexit has left Scottish workers extremely vulnerable in terms of health and safety law, employment rights and discrimination.

2. Brexit represented a significant shift in the balance of legislative power between Holyrood and Westminster in a way that was simply not in the contemplation of the public or the politicians at the time of the original Scotland Act or any additional legislation extending the devolution settlement. That is because everyone recognised that, in the main, the real legislative power in relation to health and safety law and, to a large extent, employment and equalities law, lay with the European Union. No-one would have suggested that Westminster had any significant autonomy over those issues. That is, in many ways, why health and safety law and employment law was reserved to Westminster in the original Scotland Act. It is therefore appropriate and necessary to re-visit the devolution settlement in light of Brexit and the significant additional powers it hands to Westminster at the expense of the Scottish Parliament.

3. Thompsons Solicitors believe that health and safety, employment law and equalities should be devolved to the Scottish Parliament.

4. A right or protection in law is worthless if there is not an effective forum with appropriate procedures to enforce or prosecute that right. Thompsons Solicitors also believe that, particularly in light of Brexit, the current model of devolving administration of the employment tribunal system to Scotland is insufficient and the current draft of the Order in Council is inappropriate. The Scottish Parliament ought to have the fullest administrative and procedural powers over the employment tribunal system; including the ability to develop rules and procedures which encourage early intervention with immediate and fair resolutions to employment disputes. Such a model would necessarily require the ability to impose sanctions on parties who do not follow the spirit of the procedures through awards of legal expenses.

HEALTH & SAFETY

5. The UK's entire legislative framework on health and safety is based on European law. We have many Regulations brought into UK law by Statutory Instrument to reflect and mirror European Union Directives on specific health and safety issues. Thus, The Provision & Use of Work Equipment Regulations 1998 mirrors The Work Equipment Directive. As with all secondary legislation, the health and safety Regulations require an enabling provision within primary legislation. That is found in the Health & Safety at Work Act 1974. Because all of the health and safety regulations are brought under the same very short section of the 1974 Act, they can all be removed at the stroke of a pen at Westminster.

6. That is no unlikely flight of fancy. It is exactly what the current government did with Section 69 of the Enterprise & Regulatory Reform Act [ERRA], whereby making a very minor amendment to the 1974 Act the government removed the right to rely on a breach of health and safety Regulations as a basis for obtaining financial redress for workplace injuries. Section 69 ERRA reversed the universal legislative approach to health and safety breaches in the UK dating back to 1802.

7. As bad as section 69 ERRA was, the important thing to note is that the removal of civil liability was as far as the Government lawyers thought they could go at that stage because of the UK's membership of the European Union. There is no doubt that the Government would like to have gone further but believed that they were prevented from doing so by EU law. Brexit changes that and there is no doubt that there will be a further dismantling of workers' rights in terms of health and safety law in the early post Brexit years.

EMPLOYMENT AND EQUALITY LAWS

8. The last 20 years have seen a revolution in the development of core employment law protections for workers. It is no longer lawful to discriminate against workers on the basis of their age, race or sexual orientation; to pay women less than men; to allow people to work long hours which damage their health; or to treat working women less favorably because they are pregnant. All of these advances, with their wide ranging benefits in creating a fairer society, have come about through EU law. And the EU has developed various protections for part time, fixed term and agency workers. With the specter of zero hours contract, the "gig" economy and increasingly precarious work, these protections are more valuable than ever.

9. In fact, the only workers' rights which are not derived directly from European law relate to the right not to be unfairly dismissed and to be paid the minimum wage. The most vulnerable workers in Scottish society- low paid men and women in precarious employment- have therefore been protected from exploitative work not by Westminster but by Brussels.

10. A 'Brexit' Tory government will unquestionably set about reversing these protections. They have had them in their sights for many years. They have only been restricted from repeal by the UK's membership of the European Union. The committee should bear in mind that everything Westminster could have done in the last ten years to attack employment rights, they have done. For example, they have increased the qualifying period for unfair dismissal to two years; they have introduced punitive Employment Tribunal fees of up to £1200 and they have introduced a cap on all unfair dismissal awards which, for the lowest paid, makes it uneconomic for them to bring a claim.

11. In terms of equality law, the Tories have also already made small attacks on individual rights by removing the ability to claim for 3rd party harassment and changing the questionnaire procedure which makes it more difficult for people to investigate whether they have a claim for discrimination. Like other areas, these are as far as they believe they can currently go because of EU law.

A NEW DEVOLUTION SETTLEMENT

12. During all previous devolution settlement negotiations, health and safety and employment law should have been 'non-issues'. This was because, in truth, no real power lay with either legislative body. The real power was in the hands of the EC and European Parliament. Had real power in relation to these areas been 'up for grabs', the devolution settlement in relation to all of the Devolved Administrations could have been very different. Those discussions must now take place and the Scottish Government has a very strong moral and political case for these areas to be devolved to Holyrood.

THERE ARE NO RIGHTS WITHOUT THE ABILITY TO PROSECUTE THOSE RIGHTS

13. Having rights on the face of the law is of little use if you are unable to take action through a court or tribunal to enforce those rights. The Conservative government are only too well aware of this fact. It is what was at the heart of the Trade Union Act – making it more difficult for trade unions to prosecute and defend members' rights. Employment Tribunal fees, the referral fee ban and fixed fees in civil cases in England and Wales can all be seen as similar attacks on trades union finances and trades unions' ability to support their member's cases.

14. In the context of employment law, the impact of employment tribunal fees has been devastating: a 70% reduction in claims. It is therefore positive that some control over the administration of employment tribunals is to be devolved to Scotland. The current proposal as to the level of devolution is however insufficient, particularly in light of Brexit. The Scottish Parliament should have complete control over every aspect of employment tribunal processes, procedures and rules.