Potential Impact on Workers’ Rights

Introductory Remarks
1. The Committee is conducting an inquiry into the economic impact leaving the European Union (EU) would have for Scotland. The purpose in submitting this evidence is to draw attention to the potential impact leaving the European Union would have on workers’ rights. This note summarises a position paper written by this author for a Roundtable on ‘Social Protections and Human Rights’ organised by the Scottish Government’s Standing Council on Europe on 24 October 2016. The full paper is available at https://sulne.ac.uk/position-papers/.

The EU’s impact on workers’ rights in the UK
2. European employment laws underpin key aspects of UK employment law, including in the area of equality law, the organisation of working time and the protection of fixed and part-time work, pension and social security rights and collective rights. Overall, EU legislation has 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. 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.

Implications of the UK’s withdrawal from the European Union on workers’ rights
3. We can split the implications of the UK’s withdrawal from the EU on workers’ rights into three phases: immediate; short-term; and, medium-term. Much will depend on the future relationship between the UK and EU which is, for obvious reasons, difficult to predict. This note proceeds on the basis that the UK leaves the EU completely. A future UK government would, in such a case, 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.

4. Immediately after Brexit, there will be a need for a transition period 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 and it is necessary to clarify the status of EU law during that period. There is a substantial body of case law developed by the Court of Justice of the European Union (CJEU) which widens the scope of protections and rights granted to workers under EU law. The CJEU’s generally progressive case law in the field of employment law can be contrasted with the

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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 19TFEU) which require Member States to provide effective procedures and remedies for the enforcement of employment rights will cease to have effect. Finally, future decisions of the CJEU progressively interpreting EU legislation will not be applicable in the UK.

5. In the short-term, leaving the EU would entail the amendment and probable 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. Repeal of the 1972 Act would leave the status of the legislation unclear.

6. The Prime Minister has indicated that a bridging solution will be found by incorporating all EU legislation in force on ‘Brexit’ day into national law. However, this does not necessarily mean that all rights will be the same after the UK leaves the EU. For example, individuals will no longer have access to the Court of Justice to enforce or clarify their rights. The Great Repeal Bill will also need to make provision for the coordination of pension and social security rules, and the creation of standardisation bodies in the field of health and safety.

7. In the medium-term, 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. Based on long-standing opposition of some past UK Governments to certain EU social rights, a number of EU-derived employment laws are likely to 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.

8. In the absence of an obligation to abide by harmonised EU rules, the UK may seek competitive advantages by implementing labour standards that are less onerous for employers than those required of their counterparts in the European Union.

Areas of particular concern

9. Two areas subject to EU legislation merit particular mention: pension and social security rights; and, health and safety. In relation to the former, Regulation 883/2004 (complemented by Regulation 987/2009) 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 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 EU workers are either insured in more than one Member State or not at all, the coordination provisions determine which national legislation applies to a worker in each particular case, and allows workers to add up periods of time worked in different Member States towards one pension income. **This legislation will have to be renegotiated or replicated before Brexit in order to avoid a situation where EU workers in the UK and UK workers in other Member States are left in a situation without adequate pension provision.**

10. In the field of **health and safety**, 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. There is also a Directive on the Protection of Young People at Work which lays down minimum requirements for the protection of young people at work. In addition, a series of European guidelines aims to facilitate the implementation of European directives as well as European standards which are adopted by European standardisation organisations. **Provision will need to be made for equivalent rules and relevant standard-setting bodies in the field of health and safety to cover workers in the UK following Brexit if serious work accidents are to be avoided.**

**Policy Options for Scotland**

11. 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 (PIL) 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.**

12. In addition, **public procurement is a devolved matter.** The Scottish government has already introduced more stringent measures on public procurement than is required under EU law. For example, the Procurement Reform (Scotland) Act 2014 places a number of more general duties on authorities in relation to their procurement functions which require authorities to assess prior to tendering, how each procurement can improve the “economic, social, and environmental wellbeing” of its area and involve wider stakeholders. This gives potential scope for greater involvement of, for example, trade unions and workers.

13. The Act also includes measures designed to encourage payment of the living wage and for local authorities, when assessing bidders, to have regard to their recruitment and remuneration policies (including on the living wage) to the extent these could affect their ability to perform the contract. Currently, a requirement to pay the living wage would fall foul of the CJEU’s jurisprudence. However, post-Brexit, there may be scope for the Scottish Government to introduce clearer guidance and/or legal requirements.

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