European and External Relations Committee

The EU referendum and its implications for Scotland

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With reference to the above call for evidence issued by the Parliament’s European and External Relations Committee, we wish to respond from the perspective of Labour Law and Labour Rights. It may appear at first glance that this issue is tangential to the main issues raised in this Call; however, it is our view that the issue of Labour Law must be an integral part of the discussion of the possible Brexit implications for Scotland for, if Scotland remains in the EU, the body of EU Labour Law as part of the *acquis* must continue to apply and, if Scotland also remains in the UK, it is inconceivable that that part of the *acquis* can be maintained and remain compliant with EU Law in future without full devolution of powers to the Scottish Parliament from Westminster in the reserved areas of employment and equality law.

In this paper, we are specifically addressing the following issues which are raised in the call:

1. Scotland’s future relationship with the EU
2. The withdrawal process
3. The domestic process for dealing with a withdrawal from the EU
4. The position of EU citizens in Scotland

(1) Scotland’s future relationship with the EU

In considering the matter of the value of Scotland’s membership of the EU from a labour law standpoint, it is clear that many of the rights currently enjoyed by employees and workers in Scotland have their source in EU Law e.g. working time and holiday entitlement,\(^1\) protection of contract terms on the transfer of an undertaking,\(^2\) certain work-family rights,\(^3\) certain consultation rights,\(^4\) protections for certain categories of precarious workers,\(^5\) and equality law.\(^6\) It is also clear that in

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specific aspects of labour law that are reserved to Westminster and which do not fall within the scope of the Treaties (and are therefore outwith EU competence) there has been continual erosion of the protections provided e.g. increase in qualifying period for unfair dismissal claims, employment tribunal fees and access to justice. We accordingly put forward the view that Scotland’s membership of the EU is essential in order to maintain and guarantee at present levels the employment rights provided in the areas mentioned. The lack of a written constitution distinguishes the UK from most, if not all, of its EU partners and means that there is no framework guarantee or minimum rights’ provision: any right is vulnerable to a simple majority of MPs voting in the House of Commons. Furthermore, Scotland is much more ideologically aligned with their EU partners in its attitude towards labour relations, particularly in the context of trade union rights, which is at odds with the UK position. Maintaining a relationship with Europe is vital to ensure that Scotland can not only retain vital employment protection rights, but also to pursue this divergent (European) attitude towards labour law. Allied to this, is the necessity for Scotland to remain a signatory of the European Convention of Human Rights which at least offers some safeguard against arbitrary interference by the state in a person’s fundamental rights.

(2) The Withdrawal Process

In essence, the management of the withdrawal process depends on the strategic aim which is being pursued: if Scotland is to be an independent member state of the EU then no negotiation on labour law or ECHR status would be required - these would be automatic consequences of Scotland’s EU membership. However, if the strategic aim is to maintain Scotland’s relationship with the EU whilst also retaining membership of the UK, then a different negotiating position would be required. It is impossible at this stage to foresee how such negotiations would be undertaken and what form they might take, however, the aim of this paper is to raise awareness of these issues which we consider to be of great importance and significance to the citizens of Scotland in addressing the Brexit negotiations.

(3) The domestic process for dealing with a withdrawal from the EU

If the strategic aim is to secure continuing membership of the EU for Scotland, whilst simultaneously remaining a devolved jurisdiction within the UK, then in our opinion the Scottish Parliament should urgently seek to acquire devolved control over employment and equality laws. As indicated above, it is our view that Scotland has a very different attitude towards labour relations and labour law to that of the remainder of the UK (rUK), and devolving these areas to the Scottish Parliament is

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7 Employment Rights Act 1996 c.18, s 108.


9 Trade Union Act 2016 c.15.

necessary to ensure that Scotland can develop its own distinct approach towards labour law and its regulation. In any event, this would be required to ensure the continued applicability of EU Labour Law post Brexit by the rUK. Alternatively, if Scotland were to become independent, then the Scottish Parliament would then of course have such control. There would of course be no need to repeal legislation in the event either of Scotland being independent or assuming control within a reformed devolution settlement.

(4) The position of EU citizens in Scotland

As discussed above, the erosion of employment and/or equality rights in Scotland would impact greatly on EU nationals who have made their homes here in good faith, utilising the free movement provisions of the EU Treaties. The likelihood is that it would have a future impact on further migration to Scotland from other EU states if Scotland were no longer in the EU, leading to a probable skills shortage and lack of inward investment, thereby impacting negatively on the Scottish economy.

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