



The iSPER Brexit Series

PAPER IV:

The potential impact of Brexit on employment rights and fairness at work

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Since the British public voted to leave the European Union, there has been widespread conjecture as governments across Europe and beyond try to assess the political and social ramifications of the result. There is no question that Brexit has the potential to impact on all aspects of our day-to-day lives, from education to the economy, health and housing, trade and travel, and much more besides.

As such, policy makers face a number of challenges in light of the increased responsibility placed on them – as areas of legislation previously under EU competence may soon be decided nationally – at the same time as preserving our global position, links and security.

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1. Summary

During the debate over the UK's membership of the European Union (EU), the argument that 'European laws' imposed unreasonable burdens on business was a touchstone for supporters of Brexit. However in the wake of the referendum vote, there have been growing calls for workers to be offered equivalent legal protection when the UK finally leaves the EU. This paper argues that maintaining existing standards is vital in protecting the most vulnerable and challenging the reliance of the UK economy on low paid and low skilled work. However it also suggests that a robust framework of individual employment rights and the extension of collective forms of employee representation are necessary if the UK is to close the productivity gap with its EU counterparts. Consequently it makes a number of specific recommendations:

- The UK government should commit to ensuring an equivalent level of employment protection for the life of the current Parliament.
- A Fair Work Commission should be established to review the impact of employment regulation and develop policy in relation to labour standards.
- The current employment tribunal system should be reviewed and new pro-active mechanisms of enforcement and adjudication should be considered.
- New legislation should be introduced to ensure worker representation at workplace, company / organisation and board levels. .
- Statutory union recognition procedures should be simplified to ensure that collective bargaining is provided where there is sufficient demand from workers.

2. Purpose of Paper

This paper outlines the relationship between domestic and European employment legislation and the context of the ongoing debate over the future of labour regulation in a post-Brexit UK. It questions the extent to which employment rights represent a burden to business, explores the problem of enforcement and also examines how issues of fairness and employee voice provide insights to understanding the productivity gap between the UK and other European economies. A number of recommendations are then made, which are aimed at stimulating policy development and debate at local and national level.

3. After Brexit – rights at risk?

In simple terms, employment rights for British workers can be categorised into three types, the first of which contains laws which are purely national measures with no EU influence or intervention and upon which Brexit will have no direct effect. The National Minimum Wage and National Living Wage fall into this group, as does the law on unfair dismissal, shared parental leave, and collective labour legislation. A second set of employment regulations came into force as a result of EU directives, normally in the form of regulations: this group includes matters such as equal treatment for agency workers, limits on working time and rights around information and consultation by employers. These are perhaps most at risk of change.

The third, and perhaps most complex, type is where British law has been amended, extended and underpinned by EU measures. For example, national law prohibiting discrimination on the grounds of sex, race and disability was extended to include sexual orientation, religion and belief, age and gender reassignment as a result of EU legislation or judgements of the European Court of Justice. Health and safety at work legislation has been substantially underpinned and extended by regulations coming from Europe, as have rights related to maternity and equal pay.

In October last year, the UK government announced that it intended to transpose all existing employment rights that rest on EU legislation into domestic law through a Great Repeal Bill. But this does not mean that the government could not subsequently seek to reduce protection in certain areas. The current Conservative government (like its predecessors) has generally seen employment regulation as a barrier to economic efficiency and business growth. Indeed, the Head of Policy in Theresa May's administration, [George Freeman, has advocated regionalisation of the minimum wage and exemptions from employment law for new businesses](#). The Chartered Institute of Personnel and Development have suggested that the coming years will see ["a tinkering with specific areas which have been less popular with UK employers"](#), and it is possible that rights related to the following may be most at risk:

- working time and paid holidays;
- agency workers;
- protection against some forms of discrimination;
- health and safety;
- collective consultation on issues such as redundancy.

These instincts may be countered by the political need to appeal to traditional Labour voters seen by some to have delivered the decisive blow for Brexit. As part of her drive to overhaul corporate governance, Theresa May pledged to appoint employee representatives to company boards, an extension of workers' rights which would have gone beyond that considered by the last Labour administration and, ironically, brought the UK into line with EU members like France and Germany. However, in a speech to the Confederation of British Industry in November 2016, the pledge was withdrawn, with May confirming that the move would not be mandatory and that companies would be left to ["find the model that works"](#). At the same time, though, David Davis, who is leading the Brexit negotiations, has denied that leaving the EU will involve any dilution of employment protection saying that "the great British industrial working classes voted overwhelmingly for Brexit. I am not at all attracted by the idea of rewarding them by cutting their rights." The decision by the UK government to rule out membership of both the EU single market and customs union, as part of their negotiating strategy, has once again [raised the possibility that employment protection may be a casualty of a 'hard Brexit'](#).

4. Employment regulation – a burden to business?

In the run up to the EU referendum, the business-orientated think tank, [Open Europe](#) argued that the annual cost to the British economy of adhering to the Working Time Directive and

the Temporary Agency Workers Directive amounted to £6.3 billion every year. In contrast both the [Trade Union Congress \(TUC\)](#) and the Labour Party argued that Brexit would result in an erosion of workers' rights, undermining job security and exacerbating income inequality.

However, in highlighting the importance of maintaining the UK's current provision of employment rights, it is important not to exaggerate the extent of protection currently provided. Most employment rights have to be enforced by the individual employee; for instance, there is no agency proactively overseeing the right not to be dismissed unfairly. Moreover, even those agencies which do have a role in enforcement, notably the Equality and Human Rights Commission (EHRC) and the Health and Safety Executive, have seen their ability to do so eroded by substantial cuts in funding and, in the case of the EHRC, a reining-in of their powers. Most employees who feel their rights have been breached, then, must take on their employer through the Employment Tribunal, a daunting prospect which starts with the completion of a sixteen page form. Tribunal fees of up to £1200, which saw applications fall by around two-thirds, have now been abolished following a landmark ruling by the Supreme Court, but the complex rules relating to eligibility and time limits remain.

The system of employment rights in the UK is essentially reactive and depends on employees having the confidence and knowledge to pursue their rights. Several studies have pointed to relatively low levels of awareness of the detail of rights at work. It is not surprising, therefore, that the rights of many employees are breached, subverted or ignored. [It is estimated, for example, that over 200,000 workers over the age of 21 are being paid less than the legal minimum wage.](#) Similarly, a 2016 study by the [Equality and Human Rights Commission found widespread discrimination at work against pregnant women and mothers.](#) While the House of Commons Business Innovation and Skills Committee inquiry into the employment practices of Sports Direct has received widespread publicity, it is unlikely that this is in any way unique. As Professor Linda Dickens has argued "[despite the proliferation of statutory employment rights there is continued widespread experience of unfairness in British workplaces](#)".

5. Fairness, equity and voice – missing pieces of the productivity puzzle

Far from being a 'burden' to business, it can be argued that employment rights underpin economic efficiency and productivity by encouraging employers to invest and innovate, rather than joining the race to the bottom by seeking competitive advantage through low wage costs. There is a significant danger that any erosion of employment rights post-Brexit will further entrench the dependence of the UK economy on low wage, low skilled jobs that restrict productivity growth. [In 2014, productivity \(output per hour\) in the UK was 18% below the other six members of the G7, the widest gap since comparable records were introduced 25 years ago.](#) This was 10% lower than Italy and 31% and 36% behind France and Germany respectively.

We would also suggest that a broader commitment to workplace fairness and equity is a vital part of a solution to the UK's productivity puzzle. [Research conducted by Nick Bloom and John van Reenen from the London School of Economics](#) has found a clear link between good management practices and productivity growth, [while Acas have suggested that there are seven 'levers of productivity'](#):

- Well designed work
- Skilled line managers
- Managing conflict effectively
- Clarity about rights and responsibilities
- Fairness
- Strong employee voice
- High trust: relationships based on trust, with employers sharing information at the earliest opportunity

The extent to which workers feel they are supported by their managers cuts across a number of these 'levers' and [as John Purcell has argued](#), high trust relationships between employers and employees and consequent levels of engagement are underpinned by perceptions of fairness and organisational justice. However, while the minimum framework of employment rights that we currently enjoy in the UK is a necessary condition for this sense of organisational justice, we contend that it is not sufficient.

As we point out above, decent labour standards in the UK are often compromised despite existing safeguards. This problem of enforcement is made more acute by the erosion of structures of employee representation and voice. Declining union density and the shrinking of collective bargaining over the last 35 years has been well documented but, crucially, there is little evidence of alternative sources of employee voice filling this gap. [According to the 2011 Workplace Employment Relations Survey](#), two-thirds of workplaces have no representative structures and the majority of employees have no access to an on-site representative. This means not only that most workers in the UK are reliant on the law to ensure fair treatment but also when faced with a problem at work they are effectively on their own. Of course it could be argued that independent information, advice and support on employment issues is available from a range of organisations, the major example being the Citizens' Advice Bureaux. However, as [Ed Heery from Cardiff University has pointed out](#), such organisations cannot usually represent employees at the workplace: the only independent organisation that can do this is a trade union.

Effective workplace representation can both help workers to enforce their rights and resolve potential conflict and so minimise the need for legal adjudication. [Research conducted for Acas](#) has consistently found that high levels of trust between employers and trade unions make it more likely that conflict can be identified and resolved at an early stage, restoring productive employment relationships.

6. Recommendations

In considering the implications of Brexit for workers' rights, it is vital that we examine how those rights are going to be enforced both within and outside the workplace. This in turn requires a broader perspective which highlights the ways in which the interests of workers are represented. Even if the government leaves the current framework of employment rights intact, this will do little to remedy the persistent problems of unfair treatment experienced by

British workers and the negative consequences of this for employee engagement and productivity. Therefore, we recommend the following:

- **The UK government should commit to maintaining the existing framework of employment protection for the life of the current Parliament.** Theresa May's commitment to introduce a Great Repeal Bill will guarantee current employment rights in the immediate aftermath of Brexit but there will be considerable pressure to target specific areas for de-regulation. A commitment to leave existing rights in place will provide stability as employers and workers respond to the inevitable challenges of departure from the EU.
- **In line with the Government's stated commitment to a fairer Britain, a Fair Work Commission should be established to review the impact of employment regulation and develop policy in relation to labour standards.** This would have representation from employers, trade unions, government and academics and provide an independent and objective source of information and guidance to inform and improve policy-making in this area.
- **The current employment tribunal system should be reviewed and new proactive mechanisms of enforcement and adjudication should be considered.** The first job of the new Commission should be to assess not only the impact of recent reforms to employment tribunals, such as the introduction of fees, but also consider their effectiveness as whole either in facilitating effective enforcement or dispute resolution. Proactive approaches to enforcement such as the Fair Work Ombudsman system in Australia possibly offer a way forward.
- **New legislation should be introduced** to ensure worker representation at workplace, company / organisation and board levels. Employee voice is one missing piece of the UK's 'productivity puzzle'. The promise of worker representation on company boards, now withdrawn, would have had little real impact unless replicated at all levels of the organisation. One option is to strengthen the existing Information and Consultation of Employees (ICE) Regulations.
- **Statutory union recognition procedures should be simplified.** Good relationships between employers and effective, independent trade unions underpin trust, fairness and conflict resolution. The current system of statutory union recognition, with its focus on workplace ballots, encourages adversarial attitudes rather than promoting partnership working. Other methods of assessing support for collective bargaining – for example through petition - should be explored.

7. Key sources

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The views expressed within this paper are those of the academics and are not necessarily representative of the University of Plymouth.