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UK Anti-Discrimination laws after Brexit

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UK and EU: A Constructive Relationship

- Equal Pay: Equal Pay Act 1970; Article 119, now Art 157 TUE
- Equal Pay for work of equal value
- SDA 1975: Indirect discrimination
- Bilka Kaufhaus: indirect discrimination
- 'Particular disadvantage' definition: Dir 2000/43; 2000/78; 2006/54
- Race RRA 1976: Race Directive 2000/43
- Disability: DA 1995: Employment Directive 2000/78
- Sexual orientation, age, religion and belief: Dir 2000/78: EA 2010
- Pregnancy protection: Dekker, Pregnant workers directive: EA 2010
- Part-time workers, agency and fixed term workers UK Regs
- Parental rights; right to request flexible working



Role of EU law in domestic law pre-Brexit

- No written constitution: no entrenched equality right
- Parliamentary sovereignty limited by EU law
- Central role of EU law as non-derogable fundamental right
- EU law can be used to disapply UK legislation
- Direct effect, vertical and horizontal (Defrenne)
- Courts bound by EU law and decisions of CJEU
- Duty to refer to CJEU creates mutual interchange



Risks post Brexit

- Parliamentary sovereignty: Parliament can repeal Equality Act 2010 through ordinary Parliamentary process
- Executive can repeal delegated or secondary legislation (part-time and agency regulations)
- Henry VIII clauses: can executive repeal primary legislation?
- Courts need not follow CJEU
- Future developments in EU equality law not incorporated
- No place at the table for social dialogue.
- Erosion by stealth: ceiling on compensation levels; increase qualification periods; access to justice (tribunal fees)



Withdrawal Bill

- Repeal European Communities Act 1972
- BUT retain EU law until Parliament has time to determine whether to repeal.
- Includes: (i) EU Directives implemented by either legislation or secondary legislation: 'EU-derived domestic legislation' EA 2010, Part-time etc regulations.
- (ii) Regulations ('direct EU legislation')
- (iii) Directly effective rights (e.g. rights derived from Article 157 or gender, race, and employment directives)



Withdrawal Bill: Court of Justice

- UK courts not bound by principles laid down or decisions by Court of Justice post exit day
- UK courts cannot refer any matter to Court post exit day
- Courts **need not** have regard to decisions by CJEU post exit day but **may if consider it appropriate** to do so
- For 'retained EU law' lower courts should follow retained EU case law (ie decisions and principles of CJEU in relation to EU law kept in force until modified by UK, except for Charter).
- BUT UK Supreme Court not bound by retained EU case law



Withdrawal Bill: Role of Charter

- All EU legislation transferred to UK law to be sifted through and amended post Brexit
- BUT EU Charter expressly **excluded**
- YET **fundamental rights and principles included**



Stated Aims of Withdrawal Bill

- Rights capable of replication in UK will continue to be protected as 'EU-derived law' **but Parliament can repeal post Brexit**
- Specific mention of worker's rights, equal pay and equality rights.
- 'EU-derived law' to be interpreted in line with CJEU
- Decisions of CJEU up to 'Brexit Day' will have the same force in UK law as decisions of UK Supreme Court
- Binding on all courts except the Supreme Court - **i.e Supreme Court can diverge from CJEU decisions post Brexit.**



Protective possibilities

- Preamble
- Non regression clause
- No repeal except by Parliament
- Continuing Role of past CJEU case law: binding?
- Role of future CJEU case law: persuasive?
- Incorporation into 'free trade treaties'?
- ECHR and Human Rights Act
- International Human Rights Treaties.



Preamble

- Advantages: Purposive interpretation of equality law
- Counters tendency of UK courts to be technical
- Disadvantages: Courts may be technical in interpreting preamble
- Difficult to reach consensus on values



Non-regression Clause

- Options:
- No regression by delegated legislation – full Parliamentary scrutiny
- Declaration in all legislation that equality rights not reduced (as in Human Rights Act)
- Challenges: When is this a regression?



CJEU decisions

- Take account of future CJEU decisions
- Alter only if advancing equality to do so – e.g. wider affirmative action principle
- Legal education: keep EU law in focus
- Challenges: complex role of Charter



Uncharted territory



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