

The EU Referendum and Equality

This briefing summarises how membership of the EU has affected equality legislation in the UK, and considers the possible impact of leaving the EU, focusing on the development of new legislation and the status of existing legislation.

The European Union Referendum Act 2015, which received royal assent on 17 December 2015, enables the government to hold a referendum on whether the UK and Gibraltar should remain in the European Union (EU). The referendum will take place on 23 June 2016.

The EU has influenced UK law in many key areas. Most important for EDF members are the introduction and enhancement of rights in relation to discrimination which we set out more fully below. Other relevant areas include access to paid holidays and other working time provisions, improved health and safety protection, rights to unpaid parental leave, rights to time off from work for urgent family reasons, equal treatment rights for part time, fixed term and agency workers, rights for outsourced workers and rights for worker's representatives to receive information and be consulted, particularly in the context of job restructuring.¹

Compliance with EU-derived legislation is often portrayed as arduous and those in favour of Brexit argue that leaving the EU would provide the opportunity to repeal some of this perceived regulatory burden. However, research into employment regulation shows that there is a perception-reality gap, whereby the 'perception of regulation being burdensome was influenced by anxiety and the belief that regulation was overly complex, rather than by the actual legal obligations that employers had to meet'.² Additionally many employers value the importance of having an area within which to trade, travel and do business, where the rules are the same, including those that apply to non-discrimination.

The UK has in turn had an important influence on the EU equalities agenda in Europe. UK civil society organisations have made and can continue to make a huge impact on this agenda and the development of civil society in Europe. For example, consider the role that we have played in developing the equal treatment of LGBT people and how this has changed in Europe and how at the same time legal developments at EU level have helped improve the rights of LGBT people in the UK.

¹ See UK Employment Rights and the EU, TUC, at <https://www.tuc.org.uk/sites/default/files/UK%20employment%20rights%20and%20the%20EU.pdf>

² See Employer perceptions and the impact of employment regulation at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/128792/13-638-employer-perceptions-and-the-impact-of-employment-regulation.pdf

How does the EU affect equality in the UK?

The EU affects UK equality legislation and policy through:

- EU treaties and directives to which the UK as a member is a signatory
- European Court of Justice decisions which ensure EU law is properly applied in member states³

What have we gained in equality terms from the EU?

The UK already had anti-discrimination laws in relation to sex and race when we joined the EU but our membership of the EU has led to an enhancement and extension of these rights. As a direct result of EU directives, employment discrimination based on sexual orientation, age and religion or belief was outlawed in Great Britain. Additionally, EU rulings have led to improved definitions of direct discrimination, indirect discrimination and harassment for all grounds of discrimination. These changes have in turn been important in driving cultural change and establishing new norms that have benefitted us all, for example in creating more inclusive workplaces.

Sex discrimination – the first sex discrimination and equal pay provisions were introduced into the UK before we joined the EU. However, as a result of joining the EU these provisions were extended and further clarified so that it is now clear that, for example, that women part-time workers have the right to equal access to occupational pensions schemes and equal protection from unfair dismissal. The concept of equal pay for work of equal value resulted from EU action. This led to many equal pay cases and the renegotiation of pay in local government, the NHS and beyond.

Maternity and pregnancy – the EU Pregnant Workers Directive 1992/85/EEC⁴ gave women the right to paid time off for ante-natal appointments and required employers to assess their health and safety at work.

Gender identity – protection from discrimination on grounds of gender re-assignment was recognised as an aspect of sex discrimination following the European Court of Justice case of *P v S and Cornwall County Council*.⁵ This case was the first to make clear that a trans woman who was dismissed from her job when she announced that she was undertaking gender re-assignment was unlawfully dismissed.

Sexual orientation – the UK introduced provisions⁶ to outlaw discrimination in employment on the grounds of sexual orientation as a direct result of the EU Employment Equality Directive 2000/78/EC.⁷ This meant that for the first time people

³ The European Court of Justice is an EU institution. It is sometimes confused with the European Court of Human Rights which is not part of the EU.

⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0085>

⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0013>

⁶ Employment Equality (Sexual Orientation) Regulations 2003 which were replaced by the Equality Act 2010.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>

were protected from unfair treatment on the grounds of their sexual orientation. Additionally, a case from the Court of Justice of the European Union has clarified that an employer's pension provisions for a surviving partner must now include provision for a same sex partner.⁸

Religion or belief – the UK introduced provisions to outlaw discrimination in employment on the grounds of religion or belief in employment across Great Britain⁹ as a direct result of the EU Employment Equality Directive 2000/78/EC.¹⁰

Age – the UK introduced provisions to outlaw discrimination in employment on the grounds of age (above 18 years) as a direct result of the EU Employment Equality Directive 2000/78/EC.¹¹ This has meant that rigid upper age limits for recruitment into the fire service, the police service or for airline pilots are not permissible unless they can be shown to be justifiable, however, checks on physical ability are permissible.

Race discrimination – when we joined the EU we already had some provisions to counter race discrimination, however, after the Race Equality Directive 2000/43 /EC¹² they were expanded and improved, leading to a more extended definition of direct discrimination and indirect discrimination.

Disability discrimination – the UK introduced provisions to counter disability discrimination before the EU passed the Employment Equality Directive 2000/78/EC which prohibits disability discrimination in the workplace, however, the extent of protection provided in the UK was extended by EU legislation. For example, in the case of *Coleman v Attridge Law*¹³ the Court of Justice of the European Union clarified that direct discrimination included less favourable treatment because a person is associated with someone with a protected characteristic. In this case she experienced discrimination because she was less favourably treated because she had a son who had a disability. This interpretation has been important across the whole of the European Union.

What would happen if we left?

Negotiation period

If a member state chooses to leave the EU, the Treaty provides for a two-year period of negotiation before exit takes effect by operation of law, whether or not any suitable trading agreements had been reached by then.¹⁴ There are many uncertainties about what this would mean in practice and neither side has published a detailed manifesto

⁸ Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-267/06>

⁹ Employment Equality (Religion or Belief) Regulations 2003 which were replaced by the Equality Act 2010. Provisions to counter religious discrimination were already in place in Northern Ireland.

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>

¹¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0078>

¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0043>

¹³ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-303/06>

¹⁴ See Article 50 of the Treaty on European Union.

on how exit might be managed. What would come out of that negotiation is unclear.¹⁵ However, the negotiation is likely to be drawn out and tendentious, which would create uncertainty and this would affect equality rights just as much as any other area of law or policy. For example, it might create uncertainty about the validity of European Court of Justice decisions during any interim period. If nothing is agreed, then the UK would simply withdraw at the end of that period.

New legislation and case law

There is no doubt that a decision to leave would bring an end to the development of UK equality law and case law in line with EU law. As we have seen in relation to the equality rights set out above, in some key areas the EU has been an important driver for improvements which have benefitted us all.

There can be no guarantees that current or future governments of whatever political party will advance or strengthen equality legislation. In such circumstances and given the EU's institutional commitment to harmonisation in this area, membership of the EU could provide an essential source of innovation and improvement. For example, the current government has made important commitments to increasing equality of opportunity through non-legislative means, but has shown little appetite for significant new equality legislation.

In addition, we would no longer have access to Court of Justice of the European Union so we could not ask them to enforce any of the European equality provisions.

(Note that we would continue to have access to the European Court of Human Rights because leaving the EU does not mean that we leave the European Convention on Human Rights. However questions have been raised about our continued membership of the European Convention on Human Rights, in the context of the proposed British Bill of Rights)

Existing legislation and case law

The government has not yet set out whether it plans to reform existing equality employment law in the event of a Brexit or how it would interpret existing legislation without the assistance of EU case law. It is not possible to predict with certainty what current or future governments would do.

If the UK remains in the EU, there may still be an impact on employment as a result of a change in the terms of the UK's membership. For example, EU migrants will not be able to claim the new unemployment benefit, Universal Credit, while looking for work and child benefit will not be transferred home at UK rates. It has also been agreed that we will not be continuing to work towards 'ever closer union' with the rest of the EU.

¹⁵ It would certainly involve a reconsideration of and possible amendment to the European Communities Act 1972.

If the UK votes to leave, it is not likely there would be any change in the short term during the negotiation period. Beyond that, however, different scenarios are possible. On the one hand, there are many examples of when legal systems have divided leaving old laws as they stand without their being immediately thrown over. On the other hand, it would be complacent to assume that our equality law and institutions would be secure. The lessons of the Red Tape review of legislation under the previous Coalition government are helpful here. When the government were considering repealing the Equality Act 2010 it was the EU equality provisions that prevented them from eroding the main equality laws. Instead they removed some relatively minor, although nonetheless important, provisions that were not protected by EU law.¹⁶ It is possible that a result of Brexit would be an attack on the perceived 'red tape' that originated in the EU.

Conclusion

The EU has played an important role in both developing and safeguarding equality legislation in the UK. This has brought significant public benefit and a legacy that has strengthened protection from discrimination, enabled many thousands of people to challenge unfair treatment, and helped employers to create more inclusive and more competitive workplaces.¹⁷

Whether the UK remains in or leaves the EU, it will be essential for us all – government, employers' organisations, and civil society – to protect and build on that legacy.

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¹⁶ These were the provisions relating to the statutory questionnaire procedure, the Employment Tribunal's power to make recommendations to employers, and the dual discrimination provisions. The House of Lords Select Committee Report on the 'Equality Act 2010: The impact on disabled people', 2016, has recommended that this should be reversed. See <http://www.parliament.uk/business/committees/committees-a-z/lords-select/equality-act-2010-and-disability/news-parliament-2015/equality-act-report-published/>

¹⁷ <http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters>