Predictions for UK labour law in 2021

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Brexit has been 'done'. Or rather, the next stage of the Brexit saga has been finalised. A treaty has been finalised – the Trade and Cooperation Agreement (TCA) – and provisionally applied. Much of the controversy of the final months of negotiation concerned labour law or level playing field (LPF) conditions to be precise. The question is how this will unfold in the years ahead.

The LPF conditions for labour law fall into two parts: (1) non-regression and (2) rebalancing. As far as non-regression is concerned, Art. 6.2(2) provides that "a Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards." However, each Party can set its policies "to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies".

The advent of the European Pillar of Social Rights (EPSR) has seen something of a renaissance of social policy at EU level. The Transparent and Predictable Working Conditions Directive, passed in 2019, needs to be implemented in the next two years and with it some important provisions on the maximum duration of any probationary period and limitations on the use of zero hours contracts. Yet more radical is the proposal for a Directive on adequate Minimum Wages.

For the UK, the freedom to diverge could mean regulation or deregulation. Theresa May, the former prime minister, demonstrated no appetite for using Brexit for more deregulation. Indeed, she boasted she would use her new-found freedom to improve labour standards in the UK (EU membership did not, in fact, preclude that). In 2019, Boris Johnson committed to setting "a high standard, building on existing employment law with measures which protect those in low paid work." This commitment has not been repeated much recently. However, his newly acquired 'red wall seats' (former Labour seats which have had a Conservative MP since the 2019 election) were won on a pledge to get Brexit done and to level up. Widespread deregulation does not fit this agenda.

That said, some the Court of Justice's interpretations of the Working Time Directive have long aggravated employers, and the UK government may well remove requirements to pay holiday pay at the end of a long period of sick leave and not to pay rolled up holiday pay. Likewise, some or all of the Agency Workers Regulations, implementing the Agency Work Directive 2008/104, might be repealed. There may be other changes too. Despite initial government

denials, the UK Secretary of State has now said there is a review of EU employment law, but he insists that the plan was to maintain "a really good high standard for workers in high employment and a high-wage economy".

But does this not constitute wholescale deregulation? Does it even trigger Article 6.2(2) of the TCA? Does salami slicing – in a limited and specific way – really affect trade or investment? Or are the barriers for UK access to the single market now so high that the EU can weather some low-level regression by the UK? There is a remedies provision for breach of the non-regression clause – based on convening a Panel of Experts (not very tough) – but buried elsewhere in the text is the possibility for parts of the agreement to be suspended in the case of non-compliance.

The second part of the LPF provisions on rebalancing concern *future* measures in the field of labour or social policy (Article 9.4). Where *material* impacts on trade or investment arise as a result of significant divergences between the Parties, either Party can take "appropriate rebalancing measures" which shall "be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation". Article 9.4 applies where one party significantly improves its labour standards or the other significantly reduces theirs.

Even if the UK does not go down the route of deregulation, it is possible that the EU will go further in developing its social policy as a result of the EPSR. Its proposal for a Directive on adequate minimum wages would set a framework for EU member states based on the Kaitz index which describes the relationship between minimum and median or average wages. If adopted, this Directive would be a radical step for the EU (and raise difficult questions about its legal basis). Would it have material impacts on trade? Well, given that the UK already has a minimum wage which is regularly examined by the Low Pay Commission which makes annual recommendations on the future level of the National Living Wage and National Minimum Wage rates, it seems unlikely that this will constitute a significant divergence. If the rebalancing measures are engaged, the mechanism is swift and results in proportionate action suspending part of the agreement.

The first potential use of these procedures may come with the establishment of free ports. These are seen as one of the benefits of Brexit and are a pet project of the UK Chancellor of the Exchequer, Rishi Sunak. So far it has been confirmed that free ports will benefit from: streamlined planning processes to aid brownfield redevelopment; a package of tax reliefs to help drive jobs, growth and innovation; and simplified customs procedures and duty suspensions on goods. It is not yet clear whether the package might include lower employment or environmental standards. For some Brexiters, free ports also provide an opportunity to test the resilience of the TCA and its dispute resolution mechanisms.

(De-)regulation of employment law may be another area where the government decides to test the EU's willingness to flex its muscles over the scope of the non-regression and/or rebalancing measures. At a time when both sides profess a commitment to high employment standards, it seems possible that there will be a fight over precisely what that means.