

## **BORIS 'UNCHAINED'**

### **THE THREAT TO HARD-WON EQUALITY AND WORKERS' RIGHTS**

#### ***A short report/media briefing.***

R. Harwood, 21<sup>st</sup> October 2019, Public Interest Research Unit.

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#### **1. Threat to equality and workers' rights**

- (a) Equality and workers' rights in the UK have been hard won over many generations - and enacted under governments of different political colours [see appendix 1 below] - but are now under serious and imminent threat.
- (b) Past comments of current ministers suggest that the present government could move quickly to begin cutting what ministers have described as unnecessary "red tape" (i.e. workers' rights) if and when the UK leaves the European Union [see appendix 4 for a sample, with citations]. For example -
  - Dominic Raab [now Foreign Secretary] wanted to "secure an exemption from the draconian Working Time Directive ... scrap the Agency Worker Regulations"; and he asked - "Why not suspend the minimum wage for 16 to 21 year olds working for small businesses.. ?" (Raab, 2011).
  - Boris Johnson, referring to David Cameron's EU treaty "re-negotiations", stated (Johnson, 2014) – "We should go into those renegotiations with a clear agenda: to root out the nonsense of the social chapter – the working time directive and the atypical work directive and other job-destroying regulations." Among other "nonsense", the Working Time Directive provides for annual leave.
  - Priti Patel [now Home Secretary] said - "Following a vote to leave the EU ... introduce one of the most flexible and liberating regulatory regimes anywhere in the world".

- Indeed, to our knowledge, there has never been a UK Cabinet which has appeared as personally committed to cutting employment protections as this one.
- (c) Boris Johnson's Withdrawal Agreement (published 19<sup>th</sup> October 2019, UK Government 2019a) appears to undermine Theresa May's commitment – in her Agreement of November 2018 and also made elsewhere [appendix 3(2)] - not to weaken workers' rights post-Brexit. And there appears no genuine intention, on the part of Johnson's government, to ensure dynamic alignment i.e. that UK labour rights keep pace with EU labour rights. For example –
  - Johnson's Agreement has dropped Article 4 in Theresa May's Agreement which provided that - "With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure" "non regression of labour and social standards" [see appendix 3(2)(a) for the full paragraph]. Instead, there is a weak statement of preference (using the term "should" not "shall") in Johnson's non-legally binding Political Declaration [see note 0.1].
  - In addition, as the option of creating a single customs territory has apparently now been discarded [see Note 0.2(a)], the putative aim at which non-regression could have been directed (i.e. the proper functioning of that territory) would seem to have been dropped.
  - The idea that a level playing field could be obtained through a Free Trade Deal, and that this would protect workers' rights, is illusory [see note 0.2(b)]; and, in addition, the prospect of leaving the on WTO terms at the end of the transition period appears to be a very real one.
- (d) Recent government statements, ministerial comment in debate, along with Johnson's recent Withdrawal Agreement, add to fears for the future of UK equality and employment rights. For example -
  - Boris Johnson's letter (dated October 2<sup>nd</sup> 2019) to Jean-Claude Juncker, President of the European Commission, states – "The Government intends that the future relationship should be based on a Free Trade Agreement in which the UK takes control of its own regulatory affairs" (Johnson, 2019a). There is no reference in the letter to retaining existing equality or workers' rights.
  - Jeremy Corbyn (3<sup>rd</sup> October 2019) claimed in the Commons - "this Government's agenda is clear: they want a Trump deal Brexit that would crash our economy and rip away the standards that put a floor under people's rights at work and protect our environment and consumers" (Corbyn, 2019).
  - The Prime Minister's reply to Mr Corbyn was - "I think that it would be the will of the House under any circumstances to keep our standards the highest in the world" (Johnson, 2019b).
  - Concerns arising from the above reply and other comments from the PM and his ministers include:
    - The new Withdrawal Agreement does not contain a commitment to retaining existing workers' rights (as discussed above) and there is no indication (in the WA or the PD) that dynamic alignment on labour

rights (i.e. that UK labour rights keep pace with EU labour rights) would be a goal.

- It would instead be left to the whim of future UK majority governments to decide whether or not to repeal equality and workers' rights. Further, where rights had been enacted through secondary legislation, their repeal could take place with little or no parliamentary scrutiny.
- The PM's claim (in his reply to Mr Corbyn) to think that "it would be the will of the House under any circumstances to keep our standards the highest in the world" is highly problematic. The following is noted-
  1. The UK in fact has a quite low level of workers' rights ("standards") compared to other EU nations [see below para 2(a)]. In other words, the PM's claimed premise was and was presumably known to be factually false.
  2. The Conservative Liberal Democrat Coalition, and succeeding Conservative Government, made substantial cuts to already comparatively limited UK workers' rights [see appendix 1, para 2].
  3. It appears that the Coalition would have cut even more workers' rights if the requirements of EU law had not in effect put these out of reach [appendix 2, para. 4].
  4. These rights would no longer be out of reach if and when the UK leaves the EU with no deal or with the kind of deal entailed in Boris Johnson's Withdrawal Agreement; and the current government – which has been characterised by some, including former Conservative MPs (e.g. Soubry, 2019), as "hard right" – appears a good deal more committed to cutting workers' rights than the Coalition was.
  5. The widely expected post-Brexit recession (e.g. Inman, 2019) or other economic downturn could provide a pretext for cutting what can be expected to be described along the lines of "burdens" to business (i.e. workers and equality rights); as would chasing a trade deal with Donald Trump's administration [note 3].
- There were also indications from Europe that Boris Johnson's proposals would entail dropping Theresa May's government's commitments to workers' rights.
  - For example, Guy Verhofstadt, chair of the European Parliament's Brexit Steering group, referring to withdrawal proposals from Boris Johnson in October 2019, stated in the Parliament - "the proposal is to downgrade the political declaration on the future relationship ... destroying the ecological social and labour standards" (Verhofstadt 2019).
- Since Boris Johnson became PM, ministers in his government have indicated that "deregulation" will be an important government focus post-Brexit [note 4]. For example, Leadsom (in July 2019) referred to "the benefits of doing

away with certain EU red tape that has a strangle hold on productivity.” (cited in Department for Business, Energy and Industrial Strategy, 2019b). There appears, however, to have been a belated realisation that talking about repealing workers’ rights (even when wrapped-up in the language of “cutting red tape”) might not be politically astute if the government then needs to win support for a withdrawal deal from the group of potentially amenable Labour MPs; and until after a possible “People vs Parliament” election has been won.

- Dominic Raab’s comments on the Andrew Marr Show (20<sup>th</sup> October 2019, cited in Sparrow, 2019) –
  - “He said British businesses and workers need ‘a set of regulations that is smarter and tailored towards them’.
  - “Asked why the ‘level playing field’ for workers’ regulation had been taken out of the legally binding withdrawal agreement and put into the non-legally binding political declaration, Raab responded: ‘We’re basically saying these issues of employment rights, environmental protections, are so important, and the circumstances in the UK are obviously different’.
  - ‘We actually should make sure politicians are accountable to the voters watching the show. Why would you abdicate responsibility for those issues if they’re so important?’
  - Raab’s comments are arguably deeply misleading. The following is noted –
    - EU law sets a floor but not a ceiling on workers’ rights [with the possible exception discussed below at Note 6]. The UK would be perfectly able within the EU – or if it agreed to align with EU standards - to go further than EU required minimum standards and give individuals in the UK the best employment and equality rights and protections in the world.
      1. Therefore, the only “tailor”ing that Raab seems to have in mind (in the sense that EU law might restrict it) is tailoring downwards i.e. reducing rights below those enjoyed by EU workers.
    - As regards Raab’s claim that “the circumstances in the UK are obviously different”, its noted -
      1. Employment circumstances vary between all EU countries. But the basic needs of workers – such as for maternity leave or annual holidays – are shared across all European countries.
      2. One sense in which Raab’s comment – about UK circumstances being different - is to some degree true is that UK workers already have fewer employment protections than the majority of their EU counter-parts [see para 2(a) below]. But this is a reason to keep minimum EU standards rather than ditch them and cut UK workers’ rights even more.
    - As discussed above, it seems clear that a post-Brexit Tory government - freed of EU law - would want to cut employment rights below the levels enjoyed an required in the EU.

1. Raab for example has made clear that he wants to repeal the Working Time Regulations and Agency Worker Regulations [see para 1(b) above].
  2. The Coalition government cut 22 significant equality and workers' rights and appeared to have wanted to cut more but EU law put these out of reach. The current government are even more gung-ho about cutting rights than the coalition were.
    - Raab's apparent suggestion that taking workers' rights out of the legally binding Withdrawal Agreement reflected the importance the government places on these rights seems nonsensical. The only reason to take them out of the legally binding agreement is so that the government is not legally bound to ensure these minimum standards.
- The idea that having minimum standards would somehow reduce accountability to voters appears equally unsupportable.
    - Political parties since the UK joined the EU have put forward very different manifesto commitments on workers' rights; and Labour in government has tended to increase rights and the Conservatives and Liberal Democrats have tended to reduce them. Therefore, people have had a choice between more pro and more anti workers' rights parties; just the same as they would outside the EU.
    - The only way that minimum EU standards might be argued to reduce accountability is if the majority of voters wanted rights even lower than EU minimum standards – such as wanting no right to a paid holiday – but there is no evidence that voters do want a reduction in rights.
    - Coalition cuts to employment rights do not appear to have had popular support; and therefore the Coalition could have been more accountable by not having made these unpopular cuts. But they presumably went ahead because it's possible, of course, for governments to have unpopular policies and still be re-elected on their platform as a whole.

## **2. The value of equality and workers' rights**

- (a) A long pedalled myth is that workers in the UK enjoy strong rights compared to workers elsewhere and that these UK rights are excessive. The reality appears to be different. For example -
  - Grimshaw et al. (2017: 225) write – “The UK is differentiated from most EU countries in ... its standards of employment protection are weak. Among the 24 EU countries listed in the OECD database, the UK ranks bottom for the measure of individual dismissal protection (standard contracts) ... (2013/14)”.
  - Croucher (2016) reports that – “Botero et. al.'s index, derived from a large sample of countries worldwide ranked employee protection from 0(non-existent)-1(extremely high). The global median is 0.4613. Most European countries score above that. Thus, Germany = 0.6071 .... Ukraine = 0.5774;

Norway = 0.6488. The high degree of de-regulation in the UK since the 1980s is shown by a rating of 0.1875, lower than the USA at 0.2589”.

- (b) The other pedalled myth has been that workers’ rights – often referred to as “red tape” – are bad for business and damage the economy. Again, the reality appears to be different. For example -
  - Reasonable levels of employment rights appear in general to be more conducive to productivity, competitiveness and economic growth than low levels of rights. This seems to be, in part, because making it easier to dismiss workers (such as when the coalition doubled the qualification period for protection from unfair dismissal) reduces an organisation's incentive to develop employee skills and knowledge through training and development (Harwood, 2015).
  - Equality laws can also help ensure that employers can and do employ the best person for a job and that staff can fulfil their potential. For example, disability reasonable adjustments required under the Equality Act 2010 (such as making an office more wheelchair accessible) can benefit organisations at the same time as benefiting disabled workers. For instance, referring to reasonable adjustments, Bell (2015:11) writes - "Studies from the US have reported significant benefits in terms of improved productivity, less absenteeism, better workplace morale and avoiding the costs of recruiting and training a replacement worker".
  - Rubery and Piasna (2017: 45) refer to “the lack of empirical evidence to support a link between regulation and overall employment outcomes ...” and add - “Moreover, existing empirical evidence provides very little support for the expectation that deregulation will create additional jobs or reduce unemployment”.
  - Therefore, cutting workers’ rights – as ministers appear to favour - could well add to the country’s economic woes.
  - It is recognised, however, that there are fairly intractable methodological problems around measuring the possible relationships between employment rights and economic performance; and that, therefore, figures from all quarters need to be treated and indeed presented with caution.
- (c) Our laws say a lot about who we are, what we regard as desirable and what we consider unacceptable; and help guide individual and collective actions and build the kind of society we want to live in.
  - While workers’ rights in the UK are weaker than those in most other EU nations [see above], our equality rights are reasonably strong and in some cases preceded and go beyond what was required under EU law.
  - The question is whether we want to go back towards the times when it was lawful to dismiss someone for discriminatory reasons such as the colour of their skin or their sexual orientation; when many disabled members of the public could not access public buildings or public transport; or when it was not uncommon to have the now infamous “no Irish, no blacks, and no dogs” signs at places for rent (e.g. Sherwood 2003). Of course, none of this

regression would happen overnight – but it is a question of choosing a direction of travel.

- (d) UK equality and employment laws have made an important contribution to improving the quality of life in the UK, including in relation to education, health and social care, bringing-up children, employment, social security, recreation, and justice and individual freedom. For example, Benn writes (2016) - “340,000 women receive paid maternity leave each year in the UK. “
  - However, there are major weaknesses in the drafting of the employment and equality law statutes and regulations, their interpretation, and enforcement [e.g. Harwood, 2016 on some of the weaknesses of disability equality law].
  - In addition, existing laws appear inadequate to present challenges. In particular, the increasing casualisation of work – with, for example, the rise of zero hours contracts [note 5] - means that growing numbers of workers are denied basic rights. -
    - They are not employed long enough to be entitled to many important rights and protections and are in general in too weak a position to enforce the rights and protections that they are entitled to.
    - For example, Harwood (2015: 16) reports – “a woman who worked in retail stated – ‘My employer said that I had a zero hours contract ... I had to be on call any and every day for a shift ... no adjustments made despite quoting the disability act till I'm' pink in the face. Zero hours are not good for ADHD or OCD. It turns you into a complete wreck.’”.
  - Therefore, the study taking place as part of this campaign will explore further where laws are not working, how laws can be made more effective, and what else can be done to help ensure decent, secure, rewarding work, and freedom from discrimination.
    - For example, arguably there should be a legal duty on employers to try and protect employees from sexual and other protected characteristic related harassment by clients and customers. The Fawcett Society notes (2018: 5) that - “Section 40 of the Equality Act 2010 provided protection to employees in these cases, but it was repealed in 2013” and continue – “we recommend that section 40 is reintroduced, with an amendment so that it requires only a single prior incident of harassment. Pregnancy and maternity, as well as marriage and civil partnership status, should also be included as protected characteristics when it comes to prohibiting harassment”. This would seem to make sense.

## **APPENDICES**

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## **APPENDIX 1**

### **Improvements and cuts to rights: 1975 to 2019**

1. There have been major improvements to equality and workers' rights under governments of all the main political parties, albeit not under all governments.

- For example, Race and Sex Discrimination Acts were passed under Harold Wilson's Labour government in the 1970s; and the Disability Discrimination Act 1995 was passed under John Major's Conservative government.
- Wintemute (2016: 13), however, argues – "Historically, the Conservative Party has rarely proposed new UK anti-discrimination legislation. The Race Relations Acts 1965, 1968 and 1976, the Equal Pay Act 1970, the SDA (Sex Discrimination Act 1975), the Regulations implementing Directives 2000/43/EC and 2000/78/EC, and the Equality Act 2010 were all introduced by the Labour Party. The main exception was the Disability Discrimination Act 1995, which required direct action by disability rights campaigners sufficient to embarrass John Major's Government into legislating..." (words in brackets added).
- The year 2010 – which saw the passing of the Equality Act in the dying days of the last Labour government - was arguably the apogee of equality rights in the UK and (with the incredibly important exception of trade union rights) of workers' rights more generally.

2. There have been major cuts to workers and equality rights since the election of the Tory-Liberal Democrat Coalition government in 2010.

- There were at least 22 significant cuts to employment and equality rights under the Coalition (Harwood, 2015: 8); including, for instance, the doubling of the normal qualification period for protection from unfair dismissal.
  - This weakening of legal rights occurred at the same time that increasingly precarious employment – including with the rise of zero hours contracts [note 5] – meant that strong legal protections became more important than ever.
  - In addition, the Coalition introduced, and the succeeding David Cameron Conservative government passed, the Trade Union Act 2016; further weakening the position of workers.
    - Collective bargaining and agreements (i.e. between employers/ employers' associations and unions), at firm or sector level, can be as or more important than workers' individual legal rights in helping to ensure decent terms and conditions - "such as more generous severance pay, sick pay or maternity leave" (Grimshaw et al 2017) - and in defending individual workers.
    - However, union rights in the UK have been eroded from Margaret Thatcher's government onwards; and union membership and the coverage of collective agreements has declined, including under New Labour (Brown and Nash, 2008: 93-98). In addition, Smith and Morton (2006: p. 404), referring to New Labour, note – "Labour's acceptance of the bulk of Conservative legislation on industrial action ..". This

meant no return of the right to take industrial action beyond the particular enterprise, which had been a principal way that unions could support workers. Meanwhile, multinational firms can take action across international borders when dealing with workers at an individual work-place.

- The Trade Union Act 2016 leaves UK trade union laws even further out of alignment with internationally accepted standards for the freedom to organise. For example, Professor Bogg (2016: 299), of Oxford University, writes that the Act's characteristics include "a repressive strategy of de-democratisation, undermining political resistance and stifling dissent in the democratic process..".
- Theresa May's government proposed significant improvements to workers' rights [appendix 3, para 2(b)] but the future of these proposed changes now appears at best uncertain.
  - For example, it consulted in Spring 2018 on its stated "intention to enforce a wider range of basic employment rights on behalf of vulnerable workers" (Department for Business, Energy and Industrial Strategy, 2019a). The consultation responses were published in December 2018 but it is not clear that the government has progressed the matter since.

## **APPENDIX 2**

### **The role of the EU in the development of equality and workers' rights in the UK**

1. Many of the rights that workers in the UK currently enjoy arise from European Union membership and/or are guaranteed under that membership.

- EU law provides a floor of workers' rights on which "national labour law and industrial relation systems can add further layers of protection" (Countouris and Koukiadaki, 2016).
  - EU law labour and equality does not – with several possible and contested exceptions [note 6] - set a ceiling on workers' rights. The UK would be perfectly able within the EU to give individuals in the UK the best employment and equality rights and protections in the world.
  - Going beyond minimum employment standards is not what the coalition often attacked as "gold plating" [note 7]. It is a shared expectation among EU states.
- However, as will be addressed in the study report, the EU's impact on the progress of workers' rights has at times slowed to a crawl (e.g. Zahn 2018). Further, there appears to be a strong argument for the EU (including if it wishes to survive an age of populist rhetoric) to unambiguously put a social Europe and the interests of its people (including of course immigrants) above the claims of transnational corporations.

2. Current UK rights derived from, and/or underpinned by, EU law include [note 8]:

- Working time rights (see EU, 2019a), including the 48 hour week, rest periods and breaks and paid annual leave.
- Pregnant workers' rights and maternity rights; and parental leave rights, including rights to leave on birth or adoption and time off for family emergencies.

- Protection for young people at work (EU, 1994); and rights part time workers, fixed term/temporary, and agency workers. For example, Bell (2018: 2) notes that the Court of Justice of the EU (CJEU), on the basis of EU legal protections, “has rejected the idea that employers can, without rigorous justification, exclude part-time and fixed-term workers from important benefits such as length-of-service pay increments, or access to occupational pensions..”.
- Protection from discrimination on the grounds of age, disability, gender, gender reassignment, “race”/ ethnicity/nationality, religion and belief, and sexual orientation.
- Health and safety at work protections. For example, the Commission has recently [EC, 2018] taken additional action to protect workers from cancer causing chemicals. Groch (2018) notes – “of the 65 ... new British health and safety regulations introduced between 1997 and 2009, 41 originated from the EU. “
- TUPE rights. Morris (2018: 9 pd) writes – “The 2001 Transfer of Undertakings Directive (and the consequent transposition into the ‘TUPE’ Regulations in the UK) protects employees’ contractual entitlements when they are moved to a different organisation due to a merger or legal transfer”.
- Rights to written information on employment terms and conditions.
- Payment of employees’ outstanding claims in the event of employer insolvency; and rights in relation to collective redundancies.
- A general framework for informing and consulting employees on major decisions being made by companies; rights to establish works councils; and data protection at work rights.
- EU pensions directive, aimed at better protecting the benefits of members and beneficiaries of workplace pensions.

3. Directives and rights within them which are under consideration or have been agreed (but not yet passed into UK domestic law), and which UK workers would or could miss out on with Brexit, include.

- The European Parliament and Council directive on work-life balance for parents (adopted in June 2019), which includes “carers' leave for workers providing personal care or support to a relative or person living in the same household” (EU 2019b). The UK already provides some rights established under this directive.
- The Directive 2019/1152 on Transparent and Predictable Working Conditions (EU 2019c); which includes, for example, greater protection for those on zero hours contracts, including a right to know a reasonable period in advance when work will take place.
- Draft “directive on the protection of persons reporting on breaches of Union law” (EU 2019d).

4. It seems probable that the Tory Liberal Democrat Coalition would have cut more workers’ protections if EU employment law had not restrained it. For example, -

- It seems that the Coalition wanted to curtail working time rights but the EU directive prevented them from doing so. For instance, the coalition “programme for government” states that the coalition “will ... work to limit the application of the Working Time Directive in the United Kingdom.” (UK Government, 2010: 19).

- The TUC (2016a: 9) reports, referring to the Transfer of Undertakings Regulations (see para. 2 above in this appendix), states - “ While the regulations were somewhat weakened in 2013, the EU legislative framework meant they could not be repealed “
- Harwood (2016a: 1) writes – “As Elias LJ put it in *Unison v The Lord Chancellor* (... para. 26), ‘A right is rendered illusory if there is no practical mechanism for enforcing it.’” The coalition appears to have weakened the “practical mechanism”, and for many individual removed it, when it introduced employment tribunal fees in July 2013, and “total claims to employment tribunals went down by 81% between the first quarter of the 2013/14 financial year and the first quarter of the 2014/15 financial year...” (Harwood, 2016a: 2, citing MOJ figures). In 2017, the UK Supreme Court found that the Fees Order was unlawful under both domestic and UK law (UK Supreme Court, 2017).

### APPENDIX 3

#### Acts, agreements, and Bills

##### 1. The European Union (Withdrawal) Act 2018

- The European Union (Withdrawal) Act 2018 would end “the supremacy of European Union (EU) law in UK law” convert “EU law as it stands at the moment of exit into domestic law, and” preserve “laws made in the UK to implement EU obligations ...” (UK Government, 2018: 4). The Explanatory Notes to the Act continue (ibid: 5) – “As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes”.
  - However, there is nothing in the Act to stop the government from abolishing all these EU derived and indeed any and all workers’ rights if and when the UK is out of the EU. The Explanatory Notes state (ibid: 8) – “because the supremacy of EU law will not operate on new, post-exit legislation, Parliament (and, within devolved competence, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU”.
  - The so-called Henry VIII sections of the Act raise the concern that EU derived equality laws contained in UK secondary legislation (e.g. the Sexual Orientation regulations) will be vulnerable to rapid repeal with little or no parliamentary scrutiny. A particular concern is that such powers are open to abuse by a government which does not adequately respect parliamentary sovereignty or the constitution more generally.
    - Clarke (2019) explains – “Henry VIII powers are one type of delegated legislation that allow ministers to amend or repeal primary legislation - without having to create a new Act of Parliament that parliamentarians must debate and vote on. Henry VIII powers may also be referred to as secondary legislation”.

##### 2. Theresa May’s withdrawal agreement

- (a) Theresa May’s withdrawal agreement (“Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union...”) is an unratified treaty between the UK and the EU.

- It includes an (expandable by mutual consent) transition period until 31 December 2020, during which EU laws (including equality and workers' rights laws) continue to apply to the UK.
- In addition, Article 4 of the withdrawal agreement provides that "With the aim of ensuring the proper functioning of the single customs territory, the Union and the United Kingdom shall ensure that the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period in the area of labour and social protection and as regards fundamental rights at work, occupational health and safety, fair working conditions and employment standards, information and consultation rights at company level, and restructuring".
- (b) Theresa May and her then minister Greg Clark (from whom Boris Johnson removed the Tory whip on 3<sup>rd</sup> September 2019) had – in an attempt to win Labour support for the draft agreement - given assurances that the government would keep the UK employment law framework closely aligned with new EU employment rights post-Brexit and had proposed a mechanism to facilitate parliament's input into future changes to rights [UK Government 2019]. This would have been, in the Guardian's words, "a tiny upgrade to powers that already exist" [note 21a]. For example, if there was a parliamentary majority for mirroring an improvement in rights for EU workers post Brexit, parliament could find a way to pass legislation to mirror these rights without this proposed "process to enable parliament to consider whether the UK should align with EU rights".

### 3. PM Theresa May's speeches to Parliament on a proposed new Brexit deal in May 2019

#### 3.1. *Speech on 21 May 2019*

On the 21<sup>st</sup> May 2019, then PM, Theresa May, delivered what the press release described as "a speech on the new Brexit deal" (May 2019a). In the end, of course, this went nowhere.

Extracts, relevant to debates around workers', include the following:

"And while the talks with the opposition did not reach a comprehensive agreement, we did make significant progress in a number of areas.

Like on workers' rights. I am absolutely committed to the UK continuing to lead the way on this issue.

But I understand people want guarantees. And I am happy to give them.

So the new Brexit deal will offer new safeguards to ensure these standards are always met.

We will introduce a new Workers' Rights Bill to ensure UK workers enjoy rights that are every bit as good as, or better than, those provided for by EU rules.

And we will discuss further amendments with trade unions and business".

#### 3.2. *Speech on May 2019*

Theresa May gave further details the following day (May, 2019b). Relevant extracts include the following:

"we are now making a 10-point offer to Members across the House—10 changes that address the concerns raised by right hon. and hon. Members; 10 binding commitments that will be enshrined in legislation so they cannot simply be ignored ....

"to address concerns that a future government could roll back hard-won protections for employees, we will publish a new Workers' Rights Bill.

Fourthly, to address concerns that a future Government could roll back hard-won protections for employees, we will publish a new workers' rights Bill.

"As I have told the House many times, successive British administrations of all colours have granted British workers' rights and protections well above the standards demanded by Brussels.

"But I know that people want guarantees, and I am happy to provide them.

"If passed by Parliament, this Bill will guarantee that the rights enjoyed by British workers can be no less favourable than those of their counterparts in the EU – both now and in the future.

"And we will discuss further amendments with trade unions and business".

### 3.3 Criticism

- This is portrayed here, and also by a number of withdrawal deal amenable Labour MPs, as a "Workers' Rights Bill". However, as the author of this press release understands it, it would not be a Bill of Rights in the normally understood constitutional sense. It would be no more than a commitment that one government makes and the next government could repeal with a majority of one. The continuation of UK equality and workers' rights (both those which had been underpinned by EU law and those which went beyond EU law) would in essence be at the whim of future governments. And this is where the serious and imminent danger lies.
- In contrast, amending articles of the US constitution requires inter alia the following (taken from The (US) National Archives, Federal Register, National Archives, 2019):
  - That an amendment be proposed either by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures; and
  - this proposed amendment – to become part of the Constitution – needs to be ratified by three-fourths of the States (38 of 50 States)".
- While a particular employment law (such as the right to a rest period every six hours) might not be considered a fundamental right, minimum rights for workers arguably should be – as rights that give them some power in what would otherwise be highly asymmetrical power worker-employer relations in which workers have no choice (if they want an income to live on) not to take part in.
- The kind of relationship that – in the absence of robust legal protections and collective employee power – could be regarded as undermining fundamental freedoms include, for example, the balance of power between a non-union individual low ranking employee and the multinational multibillion corporation which employs him or her on a zero hours contract.

#### 4. Boris Johnson's Withdrawal Agreement 2019.

This is covered above, including in para 1 of the Media Briefing.

## APPENDIX 4

### Past statements of selection of current Ministers

- Michael Gove (now Chancellor of the Duchy of Lancaster):
  - Mason (2016, 7<sup>th</sup> December) reported – "Two former cabinet ministers, John Whittingdale and Michael Gove, suggested to the CBI business group on

Wednesday that companies should start drawing up a list of regulations they want to see abolished or reformed.

The two leave campaigners raised the prospect of EU laws being scrapped after the passage of May's great repeal bill carrying over existing legislation, as they cross-examined witnesses at a session of the Commons committee on exiting the EU".

- The TUC (2017: 5) reports that Michael Gove referred to a 'battery of job-destroying European measures from the Working Time Directive, to the varied provisions of the social chapter.'
- Sajid Javid (now Chancellor of the Exchequer)
  - In July 2015, then Business Secretary, Sajid Javid, according to the Department for Business, Energy and Industrial Strategy (2015) news release, announced "ambitious reviews into burdensome red tape in 5 key industry sectors". The press release reports that Javid "said" – "I am determined to take the brakes off British businesses and set them free from heavy-handed regulators ". Heavy handed regulators referred to included, for example, those inspecting care homes.
- Boris Johnson (now PM).
  - Swinford's headline (2017), in the Telegraph, - was "Boris Johnson backs Telegraph campaign to cut EU red tape that is choking Britain after Brexit ". Swinford continues (ibid) –
    - "Boris Johnson has backed calls to sweep away decades of 'burdensome' EU regulations after Brexit as he 'applauded' a campaign by The Telegraph to slash red tape".
    - "He said: 'It will be an opportunity for this country to get rid of some of the burdensome regulation that has accreted over the last 44 years'.
  - Johnson wrote in the Telegraph (2014) – "We should go into those renegotiations with a clear agenda: to root out the nonsense of the social chapter – the working time directive and the atypical work directive and other job-destroying regulations. "
  - Bennet, in the Express, reports (2014) Boris Johnson stating in a speech on 6<sup>th</sup> August 2014:
    - "There is little doubt that it is that extra stuff, the stuff from Brussels, that is helping to fur the arteries to the point of sclerosis. "
    - "The weight of employment regulation is now back-breaking: the collective redundancies directive, the atypical workers directive, the working time directive and a thousand more".
  - Brimelow (2019) reports that Boris Johnson "gave evidence to a select committee that (the working time directive) ... had proved too expensive to implement in the UK".
- Andrea Leadsom (now Secretary of State for Business, Energy and Industrial Strategy):
  - Walker (2017) cites Leadsom as saying "Now, as we prepare to leave the EU, I will be looking at scrapping the rules that hold us back and focusing instead on what works best for the UK."

- Taking what on the face of it seems to have been a different stance, an article in the Times by Leadsom and Gisela Stuart included – “All of the EU legislation we have accepted since Tony Blair took us into the social chapter ... will remain in place if we vote to leave “ (Stuart and Leadsom, 2016). However, this appears to have been aimed at countering the, what appeared at the time to be effective, Remain argument that leaving the EU would threaten workers’ rights, and so was possibly just aimed at winning the Referendum.
- Patel, Priti (now Home Secretary )
  - The TUC reports (TUC 2016b) that Priti Patel, in a speech at the Institute of Directors (on 17 May 2016), said: “If we could just halve the burdens of the EU social and employment legislation we could deliver a £4.3 billion boost to our economy and 60,000 new jobs.” As reported by Clark (2016), Patel, in this speech, continued - "Just think of how much more success our economy could have if we had the power to reduce the burden of red tape and replace pointless EU rules with sensible domestic regulation. If we vote to leave, those opportunities arise”.
  - Bienkov reports (2017) - “The government has promised to adopt all EU laws and regulations as part of the Great Repeal Bill. However, Patel suggested the government should be proactive about stripping them back. Speaking to IEA director Mark Littlewood, Patel also agreed that Brexit was an opportunity for widespread ‘deregulation.’ ‘That’s absolutely right and that’s the case I made when I campaigned to leave the European Union’, she said.”.
  - Hall (2016) reported on what Patel was expected (from her written speech) to say to an Association of Licensed Multiple Retailers conference later that day.
    - Hall writes - “ The Employment Minister will call for a sweeping audit of regulations if Britain votes to leave the EU to identify what rules can be scrapped ....”
    - And he writes that Patel is expected to say - “We could make sure that businesses can thrive and prosper as we introduce one of the most flexible and liberating regulatory regimes anywhere in the world.”
- Dominic Raab (now Foreign Secretary).
  - In 2011, Raab (2011) wrote – “In a report published by the Centre for Policy Studies today, I make the case for ten regulatory reforms to boost job creation. Small firms and start-ups ... are being stifled by the welter of red-tape. They should be exempt from regulation, like extensions to the right to request flexible working and time off for training... “.
    - He goes onto to state (ibid) - “Why not suspend the minimum wage for 16 to 21 year olds working for small businesses.. ? ... We also need an overhaul of EU social and employment red-tape ...secure an exemption from the draconian Working Time Directive that stifles flexibility – for employees and employers – ... Then, scrap the Agency Worker Regulations ”.
  - Kirton-Darling (2018) writes that “back in 2012 Raab, alongside other rising Conservative MPs who became prominent Brexiteers such as Priti Patel and Kwasi Kwarteng, published a hard-right manifesto titled ‘Britannia

Unchained' where they described British workers as 'among the worst idlers in the world.'"

- Stewart et al (2019) report that Rabb has "spoken of wanting to scrap the Government Equalities Office, which he describes as 'pointless' ...".
- Rees-Mogg (now Leader of the House of Commons).
  - Speaking at the Treasury Select Committee, Rees-Mogg (referring to EU emission and other regulatory standards), stated (Rees-Mogg, 2016) - "We could say if its good enough for India, its good enough for here. There's nothing to stop that". The witness suggests problems of imposing no regulatory standards and Rees-Mogg continues: "We could take it a very long way... we could remove. I accept that we are not going to allow dangerous toys to come in from china ... we don't want to see ... those level of risks but there's a very long way you could go" (taken from video clip available on Independent website, with article by Stone, 2016).

### NOTES

0.1 Extract from Boris Johnson's Political Statement (UK government, 2019a: para. 77) - "The precise nature of commitments should be commensurate with the scope and depth of the future relationship and the economic connectedness of the Parties. These commitments should prevent distortions of trade and unfair competitive advantages. To that end, the Parties should uphold the common high standards applicable in the Union and the United Kingdom at the end of the transition period in the areas of state aid, competition, social and employment standards, environment, climate change, and relevant tax matters".

#### 0.2 *Customs territory and Trade agreements*

- (a) Boffey et al (2019) report that Michel Barnier, the EU's chief negotiator, talking after the agreement was reached with Boris Johnson's government on 17th October, "said the British government was seeking a looser relationship to the bloc and 'the option of creating a single customs territory between us has been discarded'".
- (b) Also note - Raoul Ruparel @RaoulRuparel (former special advisor on Europe to Theresa May) writes, of the new deal, "The level playing field commitments seem in line with approach in FTAs (Free Trade Agreements) & signal EU acceptance this is for the next phase" and adds that the deal has "removed level playing field from" the Withdrawal Agreement.
  - We would argue that good employment practice, including in the interests of a level playing field, have proved notoriously difficult or impossible to impose/achieve through trade negotiations and agreements. It is predicted that the EU would allow the UK to have declining labour protections compared to the EU and would not be able to do much about it.
- (c) As Keir Starmer, and others, have noted, Theresa May's Political Declaration (PD) included "Parties envisage having a trading relationship on goods that is as close as possible, with a view to facilitating the ease of legitimate trade" but there is no reference to "as close as possible" in Boris Johnson's PD. Instead, Boris Johnson's PD has "the Parties agree to develop an ambitious, wide-ranging and balanced economic partnership".

#### 0.3 More comments

- “We hope that this campaign will help make clear to this and future governments that there is a consensus of decency in the UK; and that it is not acceptable to go back to a time when individuals could be excluded from jobs or even from renting a room because of the colour of their skin or any other currently protected characteristic”.
- “We also hope that the government will acknowledge that all workers deserve secure and rewarding work; that all those who are not working should be guaranteed a good standard of living; and that eradicating poverty should be a number one UK government priority”.

1. Keir Starmer stated (Starmer 2019) in the House of Commons (7 October 2019, column 1502, volume 664) - “The Government have presented the EU with a 44-page legal text, a seven-page memorandum and a four-page letter. In this House, we have seen the memorandum and the letter, but not the full legal text. ... without the full legal text, we are being asked to guess at the detail of the Government’s proposals, or, worse, we are being asked to take the Prime Minister’s word on it”.

2. Also, for example, the Minister, James Duddridge, during another Brexit debate, did not take the opportunity to declare or even hint at the inclusion of any kind of commitment to workers’ rights (in Boris Johnson’s proposals) when the Conservative MP (for Banbury) asked him the following – “As a member of the ‘MPs for a Deal’ group, it would make my life easier if we were to include environmental and workers’ protections, as requested by many Opposition Members, but does the Minister agree that the right place for those protections is probably in the political declaration?” (Prentice, 2019).

\* 3. Trade deals.

- a) It appears that Boris Johnson’s motivation for wanting to remove Theresa May’s “level playing field” commitment (i.e. her commitment not to reduce existing standards) could in part be so that the UK can lower its employment, consumer and environment standards in order to make a trade deal with the US.
- b) The UK would, however, struggle to get a trade deal with the US if Brexit had – such as through the establishment of custom checks - undermined the Good Friday Agreement, as the US Congress has made clear that it would block a trade deal in those circumstances. For example, the Belfast Telegraph (2019) reports that Nancy Pelosi (Speaker of the House of Representative) stated - “If Brexit undermines the Good Friday accord, there will be no chance of a US-UK trade agreement passing the Congress. The peace of the Good Friday Agreement is treasured by the American people ....”
- c) In addition, any trade deal could take years to reach fruition and would be made with a UK out in the cold (i.e. no longer part of the EU - the largest trading block in the world) and so from a position of weakness vis-a-vis the US.
- d) None the less, it seems that Trump’s administration and its advisors have been putting pressure on the UK to leave the EU without a deal, ditch environmental and other protections, and reach a free trade deal with the US. For example, Farand (2019) reports, referring to Trump’s then National Security Advisor John Bolton – “Bolton sits at the heart of a transatlantic network pushing for deregulation post-Brexit to advance US right-wing libertarian interests” Farand continues – “Speaking on Fox News after the referendum result, Bolton said: ‘Britain can now rid itself of the sclerotic over-regulation of the Brussels bureaucrats. It can reduce its taxes, reduce regulation, be a much more attractive place for foreign investments.’”.

\*4. Mirroring how the Coalition government laid the ground work for its cuts to workers' rights, Boris Johnson's ministers cite the views of a small selection of right leaning, pro-Brexit, "business leaders" as evidence that business as a whole is crying out for the government to cut "red tape" post-Brexit.

- a) For example, what the Department for Business, Energy and Industrial Strategy (2019b) referred to as the Business Secretary Andrea Leadsom's "first Brexit roundtable with a range of businesses" in fact consisted of "business leaders" from what are thought to be 12 Brexit supporting businesses, including Tim Martin, the chairman of Weatherspoon's. Leadsom is cited in the news release as sayings that these "business leaders" "spoke about the benefits of doing away with certain EU red tape that has a strangle hold on productivity." and, with reference to Brexit, "were excited about the opportunities that lie ahead".

5. French (2018: 26), citing ONS (Office of National Statistics) figures, writes – "in the three months to June 2017, there were 883, 000 people employed on zero-hour contracts, four times more than in the three months to December 2000". With zero hours contracts 'people agree to be available for work as and when required, but have no guaranteed hours or times of work' (ACAS 2012).

6. A ceiling over some rights?

- a) The Court of Justice of the EU (CJEU) appeared to suggest a possible ceiling of rights in relation to posted workers and collective redundancies in two notable cases. However, Countouris and Koukiadaki (2016) argue that the CJEU's opinion in these cases appears to have been "very problematic".
- b) In addition, the author of this news release would argue that the slightly more recent Grand Chamber judgment in *AGET Iraklis* (Case C-201/15 AGET Iraklis) – concerning as it did what might be understood to have been the Troika (of the EC, ECB and IMF) undermining Greek sovereignty and the Greek government's efforts at social protection – is the kind of EU action that fuels anti-EU sentiment; and would argue that EU legislative action is required to put it beyond doubt that EU members states can – without fear of CJEU contradiction - build workers' rights as high above the EU set minimum floor as they wish and that the EU is first and foremost a social project dedicated to improving the lives of its people.

7. For example, the coalition government introduced a duty which appears to be aimed at limiting the use of procurement to promote equality. Specifically, the Revised Best Value Statutory Guidance (DCLG, 2015) states - "Authorities should avoid gold-plating the Equality Act 2010 and should not impose contractual requirements on private and voluntary sector contractors, over and above the obligations in that Act".

8. For more details on EU derived laws see for example:

*Equality and Non-Discrimination and Brexit* (Robison, 2016).

<https://sulne.files.wordpress.com/2016/11/equalities-sulne-roundtable-oct-2016-v2-2-11-16.pdf>

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