Retained EU Law: where next?

Response from the Employment Lawyers Association

6 April 2022

INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Standing Committee, chaired by Louise Taft, was set up by the Legislative and Policy Committee of ELA to respond to issues arising from the UK leaving the EU, from which a Working Party was formed to consider this Call for Evidence. Members of the Working Party are listed at the end of this paper.

EXECUTIVE SUMMARY

3. The concept of retained EU law was created to provide a functioning statute book as Britain exited the EU. It is not a distinct category of law per se and is not in any sense "supreme": Parliament is free to repeal or amend EU-derived laws, subject only to the UK's obligations under the UK-EU Trade and Cooperation Agreement not to weaken or reduce labour and social standards below the levels in place at the end of the transition period in a manner affecting trade or investment.

4. ELA is apolitical and takes no position on whether EU derived employment laws should change. Retained EU law can refer to all the statutes and regulations based on EU law. It can also mean the principles developed under EU law. They are different.

5. Removing all statutes and regulations based on EU law would undermine the fundamental principles and structure of UK employment law, much of which is EU derived. Wholesale removal of all retained EU law (to include primary and

secondary legislation derived from EU Directives), if that is what is proposed, would create a vacuum. It would remove all equality laws and statutory rights to paid holiday, to give just two examples. Parliament would need to legislate to replace retained EU law in fields in which it is acknowledged that legislation is necessary, and to maintain our obligations under the Trade and Cooperation Agreement. In short, the clarity and coherence of the statute book requires the retention of statutory and regulatory EU law to allow Parliament time to consider whether individual changes are necessary. To that extent the statutory and regulatory retained EU law is not just sustainable, but necessary.

6. Departing from pre IP Completion Day EU case law, whether from European or domestic courts, would mean that many principles of interpretation of and the meaning of employment law would cease to exist. Principles would need to be relitigated with much reduced certainty as to outcome for businesses along with the attendant cost of increased litigation as the Courts and Tribunals developed new principles. This damages the interests of both employers and employees. Post IP Completion Day EU case law is not binding on UK courts, though it may be persuasive in the same way as courts regularly refer to case law from other jurisdictions where it is helpful to do so. Allowing lower courts to depart from domestic decisions regarding retained EU law interferes with the UK's long established principle of precedent. As we identified in the 2020 Consultation on extending the right to depart from retained EU law, allowing lower courts to do this would create uncertainty, delay, unmeritorious claims and defences, and have unintended consequences.

7. The UK no longer needs to have regard to principles and concepts of EU law when drafting new legislation. However, many principles and concepts of EU law have been developed from UK concepts. It is not easy to distinguish which are UK or EU concepts. Key EU principles and concepts are part of our settled law; their removal would create uncertainty.

8. Employment law is a reserved matter in Scotland and Wales. Retained EU law has not therefore affected devolved competence for these nations. Northern Ireland does have the power to modify employment laws, including retained EU law, but is constrained by the Northern Ireland Protocol.

9. A bonfire of retained EU law would create an employment law wasteland of uncertainty, increased costs to business and industrial levels of employment litigation. Delays in the Tribunal system and then delays as this waterfall of litigation proceeded through the appeal Courts would mean that it would be years before the many issues and principles would be resolved.

QUESTION 1: IN WHAT WAYS IS RETAINED EU LAW A DISTINCT CATEGORY OF DOMESTIC LAW? TO WHAT EXTENT DOES THIS AFFECT THE CLARITY AND COHERENCE OF THE STATUTE BOOK?

10. In many aspects, retained EU law is not a distinct category of domestic law. On 31 January 2020 ("Exit Day") the UK withdrew from the EU. However, the Withdrawal Agreement provided for a transition period that ended at 11pm on 31 December 2020 ("IP Completion Day"). During the transition period EU law continued to have full force and effect in the UK as it did before Exit Day.

11. From IP Completion Day (31 December 2020) the principle of supremacy of EU law no longer applied in UK law.

12. EU law became retained law from 11pm on 31 December 2020. Retained EU law falls into three broad categories: firstly domestic laws and regulations made under domestic law but implementing EU law, secondly EU legislation, and a broad set of rights and principles arising from EU rights and obligations recognised by either domestic or EU courts prior to 31 December 2020.

13. Accordingly, to ensure continuity between the pre and post Brexit legal and regulatory landscape, a "snap shot" was taken of all EU legislation on IP Completion Day, 31 December 2020. This became part of UK law under the label "retained EU Law". Legally, this was achieved by the European Union (Withdrawal) Act 2018 (EUWA), the express purpose of which was "*to provide a functioning statute book on the day the UK leaves the EU*" [1].

14. The purpose, as the call for evidence acknowledges, was to avoid a gap in the statute book which would otherwise have existed when EU law ceased to apply in the UK on IP Completion Day. The effect is to preserve continuity in UK law, unless or until the UK Parliament legislates to amend or replace any retained EU law.

15. As summarised above, retained EU law has been incorporated into domestic law via the EUWA in one of three categories:

    15.1. Domestic legislation implementing EU Directives (section 2 EUWA) . There is a significant body of UK employment statutory law which falls into this category, including regulations governing:

        15.1.1. Discrimination and equal pay;
        15.1.2. Working time;
        15.1.3. Collective redundancies;

[1] Para 10 of the Explanatory Notes

15.1.4. Transfer of undertakings;
15.1.5. Information and consultation with employees;
15.1.6. Fixed term and part-time workers; and
15.1.7. Industrial action.

15.2. Directly applicable EU legislation i.e. EU legislation which had not been or did not need to be specifically implemented into UK law prior to Exit Day and applied automatically by virtue of UK membership of the EU - UK legislation which was linked or refers to EU provisions that might otherwise fall away (section 3 EUWA). This is less relevant for UK employment law than the first category, but would include for example the EU General Data Protection Regulation.

15.3. Section 4 of the Act then retains all other rights and obligations under EU law and retains them subject to a wide exception. The rights or obligations are not retained if they arose under a Directive of the EU and were not recognised either by an EU or domestic court before IP Completion Day. Therefore Directive rights were only retained if they were sufficiently clear, precise and unconditional to have conferred rights directly on individuals (as these are rights recognised by an EU or UK domestic court). For employment law purposes, this includes for example the principle of equal pay and the right not to be discriminated against on grounds of nationality, which are provided for in the Treaty on the Functioning of the EU (TFEU) and applied by EU and domestic courts (section 4 EUWA).

15.4. The effect of Section 4 EUWA is wide. It includes, as retained EU law, any EU rights or obligations recognised by EU or domestic courts as stemming from Directives before IP Completion Day. It includes retention of interpretive approaches of those Directives before either pre IP Completion Day decisions of the Court of Justice of the European Union (CJEU).

16. In one sense, retained EU law is perhaps a less distinct category of law than it was before Brexit, since it has now been expressly incorporated into domestic UK law by the EUWA.

17. That said, retained EU law is a distinct category of domestic law in some ways, perhaps most importantly in terms of how it is interpreted, as compared to pure domestic UK legislation. For example:

17.1. all domestic UK legislation enacted before IP Completion Day must be interpreted compatibly with retained EU law (in accordance with the *Marleasing* principle[2]); and

17.2. in relation to directly applicable EU law, section 7 and schedule 8 EUWA contain specific rules for amendment or modification.

18. On the other hand, domestic legislation enacted after IP Completion Day is capable of repealing retained EU law (in accordance with section 7 EUWA).

19. Another distinction is the ability created by the EUWA for ministers to "*prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU*" (section 8 EUWA).

20. Finally, retained EU law is also subject to the provisions of the UK-EU Trade and Cooperation Agreement, specifically the commitment by both the EU and the UK not to weaken or reduce their labour and social standards below the levels in place at the end of the transition period in a manner affecting trade or investment, including by failing to effectively enforce their law and standards (Article 6.2.2.), and to strive to increase their respective labour and social levels of protection (Article 6.2.4.).

21. In terms of the clarity and coherence of the UK statute book, the laws which now constitute retained EU law have been part of UK law for many years. As noted above, the purpose of retained EU law is to preserve continuity in the statute book, unless and until the UK Parliament determines that changes are warranted.

22. In one sense, it may be argued that the EUWA has improved the clarity and coherence of the UK statute book, by making retained EU law expressly a part of UK law.

23. On the other hand, it is undoubtedly true that some of the mechanisms employed by the EUWA are complex, and may present a challenge to the clarity and coherence of the statute book. In ELA's view, this is not a reflection of the substance or validity of retained EU law itself; instead it is the necessary result of the complex task of creating retained EU law within the domestic UK law framework.

[2] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) C-106/89

QUESTION 2: IS RETAINED EU LAW A SUSTAINABLE CONCEPT AND SHOULD IT BE KEPT AT ALL?

24. Yes. ELA is of the view that retained EU law is a sustainable concept and should be preserved.

25. As ELA has previously commented in its response to the 2020 Consultation on extending the power to depart from retained EU law beyond the Supreme Court (annexed to this paper), EU law runs through UK employment law like words in a stick of rock. Removing retained EU law would undermine the fundamental principles and structure of this body of UK law. It is ELA's view, as explained below, that not only is retained EU law *sustainable*, it is *essential* for legal certainty and continuity, and is also desirable as a matter of principle.

Sustainable and changeable

26. Were the UK to have no ability to modify or amend retained EU law, this would be inconsistent with the UK's status outside the EU and the constitutional principle of Parliamentary Sovereignty. But that is not the case. The purpose of retained EU law was to ensure the proper functioning of the UK legal system and avoid an unworkable legal void. Under the EUWA, retained EU law has a different constitutional status than that of EU law pre-Brexit: the EUWA conferred unfettered sovereignty to the UK, giving it the right to amend any EU retained law. As Professor Catherine Barnard notes, the EUWA puts retained EU Law into a "*holding pattern until the legislature decides to repeal or amend its provisions*"[3].

27. On the question of interpretation of law, the UK appellate courts (the Supreme Court and Court of Appeal and their equivalents), but not lower courts and tribunals, are free to depart from pre- IP Completion Day CJEU case law as it applies to rights after 11pm on 31 December 2020 in accordance with the rules that entitle the Supreme Court to depart from its own decisions.

28. It could be said that the EUWA operates to preserve a "fossilised" version of EU law, as any subsequent amendments made within the EU will not be mirrored automatically. Whilst that may be true, ELA does not believe that this renders retained EU law unsustainable because although retained EU law may not be automatically updated, the UK has the ability to amend it or otherwise in the future, as it sees fit.

29. The UK's ability to change retained EU law is not entirely without consequences. Under the EU-UK Trade and Co-operation Agreement, the UK and EU agreed not to reduce labour and social standards below those in place at the end of the

[3] SSRN-id3947215.pdf

transition period *in a manner affecting trade or investment*. The UK also agreed that any changes would be subject to other international commitments (for example, the European Convention of Human Rights). As the questions of retention and change are so closely connected, this is an important consideration.

30. Accordingly, Parliament is free to change the law but a wholesale bonfire of retained EU law would leave employment law uncertain for all and for years, cause expensive litigation and potentially put the UK in breach of its treaty obligations. It is a matter for Parliament whether to change retained EU law but, for the reasons detailed above, that process should only take place by targeted repeal and replacement.

Should EU Retained Law "be kept at all"?

Common principles

31. It is unclear what not keeping retained EU law "at all" would, or realistically could, mean. The government has pointed to its "*overall intention* [to]…*amend, replace, or repeal all the REUL that is not right for the UK*."[4] Whilst replacing law which is wrong for the UK must be a sensible aspiration, this should not mean change for its own sake or at a such a pace that causes problems. As explained below, in the field of employment law, domestic and EU law are fundamentally interconnected. For this reason, unconsidered legislative change would be problematic as a matter of principle and practicality.

32. First considering the underlying principles, the implication of the proposed strategy seems to be that retained EU law is an imposter in domestic law. But, in the case of employment law, this misrepresents how UK employment law has developed. The principles and concepts of EU law, preserved in domestic law by means of retained EU law, reflect a common understanding of employment rights across Europe, which the UK has helped form.

33. Whilst Brexit may have changed the UK's relationship with Europe, this does not mean that the fundamental principles underlying retained EU law have ceased to be suitable for the UK. Although there may be disagreement on how some of the details of EU employment law have been interpreted, the underlying structure and principles (such as principles of equality and non-discrimination), come from key values that the UK will continue to share with the remaining EU member states. They reflect how employment laws have evolved in developed economies around the world over the last half century.

[4] Written statements - Written questions, answers and statements - UK Parliament

34. Indeed the degree to which these values have historically been shared is apparent from the fact that the driver for change has come from both sides of the UK / EU relationship: UK employment law was not always changing in response to EU law. Taking the field of equality rights protection, the UK was ahead of the EU in legislating against race and disability discrimination[5] and the EU followed. On the other hand, other key equality rights protections, such as sexual orientation and age discrimination, were introduced in response to EU Directives. Retained EU law in the employment field is not an anomalous body of law that requires urgent and comprehensive overhaul. Rather, it is a large and diverse body of law, some of which originated in the UK, some of which is highly integrated into law which originated domestically, some of which is generally popular with both employers and employees, and some of which might benefit from considered and judicious amendment to better suit domestic requirements.

Practical Challenges

35. Looking at the proposal from a practical perspective, again, precisely what is meant by not keeping retained EU law is unclear. Potential scenarios are considered below but what is clear from this assessment is that simply removing retained EU law in any form would be hugely disruptive due to the interconnection of domestic and EU employment laws.

36. Despite the superficial simplicity of the strategy, if the removal of retained EU law were to mean the revocation of rules giving effect to EU law, this would cause enormous challenges in the employment field. The reality is that rules giving effect to EU law are intertwined with purely domestic laws in a way which could not be easily unpicked. The government has indicated a wish to ensure that UK law-derived rights are not "*confused or over-laid with EU-derived rights*", but in truth the reverse is also a reality. Take pregnancy and maternity rights, for example. In this arena, domestic and EU derived rights are thoroughly interlaced, with domestic rights in some respects 'over-laying' those derived from the EU. For example, the UK right to 52 weeks' maternity leave is more generous than that of 14 weeks required under the 1992 Pregnant Workers Directive.

37. Undoubtedly, laws covering the same areas as many EU-derived employment laws would have been introduced in the UK whether or not the UK had been an EU member, as they have been in other similar economies around the world.

38. With regards to case law, the UK could, in theory, remove any CJEU pre-transition case law from having any effect in the UK courts and tribunals, but this would create great uncertainty and confusion. The case law of the UK courts and tribunals over several decades has relied on the combination of EU and domestic

[5] With the Race Relations Act 1976, and the Disability Discrimination Act 1995.

decisions. Removing the binding precedents of the CJEU would not remove the domestic court decisions (some of which would be binding on lower courts) and would therefore be a partial and unsatisfactory unravelling creating significant uncertainty for employer and employee.

39. It is also unclear what this proposal would mean for domestic case law forming part of retained EU law. It is assumed that the proposal would not be to remove all such case law; if that were the case this would cover whole swathes of domestic law, encompassing key decisions such as the EAT decision in *Grainger*[6] (regarding the definition of philosophical belief under the Employment Equality (Religion or Belief) Regulations 2003), to give just one example.

40. Another approach to "removing" retained EU law may be even more sweeping, seeing the repeal of all domestic employment laws which have to any extent been influenced by EU law. What would this look like for employment law in the UK? The remaining body of UK employment law would be sparse. Very little employment law would be left, with unfair dismissal laws, laws on redundancy payments, whistleblowing and minimum pay laws being a few key remnants. Furthermore, in light of both the shared values noted above, and the obligations regarding the irreducibility of labour standards, it would seem very likely that the UK would want (and need) to introduce laws covering much of the same ground in any event.

41. Finally, a key consideration must be the huge uncertainty which such a major overhaul of employment laws would create. This is inherent in all the scenarios considered above. Domestic employers and those looking to invest in the UK look for certainty and stability. Any mass removal of EU-derived law would undermine this.

42. In any event the decision as to whether law be retained is one for Parliament and not ELA. However, where law is not retained then there is a vacuum which would have to be filled. Depending on the policy decisions made by Parliament, if the vacuum is not filled or not filled as fully as before then the consequences range from complete uncertainty for employers and workers, a bonfire of employment rights and a growth in the risks of exploitation, through extensive litigation of the new employment rights and their meaning to the mechanisms for enforcement of the EU-UK Trade and Co-operation Agreement for potential labour market violations.

[6] *Grainger Plc v. Nicholson* [2010] I.R.L.R. 4

If is not kept, what would it be replaced with?

43. Considering the question of whether to retain EU law therefore raises the question that if it is not retained, what laws should fill the vacuum? The prospect of mass removal of retained EU law as considered above would, we believe, not lend itself to measured and constructive legislative change, and risks resulting in rushed and unscrutinised legislation.

44. That is not to say that retained EU law could not be amended in a more sustainable and constructive way. It is not for ELA to suggest policy initiatives. However, the UK's new-found freedoms could certainly be exploited to make some changes to domestic employment laws such as TUPE or the Working Time Regulations. For example, the interpretation of the Working Time Regulations consistently with the Working Time Directive has resulted in a body of complex case law on questions such as calculation of holiday pay. This might be an area on which the UK could exercise its new legislative freedoms if it considered it appropriate to do so.

45. The UK could also use its new powers to make more fundamental changes. For example, the UK might reconsider the arguments for and against permitting some positive discrimination in favour of under-represented groups, a change it would not have been permitted to make under EU law. Such potential changes would, though, need to be both reasoned, logical and constructive.

46. In addition, case by case, organic change to domestic employment law would also make it easier for the UK to comply with its treaty obligations by demonstrating that it had considered whether the change "affected trade or investment".

47. Arguably, the UK has the best of both worlds at the moment. It has unfettered sovereignty over employment law but an environment where established legislation (EU-derived or not) and a body of case law (domestic and EU) provides a significant degree of certainty to businesses in the UK. ELA is therefore of the view that this – and therefore retained EU Law – is a sustainable arrangement and should be preserved but, if the policy decision is made to change that, it should be by measured and carefully targeted, considered and consulted upon changes.

QUESTION 3: DO THE PRINCIPLES AND CONCEPTS OF EU LAW CONTINUE TO PROVIDE AN ACCEPTABLE AND SUITABLE BASIS FOR LEGISLATION IN POST-BREXIT UK?

48. If what is explored by this question is the extent to which future UK legislation should be framed and drafted taking into account "principles and concepts of EU law" then that is a matter for a policy decision by others and not ELA. Before the UK's exit the requirement to implement EU Directives into national law required embracing the specific provisions of the Directive as well as the purposes of the Directive set out in the preamble. As EU Directives passed in future will be of no relevance to the UK, there is little apparent reason for UK legislation to consider that the EU approach to legislation is something to which it should have regard.

49. As EU law is essentially civil law rather than common law in nature, the doctrine of precedent does not have the same status. Decisions of the CJEU are not formally binding on subsequent considerations of the point in issue whereas in the UK decisions of a superior court are binding. We can see no reason to depart from this principle.

50. However, as we explained in our response to Question 2, the UK helped to form the principles and concepts of EU law. It is not easy to distinguish the two. Certainty is not purely an EU concept. The concept of legitimate expectation was developed in English law as a ground of judicial review. Clarity and prohibitions on retroactivity and the misuse of powers are key principles of UK law irrespective of our past EU membership. They are, to that extent, likely to continue to be of relevance.

51. Principles employed in EU law regarding interpretation are particularly likely to remain relevant. The purposive approach to deciding issues arising under Directives and the national laws implementing these is well established. This has been a developing feature of UK law for some time and the focus of the decision of the House of Lords in *Pepper v Hart* [1992] UKHL 3, (a case wholly unrelated to EU law) and most recently adopted by the Supreme Court in *Uber v Aslam* [UKSC] 2019/0029. This, therefore, is the clear direction of travel for UK jurisprudence.

52. As set out above, for reasons of certainty, we would not recommend departing from this approach where UK courts come in future to consider questions arising on UK legislation that has implemented EU Directives.

53. Proportionality is one concept that might properly be described as belonging to the EU rather than the UK. However, it is now embedded in UK employment law. UK anti-discrimination laws previously used the language of justification for

requirements or conditions that would otherwise be indirect discrimination. When the Equality Act 2010 consolidated anti-discrimination laws and codified the effect of EU Directives and CJEU case law, this was replaced with a need to demonstrate a proportionate means of achieving a legitimate aim. Domestic, as well as CJEU, case law has developed accordingly. Removing the proportionality principle, and reverting to the prior language of justification or perhaps reasonableness, would require change to primary legislation and result in uncertainty until case law could interpret, in a few years, what that meant in practical terms for both employer and employee, with attendant costs for business.

QUESTION 4: HOW HAS THE CONCEPT OF RETAINED EU LAW WORKED IN PRACTICE SINCE IT CAME INTO EFFECT AND WHAT UNCERTAINTIES OR ANOMALIES HAVE ARISEN, OR MAY YET ARISE IN THE FUTURE?

54. Retained EU law only came into existence following the end of the transition period on 31 December 2020. Consequently, there has only been a short period in which retained EU law has been applied and it may be too soon to analyse how it is working.

55. One example is equal pay claims, where a Claimant must compare her terms to that of a real comparator. Under the Equality Act 2010, an equal pay Claimant (A) can only rely on a comparator (B) working for the same employer or an associated employer at a different establishment if "common terms" apply at the establishments (either generally or as between A and B) (*section 79(4)*).

56. It is possible to rely, alternatively or additionally, on Article 157 of the TFEU which enables a Claimant to compare herself against employees in the same establishment or service and where the terms and conditions are attributable to a single source. In a reference to the CJEU just before the withdrawal of the UK from the EU[7], the Watford Employment Tribunal sought clarification as to whether the concept of “single source” applied in equal pay cases where the claims are about equal value. The question was answered after the UK’s exit from the EU, and confirmed the position that Article 157 can be relied upon in equal value claims.

57. Prior to the reference being made, a number of cases in the UK had considered the concept of single source and, dependent on the facts, either held that there was no single source to which pay inequality could be attributed[8] or accepted that there could be a single source[9]. The reference to the CJEU in *K & others* did not

[7] *K & others v Tesco Stores Limited* (C-624/19) EU:C:2021:429
[8] *Robertson v DEFRA* [2005] IRLR 363
[9] *Asda Stores Ltd v Brierley [2019] EWCA Civ 44*

alter retained EU law, and the single source test had been considered by our courts on more than one occasion in the past in relation to equal pay claims, particularly in claims where comparators are cross-establishment and employed by the same employer.

58. In implementing retained EU law, Parliament made tens of thousands of amendments via secondary legislation to ensure that the legislation could be applied within the UK. It is not the case that retained EU law was transposed wholesale into the UK law without care; due regard was had to its contents enabling Parliament to scrutinise content and amend where appropriate.

59. While general principles of EU law remain relevant to interpreting retained EU law, a breach of a general principle can no longer be challenged in UK law[10].

60. It is ELA's view that significant uncertainties or anomalies would have arisen without retained EU law, which has served and continues to serve as an anchor to employment rights.

61. In the future, issues that may arise are likely to relate to how UK courts will interpret retained EU law. It is likely that where there is ambiguity as to the meaning of retained EU law, the UK courts will take a purposive approach to the interpretation of broad principles. As identified at Question 3 above, this is not just an EU principle but one applied in the UK outside of EU law. It is still possible for the courts to look to the intention of Parliament when interpreting retained EU law.

62. Future uncertainties are only likely to be significant in the event that future UK legislation seeks to depart from employment rights arising out of retained EU law that are already well-embedded within the UK, as detailed at Question 2 above.

QUESTION 5: (A) IN LIGHT OF THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY, WHAT WAS THE RATIONALE FOR RETAINING THE PRINCIPLE OF THE 'SUPREMACY OF EU LAW'?

63. In our view, this question suggests confusion with regard to the nature of EU law in the UK post 31 December 2020. To use the phrase "*supremacy of EU law*" to describe the law of the United Kingdom post Brexit is neither accurate nor constructive.

64. With effect from 31 December 2020, EU law is not supreme, save in a limited way (see below). Whereas previously the principle of supremacy of EU law would have given all EU law priority over any domestic law or legislation, this is not the status afforded to retained EU law.

[10] *Adferiad Recovery Ltd v Aneurin Bevan University Health Board [2021]* EWHC 3049

65. EU law is not supreme in the sense that retained EU case law will have the same, and not superior, binding, or precedent, status in domestic courts and tribunals as existing decisions of the UK Supreme Court and High Court of Justiciary in relation to any question as to the validity, meaning or effect of any retained EU law. Appellate courts are required under s6(5) of the EUWA, as amended by the European Union (Withdrawal Agreement) Act 2020, to apply the *"same test as [they] would apply in deciding whether to depart from [their] own case law"* in deciding whether to depart from retained EU case law. The UK Supreme Court test in deciding whether to depart from its own case law is set out in the House of Lords Practice Statement of 26 July 1966, namely *"whether it appears right to do so".*

66. Further, the principle of supremacy of EU law was specifically not retained for prospective legislation. Parliament is free to amend or repeal retained EU law.

67. The limited application of the supremacy of EU law is to the interpretation of retained direct EU legislation in relation to domestic legislation passed before IP Completion Day. Our response to the 2020 Consultation (annexed to this paper) sets out ELA's view that retaining established EU employment law was desirable and the only way of ensuring consistency and certainty for businesses and employees alike, to retain our international competitiveness. It also explains ELA's support of the limited continuing applicability of the supremacy principle to the interpretation of, and resolution of conflicts between, retained EU law and other domestic law. Again, this is to achieve certainty.

68. The question also implies that this limited form of supremacy causes conflict with the legislative supremacy of Parliament. ELA does not agree that such a conflict exists. As EU law is retained by the EUWA, it is part of the same domestic law. There is, in our view, no question of such a conflict. At any time Parliament may legislate to alter the effect of any particular EU provision or court decision that it decides ought no longer to be applicable. Parliament may act to breach the UK's obligations under the UK-EU Trade and Co-operation Agreement although that exercise of sovereignty could, of course, either lead to enforcement mechanisms under the Agreement or other consequences being imposed by the EU.

QUESTION 5 (B) WHAT IS THE MOST EFFECTIVE WAY OF REMOVING THE 'SUPREMACY OF EU LAW' AND OTHER INCIDENTS OF EU LAW FROM THE STATUTE BOOK?

69. In our view Parliamentary sovereignty is supreme in UK law. Section 5(1) of EUWA provides for this as follows '*The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after [IP*

completion day] .' Parliament may do what it wants with respect to retained EU law. There may be real world consequences as a result of the breach of Treaty obligations, as set out above, but Parliament is supreme and it has stated it in terms. Retained EU law is the will of Parliament and Parliament may change that. There is precedent but, again, this is subject to the Parliamentary sovereignty and Parliament can amend or act in this regard. We note, however, the consequences of uncertainty, cost, litigation delay and breach of treaty obligations should Parliament not act in a closely targeted manner.

70. We take this opportunity to repeat para 33 of our response to the 2020 Consultation: "*the best way to maintain the legislative supremacy of Parliament is only to allow the Supreme Court to depart from EU law thereby ensuring that fewer policy decisions end up in the Courts and stay, where they should, in Parliament.*" Whilst our concerns did not prevent the extension of this power to the Court of Appeal, any further extension would likely have this effect, as discussed further in Question 7 below.

71. We are unsure what is meant by removing the other "incidents of EU law from the statute book". Insofar as this refers to an attempt to somehow repeal all retained EU law, ELA is firmly of the view that this is neither desirable nor workable for the reasons set out at Question 2 above.

QUESTION 6: SHOULD EU LAW BE INTERPRETED IN THE SAME WAY AS OTHER DOMESTIC LAW? SHOULD THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION HAVE ANY RELEVANCE IN THE INTERPRETATION OF RETAINED EU LAW?

72. As we identified in our response to the 2020 Consultation (annexed), the body of EU law in UK employment law is substantial. Many well-understood rights are based on settled European authority. EU and domestic law have emerged from their own streams to mix their waters indistinguishably in the river of domestic UK employment law. It is difficult to envisage how retained EU law could be interpreted without reference to CJEU case law.

73. Most EU employment rights are the subject of long-established authorities from the CJEU, which the UK courts have applied consistently over a period of time. That body of law is settled with long established authority. It has a broad and deep application.

74. That CJEU jurisprudence is embedded in UK employment law can be demonstrated by a brief consideration of only a few of the main CJEU cases in the following fields of employment law:

69.1 Sex discrimination[11];
69.2 Equal Pay and discriminatory pay[12];
69.3 Working Time and annual leave[13];
69.4 Pension discrimination[14];
69.5 Amendments to include indirect discrimination which was not intentional (indirect discrimination)[15];
69.6 Justification of indirect, age and disability related discrimination[16];
69.7 Associative discrimination[17];
69.8 Collective redundancies[18];
69.9 Transfer of undertakings[19];
69.10 Pregnancy discrimination[20];
69.11 Fixed term workers[21];
69.12 Industrial action[22];

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[11] *Marshall (No.2) [1993] ICR 893, Levez [1999] ICR 521, Arjona Camacho v Securitas Seguridad Espana [2016] ICR 389* requirement for effective remedies precluding a cap on damages, extended period of claim for back pay from 2 to 6 years and compensation must fully cover the loss and damages

[12] *Allonby v Accrington & Rossendale College & Others C256/01* extending the definition of worker and single source of employment under Article 141 EC Treaty, *Barber v Guardian Royal Exchange Insurance Group [1990] ICR 616* equal pay law covered all forms of pay relating to the employment relationship including ex gratia termination payments and pensions, *Enderby v Frenchay Health Authority [1994] ICR 112* where significant statistics disclose an appreciable difference in pay between two jobs of equal value (but no job evaluation study), the employer is required to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.

[13] *Commissioners of Inland Revenue v Ainsworth [2005] IRLR 465, Stringer v HMRC [2009] IRLR 214, Pereda v Madrid Movilidad SA [2009] IRLR 959, KHS AG v Schulte [2012] IRLR 156, Neidel v Stadt Frankfurt am Main [2012] IRLR 607, Lock v British Gas Trading Ltd Case C-539/12, Robinson-Steele [2006] ICR 932* as to the amount of holiday pay, how it operates and how it should be carried over in cases of sickness, and how it cannot be replaced by a payment in lieu

[14] *O'Brien v Ministry of Justice Case C-432/17* on part-time pension discrimination

[15] Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 (SI 1996/438

[16] *Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84), HK Danmark, acting on behalf of Kristensen v Experian A/S: C-476/11*

[17] *Coleman v Attridge Law C-303/06, CHEZ Razpredelenie [2015] IRLR 746* extended discrimination protection to associative direct discrimination and then indirect discrimination

[18] *Junk v Kühnel: C-188/03, Atavan Erityisdojen AEK v Fujitsu Siemens Computers C44/08*

[19] *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, Rask and Christensen v ISS Kantineservice A/S: C-209/91, Rygaard v Stro Molle Akustik A/S: C-48/94, Alemo-Herron v Parkwood [2013] ICR 1116* definition of an undertaking, unit of transfer, durability of protected terms and approaches to causation

[20] *Dekker [1992] ICR 325, Webb v Emo [1995] ICR 1021, Thibault [1996] ICR 160* pregnancy is unique to women, so that no comparator was required so that protection respectively was against: non-appointment to employment, dismissal because of pregnancy or maternity leave and discrimination in terms and conditions, save for pay during maternity leave

[21] *Tele Danmark [2004] ICR 610, Jimenez Melgar [2004] ICR 610* protection from pregnancy or maternity dismissal extended to fixed term contracts

[22] *Laval [2008] IRLR 160, Viking [2008] ICR 741* although the right to take collective action is a fundamental right under EU law, strike action which was aimed at compelling a foreign contractor to

69.13 Disability[23];
69.14 Gender reassignment[24];
69.15 Post termination discrimination[25].

75. Domestic law has then settled on top of that body of EU authority to create well understood principles of employment law.

76. Given the way in which employment law has developed in the UK, it is difficult to envisage how case law of the CJEU will not have any relevance to its interpretation, until such time as Parliament legislates to depart from retained EU law.

77. Section 6(3) of the EUWA provides that, so far as retained EU law is unmodified on or after IP Completion Day, it should be interpreted in accordance with any relevant retained EU case law. ELA's view, as described above, is that this approach is sensible, as it provides individuals and companies with clarity and legal certainty. Should Parliament wish to diverge from retained EU law, whether that be domestic or CJEU case law, then it may do so by way of legislation.

78. The UK courts and tribunals are not bound by any decisions made by the CJEU on or after IP Completion Day [26]. They may, however, still have regard to decisions of the CJEU, providing they are relevant to any matter before the court or tribunal because this is what Parliament provided for in the EUWA[27]. This is not dissimilar to how the UK courts treat other foreign jurisprudence as persuasive authority, without being bound to follow it. Just as Parliament imposed this section, so it can repeal it.

79. However, these provisions strike a balance between acknowledging that much of our domestic law has developed through decisions of the CJEU, whilst also ensuring that the courts are not bound by future interpretations of EU law, where this is not appropriate in the context of the UK's relationship with the EU.

80. Over time, it is possible that the persuasive effect of post-exit CJEU decisions will diminish where UK law diverges from EU law. However, to the extent that EU law remains at the heart of much UK domestic employment law, the courts and

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sign a collective agreement providing for rates of pay that were higher than the national minimum was not justified. This amounted to an interference with the freedom to provide services

[23] *Chacon Navas [2007] ICR 1* Disability includes impairments which affected professional life, not just daily activities outside work

[24] *P v S [1996] ICR 795* discrimination on grounds of gender reassignment was a form of sex discrimination

[25] *Coote v Granada Hospitality [1999] ICR 100* extended post-employment victimisation

[26] Section 6(1) EUWA 2018

[27] Section 6(2) EUWA 2018

tribunals will inevitably continue to find the case law of the CJEU relevant and persuasive.

QUESTION 7: SHOULD A WIDER RANGE OF COURTS AND TRIBUNALS HAVE THE ABILITY TO DEPART FROM RETAINED EU CASE LAW AND SHOULD IT BE BINDING AT ALL?

81. We refer to ELA's prior Consultation response on this subject (annexed to this paper) as both elements of question 7 were addressed therein.

82. We consider that there have been no developments since that response that would materially alter ELA's analysis with respect to retained EU case law in relation to employment law.

83. The Executive Summary of that response emphasised five particular risk factors in relation to a wider scope to depart from retained EU case law:

    78.1 confusion in stare decisis;
    78.2 uncertainty;
    78.3 delay;
    78.4 unmeritorious defences or claims; and
    78.5 unintended consequences.

84. We consider that such risks remain manifestly relevant in economic and social circumstances heavily impacted by Covid-19 (including the Employment Tribunal system) and in a political environment of profound global volatility currently; and that such risks would be amplified and exacerbated were the range of courts and tribunals with the ability to depart from retained EU case law to be expanded.

85. The reasons cited in August 2020 which underpinned our analysis were emphasised at paragraphs 21 – 34 and 38 - 44 of that response: we consider that they remain highly relevant currently and will remain so.

86. In response to this Consultation, the Government concluded:

> *"The Government notes the caution expressed about the potential impact that a decision to depart from retained EU case law might have on confidence in, and certainty of, the law; but in doing so, notes also that it was the question of whether more courts ought to be able to depart from retained EU case law, rather than the existence of the ability to depart from retained EU case law itself, that was the subject of this consultation – the latter point having already been determined by Parliament.*

Having considered the consultation responses fully, the Government is satisfied that it is appropriate to introduce Regulations to extend the power to depart from retained EU case law to the Court of Appeal in England and Wales; the Court of Appeal of Northern Ireland; the High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; the Inner House of the Court of Session; the Lands Valuation Appeal Court and the Registration Appeal Court.

Extending the power to this limited list of additional courts will help achieve our aim of enabling retained EU case law to evolve more quickly than otherwise might have been achieved. Such a step would help mitigate the operational impacts on the UK Supreme Court and High Court of Justiciary in Scotland which would arise if the power were reserved solely to those courts; and there will be benefits to the UK Supreme Court in being assisted by a prior judicial dialogue on these complex issues from the Court of Appeal or the relevant appellate court in Scotland or Northern Ireland.

By restricting this power to the highest appeal courts, we will also minimise the risk, identified in the consultation responses, of adverse impacts which may arise out of any legal uncertainty resulting from additional litigation being brought, and the risk of divergence of approach between courts across the UK."[28]

87. Government recognised that there are serious potential unintended consequences and uncertainty which could follow from departing from retained EU law. The extension of the power to the Court of Appeal and its equivalents is clearly noted; but we strongly remain of the view that the range should not be extended further. The responses at paragraphs 57 – 74 of our response to the 2020 Consultation indicate the challenges faced by the Supreme Court in a context of assessing public policy considerations. Such challenges are increased at Court of Appeal level. Our view remains that it would place unacceptable constitutional and operational strain on the EAT and Employment Tribunals were the power to deviate be extended thereto.

88. Whether retained EU case law "*should be binding at all*" is ultimately a political question and one that ELA's apolitical nature prevents us from answering in the political sphere. The current position is that Parliament has provided that retained EU law including retained EU case law is binding by virtue of the EUWA as qualified by Section 6 thereof and we note that primary legislation would be necessary to revise Section 6. ELA's 2020 response emphasised throughout the vitally important features of legal certainty and the separate functions of the

[28] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926811/departure-eu-case-law-uk-courts-tribunals-consultation-response.pdf

judiciary and the legislature. ELA considers that Parliament would be better placed to depart from retained EU law by way of legislation, taking into account any relevant policy considerations. As noted in paragraph 19 of our 2020 response:

"We do not believe that it should be left to the courts to determine economic and social policy or labour market reform."

QUESTION 8 TO WHAT EXTENT HAS RETAINED EU LAW AFFECTED DEVOLVED COMPETENCE?

89. Employment law is a reserved matter in Scotland and Wales. We therefore consider that retained EU law has not affected the devolved competence of either nation in the sphere of employment law.

90. The position in relation to Northern Ireland is much more complex and unique. Employment law is a devolved matter in Northern Ireland. The EUWA removed the prohibition on devolved legislatures making primary legislation that is incompatible with EU law, and this prohibition was repealed at the end of the Transition Period on 31 December 2020 in the relevant provisions of the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998.

91. This was however replaced with a new power for the UK government to prohibit each devolved legislature from passing primary legislation that would modify, or confer power by secondary legislation to modify, retained EU law by passing so-called "freezing provisions". Similar freezing provisions applied in relation to executive competence. However, the UK government ultimately did not make any freezing provisions. The power to make them expired on 31 January 2022, and regulations to repeal the power were laid before Parliament on 25 January 2022.

92. As the power to make freezing provisions has expired and is due to be repealed, and as the United Kingdom Internal Market Act 2020 does not address employment law, this means that in general terms Northern Ireland's competence in relation to employment law has expanded, in the sense that it is not prevented from modifying retained EU law. However, conversely Article 2(1) of the Protocol on Ireland / Northern Ireland requires Northern Ireland to continue to abide by six EU equality directives post Brexit and indeed to apply them as amended or replaced. The Directives must also be interpreted in accordance with CJEU judgments including post-transition case law. These requirements are also reflected in the Northern Ireland Act which prevents the NI administration from legislating in a manner which is incompatible with Article 2(1).

93. Northern Ireland is therefore in a unique position as a devolved adminstration while the Northern Ireland Protocol endures in its current form because while it has legislative competence in employment law which may impact retained EU law, it also has special restraints on its ability to deviate from certain aspect of retained EU law in the post Brexit period and indeed an ongoing obligation to keep pace with post Brexit EU equality law. These restraints clearly do not apply to the UK government in its approach to retained EU law.

QUESTION 9 ARE THERE ISSUES SPECIFIC TO THE DEVOLVED ADMINISTRATIONS AND LEGISLATURES THAT SHOULD BE TAKEN INTO ACCOUNT AS PART OF THE GOVERNMENT'S REVIEWS INTO RETAINED EU LAW?

94. We do not consider that there are any particular matters that should be taken into account in relation to any issues specific to the devolved adminstrations, however it is to be noted that Northern Ireland's increased competence in the sphere of employment law means that there is greater possibility of divergence between Northern Ireland and the rest of the UK insofar as this is compatible with the Northern Ireland Protocol. Clearly any future expansion in the legislative competence of the Scottish or Welsh Parliaments into areas covering retained EU law such as employment law would reinforce the scope for divergence within the UK and could result in inconsistent approaches to retained EU law.

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