A RESPONSE TO THE HOUSE OF COMMONS PUBLIC COMMITTEE'S CALL FOR WRITTEN EVIDENCE: THE RETAINED EU LAW (REVOCATION AND REFORM) BILL- ITS EFFECT ON EMPLOYMENT LAW RIGHTS AND OBLIGATIONS

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The Employment Lawyers Association

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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.

2. ELA's role is not to comment on the political merits or otherwise of proposed legislation. Policy decisions are for Government and the policy debate is for politicians and not for the expert employment lawyers who make up the membership of ELA.

3. A Standing Committee, chaired by Louise Taft, was set up by the Legislative and Policy Committee of ELA to comment on issues arising from the UK leaving the EU, from which a Working Party was formed to consider the Retained EU Law (Revocation and Reform) Bill which we shall just call "the Bill". The members of the Working Party are listed at the end of this paper and include experienced partners from solicitors' firms and a KC.

EXECUTIVE SUMMARY

4. This document is a briefing paper. It is not an exhaustive analysis of the Bill. It aims to inform those who are not employment law experts on the effect of the Bill on employment rights and obligations. The policy choices are for the Government. ELA does not enter the policy field. However, we aim to inform and explain to legislators, workers, employers and businesses of the effects, intended or not, of the Bill.

What does the Bill do?

5. First, the Bill sets a default that will 'turn off'[1] employment rights covering holiday pay, agency workers, part-time and fixed-term workers, maximum working weeks for office workers, HGV drivers and fisherman and abolish maximum annual hours for commercial pilots, and no longer preserve the employment contracts of workers when their business is bought by another. There are many other rights which are affected that we consider below.

[1] A phrase used by Catherine Barnard, Cambridge Professor of European and Employment Law

6. Second, the Bill sets a default that removes from British law three principles at the end of 2023. The Bill seeks to erase, as if they never existed, the interpretive principles and settled decisions which the Courts have relied upon to give a settled and predictable meaning to tens of employment law rights and obligations which are derived from EU law. The Three Principles are:

   6.1. Direct Effect;
   6.2. Supremacy of EU law; and
   6.3. General principles of EU law.

7. Abolishing direct effect removes rights such as a facet of equal pay law which is being used by tens of thousands of women to claim equality with better paid men. It sets a default to abolish rights such as the right to normal pay during holiday enjoyed by millions of workers or the ability to carry over holiday (and with it holiday pay) from one year to another when sick. It sets a default to remove from UK law, the legal reasoning that has helped to extend discrimination and other protections to atypical and gig workers.

8. Abolishing the principle of supremacy, together with abolishing the general principles of EU law and the removal of direct effect means that the settled meaning not only of EU Regulations but also any primary Acts of Parliament (such as, for instance, the Equality Act 2010) will not be the same after 2023. Accordingly the Bill affects primary Acts of Parliament as they may be interpreted in the future. An employment dispute centred on the meaning of a legal right in December 2023 may have a completely different outcome to one which arises in January 2024.

9. This will create legal uncertainty. Legal certainty is a fundamental constituent of any efficient legal system. Where, as here, the settled and predictable meaning of a considerable body of employment law is wiped away then there is uncertainty and unpredictability. Legal uncertainty can undermine any plan for growth as neither employers nor employees will have clarity as to the meaning of large parts of employment law that affect investment and the cost of labour.

10. Finally, the Bill grants Governments wide powers, often described as ‘Henry VIII powers’ after the power of an absolute monarch, to revoke, restate and wholly rewrite all of the affected regulations subject to one condition: any rewriting must always reduce and never impose additional regulatory burdens.

11. The Bill does provide options for the Government to preserve interpretive principles and other parts of EU law and the regulations. But that requires positive action. However, given the volume of legislation and case law that needs to be considered that may be affected and the limited time that the Government has given itself to do this (31 December 2023), ELA is very concerned that there is not enough time for this task to be properly carried out.

What does ELA Recommend?

12. Until a full audit is carried out, both employers and workers may wake up, on New Years’ day 2024 to a landscape of uncertainty, unknown employment rights and

obligations which will simply become fertile ground for litigation, delay, with unintended consequences and uncertainty striking at the attractiveness of the UK as a destination for international investment.

13. The Retained EU law Government dashboard sets out all the employment regulations identified so far that may be directly affected by the Bill. However, the full range of rights that may be affected by the Three Principles has not, so far as we are aware, been the subject of any audit.

14. ELA strongly counsel that before the Bill is given further Readings and before it goes into Committee:

    14.1. Government carries out a comprehensive audit as to the effect of abolishing:
        14.1.1. the regulations within the scope of the Bill; and
        14.1.2. the principles of direct effect, supremacy and EU general principles on the meaning;
            14.1.2.1 of all retained EU regulations; and
            14.1.2.2 on rights under Acts of Parliament.

    14.2 Government review the outcome of the audit and ensure that the powers under the Bill are used to preserve the Three Principles as are required to maintain certainty in the meaning of law prior to further reform so as to maintain certainty in the meaning of law and avoid the vacuum of uncertainty during any transition from old to new law.

15. The Bill will allow Government to rewrite all legislation affected without a consultation process. Consultation informs legislation as lawyers, employers' groups, employees' associations, Unions, business groups and others affected by employment rights raise issues that even the well informed officials at BEIS may not have considered. We recommend that Government carry out a full consultation on its proposals to ensure that the Governments' political objectives, on which we do not comment, are achieved with a full understanding of the potential effects of its legislation.

16. Finally, we recommend that Government resource the exercise fully at BEIS. In a period of a little over a year the Government plans to legislate in such a way so as to create the same amount of secondary legislation in employment law as it has over the past 50 years. In addition, for the reasons set out above, this legislation will affect a much wider number of rights than just the regulations that are its target. If the integrity of employment law in the UK is to be protected, it requires BEIS to be fully resourced so that the consequences can be properly considered.

17. We deal with employment law but the effects will be replicated in all the fields of law which rely, like employment law, to a large extent both on EU derived legislation and the Three Principles.

THE BILL

What does the Bill do?

18 The Bill 'turns off' all employment law which comes from the EU law, which is not in already in an Act of Parliament, by the end 2023 unless saved or amended by the Government in that time.[2]

19 The Bill also:
   a. stops other EU laws that applied directly into the UK from 1972 to the end of 2023 from continuing to be used in the UK from 2024;[3]
   b. stops EU law being sovereign[4] which together with the deletion of EU general principles from EU law and the abolishing of direct effect from the end of 2023 (the three principles) means that the settled meaning, ambit and effect of UK law as it has been interpreted over the past 50 years disappears;[5] and
   c. grants the UK Government almost unlimited powers to amend all affected regulations by a positive procedure in Parliament as long as no new regulatory burdens are imposed.[6]

20 At Appendix 1, we set out in more detail the provisions of the Bill and its potential consequences.

So What?

21 The Bill directly affects every employment regulation passed as a result of EU laws since 1972 either under the European Communities Act 1972[7] or in order to comply with an EU obligation[8]. That is a lot of employment regulation.

22 However, the Bill also indirectly affects primary legislation in the UK in a way that may not have been fully considered. As the Three Principles are turned off and no longer form part of retained law, any EU regulations which are not turned off and all Acts of Parliament, such as the Equality Act 2010 or the EU rights introduced by the Employment Rights Act 1996, would no longer be interpreted through the prism of the Three Principles that put much of the flesh on the bones of employment rights under primary legislation.

23 The principal issue is uncertainty. It wipes the slate clean of all the decisions on which our Courts have relied to build up a settled interpretation of EU law and which runs through British employment law like a stick of rock. The Bill will create, on 1 January 2024, a raft of EU employment rights whose application, scope and meaning is unclear. Lawyers will no longer be able reasonably accurately to predict the effect of workers' rights or employers' obligations. Businesses will no longer be able reasonably

[2] Clause 1 The Bill
[3] Clause 3 The Bill
[4] Clause 4 The Bill
[5] Clause 5 The Bill
[6] Clause 15 The Bill
[7] Clause 1(4)(a) The Bill
[8] Clause 1(4)(b) The Bill

accurately to predict their obligations. Workers will be uncertain as to the scope, meaning, application or entitlement to their working rights.

24 Fertile ground for litigation will be seeded – litigation begets the triplets of cost, delay and uncertainty: that deters investment.

25 On 1 January 2024 the interpretive principles which have created well understood rights and obligations are guillotined, abolished and wiped from the slate. The hundreds of domestic cases that are based on European principles are erased from the record and the edifice of 50 years of incremental understanding of the regulations is torn down and replaced by a void. There is no phasing out of the old as new decisions supersede them. There is no transition period. There is no gradual introduction of the new principles. The old is abolished. Until new decisions emerge over the next 50 years, there is a vacuum. That vacuum can only be filled by litigation and appeal, after appeal in an Employment Tribunal system that is unlikely to make its first decisions until 2025 or 2026 given the current delays and before any question of any appeal.

26 Of even greater concern are the known unknowns and the unknowns. The Bill is blind to that which it intends to abolish – it is no mean task to identify all the regulations that the Bill intends to abolish – that is the tip of the iceberg. No audit has been carried out of the hundreds of employment cases which have been decided over the past 50 years putting flesh on the bones of those identified bare regulations. It is those decisions that have brought clarity and meaning so that they are now well understood. Their meaning will be swept away and with them some rights, which would not even exist without the interpretive principles of direct rights, supremacy and general EU principles, will simply be extinguished and die – nobody knows how many and with what effect.

27 Without a clear understanding of all the cases that will be swept away, the cliff edge of the end of December 2023 poses unknown dangers.

28 The Bill also gives the Government wide powers to revoke, amend and change legislation. We note that those wide powers include de facto maintaining the effect of the status quo. However, once the Bill is passed the Government would have to take positive steps to make this so.

29 Legislators may then be faced with an unenviable choice, as a result of the ticking clock set by the Bill that, when faced with new and rewritten regulations presented by Government. They will have the choice either to affirm the new rewritten regulations with inadequate consideration as to the changes and consequences or let the current regulations lapse so that no employment law and or rights are preserved.

Which employment rights in practice could this affect?

30. For example if the Government did not positively act then all of the following laws would disappear:

30.1 The daily limit of 8 hours per day or the limit of 40 hours per week for children; [9]
30.2 The right of a worker to a 20 minute break in their shift and a break from work each day and a day off every week or 2 days off every 14 days; [10]
30.3 Paid holidays at the same rate of pay that a worker would get when they are working; [11]
30.4 The right of an NHS worker who has worked through the pandemic and been unable to take their paid annual leave, to carry that leave over;[12]
30.5 Maximum hours not just for office workers but also for safety critical workers such as airline pilots[13], sea-fisherman[14] and HGV drivers;[15]
30.6 The obligation on employers to make an assessment of health and safety risks to their workers or keep such a risk assessment up to date; [16]
30.7 The right of part-time[17] and fixed-term[18] workers to be treated, pro rata, similarly to permanent workers unless the employer can justify different treatment;
30.8 The right of Agency Workers that they should, after 12 weeks, receive the same basic working and employment conditions such as pay or rest periods as a directly employed worker; [19]
30.9 Rights to take parental leave;[20] and
30.10 Mean that when a business buys another business there is reasonable certainty as to which workers transfer to the new business so that the purchaser knows which employees it is getting, and workers know that they can't just be dismissed because of the transfer.[21]

31. In our experience as lawyers these regulations are used every day by workers and employers in every court and tribunal. Lawyers are asked to advise on them and use the certainty of past decisions to be able to give answers to clients that allow them to conduct their business and resolve their disputes in a settled, stable and well understood framework of law – this reduces disputes and litigation.

32. Many of these laws – such as rights to take parental leave and rights for part time workers – impact more women than they do men. The Bill's equality impact assessment confirms the Government's commitment to upholding high standards in equalities but does not expressly acknowledge the potential disparate impact of revoking these regulations.

33. It is important to emphasise that paragraph 30 are only examples and not a comprehensive list of legislation that would disappear unless the Government positively acts to prevent it. We have set out at Appendix 2 a broader review of the legislation

[9] Regulation 5A Working Time Regulations 1998.
[10] Regulations 10, 11 & 12 Working Time Regulations 1998.
[11] Regulations 13 and 16 Working Time Regulations 1998.
[12] Regulation 13(9)-(13) Working Time Regulations 1998.
[13] Regulation 9 Civil Aviation (Working Time) Regulations 2004.
[14] Regulation 6 Fishing Vessels (Working Time: Sea-fishermen) 2004.
[15] Regulation 4 Road Transport (Working Time) Regulations 2005.
[16] Regulation 3(1) Management of Health and Safety at Work Regulations 1999/3242.
[17] Regulation 5 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
[18] Regulations 3 & 4 Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
[19]Regulations 5, 6 & 7 Agency Workers Regulations 2010.
[20] Regulations 13-16 Maternity and Parental Leave etc Regulations 1999
[21] Regulations 5 & 7 Transfer of Undertakings (Protection of Employment Regulations) 2006.

affected although it is only illustrative and far from a comprehensive review given the time available. At Appendix 3 we have taken key areas that may be affected by the Bill and analysed, in more detail, the consequences of the Bill. However, this is but one snapshot of a narrow review undertaken in a short period of time. This is an exercise that needs to be carried out by Government, in detail, without which Parliament will not know the effect of the proposed Act.

What do you mean that the Bill turns off these regulations?

34. Unless Government positively acts to save the regulations then any regulation is simply abolished from the end of 2023. If the Government positively acts then it can extend the laws until 23 June 2026[22] which is the tenth anniversary of Brexit.

What other EU laws that did apply directly in the UK does the Bill turn off?

35. The Bill does not just turn off regulations. It turns off EU law that the European Union (Withdrawal) Act 2018 kept in British law. The examples are wide ranging.

36. They include two of the most used parts of employment law that tens of thousands of women in supermarkets use to compare themselves to better paid men who work in the same business in their equal pay claims.[23] If this right is taken away, many women who suffer sex based unequal pay would no longer be able to bring their claims. It would remove incentives for employers to eradicate such disparities. Equal Pay rights in the Equality Act 2010 do not go as far and have, since 1976[24], been supplemented by EU law.

37. The Bill also turns off the direct effect of many parts of EU law that the Courts use to interpret regulations in domestic law so as to bring certainty to their meaning.

38. The turning off of this type of EU law is amplified by the Bill abolishing the principle of supremacy of EU law together with the general principles of EU law. We consider these other matters that are turned off in the next two questions and then consider their effect together.

What is the principle of the supremacy of EU law?

39. The principle of supremacy of EU law means that EU law takes precedence over UK law. The principle of supremacy operates together with general principles of EU law as one of the central ways by which EU derived regulations like those set out above are interpreted, whenever there is any uncertainty. We explain below the types of general principles of EU law that are turned off and then consider how the turning off of EU laws that directly applied in the UK is amplified first by the abolition of the supremacy of EU law and yet further amplified by the abolition of the general principles of EU law.

[22] Clause 2 The Bill
[23] Article 157 Treaty on the Functioning of the European Union on the ability of women to compare themselves to men for equal pay if their pay is determined by the same single source as is the case, for instance, with many (mostly female) supermarket shop workers comparing themselves to (mostly male) distribution staff.
[24] Defrenne v Sabena, Case 43-75

What are the general principles of EU Law?

40. General principles of EU law are used by lawyers, courts and tribunals to interpret EU law. They are legion. They can range from the principle of effectiveness such as, for instance, that any employment right should be given effect and should notbe locked up behind an unaffordable paywall for workers or be so hard to enforce as to be pointless, such as when an employer deliberately misleads a worker about their right to holiday pay.

41. A further example of a general principle of EU law is the Marleasing[25] principle. That principle is used by Courts so that, until the end of 2023 if the Bill is passed, a UK court or tribunal would, if the Directive can be seen to grant concrete defined rights that should be in force by a particular date, continue to interpret UK regulation, if possible, as conforming with the purpose of the Directive which the UK regulation implements.

So what is the practical effect of abolishing direct effect, supremacy and the general principles of EU law taken together?

42. The UK regulations set out the black letter law. They are the bare bones of the law. There is often uncertainty as to what the words on the page mean. Where the regulations give effect to a Directive such as, for instance in the case of the Working Time Directive, the Courts use the Directive to help them understand the meaning of the Regulations. Directives, unlike UK law, set out their purpose and their aims in recitals – those aims help a court or tribunal to interpret a regulation.

43. As a result of EU law currently having supremacy over UK law, a court, informed by the understanding of the purpose of the Directive, can give the regulation a conforming interpretation by using firstly the Marleasing general principle of EU law and secondly the doctrine of supremacy of EU law so as to interpret the domestic regulation to give effect to the intention of the EU Directive. For instance

    43.1 One example affects tens of millions of workers who benefit from holiday pay rights. The application of direct rights, supremacy and general principles have meant that previous Court decisions have been overruled so that workers are entitled to the same pay that they earn at work when on holiday, or that workers who are misled as to their working status don't lose holiday pay when their employer refuses to pay them their entitlement;

    43.2 Another example is the definition of worker, or in the discrimination context the definition of employee, which status has been read, as a result of EU law, as extending health and safety rights and many other rights such as holiday pay and discrimination law to a wide range of workers such as gig workers and other atypical workers. This litigation has taken over 20 years culminating in the Supreme Court's decision in *Uber* which has brought a

[25] *Marleasing SA v La Comercial Internacional de Alimentacion SA Case* C-106/89

measure of certainty. All of this would now be less certain and could reopened.[26]

44. The meaning and understanding of the regulations has taken years and many different appeal cases (at great individual expense) to give the certainty of understanding of the law that we now enjoy. For instance, litigation began in 2001 over whether workers were able to carry over annual leave if they were too sick to take it. This was finally settled many cases later by *Plumb* in 2015 with a carry-over right of up to 18 months.[27] This is not unusual. The common law incrementally decides issues before a settled understanding emerges. The default of the Bill is to sweep away all this accrued understanding and not provide any clear statement of what the law will be going forward.

45. If Government does not want to change the settled meaning of UK law as it is understood today, then it would need to audit all the conforming interpretations that have affected regulations from court decisions and translate those court decisions into the body of the new or replacement regulations.

46. If that is not done, and that is a policy decision for the Government, then even if all the regulations were preserved, the abolition of direct application, supremacy and general principles will result with the UK waking up on 1 January 2024 to a New Year where large swathes of employment law that no lawyer will be able accurately to predict or advise upon, causing uncertainty for workers and employers.

What powers does the Bill give the Government to change Employment law?

47. The Bill grants the Government very wide powers to change or not to change employment law. The Bill also grants the Government powers not to abolish EU effects in respect of certain law.

48. The powers of the Government include retaining EU law and the principles of supremacy and general principles such as:

    48.1 The power to keep retained EU law and the principle of EU supremacy of that retained EU law in respect of specific provisions;[28]
    48.2 The power to restate law where the default effect of restatement is to give effect to Clauses 3, 4 and 5 of the Bill but that, on the other hand, the restatement could also create an equivalent effect to supremacy of EU law and/or the general principles of EU law;[29]

[26] *Allonby v Accrington and Rossendale College [2004] ICR 1328* applied by hundreds of decisions of Tribunals as exemplified by *Jivraj v Hashwani [2011], Pimlico Plumbers Ltd v Smith [2018] UKSC 29, Uber v Aslam [2021] UKSC 5* on the meaning variously of section 83(2) Equality Act 2010, Section 230(3)(b) Employment Rights Act 1996 and many of the rights under Regulations framed in the same was as Section 230(3)(b). In Health and Safety law the effect of *R (on the application of IWUGB) v Secretary of State for Work and Pensions [2021] ICR 372* which resulted in amended regulations being approved by Parliament coming into force on 6 April 2022.
[27] *Commissioners of Inland Revenue v Ainsworth* [2005] IRLR 465, *Stringer v HMRC* [2009] IRLR 214, NHS *Leeds v Larner* [2012] IRLR 825, *Sood Enterprises Ltd v Mr Colin Healy* UKEATS/0015/12/BI, *Plumb v Duncan Print Group Ltd* [2015] IRLR 711
[28] Clause 8 The Bill
[29] Clause 12 The Bill

48.3 The power to revoke regulations earlier than the end of December 2023 and not replace them;[30]
48.4 The power both to revoke the regulations and replace them with regulations that meet the same objectives;[31]
48.5 The widest of all powers whereby the regulations can be revoked and replaced by the Government with whatever they think is appropriate. Unlike the other parts of clause 15 this is subject to an affirmative resolution.[32]

49. There is a fetter on all the powers in that any changes under clause 15 may not increase the regulatory burden so that clause 15 provides a one way street only for deregulation.[33] This is problematic because the one concrete way in which to challenge Government regulation under the Bill is if it introduces new regulatory burdens. This ties the hand of the Government that may wish to provide balance in a regulation by reducing some rights but enhancing others. The Bill would appear to allow challenge to the enhancements but not to the reduction.

What business is it of lawyers to give this opinion?

50. We have no policy view. We simply set out the effect and potential effect of the Bill.

51. If passed the Bill would mean that swathes of well understood, settled employment law and the principles to interpret them are put on a doomsday clock by the end of 2023 if Government does not act.

52. The Bill would then give Government wide powers to revoke, amend and change legislation. We note that those wide powers include de facto maintaining the effect of the status quo. However, once passed the Government would have to take positive steps to make this so.

53. The Government would be giving itself so much to do in 2023. Parliament might be faced by rafts of legislation in 2023 where the Government introduces new, rewritten legislation, under the affirmative procedure but with inadequate time for proper consideration.

54. Legislators may then be faced with an unenviable choice – affirm the new rewritten regulations with inadequate consideration or let the current regulations lapse so that no rights were protected.

55. The practical effect for businesses and workers would be uncertainty, lack of predictability as to the meaning of the law with the increased costs from litigation and appeals as meaning of the laws are redefined. Where employment law is unpredictable, as would be the case here, that can not only create costs for our clients both employees and employers but also reduce investment because businesses would no longer be able to predict the effect of laws.

[30] Clause 15(1) The Bill
[31] Clause 15(2) The Bill
[32] Clause 15(3) The Bill
[33] Clauses 15(5) and 15(10)

56. Employment Tribunal proceedings can often take more than two years to resolve due to the backlog that existed before Covid and the further backlog contributed to by Covid and the reduction in sitting days available to Tribunals. Therefore, it will take many years for the first cases even to reach a first instance appeal and then further time as the many cases are resolved that would be required to restore employment law to its current level of predictability. That choice is, of course, for Government and politicians and not for ELA. However, we have set out above the potential consequences and ramifications of the Bill.

57. ELA reaffirms its apolitical status and its willingness to inform and counsel Government and Parliament, including meeting legislators and giving evidence to committees and officials as to matters that may affect employment law and how it is used by workers and employers.

The Working Party

Louise Taft, Chair of ELA Brexit Standing Committee
Catrina Smith, Chair of ELA Legislative and Policy Committee
Paul McFarlane, Chair of ELA
Caspar Glyn KC, Deputy Chair of ELA
Brian Campbell, ELA Brexit Standing Committee
Kiran Daurka, ELA Brexit Standing Committee
James Davies, ELA Brexit Standing Committee
Robert Davies, ELA Brexit Standing Committee
Arpita Dutt, ELA Brexit Standing Committee
Clare Fletcher, ELA Brexit Standing Committee
Eric Gilligan, ELA Brexit Standing Committee
Alan Jones, ELA Brexit Standing Committee
Anthony Korn, ELA Brexit Standing Committee
Esther Langdon, ELA Brexit Standing Committee
Louise Mason, ELA Brexit Standing Committee
Charlotte Pettman, ELA Brexit Standing Committee
Bruce Robin, ELA Brexit Standing Committee
Sybille Steiner, ELA Brexit Standing Committee
Michael Whitbread, ELA Brexit Standing Committee
David Widdowson, ELA Brexit Standing Committee

APPENDIX 1

THE PROVISIONS OF THE BILL

1. **Clause 1** of the Bill creates a sunset of the end of 2023, after which all domestic subordinate legislation made under the European Communities Act 1972 (ECA 1972) and all retained direct EU legislation is revoked, unless it has been preserved by a Minister or devolved authority before that date (or powers under clauses 12-15 are used to restate, reproduce or replace it – see below). **Clause 2** allows that sunset provision to be extended, though to no later than 23 June 2026, which is 10 years from the referendum on leaving the EU.

2. Whilst some EU laws were implemented by primary legislation (such as protection from discrimination, which is found in the Equality Act 2010), significant numbers were instead implemented by way of subordinate (secondary) legislation. It is this that will fall away at the end of 2023, unless a decision is made to preserve, restate, reproduce or replace particular regulations. Our Appendix 2 below sets out the key provisions so far as employment law is concerned. Given the sheer numbers involved (2,417 according to the Cabinet Office's REUL Dashboard[34]), ELA is concerned that there is insufficient time available to properly consider which legislation should be preserved, restated, reproduced or replaced.

3. **Clause 3** of the Bill repeals Section 4 of the European Union (Withdrawal) Act 2018 (EUWA 2018) as from the end of 2023 and in so doing repeals retained EU law. Following Brexit, a snapshot of all EU legislation was taken at 11pm, 31 December 2020 (known as the Implementation Period Completion Day, or IPCD) and became known as 'retained EU Law' ('REUL').

4. The EUWA 2018 (as amended) stopped the supranational supremacy of the Court of Justice to the European Union ('CJEU') over UK law and created REUL as a purely domestic form of UK law. It defined REUL to mean either preserved EU legislation and EU-derived domestic legislation or converted EU legislation on IPCD. The former includes regulations made under s.2 of the ECA 1972, plus other primary and secondary legislation with the same purpose (e.g. regulations made under the Health and Safety at Work Act). The latter includes EU direct EU legislation and indirect EU legislation (e.g. Treaty provisions and incorrectly implemented EU Directives).

5. The concept avoided a legal vacuum that would otherwise have been left with the repeal of the ECA 1972. This legal vacuum can only now be avoided if the government uses its powers under clauses 12-15 to replace the effect of retained EU law (see below). Again, ELA is concerned that there is insufficient time available to properly consider what should remain, and in what form.

6. **Clause 4** of the Bill abolishes the supremacy of EU law, expressly adding words to the EUWA 2018 to confirm that the principle of supremacy is not part of

[34] https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance

domestic law after the end of 2023. It goes on to explain that provisions of direct EU legislation must be read and given effect so as to be compatible with domestic laws, and that they are subject to domestic laws if they are incompatible with them, thus reversing the previous position. It is however subject to the power in clause 8 to reverse this order of priority for specific regulations (see below).

7. **Clause 5** abolishes the general principles of EU law, expressly adding words to the EUWA 2018 to confirm that no general principle of EU law is part of domestic law after the end of 2023. These general principles include the principle of effectiveness, which provides that rights must be enforceable, and the Marleasing[35] principle, which requires courts to interpret UK legislation in light of the purpose of the directive it was intended to implement.

8. **Clause 6** requires retained EU law to be known as "assimilated law" after the end of 2023. This is intended to reflect the fact that EU interpretations will no longer apply to this body of law, despite its origins.

9. **Clause 7** replaces the test for higher appellate courts deciding whether to depart from retained EU case law so that they must now take into account:

    9.1 The fact that decisions of a foreign court are not (unless otherwise provided) binding;
    9.2 Any changes of circumstances relevant to the retained EU case law; and
    9.3 The extent to which the retained EU case law restricts the proper development of domestic law.

10. There is also a new test for departure from retained domestic case law, providing that higher courts can depart from their own retained domestic case law if considered right to do so having regard to:

    10.1 The extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart;
    10.2 Any changes of circumstances which are relevant to the retained domestic case law; and
    10.3 The extent to which the retained domestic case law restricts the proper development of domestic law.

11. Clause 7 further establishes a new reference procedure, enabling lower courts and tribunals bound by retained case law to refer points of law to a higher court with the power to depart from that retained case law, if they consider it to be of general public importance. UK and devolved law officers are also given the power to make references to higher courts and to intervene in proceedings where higher courts are considering arguments about departure from retained case law.

[35] *Marleasing SA v La Comercial Internacional de Alimentacion SA Case* C-106/89

12. **Clause 8** of the Bill confers powers on relevant national authorities to make regulations that disapply the effect of clause 4 above in respect of specific provisions, i.e., to enable the particular provision of retained direct EU legislation to take priority where it might be incompatible with a domestic enactment. Again, ELA is concerned that there is insufficient time available to properly consider when this power should be used.

13. **Clause 9** of the Bill makes provision for an 'incompatibility order' that a tribunal or court ***must*** grant if it decides that provisions of standard domestic legislation are subject to provisions of retained direct EU legislation that they are incompatible with. This is analogous to the powers of the higher courts to make declarations of incompatibility under s.4 Human Rights Act 1998.

14. **Clause 10 and Schedule 1** of the Bill downgrade the status of retained direct EU legislation such that it can be amended by ordinary powers to amend secondary legislation, significantly reducing parliamentary scrutiny of amendments.

15. **Clause 11** repeals the enhanced scrutiny procedures required by EUWA 2018 for secondary legislation made after IPCD that amend or revoke secondary legislation made under the ECA 1972.

16. **Clause 12** gives national authorities the power to restate secondary retained EU law, enabling clarification, consolidation and restatement to preserve the effect of the current law but removing it from retained EU law and with that the associated EU derived legal effects and interpretive features. The purpose of this clause is to allow the current position to be preserved where that is the desired policy effect. It excludes the effect of the principle of supremacy, general principles of EU law and retained EU case law. However, a restatement may produce an equivalent effect if the relevant authority considers it appropriate.

17. **Clause 13** provides similar powers in respect of secondary assimilated law.

18. **Clause 14** goes on to explain that restatement under clauses 12 and 13 may use words and concepts that are different from the law being restated, and make changes to resolve ambiguities, remove doubts or anomalies and/or facilitate improvement in the clarity or accessibility of the law.

19. **Clause 15** gives national authorities the power to revoke secondary retained EU law without replacing it, replace it with such provision as it considers to be appropriate to achieve the same or similar objectives, or make such alternative provision as it considers appropriate. However in so doing, no national authority can "increase the regulatory burden".

20. **Clause 16** confers a power on national authorities to modify secondary retained EU law as appropriate to take account of changes in technology or developments in scientific understanding.

21. Finally, **clause 17** makes consequential amendments to the Legislative and Regulatory Reform Act 2006 and **clause 18** abolishes the business impact target in the Small Business, Enterprise and Employment Act 2015.

Consequences for legislation

22. The overall effect of clauses 1 and 3 when combined with clauses 8 and 10-16 is to shift the power to make decisions about retained EU law from the legislature to the UK and devolved executives. There is currently a lot of uncertainty about what Ministers plan to do with each piece of REUL, of which there are 2,417 to deal with according to the Cabinet Office's REUL Dashboard[36]. Ministers have not yet given any indication on which areas of law they are going to deal with or what their intentions are, and there is currently no deadline for them to do so. There is also potential for devolved government Ministers to diverge from UK Ministers on policy decisions which makes things even more complex. Therefore, at this point in time, we simply do not know which pieces of REUL will fall away on the sunset day, be restated or modified (although the one exception to this is the financial services sector, as this has been covered in the Financial Services and Markets Bill currently before Parliament).

23. Furthermore, clause 11 repeals the additional scrutiny requirements added by the House of Lords (via government amendments) to the EUWA 2018. The Bill retains a sifting procedure for clauses 12, 13 and 15 (powers to restate and revoke), meaning that SIs which are proposed to be subject to the negative procedure must be laid before Parliament (alongside a memorandum from the Minister stating why the negative procedure is appropriate), then the sifting committees of the House of Lords and House of Commons can make recommendations, including that the SI should be upgraded to the affirmative scrutiny procedure. The extent to which Parliament can scrutinise the SIs that modify or revoke retained EU law is therefore limited.

24. In short, the review of all EU derived subordinate legislation and retained direct EU legislation to determine what should be preserved, restated or reproduced is a huge undertaking to be completed in a relatively short time. ELA has serious concerns that it is simply not achievable, and that there will be unforeseen consequences.

Consequences for case law, courts and tribunals

25. Further, the scope of clause 7 cannot be underestimated. The main underlying concern is the legal uncertainty that it would inevitably create, particularly for judges attempting to grapple with decades of precedents that involve a rich tapestry of EU law interwoven with UK law and common law principles. This is not a new concern. ELA previously warned of the potential consequences in its responses to consultations submitted in 2020[37] and earlier this year[38].

[36] https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance
[37] https://www.elaweb.org.uk/law-and-practice/consultation-responses/ela-response-retained-eu-law-consultation
[38] https://www.elaweb.org.uk/law-and-practice/consultation-responses/ela-response-retained-eu-law-where-next

26. Retained EU and domestic case law is currently interpreted and applied in accordance with the retained case law position at IPCD unless it has been revoked, substantially amended or departed from by the UK's higher courts, such as the Court of Appeal for England and Wales, Court of Session for Scotland, Court of Appeal for Northern Ireland and UK Supreme Court. Their test for departure is the traditional test for the Supreme Court departing from its own decisions, namely where it is right to do so.

27. Clause 7 of the Bill therefore proposes to change the role of courts and employment tribunals significantly with potentially unforeseen consequences. In the context of employment law, a humble employment tribunal considering claims will no longer need to follow relevant pre-IPCD CJEU decisions and relevant higher court judgments on REUL, but instead can make references to those higher courts on points of law, who have in turn greater scope to depart from that retained case law. Indeed, one might see the new test to depart from retained case law as encouraging such departure.

28. This raises wider concerns about how the principle of legal certainty will apply in practice, particularly for employment tribunals, which will routinely hear cases that involve multiple claims that each have numerous issues that include points decided by retained case law.

29. For example, in a case involving alleged issues of maternity discrimination, an employment tribunal might potentially consider relevant retained EU case law on the following:

(a) Direct pregnancy discrimination under section 18 Equality Act 2010
(b) Direct sex discrimination under section 13 Equality Act 2010
(c) Indirect sex discrimination under section 19 Equality Act 2010
(d) Harassment related to sex under section 26 Equality Act 2010
(e) Victimisation under section 27 Equality Act 2010
(f) Breach of sex equality clause under section 66 Equality Act 2010
(g) Breach of maternity equality clause under section 73 Equality Act 2010
(h) Breaches of sections 44, 47C, 66-68 Employment Rights Act 1996
(i) Breach of regulation 19 Maternity and Parental Leave etc Regulations 1999
(j) Breaches of Articles 4, 5, 11 and 12 Pregnant Workers Directive 92/85/EEC
(k) Breach of Article 14 Equal Treatment Directive 2006/54/EC
(l) Breaches of Articles 2 and 10 Equal Treatment Framework Directive 2000/78/EC

30. Each claim involves a sophisticated range of case law that has been determined both domestically and internationally by courts bound by EU law. Firstly, an employment tribunal must decide what provisions of REUL and retained EU case law continue to apply after 31 December 2023 in each of the causes of action. This is a significant task in itself, as the principle of legality[39] means the employment tribunal must presume that general words are intended to be subject to fundamental individual rights. It must then carry out a more detailed exercise to disentangle the relevant

[39] See Lord Hoffman at paras 131F-G in *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115

provisions of REUL and retained EU case law for each issue in dispute between the parties under each cause of action. It is common to see 5-20 issues in dispute for each cause of action, depending on the facts and circumstances of a given case. The scale and intellectual challenge to digest and reconcile the information needed to complete the task would be almost impossible for employment judges to complete in the time they currently have available to consider these cases.

31. Even if the employment judge felt able to provide judgment on the claims, aside from the obvious risk of being appealed by the losing party for perceived errors of law in the disentanglement exercises outlined above, it must further consider what points of law (if any) should be referred to a higher court for determination and in so doing consider whether the case raises points of 'general public importance'. This is an unenviable position to be in. An unrepresented party to the litigation will have even less information and inclination (or money) to investigate whether the employment judge has carried out their role correctly.

32. Furthermore, greater confusion will result from the role of the devolved UK nations. Clause 7 gives powers to devolved law officers to make references to their respective higher courts. The Court of Appeal in England and Wales, Court of Session in Scotland and Court of Appeal in Northern Ireland might all be asked the same or similar points but give different answers. The UK Supreme Court would then need to address these issues in order to ensure consistency across each of the UK nations.

33. We doubt there are enough senior judges available for what will be needed, to say nothing of the time and money needed to retain those judges for the years of work involved to determine points of employment law of general public importance, let alone the other areas of law affected.

34. In order to give effect to clause 9, some significant work will be needed to identify a definitive list of what retained direct EU legislation includes. In the context of employment rights derived from EU law, there currently exists a very wide range of claims that can be made in typical employment law cases. For example, the Court of Appeal's judgment in the UNISON ET fees case listed EU-derived rights that can be brought in claims to an employment tribunal[40], albeit that these would need to be refined to identify an up-to-date and exhaustive list.

35. This is not something that is currently available from the REUL dashboard published by BEIS[41] and should not be left to the parties in litigation (who may not be exercised or aware of what the public interest is) or the employment judge who cannot be expected to expend additional time to research the point in each case.

36. To paraphrase how one constitutional expert[42] makes the point: politicians frequently criticise judges for exceeding the bounds of the judicial role, but the best law reforms

[40] See list at Annex 2 of *R (UNISON) v Lord Chancellor (No.3)* [2015] IRLR 912

[41] https://public.tableau.com/app/profile/governmentreporting/viz/UKGovernment-RetainedEULawDashboard/Guidance

[42] See: D. Feldman, 'Departing from Retained EU Case law', U.K. Const. L. Blog (11th Jan. 2021) (available at https://ukconstitutionallaw.org/)

in sensitive social and economic areas involves consultation followed by legislation, rather than litigation.

APPENDIX 2

OVERVIEW

EU Legislation	UK Enactment	Summary Effect of Legislation	Summary Assessment of the Impact of Bill's proposals on employers and/or employees	Short summary of effect of the Bill
Directive 91/533/EEC obligation on employer to inform employees of the conditions applicable to the contract or employment relationship	Parts of Ss 1-4 Employment Rights Act 1996	To require employers to provide key information about the terms of employment contract to employees in writing	Medium	This Directive is reflected in UK primary legislation but the interpretive principles that affected it as retained legislation through which primary legislation would be interpreted can no longer be used. The meaning of the law may be uncertain.
Directive 92/85/EEC Pregnant Workers Directive	Employment Rights Act 1996, Management of Health and Safety at Work Regulations 1999 Social Security Contributions and Benefits Act 1992	Relates to the health and safety at work of workers who are pregnant, have recently given birth or are breastfeeding	Medium / High	This Directive is reflected in both UK primary and secondary legislation. The secondary legislation may be revoked unless the Government acts positively to retain it. This Directive is reflected in UK primary legislation but the interpretive principles that affected it as retained legislation through which primary legislation would be interpreted can no longer be used. The meaning of the law may be uncertain.
Directive 94/33/EC on the protection of	Children and Young Person Act 1933	Limits the employment and hours of	High	See notes on the WTR in Appendix 2

young people at work	Working Time Regulations	work of young people		
Directive 96/71/EC Posted Workers Directive as amended by Directive 2018/957/EU	Posted Workers (Enforcement of Employment Rights) Regulations 2016 Posted Workers (Agency Workers) Regulations 2020	Requires employers to ensure workers posted to the EU benefit from certain local terms and conditions of employment	Low/Medium	UK employees working in the EU will no longer be able to require their UK employers to ensure that their terms and conditions of employment are on a par with locally employed colleagues.
Directive 97/81/EC on part-time work	Part Time Employees (Prevention of Less Favourable Treatment) Regulations 2000	Establishes the principle of non-discrimination on the basis of part-time work and that e.g. part-time employees should benefit from the same terms and conditions (pro rata) as full-time employees	High	UK employees who work part-time would no longer have the protection of parity of terms requirements.
Directive 98/59/EC On collective redundancies	Chapter II Trade Union and Labour Relations (Consolidation) Act 1992	Sets out the requirement for collective consultation and the notification of a relevant public body in the event of a collective redundancy	Medium / High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The meaning of the law may be uncertain. However, ss198A and B (pre-transfer consultations) would be rendered obsolete if TUPE were no longer in force.

Directive 99/70/EC on the protection of fixed term workers	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002	Establishes the principle of non-discrimination for fixed term workers such that they have the right not to be treated less favourably than permanent employees in relation terms and conditions unless objectively justified.	High	Fixed term employees would no longer have the right to no less favourable terms or to be informed about permanent roles.
Directive 2000/43/EC Equal treatment irrespective of racial or ethnic origin	Equality Act 2010	Directive to combat discrimination on the grounds of racial or ethnic origin	Medium / High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied.
Directive 2000/78/EC Equal Treatment Directive	Equality Act 2010	Establishes a general framework for equal treatment in employment and occupation and combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation	High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied such as, for instance, the general principles that extend coverage to atypical working relationships. Equal Pay rights would be considerably eroded.
Directive 2001/23/EC	Transfer of Undertakings (Protection of Employment)	Contains the principle of automatic transfer of	High	In the event of a business sale, employees would no longer automatically transfer to the buyer of the business

Acquired Rights Directive	Regulations 200	employment and the protection of employees on the sale of a business		and would no longer have protection against dismissal or of their terms and conditions of employment. Note that TUPE goes further than required by the Directive in containing TUPE obligations and rights on insourcings, outsourcings and changes of service provider. Query therefore whether the service provision change rules would, absent action by the Government, survive.
Directive 2001/86/EC Involvement of employees in European Companies	European Public Limited Liability Company (Employee Involvement) Regulations 2009	Establishes the principle of employee involvement in European Companies	Low	
Directive 2002/14/EC Establishes a framework for the information and consultation of employees	Information and Consultation of Employees Regulations 2004	Provides for the establishment of national works councils	Medium	Works councils have not been widely adopted by UK employees and employers. However, consideration should be given to the effect of repeal on existing works council arrangements.
Directive 2002/15/EC Working time in the transport sector	Road Transport (Working Time) Regulations 2005	Sets limits on working time for those in the transport industry and provides for rest breaks and regulates night work	High in sector	See general commentary on WTR
Directive 2003/88/EC Working Time Directive	Working Time Regulations 1998	Sets limits on working time, provides for rest breaks, regulates night work and provides for paid holiday	High	The fact that the UK had negotiated a derogation from the Directive in that employers and employees could voluntarily agree to opt out of the 48 hour week lessened the impact of the WTD in the UK. However, workers are still protected if

				they do not agree to opt out of the limit and, in any event have fall back protections in the shape of minimum rest breaks on a daily and weekly basis. The WTR also gave a statutory right to minimum paid holiday in excess of the requirements of the Directive. While many employees have a contractual right to paid holiday, lower paid and a-typical workers in particular benefited from a statutory right to paid holiday.
Directive 2006/54/EC Equal Treatment Directive as regards men and women (re-cast)	Equality Act 2010	Establishes the principle of equal treatment as between men and women regarding access to employment, training, promotion, working conditions and pay and prohibits harassment	High	The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The Three Principles often give the rights real effect.
Directive 2008/94/EC Covers the protection of employees in the event of insolvency	Employment Rights Act 1996	Requires the state to step in to support employees who are affected by the insolvency of their employer	Low / Medium	The requirements are contained in primary legislation but the interpretive principles that are abolished are not often used in respect of that legislation so the effect is likely to be low / medium.
Directive 2008/104/EC On temporary agency work	Agency Workers Regulations 2010	Entitles agency workers to the same basic working and employment conditions as	High	The Supreme Court will consider in 2023 some of the rights under this regulation. Agency workers' rights to parity after 12 weeks depend, to a large extent, on the Three Principles and their effect.

		if they had been employed directly, to access collective facilities and to be informed of vacancies at the employer		
Directive 2009/38/EC European Works Councils	Transnational Information and Consultation of Employees Regulations 1999	Regulated the establishment of European works councils in businesses with sufficient numbers of employees in more than one member state	Low	UK employees no longer covered by the EWC Directive once the UK left the EU.
Directive 2010/18/EU On parental leave	Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999			The requirements are contained in primary legislation but the interpretive principles that are often used in respect of that legislation can no longer be applied. The Three Principles often give the rights real effect.
Directive 2016/943/EU Trade Secrets Directive	Trade Secrets (Enforcement etc) Regulations 2018	Gives trade secret holders remedies for breaches of confidence	Low	

APPENDIX 3

DETAILED CONSIDERATION OF THE EFFECTS ON EU LEGISLATION

This Appendix considers in more detail the effects of the Bill on Regulations which cover key areas of employment law that we, as practitioners, encounter regularly.

Atypical workers

1. The Part Time Employees (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regs) establish the following protection for part time workers:

   1.1 The right not to be treated less favourably than a comparable full-time worker with regard to the terms of their contract (reg 5(1)). Part-time employees should benefit from the same terms and conditions (pro rata) as full-time employees unless the employer can justify different treatment. The Regulations therefore apply to basic rates of pay, bonuses and shift allowances, contractual sick pay, holidays, career breaks, parental leave, maternity pay and maternity leave, other family leave, fringe benefits, and access to pension schemes.
   1.2 The right to request their employer to provide a written statement giving reasons for any less favourable treatment (reg 6(1)).
   1.3 The right not to be subjected to any detriment by any act, or any deliberate failure to act, done by their employer on the grounds, for example that the worker has brought proceedings against the employer under the PTW Regs, alleged that the employer has infringed the PTW Regs, refused to forego a right conferred on them by the PTW Regs (or merely because the employer believes or suspects that the worker has done, or intends to do, any of them) (regs 7(2), 7(3) and 7 (4)).

2. The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 establish protection for fixed term workers, for example:

   2.1 The employee is entitled to be treated no less favourably than a comparable permanent employee (reg 2) unless the employer can justify the different treatment (reg 3(1) and reg 3(3)). This applies in relation to all contractual terms. It is unlawful for an employer to provide fixed-term employees with fewer or lesser benefits and/or lower remuneration than permanent employees.
   2.2 The employee can insist that the fixed-term contract is converted into a permanent one in certain circumstances (reg 8).
   2.3 The entitlement to be informed of available permanent vacancies (reg 3(6)).
   2.4 The employee is protected against being subjected to detriment or dismissal arising out of exercise of rights under the regulations (reg 6(2)).

3. The Agency Workers Regulations 2010 provide agency workers with day one rights:

   3.1 Not to be treated less favourably than comparable workers in relation to collective facilities and amenities (reg 12);
   3.2 To be informed of any relevant permanent vacancies (regs 13(1), 13(4));

3.3 After 12 weeks in the same role with the same hirer, an agency worker becomes entitled to the same basic working and employment conditions as a direct hire (reg 5).

4. The Bill sets a default to these rights of part-time, fixed term and agency workers being abolished.

5. Atypical workers also enjoy rights as a result of retained EU law. The definition of "worker", or in the discrimination context, the definition of "employee", has been read, as a result of EU law, as extending health and safety rights and many other rights such as holiday pay and discrimination law to a wide range of workers such as gig economy workers and other atypical workers. This litigation has taken over 20 years culminating in the Supreme Court's decision in *Uber,*[43] which has brought a measure of certainty. All of this could now be reopened, causing uncertainty.

6. Perhaps most significantly atypical workers benefit most from statutory protections, as they are less likely to have contractual entitlement to benefits such as holiday pay. Cases such as *Smith*[44] have used EU principles of effectiveness and the Marleasing principle to develop the right to holiday pay for atypical workers (see below comments on Working Time).

Collective consultation

7. Collective consultation on a large-scale redundancy exercise is one of the most significant employment-related liabilities that employers may face. Liability for failure to comply with the provisions of s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) can be up to a quarter of the annual wages bill of all affected employees.

8. While TULRCA itself will not be impacted by the Bill (by virtue of its status as primary, and not subordinate) legislation, judicial interpretation of its provisions will be[45], leading to the loss of certainty and clarity as to the obligations on employers.

At what point does the duty to collectively consult arise?

9. Under TULRCA, the obligation to conduct consultation is triggered when an employer is "proposing to dismiss" as redundant 20 or more employees.[46] Both domestic and CJEU cases have considered the precise point at which that occurs. The CJEU's decision in *Junk v Kuhnel*[47] developed the previous domestic understanding of the law. It confirmed that the obligation to consult arises prior to any decision to terminate contracts having been taken by the employer. This is an earlier stage in the process than had previously been understood by the domestic courts[48]. The law was

43 *Uber v Aslam [2021] UKSC*
44 *Smith v Pimlico Plumbers* [2022] IRLR 347
45 Since it implements the European Collective Redundancies Directive (98/59)
46 s.188(1) TULRCA.
47 *C-188/03 (CJEU)*
48 See for example *Association of Patternmakers and Allied Craftsmen v Kirvin Ltd 1978 13 ITR*

developed further in *Akavan v Fujitsu Siemens Computers*[49], in which the CJEU gave further clarification that the duty to consult arose once "a strategic or commercial decision has been taken compelling [the employer] to plan for collective redundancies".

10. While the law may continue to develop, employment lawyers are currently in a strong position to advise on the risk of a breach when helping clients identify the point at which they should begin consultation.

Meaning of establishment

11. TULRCA provides that consultation obligations are only triggered where the requisite number of dismissals are proposed at "one establishment"[50]. CJEU case law has clarified that although the term "establishment" must be interpreted so as to limit the instances in which the consultation obligations will not apply[51], an establishment is the unit to which the redundant employees are assigned to carry out their duties. The CJEU clarified in *USDAW v Ethel Austin*[52], a case referred to it by the UK Court of Appeal, that there was no requirement that the dismissals of redundant employees be aggregated across different Woolworths stores; those stores with fewer than 20 employees were not subject to the duty to consult. The decision has led to a settled understanding of what is meant by an "establishment".

Impact of the Bill

12. The removal of the principle of supremacy of EU law, together with the other EU general principles, from domestic legislation, raises questions as to whether the current understanding of the meaning of TULRCA's provisions is correct, premised as it is on EU law. This will introduce uncertainty into the requirements of collective consultation, impacting an employer's ability to effectively plan for, and minimise risk in relation to, redundancies.

13. The new test for senior appellate courts to depart from retained case law[53] and the new referral mechanism via which litigants before first instance courts can bypass the normal appeal process[54] provides a clear and readily accessible route by which to re-open the meaning of these provisions.

Discrimination

14. Currently, the Equality Act 2010 gives effect domestically to a number of EU Directives aimed at providing equality of treatment in the workplace and for people seeking work. For example, the Act implements the principles of equal treatment between women and men established by the Equal Treatment Directive (2006/54/EC) and race equality contained in the EC Race Directive (2000/43). The

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49 *C-44/08 (CJEU)*
50 S.188(1)
51 *Athinaiki v Panagiotidis and others C-270/05*
52 *C-80/14*
53 Clause 7(3) of the Bill
54 Clause 7(8) of the Bill

characteristics of age and disability are similarly protected in order to comply with the Equal Treatment Framework Directive (2000/78/EC), and so on.

15. The Bill does not repeal the Equality Act. However, through (a) no longer being bound to implement those concepts in the particular way they are construed at EU level, and (b) the removal of the need for courts and tribunals to interpret the provisions in a way which fits EU jurisprudence, there could still be change in discrimination law. Even if the provisions of the Equality Act itself do not alter, there would be nothing to prevent those concepts being developed in unforeseen ways which went beyond, or even against, the current body of case law at European level which presently regulates them.

16. By way of illustration, the way in which a type of unwanted conduct relates to a protected characteristic relied upon in order to meet the definition of direct discrimination or harassment could change. Boundary lines for discrimination by association might shift. The types of reason open to employers to justify certain forms of discrimination, particularly age discrimination, as a 'legitimate aim' could be reconsidered. Similarly, the way in which the term 'race' is interpreted could be different as a result of future domestic litigation. Each has been shaped by EU jurisprudence.

Equal Pay

17. Retained EU law plays a significant role within equal pay law. While the Equal Pay Act 1970 came into force before the UK joined the EU, EU law has shaped and influenced equal pay law within the UK for over 4 decades.

18. The uncertainty of removing retained EU law in relation to settled equal pay law, which is a complex area of equality protections affecting mostly women, is likely to be significant. Much of the case law over the years has brought clarity and added protections to female workers, including:

    18.1 who they can compare themselves to;
    18.2 a greater understanding as to what amounts to a stable employment relationship during which the employer is liable for inequality; and
    18.3 establishing how discrimination can be shown where particular disadvantage is difficult to prove allowing a woman to use significant statistics to show a difference in pay.

19. A recent example of retained EU law being applied to a British case relates to the issue of comparability – namely, against whom a claimant can compare herself in order to establish a right to equal pay. Statute requires a claimant to compare her terms of employment 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)*).

20. To date, it has been 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[55], 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. This is allowing mostly female supermarket shopworkers to compare themselves with mostly male colleagues working in distribution.

21. 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[56] or accepted that there could be a single source[57]. The reference to the CJEU in *K & others* did not 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.

22. In the event that the EU concept of single source is removed from equal pay law, the consequence will be that some claimants will have live claims reliant on the single source test, while future claimants with the same claims will only be able to rely on the domestic law, giving rise to different gateways into the same litigation.

Parental Leave

23. The Maternity and Parental Leave etc. Regulations 1999 (MAPLE) implement EU Directives on parental leave. Whilst key rights are contained in the Employment Rights Act 1996 and not therefore repealed by the Bill, much of the detail in respect of these rights is contained in MAPLE, which would no longer be in force unless preserved, restated, reproduced or replaced. Furthermore, these rights would no longer be interpreted in accordance with the Three Principles, which often give them real effect. This would create legal uncertainty in respect of the interpretation and application of several family-friendly rights and protections, such as:

    23.1 the rights to ordinary and additional maternity leave[58];
    23.2 protection of contractual rights during ordinary and additional maternity leave[59];
    23.3 the right to parental leave[60];

[55] *K & others v Tesco Stores Limited* (C-624/19)
[56] Robertson v DEFRA [2005] IRLR 363
[57] *Asda Stores Ltd v Brierley [2019] EWCA Civ 44*
[58] ERA ss71 & 73, MAPLE Regs 4-11
[59] ERA s71, MAPLE Reg 9
[60] ERA s76, MAPLE Regs 13-18

23.4 automatic unfair dismissal if the only or principal reason for dismissal is connected with a right to leave for family reasons, or requesting flexible work[61];
23.5 the right to be given first refusal of any suitable alternative job which is available during a redundancy process whilst on maternity, adoption or shared parental leave[62]; and
23.6 the right to return to the same job after maternity or parental leave, where this is reasonably practicable[63].

Pregnant Workers

24. The Bill has the potential to end much health and safety protection derived from a host of health and safety regulations. This includes the special protections which apply in respect of new and expectant mothers by virtue of the Management of Health and Safety at Work Regulations 1999 (MHSWR), which implement the health and safety requirements of the Pregnant Workers Directive (92/85/EEC) into UK law.

25. These special protections require employers:

25.1 to assess the workplace risks posed to new or expectant mothers or their babies;
25.2 to alter the employee's working conditions or hours of work to avoid any significant risk;
25.3 where it is not reasonable to alter working conditions or hours, or would not avoid the risk, to offer suitable alternative work on terms that are not "substantially less favourable"; and
25.4 where suitable alternative work is not available, or the employee reasonably refuses it, to suspend the employee on full pay.

26. Without the MHSWR, employer's health and safety obligations to new and expectant mothers would be less bespoke, less prescribed and less certain.

27. Women of childbearing age and new and expectant mothers may still have the less direct route to a measure of health and safety protection, under common law and under primary legislation such as The Health and Safety at Work Act 1974 and under the Equality Act 2010 (for example, in relation to a claim that a failure to conduct an adequate risk assessment amounts to an act of pregnancy, maternity or sex discrimination).

28. However, as explained above, both employers and individuals would likely be less clear on the legal framework, and individuals would find it harder to enforce their rights, because the Bill:

28.1 would "turn off" the MHSWR;

[61] ERA ss99 & 104C, MAPLE Regs 10 & 20
[62] ERA ss74 & 75C, MAPLE Reg 10
[63] ERA s71, MAPLE Reg 18

28.2 would leave gaps in the legal landscape, removing the current bespoke protection for new and expectant mothers, thus creating uncertainty and scope for argument; and

28.3 would erase the interpretative principles and settled decisions of the CJEU which have, to date, played a substantial role in developing this area of law and in providing certainty. Cases in the CJEU have, for example, provided clarity on the scope of employer's legal obligations in relation to risk assessments for new and expectant mothers, and on the approach which Courts should take in determining whether a failure to conduct an adequate risk assessment or to act on its findings may amount to (depending on the circumstances), maternity, pregnancy or sex discrimination.

Transfer of Undertakings (TUPE)

29. If the TUPE Regulations are repealed in their entirety and not replaced, in the event of a business sale employees would no longer automatically transfer to the buyer of the business, dismissals would no longer be automatically unfair, and nor would employees have protection of their terms and conditions of employment. Most of the liabilities associated with the employees would remain behind with the transferor and no longer transfer to the transferee. Any collective agreements would no longer be protected, Trade union recognition would no longer be protected and employees would no longer have the right to have their representatives informed and consulted about a potential transfer.

30. However, TUPE 2006 goes further than required by Council Directive 2001/23/EC in containing TUPE obligations and rights on in-sourcings, outsourcings and changes of service provider (see Reg 3(1)(b)). To the extent that TUPE implements the Directive, TUPE was made under s 2(2) of the ECA 1972. However, because the 2001 Directive and its predecessor do not specifically refer to outsourcing, re-tendering or in-sourcing, the provisions in TUPE relating to 'service provision changes' were made under s 38 of the Employment Relations Act 1999. It is not clear whether these service provision change rules would also be revoked by the Bill.

31. Without the automatic transfer provisions under TUPE, the UK would revert to the pre-1 May 1982 position of the transfer automatically terminating the employment contracts, as a matter of common law. While currently employees do not have to transfer, they do so automatically unless they object.

32. Affected employees would only have their employment protected, that is continued by virtue of an automatic transfer by operation of law, if the seller/transferor agreed to re-employ them in another capacity in a retained part of its business, or if the buyer/transferee agreed to employ them going forward as part of the transaction. Any remaining employees who were not offered employment would likely face the prospect of a redundancy dismissal by the seller/transferor.

33. This scenario would create significant uncertainty for affected employees and employers and arguably places greater burdens on the transferor in particular (who

would have to decide on any re-engagements and/or manage redundancies) and, to a degree, on the transferee (who would have to choose whether to take any employees, and if so who and on what terms). Buyers of businesses, and new service providers and their clients would no longer be able to expect that the workforce would, by and large, be retained. In the absence of TUPE, the parties would have to go through an offer and acceptance process which could result in greater attrition and loss of key personnel, skills and individual and collective knowledge which in turn could undermine deal certainty.

34. This approach would align the UK more closely with other jurisdictions that do not provide specific protections for employees on business transfers, including the USA, Japan and China.

35. It would however create a discrepancy with the long-established approach of the EU and would represent a major change to transactional and outsourcing practice in the UK. Note however that transfers into the UK from other EU jurisdictions would take place under the auspices of the Directive (and the relevant national implementing legislation), since the touchstone is where the undertaking is located pre-transfer, not where it is transferring to.

36. Consideration would also need to be given as to whether a repeal of TUPE with no replacement legislation would trigger the "level playing field" provisions of the UK/EU Withdrawal Agreement.

37. There would also be a significant risk of uncertainty for all parties. Such uncertainty may be expected to have an adverse impact at least for an initial period on transactional activity within the UK. The market has become used to the operational efficiencies that can be gained from a mechanism of automatic transfers of contracts of employment so a reversion to an offer and acceptance approach would be a significant change and potentially disruptively so.

38. There would also be an adverse impact on many service provision contracts which have already been entered into on the basis that TUPE would be expected to apply, for example on termination. It should be noted that the service provision changes were introduced in 2006 at the request of business in order to promote business certainty and to reflect a broad consensus within sectors which utilise outsourcing that greater certainty would drive operational efficiencies and was in the interests of employees and employers alike. If employees no longer transfer automatically, business sellers and transferors will be left with stranded severance costs which may include notice pay and redundancy costs. At the moment there are significant numbers of out-sourcing arrangements in both the private and public sector which have been entered into on the understanding that, on termination, the employees would transfer to the new provider and the current provider would not be left with these costs.

39. Bidders for businesses and outsourcing contracts would be able to undercut each other by planning detrimental changes to terms and conditions or the size or location of the workforce - whereas at present, all bidders have, to this extent at

least, to play on a level playing field and reduce costs by e.g. innovation and new ways of working

40. The Bill also calls into the question the status of a huge body of EU case law which is relevant to how TUPE is interpreted in the UK, in particular how to define an "economic entity" and what is a "transfer" (*Spijkers* etc). The same applies for the "purposive" interpretation, which has been fundamental to UK case law on TUPE, including those on service provision changes (e.g. *McTear*).

41. It is also worth noting that, even if TUPE is revoked, there is still some UK protection of continuity on a business transfer under section 218 of the Employment Rights Act 1996. Subsection (2) provides that if a trade or business, or an undertaking is transferred from one person to another, the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and the transfer does not break the continuity of the period of employment. Also under subsection (6), the same applies if an employee of an employer is taken into the employment of an associated employer. However, it has not been necessary to operate such provisions in isolation from TUPE and as noted in the preceding paragraph there could not be a straightforward read across of what constitutes an undertaking under TUPE.

42. The Bill does provide scope for the Government either to take what might be described as a stark approach of revoking TUPE with no alternative or adjustment – creating what could be described as a temporary vacuum for the market - or to replace TUPE with regulations that meet the same labour market and business objectives, or with other provisions which the Government deem appropriate. It is not ELA's role to express any view on the approach that should be taken by the Government, or which part(s) of the current TUPE regulations should be retained in whatever form.

43. Whilst maintaining our apolitical stance, we would note that in the past there have been suggestions from numerous sources (including previous consultations on amendments to TUPE, as well as broader market commentary) of ways in which TUPE could be revised, clarified or improved. Some (non-exhaustive) examples would be:

    43.1 the restrictions on a transferee harmonising terms and conditions post-transfer;
    43.2 the interpretation of restrictive covenants in the contracts of transferring employees;
    43.3 whether a relevant transfer can take place to a single or multiple employers where there is fragmentation of the undertaking,
    43.4 the inability of the transferor lawfully to make redundancies pre-transfer;
    43.5 the prescriptive information and consultation procedure, which only allows in very limited circumstances for employers to engage directly with employees, rather than having to elect representatives; and
    43.6 the insolvency provisions of TUPE.

44. ELA is concerned that the timeframe imposed by the Bill for consideration as to whether TUPE should be revoked, preserved or amended is insufficient to undertake a full consultation process before reaching a view, so that interested parties including employers, trade unions and trade bodies have the opportunity to respond. Without such consultation, ELA is concerned that there could be unintended consequences.

Working Time

45. Clauses 1-2 of the Bill set the defaults to abolish the following rights:

45.1 Maximum hours not just for workers in general (which can be opted out of)[64] but also for safety critical workers such as airline pilots[65], sea-fisherman[66] and HGV drivers;[67]
45.2 The daily limit of 8 hours per day or the limit of 40 hours per week for children;[68]
45.3 Restrictions on night work due to the health and safety consequences of it and provision of health assessments on being assigned to such work;[69]
45.4 The right of a worker to a rest break where their works poses a risk to their health and safety plus a 20 minute default break in their shift and a break from work each day and a day off every week or 2 days off every 14 days with an obligation to keep records to ensure that the rights are vindicated;[70]
45.5 Exceptions to the rules about daily and weekly rest breaks for emergencies and other justifiable business reasons as well as an exception for a worker when they change their shift pattern;[71]
45.6 Paid holidays at the same rate of pay that a worker should get when they are working for 4 weeks of the year, a right to a balancing payment if the worker leaves not having taken their leave entitlement and restrictions on a worker taking too much leave in their first year of employment;[72]
45.7 The right of an employer to determine when leave is taken so that it can regulate its business;[73]
45.8 The right of an NHS worker who has worked through the pandemic and been unable to take their paid annual leave, to carry that leave over;[74] and
45.9 An ability to claim compensation for breach of these rights or where annual leave payments are not made.[75]

46. Clauses 3-5 of the Bill abolish Direct effect rights, the supremacy of EU law and general interpretive principles of EU law. This has the default effect of abolishing:

[64] Regulation 4 Working Time Regulations 1998.
[65] Regulation 9 Civil Aviation (Working Time) Regulations 2004.
[66] Regulation 6 Fishing Vessels (Working Time: Sea-fishermen) 2004.
[67] Regulation 4 Road Transport (Working Time) Regulations 2005.
[68] Regulation 5A Working Time Regulations 1998.
[69] Regulations 6A and 7 Working Time Regulations 1998.
[70] Regulations 8, 9, 10, 11 & 12 Working Time Regulations 1998.
[71] Regulations 21, 22, 23 and 24 Working Time Regulations 1998.
[72] Regulations 13, 14, 15A and 16 Working Time Regulations 1998.
[73] Regulation 15 Working Time Regulations 1998.
[74] Regulation 13(9)-(13) Working Time Regulations 1998.
[75] Regulation 30 Working Time Regulations 1998.

46.1 The right of workers whose employer has misled them as to their working status and evaded paying any holiday pay during the whole of their employment so that the worker will get nothing and the rogue employer is unjustly rewarded for the evasion of legal rights;[76]

46.2 The right to holiday pay that reflects normal pay at work so that holiday pay would no longer reflect bonuses, commission or overtime;[77]

46.3 The right of a sick worker to carry over leave for up to 18 months when they are too sick to take paid annual leave;[78] and

46.4 The principle of effectiveness so that where a right is breached then an effective remedy must be provided where the procedural requirements must not make it virtually impossible or excessively difficult to exercise the rights conferred under the regulations.[79]

[76] *The Sash Window Workshop Ltd v King* [2015] IRLR 348, *Smith v Pimlico Plumbers* [2022] IRLR 347

[77] *Evans v Malley Organisation Ltd t/a First Business Support* [2003] IRLR 156 *Bamsey v Albon Engineering & Manufacturing* [2004] IRLR 457, *Robinson-Steele v RD Retail Services Ltd* [2006] ICR 958 , *Lock v British Gas* [2014] ICR 813*, Dudley Metropolitan Borough Council v Willets* [2017] IRLR 870, *East of England Ambulance Service NHS Trust v Flowers* [2019] IRLR 798;

[78] *Commissioners of Inland Revenue v Ainsworth* [2005] IRLR 465, *Stringer v HMRC* [2009] IRLR 214, NHS *Leeds v Larner* [2012] IRLR 825, *Sood Enterprises Ltd v Mr Colin Healy* UKEATS/0015/12/BI, *Plumb v Duncan Print Group Ltd* [2015] IRLR 711

[79] *Levez v T. H. Jennings (Harlow Pools) Ltd* [1999] ICR 521 CJEU §82