WRITTEN EVIDENCE SUBMITTED BY LEWIS SILKIN LLP (REULB14)

CALL FOR WRITTEN EVIDENCE: RETAINED EU LAW (REVOCATION AND REFORM) BILL

This evidence is submitted by Lewis Silkin LLP in connection with the employment law implications of the Retained EU Law (Revocation and Reform) Bill.

We are a law firm with a particular specialism in employment law. We have around 160 specialist employment and immigration lawyers, including 30 partners, based in London, Oxford, Manchester, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by legal directories and many of our lawyers are recognised as leading practitioners in employment law.

Our evidence is as follows.

1. Reducing burdens, improving the law and removing barriers to growth and innovation

(a) There is undoubtedly scope for modernising, simplifying or even removing retained EU employment laws to improve our regulatory system. There are specific opportunities to remove complexity, which could support growth and innovation by making the law easier to understand, operate and enforce. This would benefit businesses (especially smaller ones) and employees. One example that is ripe for reform is the current system for calculating holiday entitlement and pay. This is impractical, archaic, and (arguably) a barrier to engaging people on worker status contracts. Although some of these problems are down to the UK's drafting of the Working Time Regulations rather than the underlying EU directive, there is now a chance to create a simpler regime which still delivers high standards.

(b) There are other areas of employment law that would benefit from modernisation, for example in relation to collective redundancy consultation (see below).

(c) There is also an urgent and pressing need to tackle the current UK law on European Works Councils which, according to a very recent appeal court judgment, requires some UK employers to operate two EWCs simultaneously, with one EWC covering EU employees under EU law and another somehow covering EU and UK employees under UK law, despite EU law not recognising the existence of the UK EWC and EU employers being under no EU law obligation to enable the UK EWC to operate in a meaningful way.

(d) Our view, however, is that reform should be done in a targeted way.

2. The sunset clause (clause 1)

(a) A large amount of employment law is contained in EU-derived statutory instruments including laws on working time, agency workers, TUPE, part-time work, fixed-term employment, maternity and parental leave, information and consultation and health and safety.

(b) By clause 1, the draft Bill provides that all such law will vanish into the night under the sunset clause. This is presumably not a serious intention, given the consequences. We would assume that the government is unlikely to want to scrap rights to paid holiday or remove provisions about maternity leave or safe workplaces. Reform is more likely. Nevertheless, the draft Bill puts sunset forward as the primary and default option.

(c) Wholesale removal of employment law would cause severe disruption and confusion. Leaving aside the policy issues around whether dismantling employment rights is a desirable approach, employment contracts and policies will generally include provisions about key topics such as hours and holidays, and employers may be contractually unable to row back from those provisions even if they wanted to do so.

In the absence of regulation, tribunals might start implying certain terms into employment contracts as a matter of common law. Businesses would face costs of legal advice, uncertainty and litigation.

(d) It is also worth noting that deregulation does not necessarily favour employers. For example, TUPE affords certainty to employers and employees by providing for automatic transfer of employment on business transfers and service provision changes. Removing TUPE would lead to significant redundancies (with costs picked up by the outgoing employer). In some cases, employers would have to negotiate with employees to persuade them across (with costs picked up by the incoming employer).

(e) Many commercial contracts running beyond the end of 2023 will already have been signed with existing employment laws in mind. For example, contracts with staff supply agencies will often be negotiated for 3–5-year terms and contain provisions relating to compliance with the Agency Workers Regulations. Many service provision contracts will similarly have been drafted and priced on the assumption that TUPE would apply at the end of the contract to transfer staff onto the next contractor. Revoking TUPE before those contracts run to their conclusion will result in uncertainty and potentially additional costs (of unexpected severance or renegotiation).

(f) From both a practical and policy perspective we presume that the government does not intend the wholesale removal of employment law, and the true purpose of the sunset clause is to set a deadline for its review and reform. That being so, we question whether it is sensible to position the sunset clause as the primary and default option.

3. Better regulation

(a) The Bill sets out a process for restating or replacing current statutory instruments with new versions. The text of each relevant statutory instrument will need to be closely reviewed and decisions made about its future. For employment legislation, this will need to involve a careful review of caselaw. Some employment law topics have attracted a substantial body of ECJ and domestic caselaw. This caselaw will no longer apply to any new statutory instruments created under the Bill, because they will not be retained EU law (clauses 12(3) and 15(8)). Current caselaw can, however, potentially be codified into the new statutory instruments. There would also be nothing to stop a tribunal using current caselaw as a guide to interpretation of the new statutory instruments. This means that current caselaw needs to be carefully assessed and decisions taken about whether the interpretations should be kept or not.

(b) In practical terms, however, this means that BEIS officials will need to do the following, before the sunset deadline:

(i) find each relevant statutory instrument and identify which parts of it are in scope;

(ii) decide if the plan is to scrap those parts altogether or keep them in some form, to meet the overall policy objectives;

(iii) if keeping them, identify relevant caselaw and the impact of removing its interpretative effect when replacements become purely domestic law;

(iv) consider which, if any, cases should be codified into the new text and, if so, how to do that;

(v) if it's concluded that the judicial interpretation reached in any case should be jettisoned, whether the wording of the new statutory instrument should make that clear that and, if so, how;

(vi) identify the potential impact of the provisions becoming assimilated law if reform is delayed (see below), whether that creates more uncertainty and how that might be mitigated;

(vii) assess whether the end result is a net gain for deregulation/growth/UK business generally; and

(viii) consult on the above (not legally required but clearly sensible).

(c) It goes without saying that this would be a complex and time-consuming undertaking. But we will not end up with clear, high quality and tailored regulation if there is not enough time or resource to do this redrafting job well. Instead, we will end up with poor regulation and the costs of dealing with uncertainty.

(d) Even if there is enough time for redrafting, there will likely be little lead-in time for businesses to get to grips with changes (on multiple fronts) and implement them before the sunset deadline. It's worth observing that businesses had at least two years to get ready to implement any EU directive. The Bill allows for some statutory instruments to have a later sunset, but a piecemeal approach to change is not ideal and there is also the destabilising effect of the Bill's other provisions if reform is delayed (see below).

(e) Just because an employment law happens to be found in a statutory instrument shouldn't necessarily make it a priority for review. From an employer or employee point of view, this is an arbitrary distinction. There could be immediate gains from updating the collective consultation obligations in section 188 of the Trade Union and Labour Relations Consolidation Act 1992. Those obligations could be modernised and made more fit for the future, for example by clearing up confusion over how to assign remote workers to an "establishment" or introducing an explicit requirement on employers to consider retraining if jobs are being lost due to the introduction of new technology. Compliance with section 188 is something we advise on daily. But it is a piece of primary legislation so in practice the sunset deadline is going to place it in the queue for review behind any statutory instrument that is subject to the sunset clause, no matter how obscure.

4. Repeal of section 4 EUWA, removal of EU supremacy and general principles of EU law (clauses 3, 4 and 5)

(a) Primary legislation implementing EU law will be automatically "assimilated" at the end of 2023. This will apply, for example, to provisions of the Equality Act 2010. Statutory instruments implementing EU law fall under threat of the sunset clause as discussed above but, if they are saved from the sunset, they would also appear to become assimilated at the end of 2023.

(b) Assimilation, however, does not mean keeping the status quo. This is because clauses 3, 4 and 5 of the Bill remove EU legal supremacy, general principles of EU law and other retained EU obligations at the end of 2023. Assimilated law, therefore, is no longer to be governed by those principles and rules.

(c) One such principle is that of consistent interpretation: EU law has required UK courts to construe UK legislation implementing EU Directives by looking for a conforming interpretation and, where necessary, implying words into domestic legislation to achieve it (see *Lehman Brothers* paragraph 131). If we understand paragraph 86 of the Bill's explanatory notes correctly, the Bill aims to end this obligation.

(d) At the same time, however, the EU Withdrawal Act 2018 retains precedent case law (clause 6(3)). The Bill aims to make it easier to challenge that precedent caselaw but does not seek to change the fact that it is retained and still binding under clause 6(3) EUWA unless overruled.

(e) We are currently unclear about the practical impact of retaining precedent case law while removing the principles upon which it was based.

(f) We are particularly unclear about the impact on domestic laws which have been shaped by the implication of words to achieve compliance with EU Directives. Take a concrete example in our field. The Working Time Regulations say that holiday "may only be taken in the leave year in respect of which it is due" (regulation 13(9)). In other words, it cannot be carried forward into the next holiday year. ECJ cases, however, have ruled that workers must be allowed to carry forward holidays they could not take because they were on sick leave. This is required to comply with the Working Time Directive. To achieve compliance, the Court of Appeal in NHS Leeds v Larner ruled that regulation 13(9) of the Working Time Regulations must be construed to read that holiday may only be taken in the leave year in respect of which it is due "*save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave*" (see para 90). In other words, the court put words into domestic legislation to say that holiday can actually be carried forward in cases of sick leave, even though this is not what the Working Time Regulations say. Moving forward, suppose that those regulations are saved from the sunset and become assimilated law. What is the status of *Larner* and the ECJ caselaw upon which it is based? Is this still binding on an Employment Tribunal? Apparently so under clause 6(3) of EUWA, yet the obligation to imply words into domestic legislation to achieve compliance has disappeared.

(g) Alarm bells over the potential impact of clauses 3, 4 and 5 of the Bill have been sounded by the Employment Lawyers Association in their submission to the call for evidence. It is hard to assess the real practical impact of this confusion. It could depend on how many statutory instruments become assimilated law and therefore subject to this new regime. We question if it is sensible to destabilise those statutory instruments by removing the principle of consistent interpretation if the ultimate intention is review and reform.

5. Role of courts (clause 7)

(a) There are severe delays in the employment tribunal and court system. To take just one example, the Supreme Court's landmark decision in *Harpur Trust v Brazel* in July 2022 concerns the claimant's holiday pay between 2011 and 2016, in other words it took more than 6 years for a final ruling. In some regions it is now taking more than two years to get to a hearing after issuing a claim.

(b) Significant changes to a lot of legislation will inevitably lead to more litigation, whether because of uncertainty or employers failing to correctly implement the new regime. This will compound the backlog so, unless the government plans to significantly increase funding for the tribunal system (which is presumably not affordable in the current economic climate) the current drafting of this Bill looks set to exacerbate a severe existing problem.

6. Replacement statutory instruments can only be deregulatory (clause 15(5))

(a) We do not know the policy intention behind this restriction but wanted to make some observations on its potential impact.

(b) The deregulatory restriction could come into conflict with efforts to modernise our employment laws and make them fit for future workplaces. For example, there is an opportunity to overhaul our complicated and arguably outdated patchwork of family rights, but there could be disputes over whether reforms are "deregulatory".

(c) This restriction will also narrow the scope of discussions about replacement laws. For example, any new version of the Working Time Regulations would not be able to introduce a new explicit right to disconnect if a deregulatory condition is in place. Some may regard it as helpful that the issues for discussion will be narrowed, whereas others will see this as a missed opportunity.

(d) The scope of the proposed restriction is also unclear. For example, in a TUPE context, decreasing the regulatory burden on the incoming or outgoing employer will arguably serve to increase it upon the other.

7. Impact on Northern Ireland

(a) Clause 1(4) exempts "an instrument that is Northern Ireland legislation" from the scope of the sunset clause. Northern Ireland legislation is defined in section 24(5) of the Interpretation Act 1978 and includes some instruments which, although made under primary legislation, are used as primary legislation because of the history of direct rule. The carve-out therefore appears to exclude legislation such as Orders in Council from the sunset clause (which is supported by the House of Commons Briefing Paper on the Bill). While the Orders themselves would be out of the scope of the sunset provision, it nonetheless appears that *regulations enacted under them*, insofar as they implement EU legislation, would be included. This will bring a large amount of NI employment law into scope of the sunset clause including regulations on working time, agency workers, TUPE, health and safety and more. It also brings various pieces of equality legislation into scope, which is hard to reconcile with Article 2 of the Northern Ireland Protocol. In contrast to the position in Great Britain, Northern Ireland does not have a single Equality Act. Much of its equality legislation has been made by statutory instrument not primary legislation. This includes, for example, legislation against age and sexual orientation discrimination. Similarly, the non-diminution principle contained in the Protocol does not sit easily with the ending of supremacy of EU law and removal of principles of EU law. Further guidance on this, including the potential impact of the Northern Ireland Protocol Bill (currently being considered by Parliament) is much needed in Northern Ireland.

(b) Without a functioning Northern Ireland Executive, or Assembly it is not possible to prepare the Executive's legislative consent memoranda or debate the necessary legislative consent motions, and it seems doubtful that there will be enough time to review all impacted employment legislation in this jurisdiction before the end of 2023, but the power to delay the sunset provisions is given to UK ministers alone.

8. The government's dashboard of retained law

We have seen debate over whether the government's retained EU law dashboard is comprehensive and, in case it is relevant to the committee, wish to share our brief observations on this. First, it is curious that the Equality Act 2010 appears to be omitted, except in relation to pensions (at least on our search). While it is primary legislation and therefore not exposed to the sunset clause, it nonetheless operates in practice to implement several EU Directives, including the Equal Treatment Directive. Second, in some areas the dashboard confirms only that "parts" of regulations are in scope (for example the Maternity & Parental Leave Regulations 1999), so it is not comprehensive in the sense of actually identifying which parts. Third, the dashboard does not shed any light on "gold-plated"

statutory instruments (i.e. statutory instruments which implement EU law but go further than its requirements) and whether they are in scope as a whole or only in part.

9. Conclusion

(a) More clarity is needed to assess the practical impact of some of the Bill's provisions. The proposed sunset clause is a blunt tool which, in relation to employment law, could be counter-productive by swapping regulatory burden for confusion, potential increase in costs (in legal advice and implementation) and more litigation. This uncertainty could easily achieve the opposite of the presumed intention and result in the UK becoming a less attractive location for business investment.

(b) Rather than starting from the proposition that everything should be jettisoned, and building up from there, it would be better to focus on a smaller number of valuable, targeted reforms which modernise and improve employment law. There is likely to be a broad consensus over what those reforms should be. Government resources could then be focussed on creating high-quality regulation, and reforms could be introduced quickly but with enough notice for businesses to prepare. If the sunset is not abolished altogether then, in our view, it should be extended so that quick wins can be bedded in before more widespread change occurs.

Lewis Silkin LLP

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