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Brexit Backslide: How the United Kingdom's Break from the European Union Could Erode Female Labor Rights

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Brexit Backslide: How the United Kingdom's Break from the European Union Could Erode Female Labor Rights

Katherine Ryan*

Abstract

Britain's retreat from the E.U. has demonstrated the deep connection between its domestic law and E.U. law and the dangers that can arise when a country attempts to disentangle the two. With the recent passage of the Retained E.U. Law (Revocation and Reform) Act, the resulting absence of E.U. law in British domestic law may create legal holes that leave women in the workforce without protection from discrimination. International organizations and treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the International Labor Organization, may be used to patch these holes. Moreover, Britain may find inspiration from other Organization for Economic Cooperation and Development countries which have successfully protected women. This Comment serves as a cautionary tale for other European countries which may someday seek to exit the E.U., and provides a path forward for British activists looking to protect the rights of women in the workforce.

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I. INTRODUCTION

On January 31, 2020, the United Kingdom became the first and only sovereign nation ever to leave the European Union.¹ During its forty-seven years of membership, its legal system gained significantly from E.U. labor and employment laws. Without this membership, it is unlikely that the British female labor force would have many of the rights that it enjoys today, including equal pay guarantees,² maternity and parental rights,³ and part-time and temporary employee protections.⁴

Once Brexit was approved, the European Union Withdrawal Act of 2018 (EUWA) provided the U.K.'s next steps forward by detailing the legal framework for a post-E.U. Britain. Under the EUWA, E.U. laws were retained as U.K. domestic law, but Ministers of Parliament were granted broad discretion to amend or appeal them.⁵ In June 2023, legislation was passed that expanded Parliament's discretion even further. The Retained E.U. Law (Revocation and Reform) Act (RRA) gives Parliament new powers to revoke E.U.-based law, ends the principle of supremacy of E.U. law in the U.K., and encourages U.K. courts to overturn E.U.-based caselaw, among other things.⁶ The U.K. may soon find itself needing to fill the legal holes left by this Act, and failure to do so could expose the country to domestic lawsuits under the Human Rights Act (HRA), sanctions from the E.U. under the Trade and Cooperation Agreement (TCA), and international condemnation by organizations such as the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Labor Organization (ILO).⁷

This Comment offers a comprehensive overview of the legal landscape before and during the U.K.'s E.U. membership. It will explain the specific legal threats posed by the RRA, and the recourse available to laborers through the U.K.'s domestic laws and international agreements. It will conclude by suggesting how the U.K. can mend its domestic laws, taking inspiration from other members of the Organization for Economic Cooperation and Development (OECD).

¹ See HOUSE OF LORDS, Committee on the European Union 65 (2017).

² See TRADE UNION CONGRESS, Women Workers' Rights and the Risks of Brexit 2–4 (2016), <https://perma.cc/5ZS8-ZLWZ>.

³ See *id.* at 6–10.

⁴ See *id.* at 10–12.

⁵ See HOUSE OF LORDS, Lord Select Committee on Constitution 35 (2017-2018).

⁶ James Davies et al., *Retailed EU Law Bill Becomes Law: What's the Practical Impact on Employers?*, LEWIS SILKIN (June 29, 2023), <https://perma.cc/Q8BL-YU36>.

⁷ See generally Human Rights Act 1998, c. 42 (UK); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 18 at 4 (Dec. 18, 1979) [hereinafter CEDAW]; Trade and Cooperation Agreement, Apr. 30, 2021, O.J. (L. 149/10); INTERNATIONAL LABOR ORGANIZATION, Conventions and Recommendations.

A. Impact of E.U. Membership on U.K. Labor Law

The Equal Pay Act of 1970 was the catalyst for early U.K. equal pay protections. Proposed by the Labor Party in response to the Ford sewing machinist strike, the Act required men and women belonging to the same pay grade to be paid equally.⁸ But it was rendered obsolete when employers discovered that they could place female-dominated roles in lower pay grades, even when those roles required similar levels of skill, effort, and responsibility relative to those occupied by their male counterparts.⁹ The Act was not changed until the European Commission sued the U.K. government for non-compliance with E.U. law,¹⁰ after which it was amended to agree with the E.U. Equal Pay Directive's "equal pay for equal work" requirement.¹¹ Forty years later, the Equal Pay Act and its E.U.-mandated amendments were consolidated with the Sex Discrimination Act of 1975, the Race Relations Act of 1976, and the Disability Discrimination Act of 1995 to create the Equality Act of 2010.¹²

With respect to maternal rights, the U.K. has had favorable maternity leave entitlements long before its E.U. membership.¹³ Nevertheless, maternity care extends beyond time away from work. As a result of E.U. membership, British mothers gained extensively in other areas. First, they received increased access to ante-natal care.¹⁴ In 2016, approximately 430,000 British workers enjoyed the right to paid time off to attend ante-natal appointments.¹⁵ Better health and safety protections were also mandated in the workplace.¹⁶ Currently, employers are required to adjust working hours or conditions where there is a risk of harm to their pregnant employees.¹⁷ Additionally, the E.U.'s Pregnant Workers Directive prohibited dismissal of pregnant workers and those on maternity leave.¹⁸ And

⁸ See TRADE UNION CONGRESS, *supra* note 2, at 2; Rosa Cho, *Everything You Need to Know About the Equal Pay Act*, INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, <https://perma.cc/LCU6-FYQ9> (last visited Jan. 16, 2023).

⁹ See TRADE UNION CONGRESS, *supra* note 2, at 2.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *Equality Act 2010: Guidance*, GOV.UK (2013), <https://perma.cc/C7HD-62UC>.

¹³ Compare *Statutory Maternity Pay and Leave: Employer Guide*, GOV.UK, <https://perma.cc/K2JD-ECJL> (last visited Nov. 29, 2023) ("eligible employees can take up to 52 weeks of maternity leave"); with *Parental Leave*, EUROPA.EU, <https://perma.cc/28Q3-289C> (last visited Feb. 24, 2023) ("both parents are entitled to at least four months leave each").

¹⁴ See TRADE UNION CONGRESS, *supra* note 2, at 6.

¹⁵ See *id.* at 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

when the E.U.'s Parental Leave Directive was implemented in the U.K., men also gained the right to take time off to care for their children.¹⁹

E.U. membership has also improved the rights of part-time workers, which in turn improves women's rights as women make up a majority of the part-time labor force in the U.K.²⁰ Often seen as ancillary to full-time employees, part-time workers have historically been denied the legal rights that their full-time counterparts enjoy.²¹ The E.U. recognized this, and required its member states to take actions that have benefited millions of working women. In 1994, due to pressure from the E.U. Equal Opportunities Commission, Parliament was forced to amend a law that prevented part-time employees from raising unfair dismissal claims.²² Part-time workers were also given guaranteed paid holiday under the Part-Time Worker Directive, and maternity rights under the Temporary Agency Worker Directive.²³

B. Post-Brexit Legislation and International Pressure

Following Brexit, the EUWA went into full effect. To provide legal continuity, it enabled the transfer of preexisting E.U. law into U.K. law.²⁴ Referred to as retained E.U. law (REUL), these laws are a snapshot of the E.U. laws in force in Britain through the end of the Brexit transition period.²⁵ Moreover, Britain retained the principle of supremacy of E.U. law, such that, where conflicts would inevitably arise between E.U. law and the law of an E.U. member state, E.U. law would prevail.²⁶ The international law community expected REUL to be reviewed and amended over time, either judicially or through the enactment of new domestic legislation.²⁷ But Parliament has expedited the process with the RRA. Its advocates have argued that the legislation will “develop new laws that best fit the needs of the country and grow the economy,” by revoking any REUL that “do not meet the government’s desired policy effect[s].”²⁸

¹⁹ See TRADE UNION CONGRESS, *supra* note 2, at 9.

²⁰ See *Full Time and Part Time Employment*, GOV.UK (2022), <https://perma.cc/D325-PTUC>.

²¹ See The Part-time Workers (Prevention of Less Favorable Treatment) Regulations 2000, c. 1551 (UK) (the purpose of this regulation is to ensure that part-time workers are treated no less favorably than full-time workers).

²² See TRADE UNION CONGRESS, *supra* note 2.

²³ See *id.* at 11–12.

²⁴ See Heather Stewart, *Labor Threat to Defeat Theresa May Over Brexit Bill*, THE GUARDIAN (July 12, 2017), <https://perma.cc/57AP-AABS>.

²⁵ Verity Buckingham, *Retained EU Law (Revocation and Reform) Bill 2022-23: What is the Impact on Employment Law?*, DENTONS (Oct. 25, 2022), <https://perma.cc/3WYD-Q739>.

²⁶ See *Primacy of EU Law*, LEX EUROPA, <https://perma.cc/7JGB-RCC6> (last visited Feb. 26, 2023).

²⁷ See Buckingham, *supra* note 25.

²⁸ *Id.*

Early on, it was suggested that these goals would be accomplished by “sunsetting” all REUL not explicitly approved by Parliament by the end of 2023.²⁹ This would have put thousands of REUL on the chopping block, including the Working Time Regulations of 1998, the Agency Workers Regulations of 2010, the Part-time Workers Regulation of 2000, and the Fixed-term Employees Regulation of 2002.³⁰ Fortunately, when the RRA was passed in June 2023, the sunset provision was removed and replaced with a concrete list of REUL to expire at the end of this year.³¹ While the list does not include employment laws that explicitly protect the rights of women workers, the legal community is still concerned that the RRA’s other provisions could, over time, diminish U.K. labor rights gained during its E.U. membership.³²

But Parliament must operate within the confines of its existing obligations. This Comment will discuss one domestic law, one international agreement, and two international organizations that can protect women laborers: the HRA, the TCA, CEDAW, and the ILO.

The HRA was adopted in 1998 with the goal of incorporating the rights contained in the European Convention on Human Rights into U.K. law.³³ It requires that the judiciary take account of any decisions issued by the European Court of Human Rights, and interpret legislation in a way that is compatible with the Convention.³⁴ Though the HRA only protects public sector employees, those protections are robust. Article 14 requires that all rights and freedoms set out in the HRA be applied without discrimination, including discrimination on the basis of sex.³⁵ The TCA is a post-Brexit deal between the E.U. and the U.K. which committed both sides to level the playing field in employment law.³⁶ It requires both parties to maintain a system for domestic enforcement of employment rights.³⁷ This includes an effective program of labor inspections and readily accessible legal remedies. If Britain weakens or reduces employment rights in a

²⁹ See Graeme Cowie, *Retained EU Law (Revocation and Reform) Act 2023 Research Briefing*, HOUSE OF COMMONS LIBRARY (2023), <https://perma.cc/BG6A-Q6DG>.

³⁰ Buckingham, *supra* note 25.

³¹ Cowie, *supra* note 29.

³² See Davies, *supra* note 6. See also Stephanie Compson, *UK: Reforming the Retained EU Law*, LITTLER MENDELSON (July 27, 2023), <https://perma.cc/Q69B-69QM>.

³³ See Bonnie Weinstein, *The U.K. Human Rights Act*, AMERICAN SOCIETY OF INTERNATIONAL LAW (2001), <https://perma.cc/A73L-XF26>.

³⁴ See *id.*

³⁵ See *Article 14: Protection from Discrimination*, EQUALITY AND HUMAN RIGHTS COMMISSION, <https://perma.cc/3Z3S-J3GF> (last visited Jan. 16, 2023).

³⁶ See *Questions & Answers: EU-UK Trade and Cooperation Agreement*, EUROPEAN COMMISSION, <https://perma.cc/73PF-8APA> (last visited Feb. 24, 2023).

³⁷ See *id.*

way that materially impacts trade or investment, the E.U. may implement “rebalancing measures” such as tariffs or sanctions.³⁸

CEDAW, an international treaty adopted by Britain in 1986, has been described as the “world’s ‘Bill of Rights’ for women.”³⁹ Article 11 defines the right to work as “an inalienable right of all human beings.”⁴⁰ It requires equal pay for equal work, the right to social security, paid leave and maternity leave, and prohibits dismissal on the grounds of maternity, pregnancy, or status of marriage.⁴¹ The U.K. is also a member of the ILO, a U.N. agency that coordinates principles of international labor law by issuing conventions. Adoption of these conventions is voluntary, and the agency’s enforcement power is limited. However, the ILO’s conventions promote social dialogue between trade unions and employers.⁴² This power complements the enforcement measures available through the HRA, CEDAW, and the TCA.

C. Learning from Other OECD Countries

To avoid these repercussions, the U.K. should take measures to bolster the rights of its workforce. Parliament does not need to start from scratch; it can look to the examples set by similarly positioned OECD countries. For example, Canada regularly reviews old legislation to ensure that it provides for the changing needs of the country.⁴³ In 2021, the Canadian government launched a task force to undertake a comprehensive review of their Employment Equality Act.⁴⁴ The task force has taken feedback from the legal community and the general public, and has thus far identified needs relating to public reporting, compliance, and enforcement.⁴⁵ Moreover, when the government identifies new needs, they take proactive steps to address them. They recently extended the amount of parental leave from sixty-three to seventy-one weeks, established the right of employees to refuse overtime to deal with family responsibilities, and enabled employees who have completed at least six months of employment to request flexible work arrangements.⁴⁶

³⁸ *See id.*

³⁹ *See Convention on the Elimination of Discrimination Against Women (CEDAW)*, EQUALITY AND HUMAN RIGHTS COMMISSION, <https://perma.cc/N2NV-UARD> (last visited Feb. 24, 2023). *See also* Lisa Anderson, *Q+A-What Is The “World’s Bill of Rights for Women?”*, REUTERS (Nov. 12, 2013), <https://perma.cc/JL9F-Y5ZY>.

⁴⁰ *See CEDAW*, *supra* note 7.

⁴¹ *See id.*

⁴² *How the ILO Works*, ILO, <https://perma.cc/STR4-2CLS> (last visited Feb. 24, 2023).

⁴³ *See* Section V.A.

⁴⁴ *See* Employment Equity Act Review Consultation, GOVERNMENT OF CANADA.

⁴⁵ *See id.*

⁴⁶ *See* Employment Insurance Maternity and Parental Benefits, GOVERNMENT OF CANADA.

As with Canada, the Netherlands has been successful in its efforts to create strong labor protections.⁴⁷ It has been especially effective in increasing female labor force participation, a feat that is often correlated with increased economic output.⁴⁸ One possible reason for this success is its robust parental care rights. Under the Childcare Act of 2005, the cost of childcare is split among parents, employers, and the government, making it affordable at all levels.⁴⁹ Moreover, in addition to sixteen weeks of maternity leave, Dutch parents can also take up to twenty-six weeks of parental leave.⁵⁰ Another possible reason for the Dutch success is their strong protections for part-time workers. The Adjustment of Working Hours Act of 2000 is the Netherlands' most significant legislation for part-timers.⁵¹ Among other things, it standardized hourly wages, vacation time, unfair dismissal protections, pensions, unemployment, sick leave and disability, and health insurance between part- and full-time workers.⁵² Given these protections, many have characterized the Netherlands as a remarkable outlier among European countries with respect to part-time employment protections.⁵³

D. Roadmap

This Comment proceeds as follows: Section II summarizes two distinct periods of labor law in U.K. history: before its E.U. membership and during, with a specific focus on the rights gained by British women in the latter. Section III explains the legal landscape in the U.K. once Brexit took effect. It begins with an explanation of how REUL were intended to be replaced slowly, to ensure continuity of legal rights and uphold the principle of supremacy of E.U. law. It follows with a discussion of the scope and effects of the RRA. Section IV applies the requirements of the U.K.'s domestic law and international agreements to the RRA, to illustrate how it might subject the U.K. to international pressure. Section V will explore the legal frameworks of Canada and the Netherlands to provide

⁴⁷ *Brief Introduction to Dutch Labor Law*, PENROSE LAW, <https://perma.cc/J7QF-W3QS> (last visited Jan. 16, 2023).

⁴⁸ Wouter Nientker & Rob Alessie, *Female Labor Market Participation Across Cohorts: Evidence from the Netherlands*, 167 *DE ECONOMIST* 407, 420–33 (2019); CHRISTIAN GONZALES ET AL., *FAIR PLAY: MORE EQUAL LAWS BOOST FEMALE LABOR FORCE PARTICIPATION* 5-32 (2015).

⁴⁹ *See Childcare Legislation in the Netherlands*, INTERNATIONAL CENTRE FOR THE STUDY OF THE MIXED ECONOMY OF CHILDCARE (ICMEC) (Mar. 23, 2009), <https://perma.cc/EDB5-4RHZ>.

⁵⁰ *Employee Rights and Labor Law*, I AMSTERDAM, <https://perma.cc/R2GM-B5TA> (last visited Jan. 16, 2023).

⁵¹ J. Visser et al., *The Netherlands: From Atypicality to Typicality*, in *EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS* 190–222, Cambridge University Press (S. Sciarra, P. Davies, & M. Freedland eds. 2004).

⁵² *See id.*

⁵³ *See id.*

potential guidance for the U.K., should the passage of the RRA begin to negatively impact the female labor force.

II. EVOLUTION OF LABOR LAW IN THE U.K.

A. Labor Laws in the U.K. Before E.U. Membership

1. Pre-Equal Pay Act legislation.

During the Victorian era, English common law defined the role of the wife as a *feme covert*, subordinating her under the “protection and influence of her husband, her baron, or lord.”⁵⁴ Once married, husband and wife became one person under the law.⁵⁵ Divorce, whether initiated by the husband or wife, usually left women impoverished, as the law offered them no rights to marital property.⁵⁶ This imbalance was rectified by Parliament in reaction to the efforts of Lady Stirling-Maxwell.⁵⁷ Her lobbying led to the first significant piece of women’s rights legislation in the U.K.: the Married Women’s Property Act of 1882.⁵⁸ The Act amended the law of coverture to include a wife’s right to own her own property.⁵⁹ It also restored the legal identities of wives, forcing courts to recognize a husband and wife as two separate legal entities.⁶⁰

Nearly forty years later, the Representation of the People Act of 1918 gave women the right to vote.⁶¹ The groundwork for this legislation was set in the mid-nineteenth century. In 1865, scholar Charlotte Manning established the Kensington Society, an organization of middle-class women who were barred from higher education.⁶² Following one of their discussions on suffrage, a small

⁵⁴ *Blackstone’s Commentaries on the Laws of England*, LONANG INSTITUTE, <https://perma.cc/74D5-YJ3Q> (last visited Jan. 16, 2023).

⁵⁵ See Phillip Mallett, *Women and the Law in Victorian England*, THE VICTORIAN CITY, <https://perma.cc/3X7M-T5UB> (last visited Feb. 24, 2023) (forfeiture of legal personhood deprived women of the ability to sue or be sued under her own name and required that personal property obtained before or during the marriage was to be surrendered to her husband).

⁵⁶ *See id.*

⁵⁷ See Stephanie Buck, *Until this Woman Stood Up, English Wives Had No Rights to See Their Children or Even Get a Divorce*, TIMELINE (Oct. 31, 2017), <https://perma.cc/U7QZ-B3ZG> (Lady Stirling-Maxwell’s husband was a failed barrister prone to fits of drunken violence, and despite his unfitness, courts refused to grant her a divorce, causing her to lose custody of her three sons).

⁵⁸ *See id.*

⁵⁹ See Shana Loudermelk, *Married Women’s Property Act, 1879 and 1882*, U.N.C. HISTORY DEPARTMENT, <https://perma.cc/KZM7-LNW2> (last visited Feb. 24, 2023).

⁶⁰ *See id.*

⁶¹ See Rachel Arenas, *The British Representation of the People Act*, U.N.C. HISTORY DEPARTMENT, <https://perma.cc/Y8RB-W6UA> (last visited Jan. 16, 2023).

⁶² See Gitika Bhardwaj, *The Struggle for Suffrage*, CHATHAM HOUSE (Dec. 1, 2020), <https://perma.cc/2QHA-RLYA>.

committee was formed to draft a petition and gather signatures in support of the female vote.⁶³ These early British Suffragettes were not without male support. John Stuart Mill made an invaluable contribution with his publication, *The Subjection of Women*, in which he argued that the oppression of women was one of the few remaining relics of ancient times, and claimed that this oppression would severely impede the progress of humanity.⁶⁴ These collective efforts led to the passage of the Representation of the People Act.⁶⁵ But the Act was imperfect; it limited the right to vote to “women aged over thirty who occupied land or premises with a value above five pounds,” while men over the age of twenty-one were allowed to vote regardless of property ownership.⁶⁶ Suffragettes and their supporters continued to lobby Parliament until the Equal Franchise Act of 1928 was passed. The Act gave the vote to all women over the age of twenty-one, irrespective of property ownership.⁶⁷

One year after the Representation of the People Act was passed, Parliament shifted its focus to labor rights. The Sex Disqualification Act of 1919 allowed women to join professions and professional bodies, sit on juries, and receive advanced degrees.⁶⁸ These rights were exercised almost immediately.⁶⁹ But despite this initial promise, the Act’s long-term impact proved disappointing, as it was rarely invoked by the courts.⁷⁰ In 1925, women could be recruited into the U.K.’s Administrative Class, a higher policy-making grade of employment, but a 1931 report found that most departments did not do so.⁷¹ The Ministry of Defense only employed women as typists.⁷² The National Post Office kept women in the separate and low-paying “Women’s Branch.”⁷³ Until 1973, policies requiring women to resign once they married were legal and commonplace.⁷⁴ These inequities would continue until the Ford sewing machinist strike that inspired the

⁶³ See *id.* (the Committee would go on to inspire notable Suffragette figures, including Millicent Fawcett, Emily Davison, and Princess Sophia Duleep Singh).

⁶⁴ See JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 85 (1869).

⁶⁵ See Arenas, *supra* note 61.

⁶⁶ HAROLD SMITH, *THE BRITISH WOMEN’S SUFFRAGE CAMPAIGN 1866-1928* 95 (2014).

⁶⁷ DEREK HEATER, *CITIZENSHIP IN BRITAIN: A HISTORY* 145 (2006).

⁶⁸ See *The Sex Disqualification (Removal Act) of 1919*, GOV.UK, <https://perma.cc/B62V-3F8R> (last visited Feb. 24, 2023).

⁶⁹ *Id.* (Ada Summers, an active Suffragist, was sworn in as the first woman magistrate in 1919).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² *Id.*

⁷³ See *The Sex Disqualification (Removal Act) of 1919*, *supra* note 68.

⁷⁴ See *id.*

Equal Pay Act of 1970.⁷⁵ While imperfect, the Equal Pay Act remedied many of the failures of its predecessors.

2. The Equal Pay Act and its shortcomings.

On June 7, 1968, female sewing machinists at the Ford Motor Company's Dagenham plant walked out to protest their unequal pay.⁷⁶ As they left the factory, they were met with mixed reactions from both men and women.⁷⁷ Eileen Pullen remembered one man shouting, "go back to work, you're only doing it for the pin money."⁷⁸ The practice of treating women as secondary wage-earners was commonplace in 1960s Britain, and the Ford sewing machinists were no exception. They were classified in the lower-paid "unskilled" grade, despite having to pass complicated tests to gain employment.⁷⁹ Their strike halted work at the plant, and Henry Ford eventually flew to England to remedy the chaos. In the end, he agreed to pay the women ninety-two percent of what he paid men.⁸⁰ Their efforts received international media coverage and sparked conversations that led to the creation of the Equal Pay Act.⁸¹

Passed in 1970, the Equal Pay Act gave "all individuals the right to the same contractual pay and benefits as a person of the opposite sex in the same employment, where [they] are performing like work."⁸² As illustrated by the sewing machinist strike, it was common practice to have a separate, lower women's rate of pay. For example, at the Ford Motor Company, there were four pay grades for production workers: (1) skilled male, (2) semi-skilled male, (3) unskilled male, and (4) female.⁸³ As a result of this classification, the sewing machinists were paid less than male toilet cleaners and storage workers.⁸⁴ By introducing an implied equality clause into all employment contracts, the Act rid the U.K. of obviously discriminatory "women's" and "men's" rates. But the Act's success was short lived. The prohibition of gender-based pay classifications did nothing to remedy the reality that jobs mainly performed by women were often

⁷⁵ See TRADE UNION CONGRESS, *supra* note 2, at 2.

⁷⁶ Simon Goodley, *Dagenham Sewing Machinists Recall the Strike That Changed Women's Lives*, THE GUARDIAN (June 6, 2013), <https://perma.cc/YWU9-CK2A>.

⁷⁷ See *id.* (one of the strike's leaders, Gwen Davis, recalled some women thanking her, while others jeered, not wanting their husbands to be put out of work).

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ *Id.*

⁸¹ Goodley, *supra* note 76.

⁸² *Equal Pay and the Equal Pay Act 1970*, NATIONAL EDUCATION UNION, <https://perma.cc/M6A9-LKF6> (last visited Jan. 16, 2023).

⁸³ *Id.*

⁸⁴ See Kayleen Devlin, *Battle of the Sexes: 'Radical' Laws Reach 40th Birthday*, BBC NEWS (Dec. 29, 2015), <https://perma.cc/J5M4-T9J9>.

paid less than jobs mainly performed by men, even when they required equal levels of skill, effort, and responsibility.⁸⁵

B. Labor Laws in the U.K. During E.U. Membership

1. Equal pay and protection against sex discrimination and harassment.

In 1975 the E.U. adopted the Equal Pay Directive.⁸⁶ This directive explained that equal pay included equal pay for work of equal value and, as a member state, the U.K. was required to amend existing legislation to comply.⁸⁷ However, Parliament took no action to revise the Equal Pay Act. In response, the European Commission⁸⁸ sued them in the European Court of Justice (ECJ),⁸⁹ and after the U.K. lost, Parliament finally complied.⁹⁰ Lengthy legal battles followed as women brought their employers to court over violations of the expanded Act.⁹¹

One equal pay case that received national attention was *Enderby v. Frenchay Health Authority*, which involved nearly 1,500 female speech therapists employed by the National Health Service (NHS).⁹² The plaintiffs in *Enderby* demanded equal pay with NHS clinical psychologists and pharmacists, who earned £7,000 more than them annually.⁹³ They argued that the pay differential was based solely on sex: speech therapy was a female-dominated field, while clinical psychology and pharmacy were male-dominated fields.⁹⁴ The U.K. tribunal and court of appeals rejected their claims, reasoning that there was no rule that prevented them from entering the higher-paid fields.⁹⁵ The case was referred to the ECJ, which clarified that a prima facie case of discrimination exists where statistical evidence demonstrates that a job with lower pay is predominantly filled by women, whereas comparable jobs with higher pay are predominantly occupied by men.⁹⁶ After the prima facie case is made, the burden shifts to the employer to show that the pay

⁸⁵ See TRADE UNION CONGRESS, *supra* note 2, at 3.

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *European Commission*, CITIZENS INFORMATION (Feb. 25, 2023), <https://perma.cc/4ULL-UCFY> (the European Commission is the executive of the E.U.; it is responsible for initiating laws, enforcing the laws of the E.U., and managing the E.U.'s policies).

⁸⁹ *Court of Justice of the European Union (CJEU)*, EUROPEAN UNION, <https://perma.cc/7GXV-9QDD> (last visited Feb. 25, 2023) (the ECJ ensures that E.U. law is interpreted and applied the same in every E.U. country, and that countries and institutions abide by E.U. law).

⁹⁰ Case 40/82, *Comm'n v. U.K.*, 1982 E.C.R. 2793.

⁹¹ See TRADE UNION CONGRESS, *supra* note 2, at 3.

⁹² Case 127/92, *Enderby v. Frenchay Health Authority*, 1993 E.C.R. 859.

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ TRADE UNION CONGRESS, *supra* note 2, at 3–4.

⁹⁶ *See Enderby*, *supra* note 92.

differential is based on “objectively justified factors unrelated to discrimination on grounds of sex.”⁹⁷

Enderby was decided in 1993, but equal pay litigation continues today.⁹⁸ From 2005–2015 there were more than 300,000 U.K. equal pay claims, many based on the right to equal pay for work of equal value.⁹⁹ In addition to expanding the definition of equal pay, the ECJ increased the amount of back pay available to successful plaintiffs.¹⁰⁰ Before 2003, back pay was capped at two years. The ECJ ruled that this undermined the right to equal pay, and the U.K.’s Equal Pay Act was amended. Today, the back pay limit is generally six years, but when an employer lies to a woman to conceal a pay gap, there is no limit at all.¹⁰¹

With respect to sex discrimination, the U.K. made two significant changes during its E.U. membership. First, it shifted the burden of proof in discrimination cases to employers. In 2001, the Sex Discrimination Act was amended to agree with the E.U.’s Directive on the Burden of Proof in Cases of Discrimination Based on Sex.¹⁰² Today, if a plaintiff-employee has presented sufficient evidence to suggest that discrimination has occurred, the burden of proof shifts to the defendant-employer. Second, it barred compensation limits in sex discrimination cases. In 1993, the ECJ decided *Marshall v. Southampton*, a case brought by a British woman who was fired because of her sex.¹⁰³ The ECJ ordered her employer to compensate her for losses, harm suffered, and accrued interest. This amount was three times the limit set by the U.K.’s Sex Discrimination Act, and in an unexpected act of solidarity with women, Parliament abolished the limit entirely.¹⁰⁴

Protections against workplace sexual harassment were also expanded during this time. In response to the E.U.’s Equal Treatment Directive of 2006, the U.K.’s Employment Equality and Sex Discrimination Acts were amended. They now include a specific protection against harassment, defined as “behavior that violated dignity or created a humiliating or offensive working environment.”¹⁰⁵ Prior to the amendments, sexual harassment claims were not directly recognized under U.K.

⁹⁷ See Samuel Bagenstos & Ellen Katz, *Disparate Impact Abroad, in A NATION OF WIDENING OPPORTUNITIES? THE CIVIL RIGHTS ACT AT 50*, U. Mich. Press 283, 293–94 (2016).

⁹⁸ TRADE UNION CONGRESS, *supra* note 2, at 4 (“The speech therapists’ case opened the door to many more equal pay for work of equal value cases because the ECJ had confirmed separate collective agreements or pay structures within the same employer could not be a defence to an equal pay claim.”).

⁹⁹ *Id.*

¹⁰⁰ Case 326/96, *B. S. Levez v. T. H. Jennings (Harlow Pools) Ltd*, 1998 E.C.R. 07835.

¹⁰¹ See *Equal Pay and the Equal Pay Act 1970*, *supra* note 82.

¹⁰² See TRADE UNION CONGRESS, *supra* note 2.

¹⁰³ Case 271/92, *Marshall v. Southampton and South Hampshire Area Health Authority No. 2*, 1993 E.C.R. 04367.

¹⁰⁴ See TRADE UNION CONGRESS, *supra* note 2, at 5.

¹⁰⁵ *Id.*

law. Instead, a woman was required to claim sex discrimination and show that she was treated worse than a man. This led to the creation of the “bastard defense,” a legal maneuver which allowed employers to evade liability by claiming that they treated men and woman equally poorly.¹⁰⁶ Illogical as the defense may seem, it was widely used, even by the government. In *Brumfitt v. Ministry of Defense*, a female corporal in the Royal Air Force (RAF) sued over the obscene remarks she received in training.¹⁰⁷ The RAF asserted the bastard defense, arguing that, while the offensive remarks were targeted at her as a woman, the sergeant who made them was known to make similarly offensive remarks to men.¹⁰⁸ The employment tribunal found no discrimination, and the court of appeals affirmed. The E.U. directive was issued just two years after *Brumfitt*, making future use of the bastard defense impermissible.

2. Maternity and parental rights.

Not all E.U. laws offer greater protections for women; maternity leave entitlements are one such example. Under U.K. law, women are entitled to fifty-two weeks of maternity leave,¹⁰⁹ but under E.U. law, the entitlement is just sixteen.¹¹⁰ Yet maternal care extends beyond time off, and E.U. directives and ECJ rulings have created a larger set of comprehensive rights. For example, in 1992, the E.U. passed the Pregnant Workers Directive, which aimed to improve the health and safety of pregnant women and new mothers in the workplace.¹¹¹ Under the directive, British women gained paid time off for ante-natal care.¹¹² In 2016, approximately 430,000 workers enjoyed the right for paid time off to attend ante-natal appointments.¹¹³ The directive also created new duties for employers by requiring them to assess specific workplace risks to pregnant women. Previously, U.K. employers were entitled to dismiss a woman who couldn't perform her normal duties because of her pregnancy.¹¹⁴ Today, U.K. law requires employers to adjust working hours or conditions where she faces a risk of harm. If no adjustments are possible, she has the right to a paid suspension from work. Women also gained the right to refuse night shifts where their “individual risk assessment has identified a risk from night work . . . or their doctor or midwife

¹⁰⁶ *See id.*

¹⁰⁷ *Brumfitt v. Ministry of Defense* [2004] UKEAT 1004-03.

¹⁰⁸ *See id.*

¹⁰⁹ *Statutory Maternity Pay and Leave: Employer Guide*, GOV.UK, <https://perma.cc/CQ8F-39R2> (last visited Jan. 16, 2022).

¹¹⁰ *Parental Leave*, EUROPA.EU, <https://perma.cc/WK4M-B8D6> (last visited Feb. 25, 2023).

¹¹¹ Pregnant Workers Directive, 92/85, art. 1, 1992 J.O. (L 348) 1, 2 (EC).

¹¹² *See* TRADE UNION CONGRESS, *supra* note 2, at 6.

¹¹³ *Id.*

¹¹⁴ *See id.*

has provided a medical certificate stating they should not work nights.”¹¹⁵ Again, if no adjustment is possible, she is entitled to a paid suspension “as long as necessary . . . to protect their health and safety and that of their child.”¹¹⁶

The E.U.’s Pregnant Workers Directive also prohibited dismissal of workers who were pregnant or on maternity leave.¹¹⁷ In response, U.K. law was amended to make dismissal for any reason connected with pregnancy or maternity illegal discrimination.¹¹⁸ However, it took years of ECJ litigation to prompt this change. For example, in *Webb v. EMO Air Cargo*, a British woman challenged her dismissal during pregnancy as sex discrimination.¹¹⁹ Prior to appeal to the ECJ, the House of Lords held that she had not suffered discrimination as defined in the Sex Discrimination Act, because a man who was absent in similar circumstances would have been similarly dismissed.¹²⁰ The ECJ reversed, explaining that pregnancy is a condition particular to women, thus treating a woman unfavorably because of it is sex discrimination.¹²¹ While the *Webb* litigation was ongoing, the U.K. ruled in a similar case, *Brown v. Rentokil*, that dismissing a pregnant woman due to pregnancy-related illness was not sex discrimination.¹²² The House of Lords referred the case to the ECJ, and the ECJ reversed, holding that the Equal Treatment Directive did not allow dismissal of a female worker at any time during her pregnancy for absences due to an illness resulting from pregnancy. Today, the U.K.’s Equality Act of 2010 defines pregnancy and maternity discrimination using the ECJ’s interpretation, and these definitions no longer require comparison of a woman’s treatment to that of a man.¹²³

The Parental Leave Directive’s benefits also extend to male caregivers.¹²⁴ The E.U. has recognized that encouraging men to participate in family life is key to helping women gain work-life balance.¹²⁵ When the directive was implemented in the U.K., men gained the right to take time off to care for a child.¹²⁶ Furthermore, men were granted the same rights as women with respect to

¹¹⁵ *Protecting Pregnant Workers and New Mothers*, HEALTH AND SAFETY EXECUTIVE, <https://perma.cc/28RU-HPUF> (last visited Jan. 16, 2022).

¹¹⁶ *Id.*

¹¹⁷ *See* Pregnant Workers Directive, *supra* note 111, art. 10.

¹¹⁸ *See Pregnant Employees’ Rights*, GOV.UK, <https://perma.cc/MRQ4-82SM> (last visited Jan. 16, 2023).

¹¹⁹ Case 32/93, *Webb v. EMO Air Cargo*, 1995 E.C.R. 3567.

¹²⁰ *See* TRADE UNION CONGRESS, *supra* note 2, at 7.

¹²¹ *See* *Webb*, *supra* note 119.

¹²² C 394/96, *Brown v. Rentokil* [1998] Ir. LR 445.

¹²³ Equality Act 2010, c. 15 (UK).

¹²⁴ *See* TRADE UNION CONGRESS, *supra* note 2, at 9.

¹²⁵ *See id.*

¹²⁶ *Id.*

dependent caretaking.¹²⁷ The Parental Leave Directive includes an entitlement for five working days of leave per year to provide personal care to a relative or person living in the same household.¹²⁸

3. Women working part-time and on a temporary basis.

Despite changes in the traditional assumptions about domestic roles, women remain disproportionately more likely to care for children and other family members.¹²⁹ As a result, women are more likely to work in part-time and temporary positions.¹³⁰ In the U.K., thirty-six percent of working women are part-time employees, compared to eleven percent of working men.¹³¹ Often viewed as ancillary to full-time employees, these women have historically been used to avoid the costs and responsibilities of employing permanent staff.¹³² Recognizing this, the E.U. has taken steps to improve their status. One such improvement is paid holidays for part-time workers.¹³³ As with maternity rights and equal pay, most full-time, permanent employees had paid holidays before the U.K. complied with the E.U. Working Time Directive.¹³⁴ However, this did not apply to part-time workers.¹³⁵ When the directive was implemented, it was estimated that thirty percent of part-time workers had no right to paid holiday, compared to four percent of full-timers.¹³⁶ Today, all part-time workers are entitled to at least five weeks of paid holiday.¹³⁷

As with paid holidays, part-time workers have also seen an expansion of their rights in unfair dismissal cases.¹³⁸ U.K. law once required a person working between eight and sixteen hours a week to have five years of service before claiming unfair dismissal, while a full-time employee only needed two years.¹³⁹ The Equal Opportunities Commission took the U.K. government to court to challenge these rules, where the House of Lords agreed that they violated E.U. equality

¹²⁷ See *New Rights to Improve Work-Life Balance in EU to Enter into Application Today*, EUROPA.EU, <https://perma.cc/Y2FU-4PPF> (last visited Jan. 16, 2023).

¹²⁸ *Id.*

¹²⁹ Sarah Jane Glynn, *An Unequal Division of Labor: How Equitable Workplace Policies Would Benefit Working Mothers*, AMERICAN PROGRESS.ORG (May 18, 2018), <https://perma.cc/J3VJ-UMJR>.

¹³⁰ See *id.*

¹³¹ See *Full Time and Part Time Employment*, *supra* note 20.

¹³² TRADE UNION CONGRESS, *supra* note 2, at 10.

¹³³ *Id.* at 11.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Holiday Entitlement*, GOV.UK, <https://perma.cc/FT6Y-V4A5> (last visited Jan. 16, 2023).

¹³⁸ See TRADE UNION CONGRESS, *supra* note 2, at 10.

¹³⁹ See *id.*

rights.¹⁴⁰ Today, all U.K. workers can make unfair dismissal claims if they have worked for their employer for more than two years.¹⁴¹ Treatment of these workers was further improved in 2000 and 2002 when the Part-Time Worker Directive and the Fixed-Time Worker Directive were implemented.¹⁴² Under these directives, part-time workers gained the right to equal treatment without needing to show that their less favorable treatment amounted to sex discrimination.¹⁴³ This benefited workers in female-dominated fields, who could not easily compare their treatment to that of men.¹⁴⁴ Moreover, employees on fixed-termed contracts gained equal treatment with permanent staff for entitlements such as pay, bonuses, pensions, and maternity leave.¹⁴⁵

III. POST-BREXIT LEGAL LANDSCAPE

A. E.U. Withdrawal Act

1. Political history: Conservative dissatisfaction with E.U. membership.

On June 23, 2016, the U.K. government asked its citizens if they wished to remain in the E.U.¹⁴⁶ By a margin of 51.9 to 48.1, they voted to leave.¹⁴⁷ However, the U.K.'s membership in the E.U. was debated long before 2016.¹⁴⁸ In 1975, just two years after the U.K. joined the E.U., the nation held its first departure referendum.¹⁴⁹ At the time, sixty-seven percent voted to stay, comprised mostly of the U.K.'s administrative counties, regions, and Northern Ireland.¹⁵⁰ Only Shetland and the Western Isles voted to leave, indicating widespread support for the E.U. among the mainstream British population.¹⁵¹ Tensions rose again in 1984, when Conservative Prime Minister Margaret Thatcher refused to increase the U.K.'s payments to the E.U. budget. Instead, she demanded that payments be

¹⁴⁰ *See id.*

¹⁴¹ *Part-time workers*, ADVISORY, CONCILIATION, AND ARBITRATION SERVICE, <https://perma.cc/87MR-BT5Y> (last visited Jan. 16, 2023).

¹⁴² *See* TRADE UNION CONGRESS, *supra* note 2, at 11.

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See* Anthony Lane, *Britain Votes to Stand Alone*, THE NEW YORKER (June 23, 2016), <https://perma.cc/ZHK7-DBF2>.

¹⁴⁷ *Id.*

¹⁴⁸ Sarah Pruitt, *The History Behind Brexit*, HISTORY.COM (Mar. 29, 2017), <https://perma.cc/Q64J-MXDF>.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

lowered and successfully negotiated a rebate on the U.K.'s contributions.¹⁵² In 1997, Labor Prime Minister Tony Blair tried to repair the fractured relationship. A well-known E.U. supporter, he eased tensions between the U.K. and Europe during an E.U. ban on British beef exports,¹⁵³ European defense policy negotiations with France,¹⁵⁴ and the fall of Thatcher's budget rebate.¹⁵⁵ Nevertheless, anti-E.U. sentiment continued to rise in the U.K. in the mid-2000s through the 2010s, aided in part by the then-Conservative leader David Cameron.¹⁵⁶

Prior to his election in 2010, Cameron promised a referendum on the Lisbon Treaty.¹⁵⁷ The treaty increased the centralization of E.U. leadership and detailed the exit process for countries attempting to leave the Union.¹⁵⁸ Three years later, Cameron delivered his famous Bloomberg speech in which he promised that, should the Conservatives win the majority in the 2015 general election, a referendum would be held on whether the U.K. should remain in the Union.¹⁵⁹ In early 2014, Cameron described his vision for future U.K.–E.U. relations, which included tougher immigration controls on citizens of E.U. member states, enhanced power to veto proposed E.U. laws, reductions in the ECJ's control over U.K. police and courts, and a decentralization of E.U. power.¹⁶⁰ The E.U. made several concessions during its negotiations with Cameron, but he remained dissatisfied with immigration policies, claiming that “he could have avoided Brexit had European leaders let him control migration.”¹⁶¹ The E.U. stood its ground, with Angela Merkel stating “. . . only those who really accept the fundamental

¹⁵² See Derek Brown, *Thatcher Settles for 66pc Rebate*, THE GUARDIAN (June 27, 1984), <https://perma.cc/A6X6-CK6D>.

¹⁵³ See *EU Issues Worldwide Ban on British Beef Exports*, CNN (Mar. 26, 1996), <https://perma.cc/34Z8-6Q8E>.

¹⁵⁴ See Ian Black, *Blair Accepts European Defense Deal*, THE GUARDIAN (Nov. 28, 2003), <https://perma.cc/2MZV-UBWJ>.

¹⁵⁵ See John Wyles, *Tony Blair's Broken Heart of Europe*, POLITICO (June 13, 2007), <https://perma.cc/DQ8X-GBLF>.

¹⁵⁶ See Toby Helm, *British Euroscepticism: A Brief History*, THE GUARDIAN (Feb. 6, 2016), <https://perma.cc/A77F-9ZJS>.

¹⁵⁷ See *Timeline of Events in Britain's Exit from the European Union*, THE ASSOCIATED PRESS (Dec. 24, 2020), <https://perma.cc/S59M-848U> [hereinafter *Timeline of Events*].

¹⁵⁸ See *Lisbon Treaty: History, Impact and Opinions*, INVESTOPEDIA, <https://perma.cc/J498-4ENE> (last visited Jan. 16, 2023).

¹⁵⁹ *EU Speech at Bloomberg*, GOV.UK, <https://perma.cc/4N8Y-5JM7> (last visited Nov. 11, 2023).

¹⁶⁰ See Tim Ross, *David Cameron: My Seven Targets for a New EU*, THE TELEGRAPH (Mar. 15, 2014), <https://perma.cc/4HWK-QNWR>.

¹⁶¹ George Parker, *Cameron Pins Brexit on EU Failure to Grant UK Brake on Migration*, THE FINANCIAL TIMES (June 28, 2016), <https://perma.cc/3695-C8U6>.

freedoms of the Single Market . . . that is the freedom of movement of goods, people and services can get access to the Single Market.”¹⁶²

Unable to compromise, British support for the referendum grew.¹⁶³ In February 2016, Cameron formally declared that the referendum would take place that summer, and, on June 24, the results were announced. With over 72% voter participation, the referendum garnered the highest national election turnout in twenty years.¹⁶⁴ Women between 18 and 34 overwhelmingly voted to remain in the Union: 67% voted to stay and 33% voted to leave.¹⁶⁵ This trend continued for women between 35 and 54: 55% voted to stay and 45% voted to leave.¹⁶⁶ Nevertheless, the majority of U.K. citizens voted to leave, and Parliament swiftly began working to make that a reality. Shortly after the vote, Theresa May succeeded Cameron as the Conservative prime minister.¹⁶⁷ She formally notified the E.U. of the country’s intentions to withdraw, marking the start of a lengthy two-year process of Brexit negotiations.¹⁶⁸ The official withdrawal was delayed by a deadlock in Parliament after the 2017 general election, which was not resolved until Conservatives regained control in 2019.¹⁶⁹ After the election, Parliament ratified the E.U. Withdrawal Act (EUWA), and Britain officially left the Union on January 31, 2020 (exit day).¹⁷⁰

2. Retained E.U. law.

Following Brexit, the EUWA went into full effect.¹⁷¹ Section 1 of the EUWA repealed the European Communities Act of 1972 (ECA), thus revoking the binding authority of E.U. law.¹⁷² For the purposes of understanding the scope of

¹⁶² *Merkel: Britain Must Accept EU’s Freedoms to Get Access to Single Market*, REUTERS (Jan. 27, 2017), <https://perma.cc/3YQG-8Y29>.

¹⁶³ *See Timeline of Events in Britain’s Exit from the European Union*, *supra* note 157.

¹⁶⁴ Steven Erlaner, *Britain Voted to Leave EU; Cameron Plans to Step Down*, N.Y. TIMES (June 23, 2016), <https://perma.cc/VD33-X6JF>.

¹⁶⁵ *See How Britain Voted in the 2016 EU Referendum*, IPSOS (Sept. 5, 2016), <https://perma.cc/2726-UPTL> (conversely, only thirty-three percent of men between eighteen and thirty-four voted to remain in the Union).

¹⁶⁶ *See id.*

¹⁶⁷ *See* Angela Dewan & Lindsay Isaac, *David Cameron to Resign Wednesday as Theresa May to Become British PM*, CNN (July 11, 2016), <https://perma.cc/J2FD-QWSC>.

¹⁶⁸ *See Timeline – The EU-UK Withdrawal Agreement*, EUROPEAN COUNCIL, <https://perma.cc/6Y5L-U8UF> (last visited Feb. 2, 2023).

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *See* Chris Bates, *The European Union (Withdrawal Act) 2018: What It Does, Why and How*, CLIFFORD CHANCE (July 2, 2018), <https://perma.cc/5MZX-MT9W>.

this decision, it is important to note that E.U. law includes regulations,¹⁷³ directives,¹⁷⁴ decisions,¹⁷⁵ recommendations,¹⁷⁶ and opinions.¹⁷⁷

To ensure legal continuity, the U.K. and the E.U. agreed to a transition period which lasted until December 31, 2020 (implementation period (IP) completion day). During this period, the U.K. continued to apply E.U. law domestically.¹⁷⁸ When IP completion day came, E.U. law in force at that moment became part of the U.K.'s domestic legal framework as retained E.U. law (REUL).¹⁷⁹ Section 6 of the EUWA states that REUL includes anything which, on or after IP completion day, continues to be, or forms part of, domestic law per Sections 2, 3, or 4 of the EUWA.¹⁸⁰

Under Section 2, REUL consists of primary and secondary legislation that is “EU-derived,” including amendments to the U.K. Equality Act of 2010 and the Working Time Regulations of 1998 adopted in response to E.U. directives.¹⁸¹ Per Section 3, REUL also includes direct E.U. legislation, insofar as the relevant legislation had effect before IP completion day, and is not already reproduced in domestic legislation under Section 2.¹⁸² Such direct E.U. legislation includes E.U. regulations and official decisions.¹⁸³ Lastly, under Section 4, REUL consists of any “rights, powers, liabilities, obligations, restrictions, remedies, and procedures.”¹⁸⁴ This refers to provisions of E.U. treaties which confer rights directly on individuals, such as freedom of movement, citizenship rights, and competition law.¹⁸⁵ In sum, REUL includes amendments to domestic legislation implementing E.U. law (Section 2), direct E.U. legislation (Section 3), and E.U. individual rights that have been domesticated by the U.K. (Section 4). Until December 31, 2023,

¹⁷³ *Types of Legislation*, EUROPEAN UNION, <https://perma.cc/34GB-MDIJ> (last visited Feb. 26, 2023) (a regulation is a binding legislative act which must be applied in its entirety across the E.U.).

¹⁷⁴ *Id.* (a directive is a legislative act that sets out a goal that all E.U. countries must achieve; however, it is up to the individual countries to devise their own laws on how to reach these goals).

¹⁷⁵ *Id.* (a decision is binding on those to whom it is addressed and is directly applicable).

¹⁷⁶ *Id.* (a recommendation is not binding; it allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed).

¹⁷⁷ *Id.* (an opinion is non-binding; while laws are being made, the committees give opinions from their specific regional or economic and social viewpoints).

¹⁷⁸ *See* Bates, *supra* note 172.

¹⁷⁹ *See id.*

¹⁸⁰ Asif Hameed, *UK Withdrawal From the EU: Supremacy, Indirect Effect and Retained EU Law*, 85 MOD. L. REV. 726, 728 (2022).

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

the principle of supremacy of E.U. law continues to apply to REUL, such that U.K. legislation is invalid if it contravenes the rules contained in REUL.¹⁸⁶

B. E.U. Law (Revocation and Reform) Act of 2023

Under EUWA Section 7, Ministers of Parliament were granted broad discretion to amend or repeal REUL.¹⁸⁷ But they seldom exercised those powers and, as a result, REUL has remained largely as it existed before IP completion day.¹⁸⁸ In an effort to change this, the Retained E.U. Law (Revocation and Reform) Act (RRA) was introduced by the Department of Business, Energy, and Industrial Strategy in September 2022, with the goal to “restore Parliamentary sovereignty” and enable the government to create regulations “tailor-made to the U.K.’s needs.”¹⁸⁹ But the RRA came under harsh scrutiny as it awaited approval in late 2022 and early 2023. In its original form, Clauses 1 and 3 of the RRA included automatic “sunset provisions” which required revocation of all REUL not explicitly approved by Parliament by the end of 2023.¹⁹⁰ Critics took aim at these provisions, noting that to review all REUL on such a tight timeline was unrealistic and irresponsible.¹⁹¹ According to the President of the U.K. Law Society, if the Bill were enacted in its original form, the potential impact would be devastating.¹⁹²

Parliament noted these criticisms and replaced Clauses 1 and 3 with a concrete list of RUELE to be sunset by the end of 2023.¹⁹³ With this change in place, the RRA received royal assent on June 28, 2023 and will become effective in 2024.¹⁹⁴ But despite the removal of the automatic sunset provisions, legal commentators believe that the RRA still does not settle uncertainty around the

¹⁸⁶ See *UK Retained EU Law (Revocation and Reform) Bill: What Happens to Retained EU Law?*, CLIFFORD CHANCE 4 (2022), <https://perma.cc/7WFA-PPKZ>.

¹⁸⁷ European Union Withdrawal Act 2018, c. 16, § 7 (UK).

¹⁸⁸ See Stephen Kon & Jonathan Pratt, *The End of Retained EU Law?*, MCFARLANES (Jan. 4, 2023), <https://perma.cc/E892-TKPM>.

¹⁸⁹ Louise Mason, *Employment Law and the Retained EU Law Act 2023*, LINKLATERS (July 4, 2023), <https://perma.cc/UX9Y-YR3E>. See also *Retained EU Law (Revocation and Reform) Act 2023*, c. 28 (UK) [hereinafter RRA].

¹⁹⁰ See Kon & Pratt, *supra* note 188.

¹⁹¹ See Ruth Fox, *Five Problems with the Retained EU Law (Revocation and Reform) Bill*, HANSARD SOCIETY (Oct. 24, 2022), <https://perma.cc/6ESP-SLM9>. See also Jonathan Jones, *What’s So Bad About the Retained EU Law (Revocation and Reform) Bill? Here are Four Things*, ENCOMPASS (Jan. 2023), <https://perma.cc/86FT-TWQH>.

¹⁹² See Kon & Pratt, *supra* note 188.

¹⁹³ See RRA, *supra* note 189.

¹⁹⁴ Kate Higgins et al., *REULA – The Decoupling of UK and EU Laws from 1 January 2024*, LEXOLOGY (Sept. 5, 2023), <https://perma.cc/2XAQ-CB9B>.

future interplay between U.K. domestic law and REUL.¹⁹⁵ Specifically, they are concerned about the potential ambiguity caused by the Act's abolition of the principle of supremacy of E.U. law, and the provisions that bolster the ability of U.K. courts to depart from E.U. caselaw.¹⁹⁶ The remainder of this Section will explore this ambiguity, along with the RRA's other major consequences, and explain its potential to impact the rights of women in the workforce.

1. Revocation of an express list of REUL by the end of 2023.

As noted above, the RRA originally purported to include all E.U.-derived subordinate legislation. Under this approach, the RRA would have potentially sunset REUL that provided parental rights and part-time worker rights. Clause 1 of the RRA is titled "Sunset of E.U.-derived subordinate legislation and retained direct E.U. legislation."¹⁹⁷ E.U.-derived subordinate legislation refers to secondary legislation, such as statutes created to implement E.U. directives and decisions.¹⁹⁸ With respect to parental rights, the Paternity and Adoption Leave Regulation of 2002, a critical REUL implementing an E.U. directive, would have been on the chopping block, as it does not sit within an act of Parliament.¹⁹⁹ For part-time and temporary employees, the impact would have been even more devastating. REULs at risk included the Working Time Regulations of 1998, the Agency Workers Regulations of 2010, the Part-Time Workers Regulations of 2000, and the Fixed-Term Employees Regulations of 2002.²⁰⁰ Clause 1 also refers to "retained direct E.U. legislation."²⁰¹ This encompasses E.U. regulations and legal decisions which have a direct effect in U.K. domestic law.²⁰² While the effect of their sunset is not as broad reaching as that of the aforementioned regulations, without the retained direct E.U. legislation, plaintiffs' lawyers would have less tools at their disposal in employment cases.

The legal community criticized these sweeping changes. One lawyer wrote, "it doesn't look like employment protections are a priority of the government . . . it's possible that important rights will fall off the statute books without anything

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ RRA, *supra* note 189, cl. 1.

¹⁹⁸ *Id.*

¹⁹⁹ *See* Stephanie Compson & David Pollard, *What Does the Retained EU Law (Revocation and Reform) Bill Mean for UK Employment Law*, LITTLER MENDELSON (Jan. 26, 2023), <https://perma.cc/B33S-9LQD>.

²⁰⁰ Emma Thomson, *UK Parliament Considers Retained EU Law (Revocation and Reform) Bill 2022: The Potential Impact on Employment Law*, OGLETREE DENTONS (Dec. 14, 2022), <https://perma.cc/CP4Z-JEAW>.

²⁰¹ Kon & Pratt, *supra* note 188.

²⁰² *See id.*

in place to replace them.”²⁰³ This lawyer predicted that the RRA, in its original form, “would create uncertainty and could result in an increase in staff dissatisfaction, industrial action, and employment claims.”²⁰⁴ This prediction had merit, considering that 3,800 laws would require review and conversion.²⁰⁵ Senior civil servants also warned that reviewing each piece of legislation would be an enormously complex task that would likely require consultations with legal and business experts.²⁰⁶ In light of these criticisms, Parliament modified the RRA so that only “[l]egislation listed in Schedule 1 [will be] revoked at the end of 2023.”²⁰⁷ Schedule 1 contains 587 REUL, and the legal community has thus far agreed that there will be “no change to existing employment law immediately.”²⁰⁸

2. Abolition of the principle of supremacy of E.U. law.

To mitigate disruption by the EUWA, the principle of supremacy of E.U. law was retained after Brexit.²⁰⁹ This principle is an E.U. legal norm requiring domestic authorities to apply E.U. law over an otherwise applicable domestic law when the two conflict.²¹⁰ These domestic laws can come from administrative and judicial authorities, and when found in conflict with E.U. law, are said to have been “disapplied or set aside.”²¹¹ The supremacy principle was formerly codified in Section 1 of the European Communities Act of 1972 (ECA), and after the ECA was repealed by Brexit, it continued on in Section 4(1) of the EUWA.²¹²

As of January 1, 2024, under Clause 3 of the RRA, “[t]he principle of supremacy of E.U. law is not part of domestic law.”²¹³ When the RRA takes effect, E.U. rights, which flow through Section 4(1) of the EUWA, will be lost.²¹⁴ This affects REUL that relate to “powers, liabilities, obligations, restrictions, remedies, and procedures,” primarily referring to provisions of E.U. treaties which confer human rights directly on individuals.²¹⁵

²⁰³ Joanne Moseley, *Employment Law Changes 2023: Guide for Schools and Colleges*, LEXOLOGY (Jan. 3, 2023), <https://perma.cc/D73N-8E3G>.

²⁰⁴ *Id.*

²⁰⁵ *See* Kon & Pratt, *supra* note 188.

²⁰⁶ *See id.*

²⁰⁷ RRA, *supra* note 189.

²⁰⁸ *See, e.g.*, Davies et al., *supra* note 6; Higgins et al., *supra* note 194.

²⁰⁹ CLIFFORD CHANCE, *supra* note 186.

²¹⁰ *See* Kon & Pratt, *supra* note 188.

²¹¹ *Id.*

²¹² *Id.*

²¹³ RRA, *supra* note 189, cl. 3.

²¹⁴ *See Retained EU Law (Revocation and Reform) Bill Equality Impact Assessment*, UK PARLIAMENT, <https://perma.cc/BMT2-LB6H> (last visited Nov. 29, 2023).

²¹⁵ Kon & Pratt, *supra* note 188.

Some legal commentators argue that this will cause legal uncertainty for both employers and employees, because courts have routinely used these human rights guarantees to help interpret E.U.-derived employment laws.²¹⁶ For example, supremacy of E.U. law led courts and tribunals to interpret the Working Time Regulations of 1998 in a way that was compatible with the E.U. Working Time Directive.²¹⁷ This provided the U.K.'s part-time workers, who are mostly female, with an equal guarantee of vacation time, and the ability to carry over that vacation time in the event of sickness or maternity leave.²¹⁸

3. Greater freedom for U.K. courts to depart from REUL caselaw.

REUL caselaw decided before IP completion day, including decisions made by U.K. courts and the ECJ, are binding on U.K. lower courts.²¹⁹ The RAA will amend this, providing U.K. courts greater freedom to develop caselaw that departs from REUL caselaw.²²⁰ Under Clause 6, higher courts are instructed to consider a new set of factors when deciding whether to depart from REUL caselaw.²²¹ Specifically, they are instructed that:

[i]n deciding whether to depart from any retained EU case law . . . the higher court concerned must (among other things) have regard to (a) the fact that decisions of a foreign court are not (unless otherwise provided) binding; (b) any changes of circumstance which are relevant to the retained EU case law; (c) the extent to which the retained EU caselaw restricts the proper development of domestic law.²²²

In addition to these new factors, Clause 6 also instructs higher courts that, when deciding whether to depart from REUL caselaw, to consider “the extent to which the retained domestic caselaw is determined or influenced by retained EU caselaw from which the court has departed or would depart.”²²³ Similarly, Clause 8 requires that courts make an “incompatibility order” if they find that a provision of direct REUL legislation is incompatible with a domestic enactment.²²⁴ Moreover, Clause 6 establishes a new reference procedure, which enables lower courts and tribunals bound by REUL caselaw to refer legal issues of “general public importance” to a higher court. The Attorney General and other Law

²¹⁶ See Compson, *supra* note 32.

²¹⁷ Mason, *supra* note 189.

²¹⁸ *Id.* See also Section II.B.

²¹⁹ See Compson, *supra* note 32. See also Higgins et al., *supra* note 194.

²²⁰ RRA, *supra* note 189, cl. 6.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See *id.*

Officers were granted a similar power.²²⁵ Together, these enhanced referral powers will give higher courts, which can decide whether to accept the referral, broader discretion to hear and decide legal issues formerly governed by REUL caselaw.

With these changes in place, judges may be more likely to depart from E.U. precedent. If that is the case, ECJ decisions protecting female workers, such as *Enderby v. Frenchay Health Authority*, *Brumfitt v. Ministry of Defense*, and *Brown v. Rentokil*, are at risk of repeal.²²⁶ But many legal experts note that it “remains to be seen whether the courts will show greater appetite to depart from retained EU caselaw,” and “[t]he courts have not shown themselves to be too keen to do so.”²²⁷ While higher courts will have increased power to depart from REUL caselaw, the legal community must wait to see if they actually do so.

IV. DOMESTIC AND INTERNATIONAL REMEDIES

A. Human Rights Act

Given the potential consequences of the RRA, British citizens and legal organizations should prepare to assert their rights. One tool at their disposal is the Human Rights Act (HRA).²²⁸ Passed in 1998, the HRA incorporates the fundamental freedoms set out in the European Convention on Human Rights into domestic British law. These freedoms range from life and privacy to impartial trials and security.²²⁹ The HRA applies to all public authorities and private bodies which perform public functions.²³⁰ To assert the rights of female workers, Articles 8 and 14 are most relevant.

Article 8 states that a person has “the right to respect for their private and family life, their home, and their correspondence.”²³¹ The concept of “private life” under Article 8 is broad. In general, it means that a person is entitled to live their own life with such personal privacy as is reasonable in a democratic society, taking into account the rights and freedoms of others.²³² Under U.K. labor law, this has come to include the freedom to choose one’s own sexual identity and personal

²²⁵ *See id.*

²²⁶ *See* Section II.B.

²²⁷ Higgins et al., *supra* note 194.

²²⁸ *See* Human Rights Act 1998, c. 42 (UK).

²²⁹ *See The Human Rights Act*, LIBERTY, <https://perma.cc/EU7W-J74Y> (last visited Feb. 26, 2023).

²³⁰ *Who Does the Human Rights Act Apply to*, EQUALITY AND HUMAN RIGHTS COMMISSION, <https://perma.cc/Z2AL-64HB> (last visited Oct. 15, 2023).

²³¹ *Your Right to Respect for Private and Family Life*, CITIZENS ADVICE, <https://perma.cc/U7QD-RCN5> (last visited Jan. 16, 2023).

²³² Human Rights: Human Lives, EQUALITY AND HUMAN RIGHTS COMMISSION 32 (2014).

relationships, develop one's personality, and choose how one looks and dresses.²³³ The right to respect for family life includes the right to have family relationships recognized by the law.²³⁴ It also includes the right for families to live together and enjoy each other's company.²³⁵ These protections extend beyond the traditional nuclear family; they also encompass relationships between unmarried couples, siblings, adoptive parents and children, and grandparents and grandchildren.²³⁶

Article 14 requires that all rights and freedoms set out in the Act be protected and applied without discrimination.²³⁷ This protection is not free-standing, meaning that to rely on it, plaintiffs must show that discrimination has affected their enjoyment of at least one other primary right enumerated in the HRA.²³⁸ However, plaintiffs are not required to prove that a primary right has truly been breached; only that the subject matter of the right is triggered.²³⁹ Furthermore, Article 14's protection extends to both direct and indirect discrimination.²⁴⁰ Direct discrimination occurs when an individual is treated differently solely because of a particular characteristic, such as race, gender, or sexual orientation.²⁴¹ Indirect discrimination occurs when "seemingly neutral treatment creates a disproportionate disadvantage for people with a particular characteristic, compared to people who do not share the same characteristic . . ."²⁴²

Using Articles 8 and 14 together, U.K. women who work for public authorities may successfully retain the rights provided by the Paternity and Adoption Leave Regulation of 2002. Specifically, parents will want to lean on Article 8's protection of "family life" to assert their right to live together with their newborn children during infancy. Fathers, adoptive parents, and foster parents should be entitled to the same protection under Article 14.

One case that supports such claims is *R (L and others) v. Manchester City Council*.²⁴³ In that case, the Manchester City Council paid lower allowances to foster care parents who were related to the children in their care.²⁴⁴ The plaintiffs argued that the rates were so inadequate and discriminatory as to conflict with the

²³³ *Id.* at 34.

²³⁴ *Id.* at 33.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 53.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 55.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *R (L and others) v. Manchester City Council* [2001] EWHC (Admin) 707 (UK).

²⁴⁴ *See id.*

children’s welfare.²⁴⁵ Applying the protections of the HRA, the High Court found that Article 8 obliged the local authorities to “take all appropriate positive steps . . . to ensure that children should live with their families.”²⁴⁶ This language is especially useful in preserving the U.K.’s current generous maternity and paternity leave.²⁴⁷ If this leave was lost, children might be prevented from living with their families during a crucial period of life. Moreover, to strip these entitlements from male caregivers would be discriminatory, thereby violating Article 14.

B. Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination Against Women (the Committee) may also prove useful in maintaining U.K. labor rights. Founded by the U.N. General Assembly in 1979, the Committee is an international organization supported by a body of twenty-three experts.²⁴⁸ These experts directly receive complaints from affected women and regularly monitor the progress of signatories.²⁴⁹ The U.K. ratified the Convention on the Elimination of Discrimination Against Women (CEDAW), which created the Committee, in 1986.²⁵⁰ In doing so, the U.K. agreed to: (1) incorporate the principle of equality of men and women in its legal system by abolishing all discriminatory laws and adopting ones that prohibit discrimination against women, (2) establish tribunals and other public institutions to ensure the effective protection of women against discrimination, and (3) report the measures it has taken to comply with these obligations at least every four years.²⁵¹

The U.K. is already familiar with the Committee’s advising power. In 2010, the Committee launched an investigation into accusations that the U.K. was restricting access to abortions in Northern Ireland.²⁵² In response, the U.K. argued that “abortions were allowed in certain circumstances, prosecutions were rare, and citizens could travel to other countries to access abortion services.”²⁵³ The Committee rejected these arguments, holding that the limitations on access

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 797.

²⁴⁷ See *Compare Statutory Maternity Pay and Leave: Employer Guide*, *supra* note 13.

²⁴⁸ *Women’s Resource Center*, CEDAW, <https://perma.cc/6N3U-VTTPS> (last visited Feb. 26, 2023).

²⁴⁹ See *Committee on the Elimination of Discrimination Against Women*, INTERNATIONAL JUSTICE RESOURCE CENTER, <https://perma.cc/4KL6-X7UT> (last visited Feb. 26, 2023).

²⁵⁰ *Women’s Resource Center*, *supra* note 248.

²⁵¹ Paulina Montez, *Women’s Rights are Human Rights: CEDAW’s Limits and Opportunities*, BERKELEY J. INT’L L. (Apr. 4, 2021), <https://perma.cc/29VX-53FV>.

²⁵² See Tom Miles, *Northern Ireland Abortion Laws Violate Women’s Rights, U.N. Body Says*, REUTERS (Feb. 23, 2018), <https://perma.cc/74ZT-9KQU>.

²⁵³ See Montez, *supra* note 251.

created confusion over when legal abortions would be permitted and stifled clinician willingness to perform them.²⁵⁴ They recommended that the U.K. decriminalize abortions and provide greater education and access.²⁵⁵ In July 2019, Parliament approved the proposal and instructed Northern Ireland on their recommendations.²⁵⁶ By October 2019, abortion was legalized in the region.²⁵⁷

Despite the Committee's success in preserving women's rights in this instance, signatories of CEDAW can decide which recommendations to comply with, severely limiting its enforcement power.²⁵⁸ Their recommendations in Northern Ireland were likely successful due to concurrent media pressure. In 2014, a mass grave of children was discovered at a former mother and baby home in County Galway, reinvigorating Ireland's abortion rights debate.²⁵⁹ International media attention on abortion rights in Ireland may have legitimized the Committee's recommendations and encouraged Parliament's compliance.

U.K. advocacy groups should engage in this type of grassroots activism if they wish to obtain similar results. First, they should file a formal complaint to the Committee detailing the risks of the RRA (as outlined above), and allege that it may violate Article 11 of CEDAW. Article 11 states that, "parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, the same rights . . ."²⁶⁰ CEDAW enumerates these rights, and for the purposes of this Comment, the following are most significant:

- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; and
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.²⁶¹

The Committee provides several means through which aggrieved laborers can report an Article 11 violation, including individual complaints, urgent

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ *See* Emma Campbell et al., *After a CEDAW Optional Protocol Inquiry into Abortion Law: A Conversation with Activists for Change in Northern Ireland*, 24 INT'L FEM. J. POL., 312, 312 (2022).

²⁵⁷ *See id.*

²⁵⁸ *See* Montez, *supra* note 251.

²⁵⁹ *See* Jamie Grierson, *Mass Grave of Babies and Children Found at Tuam Care Home in Ireland*, THE GUARDIAN (Mar. 3, 2017), <https://perma.cc/XP3W-VQKZ>.

²⁶⁰ Convention on the Elimination of All Forms of Discrimination Against Women, art. 11, Dec. 18, 1979, 1249 U.N.T.S. 13.

²⁶¹ *Id.*

intervention requests, and oral intervention requests at Committee sessions.²⁶² After presenting their complaint, the parties should begin contacting news outlets to raise awareness about the RRA's potential consequences, as activists did in Northern Ireland. If the RRA infringes on the rights of women laborers, it is possible that international pressure could once again sway Parliament.

C. E.U. Trade and Cooperation Agreement

In addition to the HRA's control over courts and CEDAW's power to pressure legislatures, the E.U.-U.K. Trade and Cooperation Agreement (TCA) gives the E.U. limited influence over the U.K. economy. Signed during the Brexit transition period, the TCA requires both the U.K. and the E.U. to maintain a system for domestic enforcement of employment rights.²⁶³ These rights are retained within Level Playing Field provisions, which explain the dispute mechanisms and rebalancing measures available to both parties should there be a violation.²⁶⁴ Under Article 387(2): "A Party shall not weaken or reduce, in a manner affecting trade or investment between Parties, its labor and social protections below the levels in place at the end of the transition period, including by failing to effectively enforce its laws and standards."²⁶⁵

To settle disputes arising out of alleged violations of the TCA, Articles 408–410 explain that the aggrieved party must first request consultation with the offending party.²⁶⁶ If consultation is not satisfactory, they can request the opinion of a panel of three experts.²⁶⁷ After 195 days, the panel must deliver a final report.²⁶⁸ If the report identifies a material impact on trade or investment, "[e]ither party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation."²⁶⁹

Given the TCA's power, it could be an effective tool for labor organizations. If the RRA is used to modify or repeal the aforementioned RUEs, critical labor rights would be brought below their transition period strength, triggering the agreement's protections. However, in light of Parliament's hostility to REUL, it is reasonable to wonder if they also plan to abandon the TCA. But such an extreme

²⁶² See *Committee on the Elimination of Discrimination Against Women*, INTERNATIONAL JUSTICE RESOURCE CENTER, (Feb. 26, 2023), <https://perma.cc/A6QV-VJFF>.

²⁶³ See *The EU-UK Trade and Cooperation Agreement*, EUROPEAN COMMISSION, (Feb. 26, 2023), <https://perma.cc/P78V-L6QM>.

²⁶⁴ See *Trade and Cooperation Agreement*, *supra* note 7.

²⁶⁵ *Id.* art. 387(2).

²⁶⁶ *Id.* arts. 408–10.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

measure seems unlikely. On November 23, 2022, British Chancellor of the Exchequer Jeremy Hunt announced, “I can rule out any suggestion that it has ever been the government’s intention to move away from the TCA.”²⁷⁰

Unfortunately, the TCA has yet to be enforced; thus it is unclear what constitutes “a manner affecting trade or investment.”²⁷¹ But strong labor laws increase female labor force participation, and increased labor force participation boosts economic growth and productivity.²⁷² Therefore, it is plausible that a reduction in female labor rights is likely to constitute “a manner affecting trade or investment,” despite the fact that this phrase has yet to be defined.

D. International Labor Organization

The International Labor Organization (ILO) is a U.N. agency that coordinates principles of international labor law.²⁷³ The U.K. was a founding member of the ILO, and during the past century it has ratified over eighty-seven ILO conventions.²⁷⁴ Many of these conventions include gender-specific issues, such as the 1981 Workers with Family Responsibilities Convention, the 1994 Part-Time Work Convention, the 1996 Home-Work Convention, and the 2000 Maternity Protection Convention.²⁷⁵ If the U.K. uses the RRA to diminish female labor rights, they risk violating these conventions. Labor-minded individuals should therefore be aware of the recourse available through the ILO.

The ILO’s complaint procedures are governed by Articles 26 through 34 of the ILO Constitution.²⁷⁶ They explain that a delegation of the International Labor Conference, the governing body of its own motion, or a member state which has ratified the convention in question, can file a complaint against another member state for non-compliance with that same convention.²⁷⁷ Once the complaint is received, the Governing Body establishes a Commission of Inquiry, consisting of three independent members who carry out a full investigation of the complaint.²⁷⁸ In doing so, they ascertain all facts and make recommendations on measures to address the problems raised.²⁷⁹ The establishment of the Commission of Inquiry

²⁷⁰ Henry Nicholls, *UK’s Hunt Rules Out ‘Move Away’ from Brexit Trade Deal with EU*, REUTERS (Nov. 23, 2022), <https://perma.cc/SW2B-BLTU>.

²⁷¹ See Maddy Jack et al., *Disputes under the Trade and Cooperation Agreement*, INSTITUTE FOR GOVERNMENT (Nov. 21, 2021), <https://perma.cc/VJ3N-PYLL>.

²⁷² See generally CHRISTIAN GONZALES ET AL., *supra* note 48.

²⁷³ See *About the ILO*, ILO, <https://perma.cc/ZUS9-ZPM8> (last visited Feb. 26, 2023).

²⁷⁴ *United Kingdom ILO Fact Sheet*, ILO (July 2018), <https://perma.cc/Q8M4-YCS4>.

²⁷⁵ *ILO Conventions*, ILO, <https://perma.cc/T4T5-C9QG> (last visited Jan. 16, 2023).

²⁷⁶ *Complaints*, ILO, <https://perma.cc/2CZP-4PXF> (last visited Mar. 31, 2023).

²⁷⁷ *Id.*

²⁷⁸ See *id.*

²⁷⁹ See *id.*

is the start of the ILO’s highest-level investigative procedure.²⁸⁰ To date, only fifteen Commissions of Inquiry have been filed.²⁸¹

Even with a complaint mechanism available, the ILO is not able to take further actions, and thus their enforcement powers are often characterized as weak.²⁸² Nevertheless, a study published by the London School of Economics suggests that ILO Conventions do have an influence on political decision-making.²⁸³ According to this study, sociological institutionalism explains that countries ratify and comply with ILO conventions “if doing so conforms to behavioral norms that are prevalent in their peer countries.”²⁸⁴ As Section V of this Comment explains, countries whose characteristics parallel those of the U.K. have adopted more robust rights for female workers.²⁸⁵ Thus, despite its limited enforcement power, the ILO may create sufficient pressure to prevent Parliament from using the RRA to chip away at female labor rights.

V. NEIGHBORING SUCCESSES: WHAT CAN THE U.K. LEARN FROM OTHER OECD COUNTRIES?

A. Canada

The cornerstone of Canada’s workplace gender equality is the Canadian Human Rights Act (CHRA) of 1977.²⁸⁶ Per the CHRA, “all Canadians have the right to equality, equal opportunity, fair treatment, and an environment free of discrimination on the basis of sex, sexual orientation, marital status, and family status.”²⁸⁷ After creating the CHRA, Canada passed the Canadian Charter for Rights and Freedoms, which contains two sections that supplement the CHRA’s broad protections.²⁸⁸ Section 15 ensures equal protection and benefit of the law “without discrimination based on race, national or ethnic origin, color, religion,

²⁸⁰ *See id.*

²⁸¹ *Complaints/Commissions of Inquiry (Art 26)*, ILO, <https://perma.cc/42GK-SGXZ> (last visited Mar. 31, 2023).

²⁸² *See* Eli Rosenberg, *U.S. Accused of Violating International Labor Laws, Forced-Labor Protections in New Complaint*, THE WASHINGTON POST (Oct. 7, 2020), <https://perma.cc/JQ6K-TUUW>.

²⁸³ *See* Leonardo Baccini & Mathias Koenig-Archibugi, *Why Do States Commit to International Labour Standards? The Importance of “Rivalry” and “Friendship”*, THE LONDON SCHOOL OF ECONOMICS (Nov. 17, 2010).

²⁸⁴ *Id.*

²⁸⁵ *See* Section V.

²⁸⁶ *See Federal Gender Equality Laws in Canada*, GOVERNMENT OF CANADA, <https://perma.cc/L27N-XH7F> (last visited Feb. 26, 2023).

²⁸⁷ Human Rights Act, R.S.C. 1985, c. H-6.

²⁸⁸ *See Guide to the Canadian Charter of Rights and Freedoms*, GOVERNMENT OF CANADA, <https://perma.cc/MS7T-Q8HA> (last visited Jan. 16, 2023).

sex, age, or mental or physical disability.”²⁸⁹ Section 28 guarantees that all rights apply equally to men and women.²⁹⁰

This legislation is supported by additional regulations which are narrower in scope. For anti-discrimination and pay equity, the Employment Equality Act of 1995 and the Pay Equity Act of 2018 are critical. The Employment Equity Act was created to “achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability.”²⁹¹ Recognizing the need to regularly update its legislation, in 2021 the Canadian government launched a task force to undertake a comprehensive review of the Act and provide recommendations for modernization.²⁹² Areas identified for improvement include public reporting, compliance, and enforcement.²⁹³ Additionally, the Pay Equity Act was created to “achieve pay equity through proactive means by redressing systemic gender-based discrimination.”²⁹⁴ While relatively new, this Act explicitly recognizes the gender-pay gap through proactive legislation.

Canada’s maternity and parental rights have also garnered international respect.²⁹⁵ Part III of the Labor Code prescribes labor standards for private sector employees that govern maternity, paternity, and compassionate care leave.²⁹⁶ As with the Employment Equity Act, the legislature has taken steps to modernize this regulation. Changes include extending the amount of parental leave from sixty-three to seventy-one weeks, establishing the right of employees to refuse overtime to deal with family responsibilities, and enabling employees who have completed at least six months of employment to request flexible work arrangements.²⁹⁷ Other important gender equality measures include a government unit called Women and Gender Equality Canada (WAGE).²⁹⁸ WAGE is overseen by the Minister for

²⁸⁹ *Id.* § 15.

²⁹⁰ *Id.* § 28.

²⁹¹ Employment Equity Act, S.C. 1995, c. 44.

²⁹² *Employment Equity Act Review Consultation*, GOVERNMENT OF CANADA, <https://perma.cc/54PK-SVK5> (last visited Jan. 16, 2023).

²⁹³ *See id.*

²⁹⁴ Pay Equity Act, S.C. 2018, c. 27.

²⁹⁵ *See, e.g.,* Angie Mohr, *The U.S. vs. Canada: Maternity Leave Differences*, INVESTOPEdia (Oct. 27, 2021), <https://perma.cc/9C4R-LQSV>.

²⁹⁶ *See* Employment and Social Development Canada, Information on Labour Standards: 5 Maternity-Related Reassignment and Leave, Maternity Leave and Parental Leave, Cat. No. LT-173-12-17E (2017).

²⁹⁷ *See Federal Gender Equality Laws in Canada*, GOVERNMENT OF CANADA, <https://perma.cc/Q7CP-N947> (last visited Oct. 15, 2023).

²⁹⁸ *See Women and Gender Equality Canada*, GOVERNMENT OF CANADA, <https://perma.cc/X8YR-RRQY> (last visited Feb. 26, 2023).

Women and Gender Equality, and its sole responsibility is to advance gender equity in Canada.²⁹⁹

There are two lessons that the U.K. can learn from Canada's domestic regulations. First, it is critical to regularly review old legislation and ensure that it meets the changing needs of the country. During the U.K.'s membership in the E.U., it was common for women to bring outdated legislation that violated E.U. directives to the ECJ for review and repeal.³⁰⁰ The ECJ is no longer at their disposal, leaving them with domestic courts and international bodies that rarely hear such complaints.³⁰¹ The U.K. can assist their efforts by creating a task force to review and recommend changes to old legislation, as Canada has done with the Employment Equality Act. Second, when new needs are identified, it is crucial to proactively address them in direct and powerful acts of Parliament. The U.K. has historically been slow to protect labor rights.³⁰² Parliament owes it to their constituents to be more proactive in codifying rights, especially now that they have precluded U.K. citizens from relying on the ECJ when those rights fall behind those afforded to citizens of E.U. member states.

B. The Netherlands

Dutch labor laws also provide women with broad protections.³⁰³ These laws are based in the Dutch Constitution and Civil Code.³⁰⁴ According to Article 1 of the Constitution, "discrimination on the grounds of religion, belief, political opinion, race, or sex, or any other grounds whatsoever shall not be permitted."³⁰⁵ Section 7 of the Civil Code further explains that employers are prohibited from discriminating against both men and women in hiring, promotions, and allocation of working hours, and clarifies that in sex discrimination cases, the burden of proof lies with the defendant.³⁰⁶ Furthermore, it extends these protections to shield against both direct and indirect discrimination.³⁰⁷ It defines direct discrimination as "discrimination on the grounds of pregnancy and motherhood," and indirect discrimination as "discrimination on the grounds of other

²⁹⁹ *Id.*

³⁰⁰ *See* Section II.B.

³⁰¹ *See* Section IV.

³⁰² *See* Section II.B.

³⁰³ *Brief Introduction to Dutch Labor Law*, PENROSE LAW, <https://perma.cc/97TB-4M5K>.

³⁰⁴ *See id.*

³⁰⁵ THE CONSTITUTION OF THE KINGDOM OF THE NETHERLANDS [CONSTITUTION] ch. 1.

³⁰⁶ *The Netherlands: Gender Discrimination in the Field of Employment*, SULLIVAN AND CROMWELL (2017), <https://perma.cc/FU6D-PCHX>.

³⁰⁷ *See id.*

characteristics rather than sex, that results in discrimination on the grounds of sex.”³⁰⁸

Additional regulations specifically focus on equal pay and anti-harassment. Under the Equal Opportunities Act of 1980, men and women must be afforded the same access to opportunities to enter and advance within their professions.³⁰⁹ Moreover, the Act mandates equal pay for work of equal value, explaining that differences in salary cannot be based on gender, race, disability, or temporary working contract.³¹⁰ The Working Conditions Act of 1988 addresses workplace anti-harassment measures with two key provisions.³¹¹ First, employers are required to protect against sexual harassment and aggression in the workplace.³¹² Second, employers must create a formal policy on sexual harassment after conducting risk analyses and evaluations of their workplace.³¹³ Employers who do not comply with these requirements may be fined.³¹⁴ The Gender Equal Treatment Act of 1994 further defines harassment as “conduct which has the purpose or effect of undermining the dignity of a person and creating a threatening, hostile, degrading, humiliating, or offensive environment.”³¹⁵ It also establishes the Equal Treatment Commission, which has the authority to conduct investigations on reported discriminatory behavior.³¹⁶

The Netherlands’ parental care protections are especially admirable. The Childcare Act of 2005 regulates the quality of childcare on a national basis.³¹⁷ It splits the cost of childcare among parents, employers, and the government, making it affordable at all levels.³¹⁸ In addition to sixteen weeks of maternity leave, Dutch parents can also take up to twenty-six weeks of parental leave.³¹⁹ With respect to part-time workers, the Adjustment of Working Hours Act of 2000 is the Netherlands’ most significant legislation.³²⁰ Among other things, it

³⁰⁸ *Id.* at 2.

³⁰⁹ *Id.* at 4.

³¹⁰ *Id.*

³¹¹ *Id.* at 5.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Federal Anti-Discrimination Agency, Guide to the General Equal Treatment Act: Explanations and Examples, 24 (2019).

³¹⁶ *Id.*

³¹⁷ See *Childcare Legislation in the Netherlands*, International Centre for the Study of the Mixed Economy of Childcare (ICMEC), UNIVERSITY OF EAST LONDON (Mar. 23, 2009), <https://perma.cc/9BXK-DH24>.

³¹⁸ See *id.*

³¹⁹ See *id.*

³²⁰ JELLE VISSER ET AL., THE NETHERLANDS: FROM ATYPICALITY TO TYPICALITY, EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS 11 (Silvana Sciarra eds., 2004).

standardized hourly wages, vacation time, unfair dismissal protections, pensions, unemployment, sick leave and disability, and health insurance for part-time and full-time workers.³²¹ Given these protections, many have characterized the Netherlands as a remarkable outlier among Europe with respect to part-time employment protections.³²²

The U.K. should look to the Netherlands as a model of success. The U.K. currently provides thirty hours of free childcare per week for thirty-eight weeks each year for low-income parents.³²³ If it wants to grow its economy through increased female labor force participation, it should consider emulating the Dutch model, where childcare costs are split between parents, employers, and the government.³²⁴ Dutch female labor force participation is 75.8%, which is among the highest in the Western world.³²⁵ The U.K. may be able to attain labor force participation levels such as this by alleviating the childcare burdens placed on British women. Moreover, the U.K. can learn from the Netherlands' protection of part-time workers. The Adjustment of Working Hours Act grants part-time workers all the rights enjoyed by their full-time counterparts.³²⁶ Because U.K. women are three times more likely to be part-time workers than their male counterparts, bolstering these rights will directly improve their quality of life.³²⁷

VI. CONCLUSION: THE U.K.'S NEXT STEPS FORWARD

To ignore the RRA's risks would be detrimental to British women. The strides made over the past 150 years are profound, due in large part to the E.U.'s efforts. The E.U. pushed the U.K. to modernize its equal pay laws, adequately protect women against sex-based discrimination, and enhance protections for working parents and part-time laborers. The E.U. has provided a counterweight against the Conservative party, which has historically characterized labor laws as "red tape" culpable for stagnating Britain's economy.³²⁸ In the event that their efforts are successful, women are not without recourse. The HRA, CEDAW, the TCA, and the ILO all provide tools to hold the U.K. government accountable. Other OECD countries have been extremely successful in legislating on behalf of

³²¹ See *id.* at 14–17.

³²² See *id.* at 4.

³²³ *30 Hours Free Childcare*, GOV.UK, <https://perma.cc/AT37-REHR> (last visited Jan. 16, 2023).

³²⁴ See Childcare Legislation in the Netherlands, *supra* note 317.

³²⁵ Wouter Nientker & Rob Alessie, *Female Labor Market Participation Across Cohorts: Evidence from the Netherlands*, 167 *DE ECONOMIST* 407 (2019).

³²⁶ See Visser, *supra* note 320, at 14–17.

³²⁷ See Section II.B.

³²⁸ Jessica Elgot, *Government Plans to 'Cut £1bn in Red Tape' with New Post-Brexit Legislation*, *THE GUARDIAN* (Jan. 30, 2022), <https://perma.cc/A4QL-8XY8>.

their female workforce. While it might be an uphill battle, Britain is capable of the same success.