

Independent Commission on the Constitutional Future of Wales: report of the employment sub-group

Summary

Employment law is an interface where the policies of the Welsh Government and the UK Government collide, and where the arguments for devolution or reservation are finely balanced.

The case for reservation of employment law is that it enables a UK-wide regime of employment rights and protections which underpins the single UK market. But in-work poverty resulting from low pay and poor employment practices impacts directly on the Welsh Government's objectives of reducing child poverty, promoting fair work and improving health and well-being.

The sub-group has received no unequivocal calls for devolution of these powers, or evidence that Wales has suffered particular disadvantage compared with the rest of the UK. Although there are considerable frustrations at the interface between devolved and reserved matters, the evidence does not support substantive change in the settlement in relation to employment rights and duties.

These matters have been considered in detail by the Wales TUC Commission whose report is due to be published shortly before that of this Commission. At the time of writing, the TUC Commission report is expected to focus on the enforcement of employment rights and the scope for action by the Welsh Government.

Members of the Sub-group

Commissioners: Michael Marmot, Shavanah Taj, Lauren McEvatt, Kirsty Williams, Albert Owen

Expert Panel: Gareth Williams (chair)

Sub-group approach

The sub-group decided to take a broad overview of employment powers and how they relate to the constitutional options.

The current settlement

Schedule 7A of the Government of Wales Act 2006 includes the following reservations:

Reservation 141: employment rights and duties and industrial relations (this specifies 17 Acts of Parliament whose subject matter is reserved including the Trade Union and Labour Relations Act, the Employment Tribunals Act, the National Minimum Wage Act, the Transfer of Undertakings (Protection of Employment Regulations). The subject matter of the Agricultural Sector (Wales) Act 2014 is an exception to this regulation.

Reservation 143: job search and support (with the exception of education, vocational training and careers services)

Reservation 155: health and safety at work.

These reservations are broadly in line with those in the Scottish devolution legislation. In 2014, the Smith Commission recommended responsibility for the operation of several reserved tribunals, including employment, should be transferred to the Scottish Government in 2020. This was initially postponed to 2022. The Scottish press reports that the president of the Scottish Tribunals has confirmed that there will be a further delay until 2024 “at the earliest”.

<https://www.heraldscotland.com/news/19356047.scottish-government-urged-act-smith-commissions-devolution-tribunals-faces-delay/>

Policy context

The field of employment law is important to Welsh Government policies in relation to fair work, poverty, and the health and wellbeing of the workforce. As seen by the Welsh Government, the current UK -wide regime suffers from three inter-related deficiencies:

1. inadequate protections – employment law has not kept pace with changes identified in the Taylor Review¹ and since. Workers have been left relatively unprotected in the face of fire and rehire tactics by unscrupulous employers, to which the UK Government’s response is a new Code of Practice².
2. weak enforcement – a fragmentation across different bodies charged with overseeing different aspects of employment law, all of whom lack the resources to tackle non-compliance effectively. The UK Government has not delivered its promised Single Enforcement Body: the absence of such a body has been highlighted in successive Labour Market Enforcement Strategies – most recently in the 2022/23 strategy³.

¹ [Good work: the Taylor review of modern working practices - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/681222/good-work-taylor-review-of-modern-working-practices.pdf)

² [Draft Code of Practice on dismissal and re-engagement - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/681222/draft-code-of-practice-on-dismissal-and-re-engagement.pdf)

³ [United Kingdom Labour Market Enforcement Strategy 2022/23 – March 2023 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/681222/uk-labour-market-enforcement-strategy-2022-23.pdf)

3. insufficient sanctions –when employers are found to have fallen short of their statutory responsibilities, the sanctions that follow are insufficient to deter poor practice eg in the recent P&O Ferries case, the CEO admitted to breaking employment law⁴.

Interface between devolved and reserved matters

The settlement creates a tension between the Welsh Government’s policies for fair work⁵ and social partnership⁶ and their powers to deliver, particularly in relation to the private sector.

The legal uncertainty created by the reservations creates complexity for policy formulation and the drafting of legislation. This has presented significant obstacles to the Welsh Government’s Social Partnership and Public Procurement Bill, but once passed by the Senedd, it received Royal Assent without any objection being lodged by the UK Government.

The tensions between the Welsh Government’s policy ambitions and the reservation of employment law and industrial relations are particularly acute when the two governments’ model of industrial and employment relations diverge.

This has been evident on a number of occasions – including in relation to the UK Government’s Trade Union Act 2016 which led to the Welsh Government introducing the Trade Union (Wales) Act 2017. The 2017 Act disapplied, in so far as Welsh public bodies are concerned, a number of provisions in the UK Act⁷. Such legislation would probably be challenged under the reserved powers model. More recently, the Welsh Government expressed concerns about the UK Government’s Strikes (Minimum Service Levels) Bill when being considered by Parliament⁸.

Implications of devolution

There would be significant resource challenges were employment law and industrial relations devolved to the Senedd and Welsh Government. Given the technical and specialist knowledge required in a complex area of legislation, devolution would test the Welsh Government’s policy and legal capacity and capability.

Legal protections are effective only if backed up by consistent enforcement and sanctions that act as a deterrent to poor practice. To establish an enforcement

⁴ [P&O Ferries: Not consulting on job cuts broke law, boss admits - BBC News](#)

⁵ [Fair work and trade unions | Sub-topic | GOV.WALES](#)

⁶ [Social Partnership and Public Procurement \(Wales\) Bill | GOV.WALES](#)

⁷ [Trade-union-\(wales\)-act-2017-guidance .pdf \(gov.wales\)](#)

⁸ [LEGISLATIVE CONSENT MEMORANDUM \(senedd.wales\)](#)

regime in Wales that is better resourced and less fragmented than the present arrangements, would present a significant financial and resource challenge.

There could be UK internal market issues if the regime in Wales became very different from England's and if this created difficulties for employers working on an England/Wales (if not GB) footprint, particularly given the cross-border labour market in some parts of Wales. Private sector employers could be expected to oppose such divergence.

The UK Government view is that employment rights and duties and industrial relations legislation should apply equally across the whole of Great Britain⁹.

Some have suggested partial devolution, but no concrete proposals have been presented. There could be significant challenges in trying to disaggregate those powers without creating another source of uncertainty and dispute with UKG.

Evidence

The political parties

Neither Labour nor the Conservatives are calling for devolution of employment law. In the Senedd, Plaid Cymru called for devolution in response to the UK Government's Minimum Service Levels Bill but did not provide evidence to this effect.

The Welsh Government

The sub-group met the Welsh Government Minister for Social Partnership, Hannah Blythyn and her officials on 21 April. They confirmed the Welsh Government position that basic rights (including employment rights) should be guaranteed for everybody across the UK.

The Minister noted that the cross-border challenges that arise when considering devolution of employment. There were several large cross-border sites in Wales (such as Airbus) which would be impacted. If employment rights were devolved, this could lead to different standards, and levels of protection or rights, and it was not clear what challenges that could raise for the individual, and for trade unions in terms of how they organise and represent their members.

The Minister underlined the Welsh Government's concern about enforcement of employment rights and protections. The landscape is extremely fragmented with a range of UK government departments and agencies responsible for enforcing different aspects (e.g. HMRC enforcing the minimum wage, Gangmasters and Labour Abuse Authority looking at severe examples of labour exploitation, Employment Standards Agency, Health and Safety Executive enforcing health and safety law).

⁹ The UK government has said it *"intends to legislate to remove the Trade Union (Wales) Act 2017 through primary legislation when Parliamentary time allows, to ensure trade union legislation applies equally across Great Britain"*.

The Welsh Government had called for the creation of a single enforcement body to address the fragmentation, which it did not have the powers or resources to address. The Welsh Government also raised concerns about the inconsistency of inter-governmental relations in this area, citing work on Freeports as a positive case as well as examples of no or last-minute engagement.

The sub-group asked the Minister about the possibility of seeking UK Government agreement to a Welsh pilot to test the impact of allowing asylum seekers to work and contribute to the economy, and she agreed to provide a note. (*see report of the welfare sub-group, Annex 3*).

Wales TUC Commission

The sub-group met Professor Jean Jenkins, Chair of the Wales TUC Commission (who met the full Commission in early 2022) to update on the Commission's work on 21 April.

The key points from Professor Jenkins were as follows:

- her Commission's survey findings indicated that Trade Union members were divided 50/50 on devolution of employment law; devolution was more popular amongst younger workers than older workers. It was more popular than the devolution of justice, less popular than the devolution of welfare. The larger Unions were coming to their own positions. Unison for example was in favour of devolution.
- There was more trust towards Welsh Government than the UK Government.
- Comparative work by Coventry University showed good work/ fair work initiatives and several charters across England, but their impact was limited by the weakness of regional devolution.
- There was scope for more coherence and visibility in policy for work and employment in Wales The business model for the last 30 years was one of outsourcing public money through private sector providers. There was an attempt at a different environment for employment and industrial relations in Wales, but the same fragmentation of service provision existed here. Work and employment should be at the forefront with all important levers under one Minister (similar to the climate change portfolio).
- Social justice rights were not being enforced currently. Large employers have more scope to be good employers, but they often do not insist on the same good practices in their supply chains, which are often of small and medium sized enterprises. Many large corporations sub-contract a high percentage of their work to such enterprises. New laws are not necessarily needed, but more effort in implementing the law that already exists, for example, making sure that someone who is unfairly dismissed can pursue redress.
- The lack of enforcement of existing employment rights was a major issue that came up time and time again during the TUC Commission's work. There was a need to be smarter about how to enforce and implement the rights already on the statute book, by perhaps looking at different ways of increasing

inspection and enforcement, and avenues of redress and remedy in Wales. This would improve employment in Wales without dismantling areas where there needed to be cross-border consistency.

- Wales is in competition with other regions in the UK for employment, in the context of global supply chains. To overlay a fragmented system with more devolution without any other change would result in devolution for devolution's sake without much fundamental change in the working environment on the ground.
- There was a risk that workers could fall out of existing protections that were a result of UK law if employment rights were devolved.
- The UK Government's Minimum Service Levels Bill was fundamentally anti-democratic. The only peaceful sanction that workers had to move a bargain forward was to withdraw their labour peacefully.
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Business views

The co-chairs wrote to business groups to seek their views on the potential devolution of employment matters. Replies were received from the Federation of Small Businesses, Make UK and the Institute of Directors. The key points they made were as follows:

Federation of Small Businesses

The key points were:

- lack of consistency and increased legal complexity can have an impact on SMEs' work and time, with potential opportunity costs for growth.
- FSB has been supportive of UK-wide approaches which promote simplicity, ease of understanding and allow businesses to operate in a frictionless way across the UK market.
- any divergence in law, policy and regulation on employment would require significant investment in support for capacity building to promote understanding of the changes SMEs would need to undertake.
- cross-border employment (whether commuting, hybrid, or remotely based in England) would need to be addressed to ensure clarity for employers and consistency across the workforce.,
- any proposals for devolution of responsibilities affecting SMEs, should have at their heart, simplification of existing processes and procedures.
- it is vital that SMEs in Wales are not placed in a position of competitive disadvantage by comparison to the other nations of the UK.

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Make UK

- Many of Make UK's member companies operate across multiple sites within the UK, and often in some or all of the different constituent nations of the UK. When considering the scope of devolution to the Welsh Government – and

indeed the other devolved administrations – it is important to recognise that changes made in one nation can lead to the same employer being required to follow different rules, regulations and procedures depending on the location of the relevant site.

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- Manufacturers often benefit when there is a high degree of alignment and consistency in both high-level policy objectives and technical aspects of regulation between the UK Government and the Welsh Government.
- Make UK supports the principle of the devolved administrations of the constituent nations of the UK developing policy and legislating according to their particular economic and labour market circumstances. There are many aspects of employment policy and regulation that could benefit from being developed closer to local labour markets; however, there should also be a central role for the UK Government in ensuring that there remains some degree of co-ordination between nations.

Institute of Directors

Employment law is largely consistent across the home nations of the UK. This has the following advantages:

- common understanding in the employment arrangement (between employer / employees),
- consistency across the internal organisation, irrespective of a UK geographical base,
- reassurance for non-UK companies / investors, seeking a stable Wales/UK operating environment,
- clear expectation setting and maintenance to a common UK standard,
- stability and reduced complexity in National and International business planning,
- social mobility (working across an open UK, without limiting business or employment opportunities / becoming regionalised).

A Wales-centred legislature seeking to differentiate laws, potentially based on political objectives, would be wasteful and create an industry of which businesses in Wales would have to bear increased cost and complexity. Wales is largely an SME-based economy where such a change might be perceived as unnecessary and impractical.

Conclusions

- The devolution boundary on employment is a continuing area of tension between the WG's aspirations for social partnership and fair work, and consistent employment rights across the UK, as an aspect of UK citizenship. In evidence to the Commission, the First Minister mentioned labour rights as

part of the solidarity of the enabled citizen - one of his four pillars for a reformed UK. There are two key issues:

1. policy/legislation: the settlement constrains the ability of the Senedd and WG to legislate on fair work and social partnership.
 2. weak and under-resourced enforcement - because this is reserved, WG lacks the power or resources to ensure effective enforcement of the law.
- There is a particular tension in respect of the public sector (which accounts for 30% of Welsh employment) because the Senedd and Welsh Government have direct responsibility (including over pay and many contractual terms of service) for most of the public services in Wales (the NHS, the education workforce, local government). This was brought to a head with the Minimum Service Levels Act. In light of this, there seems a strong case for formalising inter-governmental arrangements to ensure that the Welsh Government is consulted fully and in advance where the UK Government is proposing significant changes to labour laws.
 - The case for reservation of employment law is that it enables a UK wide regime of employment rights and protections which underpins the single UK market. But in-work poverty (as a result of low pay and poor employment practices) impacts directly on the Senedd and Welsh Government's ambitions to reduce child poverty, promote fair work and improve health and well-being.
 - Plaid Cymru is the only political party that has called for the devolution of legislative powers in relation to employment rights and protections. Surveys by the Wales TUC Commission suggests that the workforce is evenly divided on the matter.
 - Devolution of executive (but not legislative) powers could enable the Welsh Government to take responsibility for enforcement. But it could strengthen enforcement only by investing from its own funds, unless and until UK Government increases the relevant budgets. (We were told that the TUC's analysis suggests a need for an additional 19 enforcement officers in Wales: this is a relatively modest number but would add to the significant cumulative effect of WG expenditure compensating for gaps in UK Government provision in Wales. Under executive devolution, the Welsh Government would not have the power to set up a single enforcement body which some see as the way forward.
 - There is no easy solution to the tension between UK Government and Welsh Government policies at the boundary of reserved and devolved employment matters. Its salience would be reduced if there were more common ground between the UK Government and the Welsh Government on employment matters. but there could still be cases where the Welsh Government wanted

to take a different approach and was prevented from doing so by the settlement.

- In a federal UK, it seems likely that employment rights and protections would remain the responsibility of the UK Government. Internationally, in countries with federal constitutions, it is generally (though not universally) the case that these powers are retained at federal level, because of their linkage to commerce and trade¹⁰.
- The fact that so many individuals and businesses work across the England and Wales border (and remote working is expanding this) means that in the event of devolution, businesses could be required to operate across two different regimes of employment law, which could increase cost and complexity.
- The Welsh Government and the Senedd support an approach to refugees and asylum seekers which seeks to integrate them more fully into society. The fact that asylum seekers cannot work while their claim is being processed militates against this and deprives Wales of the opportunity to benefit from the valuable skills which many of them possess. While the current UK Government is unlikely to be sympathetic to such a proposal, there is a strong case for the Welsh Government putting forward a proposal to pilot an approach of offering temporary employment in the public sector to appropriately qualified asylum seekers.

In most federal countries including all in Europe (Spain, Germany, Austria Switzerland) plus Australia, Brazil, Mexico, South Africa employment law sits with the federal government. In the USA, federal law trumps state law only in the case of 'companies who trade inter-state'. In Canada the federal government only legislates for 'federally regulated employment' which is a relatively small proportion of the workforce.¹⁰