



Employment rights
Trade unions and industrial action
Wages
Equal opportunities and discrimination
Health and safety
Immigration
Regulation of health professions

DEVOLVING EMPLOYMENT LEGISLATION TO SCOTLAND

Dave Watson LLB FRSA

February 2024



**The Jimmy Reid
Foundation**

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Executive Summary

The outline case for devolving employment law has been made by a wide range of organisations in Scotland, from political parties to trade unions and anti-poverty organisations. In this paper, we move beyond aspiration to set out a detailed policy for the devolution of employment-related law to Scotland.

We start with an examination of employment standards, which often underpin the case for devolution. Devolution initiatives like Fair Work have mitigated some of the problems facing workers in Scotland, although as we set out in our assessment of Fair Work in Scotland last year, more could be done using these powers. However, we also recognised the limits of voluntarism and the powers of the Scottish Parliament and concluded, *'There is a strong case in principle for devolving employment law to Scotland.'* We summarise the case for and against devolution. While we understand the preference of many UK organisations for the consistency of a single UK system of employment law, we conclude that this argument has limited credibility 25 years on from devolution. The unitary UK state has long gone.

In the chapter on the employment law framework in Scotland, we identify the differences between Scotland and the rest of the UK and the existing powers that impact employment. We cover all the areas of law that might have employment law implications and look at how these could be devolved. Some areas of law, like transport, company law and social security, have more minor elements of employment impact, and those areas need to be considered in the broader devolution debate. We recommend the following for devolution:

- Employment rights, primarily those set out in the Employment Rights Act 1996, and the related court structure are already being devolved.
- Trade unions and industrial action are primarily set out in the Trade Union and Labour Relations (Consolidation) Act 1992. This includes employer associations registered under that legislation. This devolution may require a separate Certification Officer for Scotland.
- Wages as set out in employment rights and the contract of employment. This should include the National Living Wage (NLW) and the National Minimum Wage (NMW).
- Equal opportunities and discrimination law as it applies to employment. This would also extend the role of the Scottish Human Rights Commission.
- Health and safety legislation and enforcement through creating a Scottish Health and Safety Executive.
- The partial devolution of immigration policy with a Scottish visa to enter the UK would let migrants live and work in Scotland with a Scottish tax code.
- The regulation of health professions.

While a case can be made for the devolution of occupational pensions, it is difficult to identify many benefits of establishing a separate pensions regulator, ombudsman and protection fund, with the associated costs. Pensions are one of the few policy areas where scale brings benefits, and there is a

legitimate case for further consolidation in pension funds. We recognise that human rights legislation impacts employment law but argue that it will continue to be applied to employment law in a devolved administration. This issue would need to be reconsidered if the UK Government withdraws from the Convention treaty or repeals the Human Rights Act 1998.

This paper does not focus on setting out another wishlist of how employment rights could be improved through the devolution of employment law. However, there is no point in devolving any powers if they are not used for progressive purposes – powers for a purpose. We therefore examine proposals from the Scottish Government, the Institute of Employment Rights, and the Labour Party to strengthen employment rights. The underlying principle is that workers can only ensure dignity and respect in the workplace through collective action to determine their terms and conditions.

The strength of devolution is that a smaller administration can try different approaches that would be complex and slow to deliver across the UK. A new constructive model of industrial relations and modern employment rights to replace the failed model facilitated by poor legislation from Westminster. In particular, we point to the Scandinavian model that fits a country like Scotland in scale and culture. These economies have managed to be socially inclusive and egalitarian, flexible, innovative and internationally competitive. We offer this paper as a practical guide to delivering a new model through devolution.

February 2024

Introduction

In 2023, the Jimmy Reid Foundation, with support from the Alex Ferry Foundation, published *Assessing of Fair Work in Scotland*¹. The report concluded:

‘The voluntary approach to Scotland’s Fair Work initiative has made some limited but positive improvements to working lives, particularly in the broader public services. However, it has not yet delivered major results, as evidenced by the continued prevalence of poor-quality work across Scotland’s labour market. If Scotland is to claim to be a Fair Work Nation in 2025, much more needs to be done to turn the worthy ambition into reality.’

A key element of that study was to examine the experience of trade union representatives of Fair Work. The representatives interviewed expressed the view that Fair Work needed to be applied more rigorously with legislation and enforceable provisions. While the report was critical of the slow pace of Fair Work implementation by the Scottish Government using devolved powers, it recognised that the policy levers are limited because employment law is reserved to the UK Parliament. These comments highlight the problem of the UK system - a growing plethora of individual rights, 'fierce in appearance but missing in tooth and claw'², particularly referring to the weakness of enforcement and the difficulty for individuals in a 'victim-complains' system for the majority of claim types³.

The devolution of employment law is supported by the STUC and most trade unions in Scotland. The TUC also adopted this position at the 2023 Congress. The SNP and Scottish Greens support the devolution of employment law as a precursor to independence, and Scottish Labour’s 2021 manifesto included a commitment to devolve employment rights.

One challenge for those supporting the devolution of employment law is defining precisely what they want to devolve. None of the major organisations supporting devolution have explained this in detail, rarely going further than simply referencing employment law or rights. This paper aims to offer a blueprint to policymakers to champion devolution by assessing the scale of the task and the benefits of different elements. While we argue for the wholesale devolution of employment law, not all the related proposals are essential to achieve the core aims.

The Employment Rights Act 1996 (ERA) is the primary consolidating legislation but certainly doesn’t cover all aspects of the law pertaining to employment. There are already some differences in

¹ D. Watson, *Assessing Fair Work in Scotland*, (Reid Foundation, 2023), <https://reidfoundation.scot/2023/08/assessing-fair-work-in-scotland/>

² A. Pollert, *Britain and Individual Employment Rights: Paper Tigers, Fierce in Appearance but Missing in Tooth and Claw*, (Economic and Industrial Democracy, 28(1), 2007), pp. 110-139. <https://doi.org/10.1177/0143831X0707>

³ L. Dickens (ed.), *Making Employment Rights Effective: Issues of Enforcement and Compliance*. (Oxford: Hart Publishing, 2012), 3031

employment law across the UK, together with devolution in Northern Ireland, found partly in statute and partly in the common law, especially the common law of contract.

This paper seeks to develop a policy on devolving employment law to Scotland. It will start with the context of employment in Scotland, looking at employment standards and industrial relations as well as the trade union and political stances on the devolution of these powers. It will set out the case for devolving employment law and what we might do with those powers. However, this paper focuses on the current employment law framework and recommends which aspects could be devolved. The aim is to provide the basis for a credible policy on the wholesale devolution of employment law to Scotland.

1. Context

This chapter will look at the current employment standards in Scotland and the trade union and political responses.

Employment Standards in Scotland

Good employment standards are essential to social justice and the economy. Poor work drives negative outcomes way beyond the labour market. Insecure work, long hours and low pay impact families and communities and are key drivers of inequality. More than half of households in poverty in Scotland are in work. We also know from international evidence that more equal societies almost always do better⁴.

The evidence indicates that employment standards in Scotland are less than optimal, which has implications for many of the Scottish Government's national outcomes. The fundamentals of low pay, poor working conditions and the absence of effective voice in many workplaces remain a prominent feature of the Scottish labour market.

The CIPD Working Lives Scotland 2022 report gives a very mixed picture of fair work in Scotland⁵. It highlights a positive shift in approaches to flexible working post-pandemic, although less so for the low-paid. A quarter of workers report negative impacts of work on their mental health, and nearly half report going to work despite not being well enough. A tightening labour market has improved feelings of job security, but two-thirds report feeling overworked, and even before the cost of living crisis hit, one-third struggled to pay their bills.

Workers in non-unionised workplaces without effective representation often rely on Citizens Advice Scotland (CAS) for support. They report high levels of unfair treatment at work, responding to around 50,000 cases per year. As they put it, *'In Scotland we like to see ourselves as a generally fair, socially just country. Sadly, the evidence seen by CAB advisers every day tells a different story. We know that many Scots who are unemployed face severe hardship. But many who do have jobs are living on low incomes and also facing extremely unfair conditions at work.'*⁶ CAS has also highlighted that 19% of workers in Scotland are unsure of their employment rights, although other studies show that many workers overestimate the protection of the law.

⁴ K.Pickett and R.Wilkinson, *The Spirit Level: Why More Equal Societies Almost Always Do Better*, (2012), and subsequent Equality Trust research, <https://equalitytrust.org.uk/resources/the-spirit-level>

⁵ *Working Lives Scotland 2022*, (CIPD, June 2022), https://www.cipd.co.uk/Images/working-lives-scotland-2022_tcm18-109949.pdf

⁶ Gowans, R, *Exposed: the dismal state of workers' rights in Scotland*, (CAB, 2015), <https://www.cas.org.uk/news/exposed-dismal-state-workers-rights-scotland>

The Westminster Scottish Affairs Committee conducted an inquiry into future working practices in Scotland. They highlighted the growing use of insecure work and unfair working practices. The introduction of fees for applications to employment tribunals (since revoked, but UK Government plans to reintroduce) cut applications and more than half of all employees who win a case at an employment tribunal do not receive the compensation they are due. They concluded, *‘We are deeply concerned by the unfair and illegal employment practices we have heard about during this inquiry. Although it appears that these issues affect only a small proportion of workers, it is not known how prevalent unfair employment practices are in Scotland. We recommend that the Government commission a study to assess the extent of unfair employment practices in Scotland—to establish how many workers suffer from unfair or illegal employment practices, and whether there are particular issues in certain sectors.’*⁷

The Learning and Work Institute published a report last year, *Good Jobs in Scotland*, which painted a less than glowing picture of the labour market in Scotland⁸. They found that there has been a relative improvement in pay in Scotland, and trade union membership has remained stable between 2011 and 2019. However, other measures of job quality – underemployment, employer investment in development opportunities, and over-employment, have worsened.

The Carnegie UK Trust published a report, *What Next for Fair Work in Scotland?*, which examined the impact of the pandemic on Fair Work⁹. They highlighted how the pandemic deepened existing inequalities in access to good work and impacted incomes and pay packets. The rise of precarious work, the strain on work-life balance, and wellbeing were also highlighted. They also recognised that the trade union movement performed strongly during the crisis, negotiating at the highest level with the government and attracting new members who were represented and supported. However, levels of trade union membership and collective agreements are relatively low in international terms.

The Mental Health Foundation published a report highlighting the link between Fair Work and mental ill health – a devolved responsibility¹⁰. Mental ill health costs Scotland around £11bn a year, and it is estimated that mental health problems cost Scottish employers £2 billion annually. They focused mainly on the damage precarious work and zero-hours contracts have on mental ill-health.

⁷ Scottish Affairs Committee, *The future of working practices in Scotland*, (March, 2018), <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscotaf/449/44902.htm>

⁸ Learning & Work Institute, *Good Jobs in Scotland*, (2022), <https://learningandwork.org.uk/resources/research-and-reports/good-jobs-in-scotland/>

⁹ Carnegie UK Trust, *What next for Fair Work in Scotland?* <https://carnegieuktrust.org.uk/publications/what-next-for-fair-work-in-scotland>

¹⁰ Mental Health Foundation, *Fair Work Consultation Scotland*, (2022), <https://www.mentalhealth.org.uk/our-work/policy-and-advocacy/fair-work-consultation-scotland>

IPPR Scotland highlighted the impact of insecure and low-paid work in their post-pandemic study, ‘Delivering a Fair Work Recovery in Scotland’¹¹. They found that one in five workers surveyed in Scotland typically receive two weeks’ notice or less of their working hours, and one in 10 employees (over 200,000 people in Scotland) feel their work does not offer them a stable and predictable income. Their modelling showed that a lone-parent household with one child earning £9 an hour is unlikely to reach a living income, and even on £15 an hour, would have to work full time to achieve that bar.

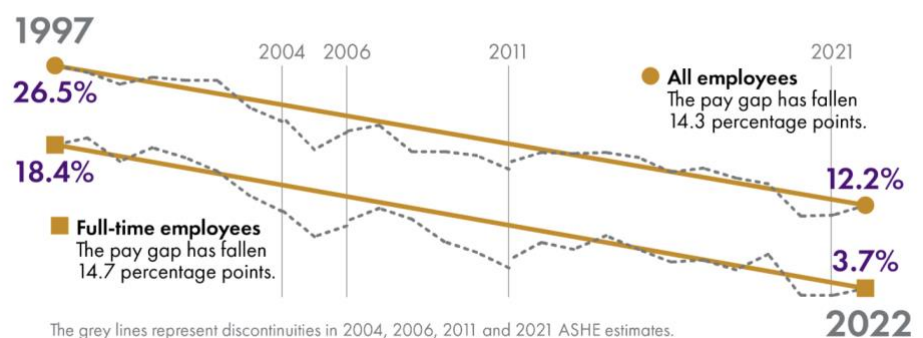
Not everybody is impacted by unfair work in the same way. Women’s employment remains characterised by undervaluation, low pay, discrimination, and insufficient and unreliable working hours. This is particularly true for young women, disabled women and Black and minoritised women. Single parents, 91% of whom are women, also face multiple and specific barriers to good-quality employment. A new three-year study has described underemployment as ‘an increasingly concerning feature of the UK labour market’, with the first findings showing that ‘*women, younger workers, workers with lower qualification levels and those from ethnic minorities are most affected by underemployment*’¹².

These issues have been highlighted to the Scottish Government and the Fair Work Convention in submissions from the Close

the Gap campaign.¹³ There are also challenges for young workers, who often face unfair work in particular sectors, and 72% miss out on key employment rights at work¹⁴. Bogus and low-income self-employment, underemployment and precarious employment

How has the gender pay gap changed over time?

This section looks at how the pay gap has changed between 1997 and 2022, for all employees and those working full-time. The Scottish Government advises that it is best to look at the change in the gender pay gap over time because of uncertainties with the statistical significance of annual changes.



¹¹ IPPR Scotland, *Delivering a Fair Work Recovery in Scotland*, (2021), <https://www.ippr.org/files/2021-08/delivering-a-fair-work-recovery-in-scotland-august21.pdf>

¹² The Underemployment Project, <https://underemployment.info>

¹³ Close the Gap, *Scotland can’t become a fair work nation without realising fair work for women*, (Feb. 2022), <https://www.closesthegap.org.uk/news/blog/scotland-cant-become-a-fair-work-nation-without-realising-fair-work-for-women/>

¹⁴ TUC, *3 in 4 young employees miss out on protection from unfair dismissal and redundancy pay*, (Nov. 2023), <https://www.tuc.org.uk/news/tuc-3-4-young-employees-miss-out-protection-unfair-dismissal-and-redundancy-pay>

undermine claims of the vitality of the job market¹⁵. ONS data suggests that Scotland is something of a hotspot for zero-hours contracts, with 105,000 Scottish workers, 3.9% of the workforce, having no set working hours. In comparison, England has 3.5%, 2.8% in Wales and 1.3% in Northern Ireland.¹⁶ However, the picture is not all grim. The gender pay gap in Scotland is closing twice as fast as that for the UK as a whole. In 2022, the difference stood at 12.2 per cent for Scotland and 14.9 per cent for the UK.

As the Institute for Employment Rights said in its Charter of Workers' Rights for Scotland¹⁷, the nation is not immune to precarious work conditions, with insecure hours and wages, meaning an uncertain lifestyle. It's not immune from low pay. It's not a country where every workplace has a recognised trade union and recognised trade union procedures.

We should emphasise that many of the challenges facing Fair Work in Scotland are replicated worldwide. Gallup's *State of the Global Workplace 2023* highlights improving but still low engagement levels, growing 'quiet quitting', staff turnover, and record employee stress levels¹⁸. Compared with other European countries, however, employment law in the UK offers far less protection to workers especially when it comes to issues like guaranteed working hours and job security, including legal protection from redundancy and unfair dismissal. Comparatively speaking, UK law is very restrictive when it comes to trade union law and workers' collective rights, especially the right to strike.

Trade Unions and Devolution

Trade unions in Scotland have generally supported greater powers being devolved to the Scottish Parliament. This is evident from submissions to the Calman (June 2009) and Smith (Nov. 2014) Commissions and their campaigning activities. This support reflects a long-standing commitment to devolution as a form of government and frustration with the approach of successive UK governments towards trade union and employment rights.

In its submission to the Smith Commission, the STUC argued for 'The devolution of employment law, health and safety, trade union law and the minimum wage,' and 'The full devolution of equality law provided that employment law is also devolved. In the case that employment law is not devolved, the

¹⁵ B.Wray, 'Slave economy'? *CommonSpace investigation finds employment figures 'skew' reality of modern work*, (Common Weal, 2019), <https://sourcenews.scot/slave-economy-commonspace-investigation-finds-employment-figures-skew-reality-of-modern-work/>

¹⁶ R.McCurdy, *Scotland is zero-hours contract hotspot of UK* (Insider, May 2023), <https://www.insider.co.uk/news/scotland-zero-hours-contract-hotspot-29993673>

¹⁷ *Charter of Workers' Rights for Scotland* (IER, 2019) <https://www.ier.org.uk/projects/charter-of-workers-rights-for-scotland/>

¹⁸ Gallup, *State of the Global Workplace: 2023 Report*, <https://www.gallup.com/workplace/349484/state-of-the-global-workplace.aspx>

STUC favours the devolution of equality enforcement along with the industrial tribunals and health and safety enforcement.’

UNISON Scotland has long argued for greater devolution of immigration powers, even before Brexit. In submissions to the Calman and Smith Commissions, they argued that Scotland’s immigration needs differ from those of other parts of the UK. This was reinforced in submissions to the Scottish and UK Parliamentary on the devolution of immigration policy.¹⁹ This has broad public support in Scotland, as more people believe immigration is good for the British economy (46%) than believe it is bad (17%). This is not unique to Scotland; the polling data is almost identical to the rest of the UK²⁰.

The EIS has taken a similar position on equality legislation in their submissions to the Smith Commission.

Political responses

Successive Scottish governments have sought to develop a distinctive approach to industrial relations in Scotland since devolution. From the Memorandum of Understanding with the STUC to the Fair Work Convention, this collective approach can fairly be contrasted with the anti-trade union stance of the current UK Government. The Reid Foundation paper *Assessing Fair Work in Scotland*²¹ outlines the journey to this distinctive approach and the strengths and weaknesses of the largely voluntary approach embodied in the Fair Work initiative.

The SNP 2021 manifesto confirmed its policy in government and went a little further:

Our Fair Work First programme makes adoption of fair work practices part of the criteria for winning public contracts and receiving grants. It uses the financial power of government to make fair work the norm. ... The principles of Living Hours - ensuring workers get the hours they need to make ends meet are reflected in Fair Work First good practice and promoted through Fair Work First where this applies to grants or procurement. If re-elected, we will go further and support a specific accreditation programme for Living Hours in the same way we have supported Living Wage accreditation. ... We will review our Fair Work First criteria for contracts and government support grants to include specific reference to fire and rehire tactics.

Scottish Labour took a different line in its 2021 manifesto. While it welcomed the ambition of Fair Work, it criticised the pace of change and introduced the concept of ‘Good Work’:

¹⁹ UNISON Scotland, *Scottish Parliament Culture, Tourism, Europe and External Relations Committee – Immigration*, (2017), <https://unison-scotland.org/wp-content/uploads/immigration-external-relations-committee.pdf>

²⁰ What Scotland Thinks, *Do Scotland and England & Wales Have Different Views About Immigration?* (SCSR) <https://www.whatscotlandthinks.org/analysis/do-scotland-and-england-wales-have-different-views-about-immigration/>

²¹ D. Watson, *Assessing Fair Work in Scotland*, (Reid Foundation, 2023), <https://reidfoundation.scot/2023/08/assessing-fair-work-in-scotland/>

‘Scottish Labour will go much further, developing a Good Work Plan, which will not merely encourage good work, but will require compliance. Good Work will promote the quality of work and fairness in line with trade union charters developed by UNISON, Unite and USDAW in their respective sectors. We will use all the levers of government to revitalise collective bargaining, including sectoral bargaining, coupled with a more robust social dialogue and the promotion of trade union membership.’

The Scottish Green Party also supported Fair Work principles. It proposed using existing powers to make public procurement and receipt of Scottish Government support conditional on compliance with Fair Work standards. It also undertook to *‘Facilitate the creation of national collective bargaining structures in areas linked to the public sector which do not currently have high levels of collective bargaining, such as social care and childcare.’*

There was no positive or negative mention of Fair Work in the Scottish Conservative Manifesto. There was a commitment to funding skills training but otherwise the workforce was largely absent from their economic thinking. The concept of Fair Work is not entirely absent from Conservative thinking. Theresa May established an inquiry led by Matthew Taylor, although the outcome was less than radical, and even the modest recommendations were, largely speaking, never implemented. Even George Osborne recognised that subsidising low-wage employers made no sense, hence introducing his so-called 'living wage'. Sadly, the current UK Conservative Government continues to undermine the trade unions and collective bargaining introducing wave after wave of restrictions on workers' right to strike.

The Scottish Liberal Democrat manifesto supported Fair Work principles. In particular, social care, it said, *‘The social care workforce should be respected for the work they do, and we will make it a requirement that any care service by any provider must comply with fair work requirements which are set nationally.’* They also said they *‘will adopt and extend the current principles of fair work.’*

From the above, it is clear that an overwhelming majority in the Scottish Parliament supports Fair Work principles, with at least Scottish Labour and the Scottish Greens prepared to go further than the benign voluntarism of the Scottish Government, and even the Conservatives not actively opposing every element. The encouragement approach of the current SNP government is not wholly explained by the reservation of powers to Westminster. This reply to a question tabled by Mark Ruskell MSP, shows that they are opposed to ‘penalising’ bad employers in principle.

‘Through our Fair Work First approach, fair work criteria is being applied to public sector grants, other funding and contracts where it is relevant and proportionate to do so. This approach encourages employers to adopt fair work practices, rather than penalising those who cannot and provides the best opportunity to engage and support employers.’²²

²² Question reference: S6W-06080, (Feb. 2022), <https://www.parliament.scot/chamber-and-committees/questions-and-answers/question?ref=S6W-06080>

There is also a majority in the Scottish Parliament in favour of devolving employment law to Scotland. Gordon Brown's recent Commission on the UK's Future report proposed making employment law a shared responsibility, which is weaker than Scottish and UK Labour's recent manifesto pledges²³. A previous Labour Party paper went much further, proposing that *'the Scottish Parliament would be able to legislate on certain aspects of employment law, but only insofar as and to the extent that such legislation strengthens rights in favour of workers and does not diminish them.'*²⁴

²³ Report of the Commission on the UK's Future, (Nov. 2022), <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>

²⁴ S.Griffin, *Remaking the British State for the Many not the Few*, (Feb.2020), https://redpapercollective.net/?page_id=217

2. Devolving Employment Law – The Debate

This chapter outlines the case for devolving employment legislation to Scotland. We also outline the main arguments against this policy and the alternative approach of using existing powers more effectively. Internationally, for example, in the US and Canada, significant aspects of workplace protection are devolved below the federal level. In contrast, in Europe, regulation is generally reserved to national parliaments and subject to minimum regulation pursuant to EU law.

The case for devolution of employment law

The primary argument used by supporters of devolving employment law is that it is necessary to enable the Scottish Parliament to deliver the policy outcomes implicit in the range of current powers. As the STUC puts it in its submission to the Smith Commission²⁵,

‘In the context of the wide range of powers already devolved to Scotland or potentially to be devolved to Scotland (including a separate legal system, powers on economic development, planning, environmental protection and additional tax and welfare powers) there is a strong case to be made for devolving workplace protection. This is because it is easier to imagine coherent policies on economic development, tackling inequality through public service provision, welfare and active labour market intervention if the Scottish Parliament is empowered to tackle discrimination, poor employment practice, insecure employment, low minimum wages, and to create healthier workplaces and promote collective bargaining.’

They also recognised the different industrial relations approach in Scotland and the desire of successive Scottish Governments to *‘forge a more positive relationship with trade unions.’*

This approach has broader support. For example, in a submission to the Smith Commission, the Poverty Alliance said, *‘It is clear that there is public appetite for employment legislation to be devolved to the Scottish Parliament. 91 per cent of people who responded to the Poverty Alliance survey on more powers for Scotland were supportive of this, and 91.5 per cent of people believed Scotland should have the power to set and enforce the minimum wage.’*²⁶

The STUC supported coupling employment law and equality law to avoid complexities and keep a streamlined approach to equality legislation. They also argued that *‘Scotland has very distinct questions around sectarianism, differing demographics and a considerable rural dimension and therefore might benefit from different and distinctive legislative approaches to support equality*

²⁵ STUC, Evidence to the Smith Commission,

<https://stuc.org.uk/files/Smith%20Commission%202014/STUC%20submission%20to%20Smith%20Commission.pdf>

²⁶ Poverty Alliance submission to the Smith Commission,

<https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

outcomes for the Scottish people.’ This was reflected in the EIS submission to the Smith Commission, ‘Many of the concerns we have – the need to uphold the Scottish comprehensive education system, to promote a curriculum in which equalities are embedded, to eradicate poverty, to end racism, to continue to challenge gender inequalities, to counter discrimination linked to actual or perceived sexual orientation and to combat sectarianism – would be better supported by the full devolution of legislative responsibility for equality issues.’²⁷

The UNISON Scotland submission to the Smith Commission sets out the trade union case for devolving health and safety; *‘We believe that devolution of powers over health and safety could improve Scotland’s poor record in health and safety at work. Scotland has different industry structures that may explain in part the differences. In addition, other aspects of health and safety, including the NHS and local authority roles are already devolved and could be joined up more effectively if this service was devolved. This is already devolved in Northern Ireland.’²⁸*

The STUC submission to the Smith Commission also supported *‘A presumption in favour of the right to Scotland to pursue distinctive policy on migration’*, and in addition, there is some limited devolution of social security. Trade unions have generally been wary of devolving cyclical benefits because of the impact on public finances for a devolved legislature without full fiscal autonomy and due to administrative costs. There has been a similar reluctance over devolving National Insurance and the state pension.

The Scottish Council for Development and Industry pointed to their research on migration, which said, *‘SCDI’s research found a widespread view that current UK immigration and visa policy is not aligned with Scotland’s distinct needs.’²⁹* This view was also reflected in the Scottish Chambers of Commerce and Universities Scotland submission concerning international students and staff.³⁰

The case against devolution of employment law.

The Calman Commission summarises the case against devolving employment law in their 2009 final report, *‘The Commission has argued that Scotland derives considerable benefits from being part of a*

²⁷ EIS submission to the Smith Commission, <https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

²⁸ UNISON Scotland, *Smith Commission on Devolution*, (2014), https://www.unison-scotland.org.uk/scotlandsfuture/SmithCommission_UNISONSubmission_Oct2014.pdf

²⁹ SCDI submission to Smith Commission, <https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

³⁰ Universities Scotland submission to Smith Commission, <https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

wider economic and social Union. The viability of this economic union is dependent on the free flow of capital, goods and labour throughout the UK, and the Commission therefore does not propose to recommend changes to the current reservation of employment and industrial relations.'

Employer organisations generally oppose the devolution of employment-related powers, preferring the simplicity of a single UK system. For example, the British Safety Council opposed the devolution of health and safety in their submission to the Smith Commission, arguing, *'We are concerned that should health and safety be devolved it could lead to the creation of different standards applying in Scotland from those in England and Wales and an end to harmonised health and safety law and management practice.'* This view also reflects the high and growing, proportion of business ownership outwith Scotland.

The Calman Commission took a more nuanced position in relation to health and safety, recognising the link to prosecution powers and concluded *'that there is no reason in principle why health and safety (or elements of enforcement) could not be devolved.'* However, they argued that a separate Scottish HSE would lead to duplication and loss of expertise. They did recommend, *'In recognition of the close interaction of the HSE's reserved functions with areas of devolved policy, a closer relationship between the HSE in Scotland and the Scottish Parliament should be developed.'*

Calman took a similar approach to immigration policy, suggesting that *'justifiable local variations are sustainable and should be actively considered by the UK Government in consultation with Scottish Ministers.'* Organisations that are hostile to immigration oppose any devolution of immigration powers. For example, Migration Watch UK told the Smith Commission *'that it would be impossible for two separate immigration systems to function within the same island. If Scotland followed a more liberal immigration policy, the likelihood is that it would serve as a backdoor to England.'*³¹

The National Association of Pension Funds opposed the devolution of tax and pension powers for typical employer reasons. In a submission to the Smith Commission, they said, *'Further devolution of tax and pension powers will add further complexity and cost for schemes and members which, in time, could lead to the separation of pension schemes into Scottish and 'rest of the UK' schemes. Schemes will incur significant separation costs and, for Scottish schemes, a loss of economies of scale leading to potentially higher charges for pension savers. Separation will not be in the interest of employers, schemes or pension savers.'*³²

³¹ Migration watch submission to Smith Commission,
<https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

³² NAFO submission to the Smith Commission,
<https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

Using existing powers to raise employment standards

The Fair Work initiative is a good example of how devolved administrations have used their limited powers to raise employment standards. The initiative has had some impact in the public sector, and the Scottish Government has been prepared to negotiate solutions to public sector pay disputes during the current cost of living crisis. This has happened quicker than their UK counterparts, which has led to less strike action in Scotland during the 2023 public service disputes. However, Fair Work's success in the private sector is less clear. This is to be expected as the Scottish Government has many more levers to use when implementing Fair Work across the public sector, even when they are not the direct employer. In the private sector, voluntarism has limitations, particularly in sectors less likely to engage with the policy.

There have been similar experiences in Wales. The Government in Wales has dipped its toes into a legislative approach with the Social Partnership and Public Procurement (Wales) Act 2023. This places a statutory duty on public bodies and Welsh Ministers to engage with trade unions and embeds 'Decent Work' (this replaces Fair Work) into economic strategy and procurement. In practice, it remains to be seen if it goes much further than the actions taken by the Scottish Government, but putting the provisions on a statutory footing may well ensure that gaps in the voluntary approach we have seen in Scotland are less likely to appear. Other devolved administrations in the UK have also adopted voluntary codes with limited outcomes.

Much more can be done with existing devolved powers, reflected in the 19 recommendations of the Reid Foundation paper *Assessing Fair Work in Scotland*³³. However, that paper also recognises the limits of voluntarism and the powers of the Scottish Parliament and concludes, '*There is a strong case in principle for devolving employment law to Scotland.*'

³³ D. Watson, *Assessing Fair Work in Scotland*, (Reid Foundation, 2023), <https://reidfoundation.scot/2023/08/assessing-fair-work-in-scotland/>, p.42.

3. Employment Law Framework in Scotland

Introduction

The principle of the devolution settlement in Scotland is that all powers are devolved except those reserved in the Scotland Act 1998 as amended. These are set out in Schedule 5 of the Scotland Act 1998. The main reservation for the purposes of this paper is 'Head H – Employment', specifically H1, 'Employment rights and duties and industrial relations' and H2, 'Part I of the Health and Safety at Work etc. Act 1974. The Health and Safety Commission, the Health and Safety Executive and the Employment Medical Advisory Service.'³⁴ Other relevant reservations in Schedule 5 include Part 1(8) The Civil Service, B6 Immigration and Nationality, F1 Social Security, F3 Occupational and Personal Pensions, G2 Regulation of the Health Professions, and L2 Equal Opportunities. There are also powers that touch on employment, including competition law, mergers, and road transport.

Scotland has a long history of legislation before the devolution settlement. It was an independent country with its own monarch until the personal union of the crowns in 1603, and that union left both legislatures intact. The Acts of Union in 1707 created the Parliament of Great Britain, but even this was not intended to be a complete assimilation. Separate legal systems were maintained, and administrative devolution, including the Scottish Office from 1885, ensured that specific legislation was passed for Scotland covering many public services. For example, the NHS in Scotland was created under separate legislation in 1947³⁵. With a separate legal system, Scots Law developed its own rules in some areas of employment, including third-party rights, holiday entitlements, claims in breach of contract, apprenticeships, and court procedures³⁶.

Other devolved powers also impact employment, including education and training, economic development, some safety provisions administered by local authorities, environmental protection and most public services. For example, the UK Parliament has recently passed the Strikes (Minimum Service Levels) Act 2023, which sets minimum service levels during strike action in public services that are the responsibility of the Scottish Parliament.

Before the UK exited from the European Union, some employment law in Scotland and the UK emanated from European legislation, and the decisions of the Court of Justice of the European Union. This remains an issue as the UK Parliament legislates to end the special status of retained EU law in the UK statute book.

³⁴ Scotland Act 1998, Schedule 5, <https://www.legislation.gov.uk/ukpga/1998/46/schedule/5>

³⁵ For a fuller discussion of the differences see, C. Himsworth, *The Scotland Act 1998*, (W.Green/Sweet and Maxwell, 1999).

³⁶ For a more detailed outline see, S. Middlemiss & M. Downie, *Employment Law in Scotland*, (Bloomsbury, 2020).

Employment rights

Employment rights in Scotland and the UK derive from legislation enacted by the UK Parliament (statutory law), common law (case law) developed from decisions made by judges in specific cases, , collective agreements negotiated between employers and trade unions and individual contracts of employment. The system of legal precedent means decisions of higher courts are binding on lower courts. This means that employment tribunals must follow the decisions of the Scottish Employment Appeal Tribunal (EAT), which in turn follow those of the Court of Session in Scotland, and usually decisions of the Court of Appeal in England unless the opinion relates to an aspect of Scots law. The Supreme Court (formally House of Lords) is the highest court in the UK. When legislation applies both sides of the border, the courts tend to apply it uniformly, although the Court of Session does not consider itself bound to follow this approach³⁷.

Employment tribunals are responsible for hearing claims from people who think that an employer or potential employer, has treated them unlawfully. Employment tribunals are separately administered in Scotland (Employment Tribunals (Scotland)) with their own president issuing practice decisions and guidance³⁸. For example, Scotland has a presumption in favour of oral evidence over written evidence. The Scotland Act 2016 (following a recommendation from the Smith Commission) provides for incorporating the Employment Tribunal and Employment Appeal Tribunal into the Scottish tribunal system. This includes the rules of procedure but not statutory employment rights themselves. However, the implementation of this devolution of powers has been delayed, with both governments briefing against the other³⁹. The Scottish Government has indicated that they had no plans to bring forward the devolution of reserved tribunals in the current parliament – which would mean no progress before July 2026⁴⁰.

The devolution of employment tribunals is not simply a matter of administration. As Jillian Merchant from Thompsons Scotland argues, the devolution of employment tribunals provides *‘the opportunity to consider a proper costs regime, widening access to justice, and the potential to create an Equality Court which could consider multiple class actions as well as the education, goods and services claims. The latter, which currently languish unenthusiastically in the Sheriff Court system, are rarely used*

³⁷ The Court of Session (Inner House) was unwilling to ignore the Scots law doctrine of mutuality of contract in the interests of there being a consistency of approach to the law of constructive dismissal in the application of s.95(1)(c) of the Employment Rights Act 1996 (McNeill v Aberdeen City Council (No.2) [2013] CSIH 102).

³⁸ Directions and Guidance for Employment Tribunal (Scotland), <https://www.judiciary.uk/guidance-and-resources/directions-for-employment-tribunals-scotland/>

³⁹ A.Grant, Row over devolution of employment tribunals as SNP accused of ‘gulf’ between rhetoric and reality, (Scotsman, Aug.2023), <https://www.scotsman.com/news/politics/row-over-devolution-of-employment-tribunals-as-snp-accused-of-gulf-between-rhetoric-and-reality-4269630>

⁴⁰ Minutes of the ET (Scotland) National User Group, (April 2023), <https://www.judiciary.uk/wp-content/uploads/2023/08/1-Scottish-National-User-Group-Minutes-25-04-23-Edited-SW.pdf>

*provisions designed to protect the rights for those discriminated against while accessing education, goods and services.*⁴¹

The post-pandemic administration of employment tribunals in Scotland remains challenging, although many concerns pre-date the pandemic. The current roadmap recognises that *‘Waiting times are too long in parts of the country. In some locations, our physical estate is too small, too frail, or both. ECM, the new case management system for Employment Tribunals introduced by HMCTS in the spring of 2021, has so far failed to produce reliable management data.’*⁴² More legal officers and judges are being recruited, and administrative reforms are introduced, including video hearings. More controversially, there is a proposal to move towards more judge-only hearings, doing away with lay members. The failed introduction of fees for those bringing claims to the employment tribunals was based on assumptions that there are too many claims and that it is too easy for people with nothing to lose to lodge deliberately vexatious claims. A study of Citizen Advice cases indicated that rather than too many, too few claims go forward, discouraged by the real and imagined costs of making a claim. Financial compensation is usually the only (less than satisfactory) remedy offered⁴³.

The Employment Rights Act 1996 is the UK's primary consolidating statute for individual for employment rights. This Act covers areas such as the contract of employment, unfair dismissal, redundancy payments, protection of wages, zero-hour contracts, Sunday working, suspension from work, flexible working and termination of employment⁴⁴. However, employment rights are also regulated in many other Acts of Parliament and statutory instruments, including;

- National Minimum Wage Act 1998
- Employment Relations Act 1999
- The Maternity and Parental Leave Etc. Regulations 1999
- Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- Transfer of Undertakings (Protection of Employment) Regulations 2006
- The Equality Act 2010
- Agency Workers Regulations 2010
- Bribery Act 2010

⁴¹ J.Merchant, THE EMPLOYMENT TRIBUNAL – WHAT COULD BE DONE WITH THE DEVOLUTION OF ADMINISTRATIVE POWERS? (June, 2021) <https://www.thompsons-scotland.co.uk/blog/employment-law/devolution-of-employment-tribunals>

⁴² Employment Tribunals (Scotland), *A road map for 2022/23*, <https://www.judiciary.uk/wp-content/uploads/2013/08/ET-road-map-31-March-2022-final.pdf>

⁴³ E.Kirk, *The ‘problem’ with the Employment Tribunal System: reform, rhetoric and realities for the clients of Citizens’ Advice Bureaux*, (Work, Employment and Society, 32(6)), pp. 975-991.

⁴⁴ LexisNexus, Summary of ERA 1996, <https://www.lexisnexis.co.uk/legal/legislation/uk-parliament-acts/employment-rights-act-1996-c18>

- Data Protection Act 2018
- Working Time Regulations 1998

Some of the substantive rights these Acts grant are discussed in the sections below. However, there are few practical difficulties in devolving the employment rights elements of the above legislation. Employment law is already devolved to Northern Ireland, which means anti-union legislation, such as the Strikes (Minimum Service Levels) Act 2023, has not been implemented in Northern Ireland, just as significant public service industrial action is threatened⁴⁵. The devolution of employment law would also be an opportunity to rationalise and simplify employment rights in Scotland. For example, the UK has three types of employment status: employee, worker and self-employed. Devolution would be an opportunity to create a single status of worker. The Labour Party has committed to doing this if it wins the next general election.

Human Rights

The UK is a signatory to the European Convention on Human Rights (the Convention), which sets out several rights relevant to employment law. The Convention is entirely separate from the European Union (EU) and is not affected by Brexit. For as long as the Conservatives are in power, British membership of the Convention remains a live political debate primarily linked to immigration policy. These employment-related rights include:

Article 2: Right to life

Article 3: Prohibition of torture and of inhuman or degrading treatment or punishment

Article 4: Prohibition of slavery and forced labour

Article 6: Right to a fair trial

Article 8: Right to respect for private and family life, home and correspondence

Article 9: Freedom of thought, conscience and religion

Article 10: Freedom of expression

Article 11: Right to freedom of peaceful assembly and association

Article 12: Right to marry and found a family

Article 14: Freedom from discrimination in respect of Convention rights

The Convention rights are incorporated into UK law through the Human Rights Act 1998, which, as a 'protected enactment', cannot be amended by the Scottish Parliament. However, the Convention and

⁴⁵ P.Coulter, NI strike: Minimum service strike law 'should apply to NI', says Buckland, (BBC, 14 Jan. 2024), <https://www.bbc.co.uk/news/uk-northern-ireland-67957510>

other human rights can, and have been, explicitly incorporated into Scottish legislation⁴⁶. Employment tribunals and higher courts must take into account the case law of the European Court of Human Rights (ECHR). Human rights are generally (outwith 'public authorities') incorporated into general employment law rather than providing a stand-alone basis for a claim⁴⁷.

The forthcoming Human Rights Bill for Scotland is an opportunity for legislative action on employment law in respect of devolved matters. In the 2023 consultation, the current proposals included the proposal to give domestic effect to the International Covenant on Economic, Social and Cultural Rights⁴⁸. This includes Article 6, *'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right'* and Article 7, which includes *'Safe and healthy working conditions'*. The Bill may also amend the functions and powers of the Scottish Human Rights Commission, which is currently prohibited from undertaking casework.

Assuming the UK Parliament does not withdraw from the Convention treaty or repeal the Human Rights Act 1998, then the Convention rights and the decisions of the ECHR will continue to apply the employment and other related legislation even if devolved to the Scottish Parliament. These rights are based on an international treaty, so they would not typically be considered appropriate for devolution and probably unnecessary for employment-related law. However, as Katy Clark MSP argues, *'There is considerable scope for the Scottish Parliament to have a greater role in setting foreign policy and providing democratic oversight within the UK to ensure that controversial projects are not foisted on Scotland against the will of the Scottish people.'*⁴⁹ Devolution has also created a constitutional framework for the ECHR as a minimum level of human rights protection. It should continue to provide opportunities to close the accountability gap in protecting human rights.

The Convention is not the only treaty that covers human rights and impacts on employment law. The UK has been a member of the International Labour Organization (ILO) since 1919. ILO standards and conventions are not legally binding in the quite the same way as the ECHR but they can be taken into

⁴⁶ K.Boyle and N.Busby, Human Rights and Devolution, (Human Rights Consortium Scotland, Aug.2021), <https://hrcscotland.org/wp-content/uploads/2021/09/Final-Devolution-and-Human-Rights-Dev-as-a-vehicle-for-HR-protection-and-progress-Sept-2021.pdf>

⁴⁷ D.Leckie, The Human Rights Act and employment law, (Law Society of Scotland, Oct. 2000), <https://www.lawscot.org.uk/members/journal/issues/vol-45-issue-10/the-human-rights-act-and-employment-law/>

⁴⁸ Scottish Government, *A Human Rights Bill for Scotland: consultation*, (June 2023), <https://www.gov.scot/publications/human-rights-bill-scotland-consultation/documents/>

⁴⁹ K.Clark, Global Relations, (Red Paper Collective), https://redpapercollective.net/?page_id=162

account by tribunals and courts⁵⁰. The IER and others have highlighted the UK Government's failings in their obligations concerning ILO conventions on Freedom of Association⁵¹.

Trade unions

Under UK law, trade unions have certain rights and responsibilities. For example, they have rights to be consulted over some kinds of organisational change, including TUPE transfers and redundancies. Workers also have rights in respect of trade unions, for example, a right not to be treated less favourably for joining or not joining a union. Trade union representatives have some limited additional protections from detrimental treatment or dismissal.

Trade unions can be officially recognised by employers in workplaces, and there is a legislative process that unions can turn to when seeking statutory recognition. The recognition procedure can be triggered when unions represent over half of employees or particular groups of employees in a workplace and where a majority of the employees favours union recognition. Alternatively, unions can rely on their 'industrial power' to persuade employers of the potential benefits of recognition, without recourse to the statutory procedure. ACAS provides a collective conciliation service which works to prevent industrial disputes from escalating into formal industrial action. The right of trade unions to organise industrial action and the rights of workers to take industrial action are severely circumscribed by law.

Legislation also covers how trade unions are regulated and administered and how they operate political funds. This is highly regulated to reflect trade unions' statutory protections, such as the protection from suit for damages caused by lawful industrial action. The Certification Officer is responsible for statutory functions relating to trade unions and employers' associations, including maintaining an official list of independent trade unions and employer associations and their annual returns⁵². Independent trade unions require a certificate of independence that distinguishes them from staff associations, employee forums and works councils that an employer effectively controls. They can also investigate complaints against trade unions and reach binding decisions. If employment law were devolved, it would probably require the establishment of a Scottish Certification Officer. This is analogous to freedom of information legislation, where there is a Scottish Information Commissioner for devolved legislation. Having a separate Certification Officer would reflect a different approach in Scotland, although, like other devolved bodies, it would liaise with its UK counterparts, share research, etc.

⁵⁰ ILO, Conventions and Recommendations, <https://www.ilo.org/dyn/normlex/en/f?p=1000:12020:::>

⁵¹ K. Ewing, Lord Hendy, A. Moretta, *Human Rights at Work: The United Kingdom, the ILO and the European Social Charter* (Joint Committee on Human Rights, March 2023), <https://committees.parliament.uk/writtenevidence/119587/pdf/>

⁵² Certification Officer, <https://www.gov.uk/government/organisations/certification-officer>

As the primary purpose of employer associations regulated by the Certification Officer is the regulation of relations between employers and trade unions, it would make sense for those duties to be devolved as well. Other employer associations provide employment-related services to their members but are not regulated under this legislation. Some already operate on a Scotland-only basis or have significant devolved offices. There is a broader issue about the need to strengthen employer voice to engage more effectively⁵³. The devolution of employment law would incentivise employers to organise better.

The primary legislation regulating trade unions and industrial action is the Trade Union and Labour Relations (Consolidation) Act 1992. UK legislation dealing with trade unions and industrial relations can impact on devolved areas. For example, the new minimum services legislation covers devolved public services and the reporting requirements for time off for trade union duties affects devolved public services.

Wages

Creating a high-wage wellbeing economy is a National Performance Indicator for the Scottish Government with cross-party support. Promoting the voluntary Scottish Living Wage has been proportionately more successful in Scotland than in the rest of the UK. This is thanks to the promotion of the Scottish Living Wage through Scottish Government-funded living wage campaigns and its enforcement through procurement and grants.

Wages are mainly set through individual contracts of employment and collective bargaining. The expansion of collective bargaining would make the most significant contribution to wage growth. OECD and ILO studies show that when collective bargaining is weak, there is a risk that many workers' wages will be clustered around the minimum wage, dragging down median or mean wages. Collective bargaining is linked to lower staff turnover, higher innovation, reduced staff anxiety relating to the management of change and a greater likelihood of high-performance working practices⁵⁴.

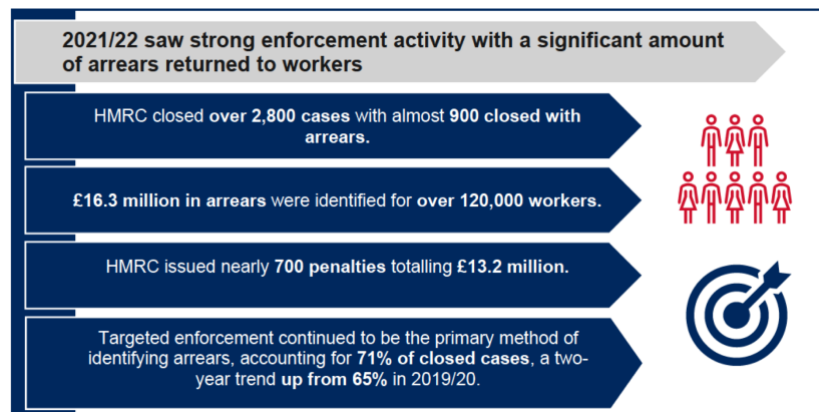
By statute, employers must pay a minimum amount on average for the hours worked. This is called (confusingly and inaccurately) the National Living Wage (NLW) for those aged 23 or over and the National Minimum Wage (NMW) for those aged under 23 or an apprentice⁵⁵. The UK Government reviews minimum wage rates annually, usually updating them in April. HMRC can enforce these rates

⁵³ M.Simms, (2023) *The dynamics shaping experiences and prospects of employer coordination in a liberal market economy: the case of Scotland. Economic and Industrial Democracy*, (doi: 10.1177/0143831X231180936)

⁵⁴ TUC, *How Collective Bargaining can deliver a better deal at work*, (Sept. 2019)
<https://www.tuc.org.uk/sites/default/files/2019-09/Astrongervoiceforworkers.pdf>

⁵⁵ National Minimum Wage, <https://www.gov.uk/national-minimum-wage-rates>

and regularly names and shame companies that are found to be in breach of the statutory provisions⁵⁶. Breaches tend to be related to uniform provision, tips, overtime, commission and other benefits.



While the UK Government claims ‘strong enforcement’, in practice, enforcement is targeted and complaint-led. As worker knowledge of employment rights is generally low, this approach has limitations. As a TUC study highlighted, the scale and nature of non-compliance with basic workplace rights is staggering. The Low Pay Commission estimates that over 420,000 workers received less than the national minimum wage in April 2019, before the pandemic. The TUC analysis of labour market enforcement statistics shows that the UK would need an additional 1,797 labour market inspectors to meet the ILO benchmark of one labour market inspector per 10,000 workers⁵⁷. UNISON research indicated that almost half of homecare workers believe they are not paid for all their work hours.

The current age rates result in what many describe as age discrimination. Workers aged 18 to 20 working for the minimum wage full-time this year would have earned £13,865, while those aged 23 and over would have earned £19,288 – a difference of £5,423. In a Westminster debate late last year, Mhairi Black, the SNP’s deputy leader at Westminster, said alternatively, the UK Government could devolve the power to set minimum pay rates, and the Scottish Government would bring in the changes instead, saying, ‘It is disgusting that 16 to 20-year-old workers can be over £5,000 worse off just for being younger.’⁵⁸

There are few practical reasons why statutory minimum legislation should not be devolved, other than practical challenges for employers on both sides of the border. It would fit well with the Scottish Government’s economic policies and would enable both higher rates of pay and better enforcement.

⁵⁶ DBT, National Minimum Wage enforcement statistics, (April 2023), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1149863/enforcement_and_compliance_report_2021_2022.pdf

⁵⁷ TUC: TUC action plan to reform labour market enforcement, <https://www.tuc.org.uk/sites/default/files/2021-05/Enforce%20report%20draft%20Final%20Version%202020%20110521.pdf>

⁵⁸ D.Bol, *SNP demand minimum wage reforms as younger workers set to lose out*, (Herald, 30 Dec. 2024), <https://www.heraldscotland.com/news/24018483.snp-demand-minimum-wage-reforms-younger-workers-set-lose/>

It could either form part of a new labour market inspection regime or, like HMRC, form part of Scottish Revenue, the Scottish Government's tax agency.

Equal Opportunities and discrimination

The substantive legislative provisions relating to equal opportunities and discrimination are set out in the Equality Act 2010. This is a reserved area and the Scottish Parliament's powers are restricted mainly to promoting equality, by for example introducing gender quotas regarding public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas, a provision that has never been enforced before.

The Scottish Government has designated a range of equal opportunities issues in their National Outcomes and have National Indicators of progress in the National Performance Framework⁵⁹. They have established the Equality Unit in the Government to take forward its cross-cutting work on equality. The Equality Strategy provides a framework for all Departments to tackle prejudice and discrimination and promote equal opportunities. The Equality and Human Rights Commission (EHRC) published a report, 'Is Scotland Fairer?' in 2015⁶⁰. They gathered data and evidence based on ten policy areas, looking at the degree of change and the scale of impact on life chances. They concluded that there was a need to improve the evidence on how fair society is and make improvements in a range of policy areas. The Scottish Government is also consulting on a Learning Disability and Neuro Diversity Bill with a specific section focusing on employment. It is estimated that employment rates are 4-8% for people with learning disabilities and 29% for autistic people, compared with Scotland's national employment rate of 82.5% for non-disabled people and 50.7% for disabled people⁶¹. It is hard to see how effective action is possible without addressing the implications of employment law.

The Equality and Human Rights Commission operates across Great Britain (GB) and shares its human rights remit in Scotland with the Scottish Human Rights Commission (SHRC). The SHRC was established in 2008, is accountable to the Scottish Parliament, and, like the Equality and Human Rights Commission, is one of the UK's three national human rights institutions. The Equality and Human Rights Commission's human rights remit in Scotland extends to those areas outside the legislative competence of the Scottish Parliament. The Scottish National Action Plan for Human Rights (SNAP) aims to make human rights a reality for everyone. The SHRC, Scottish Government, Equality and Human Rights Commission, public sector organisations, civil society organisations and others work collectively to deliver SNAP.

⁵⁹ Scottish Government, *National Performance Framework*, <https://nationalperformance.gov.scot/what-it>

⁶⁰ EHRC, *Is Scotland Fairer?* (2015), https://www.equalityhumanrights.com/sites/default/files/2021/is-scotland-fairer-2015_0.pdf

⁶¹ Scottish Government, *Learning Disabilities, Autism and Neurodivergence Bill: consultation*, (Dec. 2023), <https://www.gov.scot/publications/learning-disabilities-autism-neurodivergence-bill-consultation/pages/21/>

The EHRC has been criticised in recent years over several issues. Most recently, The Global Alliance of National Human Rights Institutions (Ganhri), which accredits bodies based on internationally recognised standards, has launched a special review of the EHRC over allegations of politicisation of the regulator and a “determinedly anti-trans stance”⁶². The EHRC intends to defend its accreditation status, arguing that the complaint is inaccurate. The EHRC has previously been criticised for racism, with a legal claim taken against it by staff. It dropped an investigation into a complaint by an opposition MP alleging a coverup by the DWP over the treatment of disabled people. UK Government appointments to the EHRC have also been criticised.

The SHRC deals with devolved laws, and therefore, if further aspects of equality legislation were devolved, these would come under their remit, with some changes to its title and statutory remit. Cooperation on shared responsibilities would remain possible.

Apart from the limited areas that are devolved, the Scottish Parliament can use criminal law or the devolved education, health or housing powers to address equal opportunities. These are indirect measures that are not primarily about ‘prevention, elimination or regulation of discrimination’. However, with a UK Government that has taken an activist stance concerning the powers of the Scottish Parliament, there is a risk that this reservation could be used to limit devolved responsibilities. As a legal opinion for the EHRC commented, *‘any form of state intervention, even light-touch encouragement and inducement of good behaviour, could be seen as a form of regulation.’*⁶³

In 1997 an amendment to the Scotland Bill in 1997 was proposed by Roseanna Cunningham MP, which would have made equal opportunities a fully devolved matter. She argued that this would allow the Scottish Parliament to address particularly Scottish issues like sectarianism and to go further than UK equality legislation. Many organisations in Scotland, including trade unions and SCVO, have made similar arguments in submissions to the Calman and Smith commissions. The objection was the usual common regime argument, as the Minister said, it *‘would undermine the level playing field for business and individuals in employment and other matters in the UK.’* The link between EU Directives and equal opportunities no longer applies, and anyway, the Scottish ministers regularly implemented EU Directives on other issues. It can also be argued that since 1998, the introduction of positive equality duties throughout Britain and the introduction of equal opportunities duties in Scotland, Wales and London, has changed the legal landscape.

More relevant is the close link between discrimination law and employment law. For example, employment tribunals are used to adjudicate discrimination law claims arising in the context of

⁶² H.Siddique, UK equality watchdog faces review after new complaint over trans stance, (Guardian, November 2023), <https://www.theguardian.com/society/2023/nov/28/uk-equality-watchdog-ehrc-complaint-trans-stance#:~:text=In%20April%2C%20the%20EHRC%20faced,were%20%20justifiable%20and%20proportionate>”.

⁶³ C. O’Cinneide, The place of equal opportunities in the devolution settlement: a legal analysis, (EHRC, 2009), https://www.equalityhumanrights.com/sites/default/files/research_report_33_the_place_of_equal_opportunities_in_the_devolution_settlement_-_a_legal_analysis.pdf

employment. As this paper makes the case for the devolution of employment law, this link would be maintained by devolving equal opportunities and discrimination to the Scottish Parliament.

A possible halfway house could be the devolution of equal opportunity standards in areas of devolved responsibility. Another option, as proposed by the STUC to the Smith Commission, would be the devolution of enforcement powers. Schedule 5 could also be amended by deleting the reference to 'regulation' in the definition of reserved equal opportunities. This would mean that the 'prohibition and elimination' of discrimination would remain reserved. However attractive though compromise often is, these approaches might simply create new lines of conflict and legal action.

The simplest way to legislate for the devolution of equal opportunities would be to remove equal opportunities from the list of reserved functions by deleting paragraph L2 of Schedule 5. This would enable the Scottish Parliament to pass equal opportunities legislation throughout the full range of devolved matters. This would still leave equal opportunities legislation to the UK Parliament for reserved areas in Scotland. There is a case to be made that all equal opportunities legislation should be devolved, but that is outwith the scope of this paper - for example, the statutory provisions in relation to discrimination in the provision of goods and services.

There can be no fundamental constitutional objection to devolving responsibility for equal opportunities. Northern Ireland has separate equality legislation, including a prohibition on discrimination on the grounds of political opinion and a set of positive equality duties imposed on private employers, neither of which has a counterpart elsewhere in the UK. In addition, the Human Rights Act provides a minimum floor of rights protection across the UK.

Health and safety and personal injury

Health and safety legislation and the enforcement institutions are reserved, but there are major differences in how offences are prosecuted. In Scotland, Health and Safety Executive (HSE) inspectors report matters they have investigated to the specialist Health and Safety Investigation Unit within the Crown Office and Procurator Fiscal Service (COPFS), who decide whether or not to institute criminal proceedings in the public interest. Civil actions for personal injury (Delict) are already devolved and are resolved in the courts using long-established Scots Law rules. There are areas of common responsibility, and the Partnership on Health and Safety in Scotland (PHASS) supports tripartite collaboration between employers, employees and government on workplace health and safety in Scotland.

There has been a long-standing campaign to devolve health and safety to Scotland, or at the very least, enforcement by creating a Scottish HSE. Three of the five parties involved in the Smith Commission's negotiations, Scottish Labour, the SNP and the Scottish Greens, publicly pushed for the creation of a Scottish HSE. As Unite the Union argued at the time, *'We hoped for full powers on workplace health and safety law to ensure the buck stops with the Scottish government in tackling the average 20 fatal workplace accidents a year in Scotland and to make a better fist of curbing lax workplace health and safety regimes.'*

There has been significant criticism of the HSE when it comes to enforcing health and safety provisions. As Thompsons Scotland put it, *‘Over several years, the Health and Safety Executive has had to endure budgetary constraints imposed under austerity and we have seen the effect of this on its work, with fewer and fewer accidents investigated and delays in criminal cases for Health and Safety crimes being brought to Court.’*⁶⁴

These criticisms have been amplified by Scottish Hazards and the STUC, who point to a range of HSE services cut in recent years.⁶⁵

Scottish Hazards has set out a detailed case for devolution of occupational health and safety regulation and enforcement, as they did in a submission to the Smith Commission⁶⁶. They highlight that the level of work-related fatalities and major injuries in Scotland has been consistently higher than that of Great Britain as a whole. A conservative estimate of work-related deaths in Scotland is 2000 per year when workplace disease is added to fatal accidents. It is often argued that this reflects a higher proportion of workers in hazardous sectors, but even if true, this reinforces the case for a different approach in Scotland. The link with devolved powers is highlighted in a paper entitled “The Scottish Safety Anomaly”, which says, *‘Scotland has a Minister of Health, with a broad portfolio of authority. Paradoxically, the Minister’s brief for the health of Scotland’s population should stop at the factory gate and office door – precisely where the majority of the working population spends most of its waking hours.’*⁶⁷

The only objection to devolution is the rather tired argument that this would lead to different standards across the UK. This train left the station with the Scotland Act 25 years ago. As highlighted above, even the Calman Commission took a more nuanced position about health and safety, recognising the link to prosecution powers and concluding *‘that there is no reason in principle why health and safety (or elements of enforcement) could not be devolved.’*

Social security

The UK Government is responsible for providing most working-age and pension-age social security benefits. In 2023-24, it is estimated that around 79% of benefit spend (including pension-age benefits) in Scotland is reserved to Westminster. This primarily relates to the state retirement pension and

⁶⁴ Thompsons Solicitors Scotland, *Devolve Health and Safety*, (April 2015), <https://www.thompsons-scotland.co.uk/blog/main/devole-health-and-safety>

⁶⁵ Scottish Hazards, The Scotland Bill, specifically paragraph 12 quoting Sheriff Davidson’s finding in a FAI. https://archive2021.parliament.scot/S4_ReferendumScotlandBillCommittee/Scottish_Hazards.pdf

⁶⁶ Scottish Hazards, Submission to the Smith Commission, <https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171017/https://www.smith-commission.scot/wp-content/uploads/2015/01/B00201.pdf>

⁶⁷ C.Woolson & M.Beck, Scottish Critical Policy Studies, Position Paper No.3.

Universal Credit. The Scotland Act 2016 devolved some social security powers to the Scottish Parliament, which enabled Scotland to set up its own system. These include Employment-injury assistance (s33, Social Security (Scotland) Act 2018), although the Industrial Injuries Disablement Benefit is currently delivered by the UK Government's Department for Work and Pensions on behalf of the Scottish Government. The delivery of this benefit is expected to become the responsibility of the Scottish Government in March 2026. Mark Griffin MSP has proposed reform in his Scottish Employment Injuries Advisory Council Bill. This has been opposed by a majority on the Social Justice and Social Security Committee, although the Convener recognised: *'The current Industrial Injuries Scheme, at over 70 years old, is inadequate. It fails to take account of modern work practices and diseases and does not deliver for women or people from ethnic minority backgrounds.'*

Social Security Scotland now delivers devolved Scottish benefits under these powers. This reflects some progress on the strange Calman Commission objection that *'Allowing variations in rates or conditionality could lead to "benefit tourism" as claimants moved to areas that operated more generous or less onerous regimes.'*

There is an ongoing debate on the case for further social security devolution, with advocates pointing to the inadequacy of benefits levels, administration issues, and links to the economy⁶⁸. Others, including trade unions, highlight the risks to the Scottish Government budget of including cyclical benefits or the state retirement pension given demographic change in Scotland. However, most of this debate is outwith the scope of this paper.

Employment-related benefits such as Employment and Support Allowance (ESA) if you have a disability or health condition that affects how much you can work, or Jobseeker's Allowance (JSA) to help you when you're looking for work, are reserved. The Bevan Commission in Wales considered this issue in detail and recommended that these benefits should remain reserved⁶⁹. They did not believe this was a good fit with other devolved powers, had budgetary risk and could not identify any interest in devolving these benefits. These arguments would all appear to apply to Scotland as well.

Occupational pensions

There are three parts to pension provision in the UK. The state pension is determined mainly by National Insurance contributions, private pensions that individuals purchase themselves, and occupational pensions that usually derive from the contract of employment and is, therefore, a relevant consideration in this paper.

⁶⁸ Scottish Government, *Social security in an independent Scotland*, (Dec. 2023), <https://www.gov.scot/publications/social-security-independent-scotland>

⁶⁹ Bevan Commission, *Making welfare work for Wales: Should benefits for people of working age be devolved?* <https://www.bevanfoundation.org/resources/making-welfare-wales-benefits-people-working-age-devolved/>

The Pensions Act 2008 gives every 'jobholder' (subject to a wage threshold) the right to be automatically enrolled by the employer in an occupational pension unless the jobholder chooses to opt-out. This is a simple 'defined contribution' scheme in which typically fairly low contributions from the worker and employer are invested at their risk to provide a pension. There is also the National Employment Savings Trust, which was established as a public option competing with private asset managers. Collectively bargained pensions are usually better and historically had "defined benefits". On retirement, people receive money based on their final salary or a career average of earnings for the rest of their lives. Living longer does not become an individual risk but is collectivised. Sadly, this type of quality pension provision in the UK has declined as employers preferred to shift the risk onto workers.

While the state pension should remain at the UK level, public service pensions for devolved services should be fully devolved. At present, devolution is limited to regulatory powers only. Experience with the UK Public Service Pensions Bill confirmed the trade union view that a one-size-fits-all UK approach is not appropriate for this issue. In their submission to the Smith Commission, the EIS highlighted the problem, *'Recent negotiations with the Scottish Government on the Scottish Teachers' Superannuation Scheme have highlighted an anomaly which, ultimately, led to the collapse of these talks. Essentially, while the regulatory administration of similar schemes is devolved to the Scottish Parliament, overall control of Public Sector Pensions Policy remains a reserved matter. This has resulted in the Westminster Government (i.e. the Treasury) holding a veto over decisions covering the Scottish Teachers' Scheme despite the fact that the enabling regulations require to be approved by the Scottish Parliament.'*⁷⁰

That leaves occupational pensions in the private sector. There are contractual provisions, statutory protections and a range of regulatory provisions. The Pensions Act 2004 includes many of these provisions and originally arose from the 1992 Robert Maxell Mirror Group pensions scandal. There is also the Pensions Regulator, which oversees standards and compliance with trustee duties. And a Pensions Ombudsman who will investigate complaints and take informal action. If all else fails, the Pension Protection Fund guarantees a pension sum is ensured, up to a statutory maximum. A levy on all pension schemes funds it.

Occupational pensions are a devolved matter for Northern Ireland, so there is no reason in principle why they could not be in Scotland. The UK Government has a poor record on occupational pensions, overseeing a massive loss in quality pension provision. In 2021/22, most individuals (90%) receiving a private pension payment did so only through a Defined Benefit (DB) pension or annuity. However, only around half (51%) of individuals accessing a private pension for the first time did so through a DB

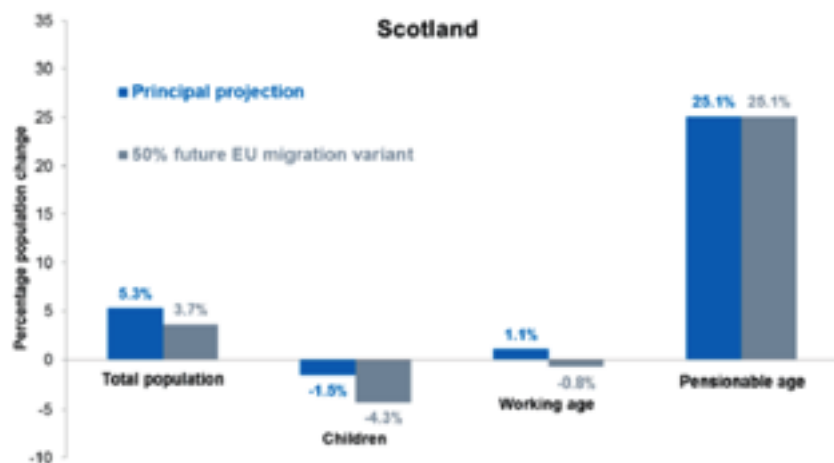
⁷⁰ EIS submission to the Smith Commission,
<https://webarchive.nationalarchives.gov.uk/ukgwa/20151202171052/http://www.smith-commission.scot/resources/submissions-organisations/>

pension or an annuity in 2021/22, compared to 62% in 2015/16⁷¹. This trend is probably irreversible, with 90% of private sector DB schemes now closed to new entrants, and recent improvements in funding levels have led to more scheme buyouts. It is difficult to identify many benefits of establishing a separate pensions regulator, ombudsman and protection fund, with the associated costs. Pensions are one of the few policy areas where scale brings benefits, and there is a legitimate case for further consolidation in pension funds. On balance, this is probably not an employment law area ready for devolution.

Immigration

Immigration is a reserved power (Scotland Act 1998, Sch.5 B6) and has important implications for employment, both as an economic driver and through the regulations that relate to employment. For example, it is a criminal offence for an employer knowingly to employ an individual who does not have permission to work in the UK, and employers must check specified documents with the UK Home Office. There is a points-based system for foreign nationals wishing to work in Scotland and the UK, with skilled worker and global business mobility routes. These rules have recently been controversially tightened to make it even more difficult to recruit workers into hard-to-fill vacancies in sectors like social care by not allowing them to bring dependents on their visa and reducing the number of jobs on the shortage occupation list⁷².

Immigration has been part of the devolution debate for some time. This debate recognises that different parts of the UK have differing needs for immigration that are not accommodated in the current ‘one-size-fits-all’ model. This challenge is not unique to the UK, and other countries have established mechanisms to allow for varying levels of devolution. Arguably, there is nowhere in the UK where the economic and social case for immigration is more robust than in Scotland. Our working-age population is not projected to increase at the same rate as the rest of the UK, and the number of working-age Scots to support our ageing population won’t be available without immigration. Since 2007, Scotland has relied on migration for population growth more than any other region in the UK. 63%



⁷¹ DWP, *Helping savers understand their pension choices*, (July 2023),

<https://assets.publishing.service.gov.uk/media/64ac1495b504f70012cdb883/helping-savers-understand-their-pension-choices-consultation.pdf>

⁷² House of Commons Library, *Changes to legal migration rules for family and work visas in 2024*, (Dec. 2023),

<https://commonslibrary.parliament.uk/research-briefings/cbp-9920/>

of Scotland's growth has attributed to immigration, compared to 53% in the rest of the UK. Brexit and UK immigration policy threaten this population growth with adverse economic consequences and staffing of our public services.

Devolved immigration initiatives have been deployed in Scotland, most notably through the Fresh Talent initiative introduced by the then First Minister, Jack McConnell, in 2004 to counter Scotland's falling population. This limited initiative encouraged overseas students to stay in Scotland after completing their courses. Dr Eve Hepburn set out three sets of levers (soft, mid-range, and hard) for differentiating the UK's immigration system in a paper for the Scottish Parliament's External Relations Committee in April 2017⁷³. This paper points to the devolution of exclusive competencies over immigration on the Canadian or Quebec model – even if that is within an agreed framework of regional visas. The main criticism of this approach is the risk of leakage of migrants to other parts of the UK once the geographical limitation period ends. However, the international evidence in the paper shows that high retention rates can be achieved. Scotland is not an isolated, low-wage, underdeveloped nation comparable to regions in other countries that have sustained lower retention rates. There is a good quality of life, a developed economy and a generally welcoming population. While we need to do more on these issues, these factors favour the higher retention rates we have seen internationally – as high as 90% in Quebec.

The Scottish Government proposes a Scottish visa to enter the UK that would let migrants live and work in Scotland, with a Scottish tax code⁷⁴. This would be similar to the Canadian Province Nominee Programme (PNP), which is less extensive than the Quebec model. This approach has broad support within Scotland, including business organisations and trade unions.

Company law

Company law is generally reserved, and the Scotland Act achieves this by reserving 'business associations' (Scotland Act 1998, Sch.5 C1). But company law interacts with other aspects of Scots law, including the procedures courts follow when winding up insolvent companies. The boundary drawn in the Scotland Act between these two areas of law is complex. Bankruptcy law in Scotland has a different history from the law in England and Wales and has always been subject to a separate legal framework.

The employment law aspects include removing directors of a company. Directors can be removed for various reasons, including misconduct or negligence, loss of qualification, insolvency or bankruptcy, shareholder consent, or by board resolution under specific circumstances (Companies Act 2006, s.168). In addition, there are a range of other provisions in the Companies Act that relate to the actions and conduct of directors, which would be challenging to separate from the broader legislation given

⁷³ E.Hepburn, Options for Differentiating the UK's Immigration System, (Scottish Parliament, 2017), https://archive2021.parliament.scot/S5_European/General%20Documents/CTEER_Dr_Hepburn_report_2017.04.24.pdf

⁷⁴ Migration: helping Scotland prosper (Jan 2020), <https://www.gov.scot/publications/migration-helping-scotland-prosper/pages/4/>

the critical role directors play in the running of companies. This can also apply to the running of charities and some pension schemes. There has been limited support for the devolution of company law, and Calman or Smith Commissions didn't seriously consider it, although it is devolved in Northern Ireland. The broader implications of this devolving company law are outwith the scope of this paper.

One important aspect of reserved employment law related to company law is the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)⁷⁵. These regulations apply when a business changes owner and aim to ensure that, in connection with the transfer, employment is protected. Transfers within the public sector are not usually covered by TUPE (typically covered in the legislation changing the public service), but some transfers from the public sector into the private sector are. Scottish provisions concerning public sector transfers (known as TUPE+) go further than the UK best practice guidance.

This legislation originated in an EU Directive, and the UK Government is planning to make some post-Brexit changes in relation to the threshold (10 to 50 employees) for the requirement to elect employee representatives. TUPE is viewed as primarily an employment law provision that company law and, therefore, should be devolved in line with the proposals above.

Miscellaneous provisions

There is other less apparent reserved legislation that impacts employment law.

Road transport is mainly reserved, including regulations on drivers' hours affecting bus drivers and, therefore, service schedules in devolved bus services. The rules for a vehicle carrying passengers include commercial and public service provisions, including travel in the UK and abroad. The regulations for goods vehicles depend on the vehicle's weight, the country the vehicle is driving in, and what the vehicle is used for. The main argument against devolving this legislation has been the challenges it would create for goods and passenger transport across the border. In practice, the UK provisions have not produced significant issues for devolved services, and there has not been a strong claim to separate this legislation from road transport. If that reservation were devolved, the employment aspects would also be devolved.

The regulation of some professions is devolved, and others are reserved. Those reserved include architects and most health professions. The Calman Commission listed health professional regulation as one of the matters that is best dealt with across the UK. The Commission's rationale was that this would provide clarity and assurance to patients that there is a common approach and set of standards UK-wide and facilitate the mobility of professionals across the UK. The same could be argued for devolved professional regulation, including social work and social care. It remains an anomaly that regulating staff in an entirely devolved service like the NHS should remain reserved. No such

⁷⁵ The Transfer of Undertakings (Protection of Employment) Regulations 2006, <https://www.legislation.gov.uk/uksi/2006/246/contents>

arguments have been made for reserving the regulation of teachers or lawyers that are also devolved. Social care regulators cooperate across the UK, and a similar arrangement could apply to health professions.

Legislative Process and Institutions

As explained above, reserved powers are set out in the Scotland Act 1999 as amended. To legislate for the changes outlined above, in most cases, Schedule 5 would simply be amended to remove the relevant reservations. Schedule 4 (protected enactments) would only need to be amended if the Human Rights Act was to be devolved.

There would also be a requirement to establish new institutions to support the legislation. A Scottish Certification Officer, a Scottish Advisory, Conciliation and Arbitration Service, Central Arbitration Committee and the Low Pay Commission. While these would not be major bodies, Scotland could sustain such organisations, and they would cooperate with their UK counterparts as other devolved institutions do. Scotland already has a Cabinet Secretary for Wellbeing Economy, Fair Work and Energy, supported by the civil service. There would be a requirement to strengthen this department to provide the necessary oversight, support the legislation, and manage the functions of the UK Department for Business & Trade, which deals with issues such as redundancy pay in insolvency through the Redundancy Payments Service.

Devolution might also set some challenges for the capacity of the court system. One use of the new devolved powers might be to reform the employment tribunals by establishing an employment court structure. This could address the problems facing applicants without access to legal aid and create a cost recovery mechanism for applicants while retaining the vexatious claims procedure for employers. The Scottish Government commissioned an independent review of legal aid to look at reform of the current system. It recommended a citizen-centred system which was flexible and focussed more on matching advice provision to identified need. It envisaged greater coordination between the services provided by lawyers and those of other publicly funded advice providers⁷⁶. The issues highlighted in this report would need to be considered in relation to employment law.

The current system has a particular problem with unrepresented applicants who struggle with the legal complexities of employment tribunals. The lack of a fee structure is also an issue for many represented clients, including trade union legal schemes that, in practice, rely on an element of cross-subsidy with personal injury work. There would also be an opportunity to reform enforcement proceedings when an employment tribunal makes an award. The current Scottish system of instructing

⁷⁶ *Rethinking Legal Aid: an independent strategic review*, (2018), <https://digitalpublications.parliament.scot/ResearchBriefings/Report/2021/9/23/5d9b4fd6-0341-478a-a64d-d5cb41099c6d#>

Sheriff Officers is more complex and expensive than the English system., particularly for unrepresented applicants.

The cost structure also impacts the interest and capacity of the legal profession to engage in employment law in Scotland. Devolution and the reforms discussed in this paper should incentivise law firms and law centres to build capacity, along with more Advocates specialising in this field. The same might also be true for universities and other civil society institutions that have a role to play in employment law.

4. Powers for a Purpose

This paper does not focus on setting out another wishlist of how employment rights could be improved through the devolution of employment law. However, there is no point in devolving powers if they are not used for progressive purposes – often described as powers for a purpose.

The relationship between a worker and his or her employer is typically heavily weighted in favour of the employer. The only way for workers themselves to ensure dignity and respect in the workplace is through collective action to determine their terms and conditions. A trade union is the prime mechanism for addressing the power disparity between workers and employers. Unions must be able to take collective action either in defence of or to advance members' interests. Workers must be free to support others in need. At the very least, we need employment legislation that meets the standards set by the International Labour Organisation conventions.

The Scottish Government paper, *Building a New Scotland: A stronger economy with Independence*, sets out specific measures that they claim would go much further to strengthen the Fair Work agenda in an independent Scotland, 'developing a legal framework that more effectively addresses the workplace challenges of the 21st century. It would give us an opportunity to redesign the system to better meet the needs of Scotland's workers and employers.'⁷⁷

Specific measures proposed in the paper include:

- establishing a Scottish Fair Pay Commission to lead a new approach to setting a national minimum wage, working with employers, trade unions and government
- improving pay and conditions with a single rate minimum wage for all age groups and better access to flexible work to help parents and carers
- repealing the UK Trade Union Act 2016 as part of developing an approach to industrial relations which suits both workers and employers
- introducing a law to help workers organise co-operative buyouts or rescues when a business is up for sale or under threat
- legislating to support workers in precarious employment and banning the practice of staff being made redundant and re-hired on reduced wages and conditions
- increasing transparency in pay reporting and data to address gender, ethnicity and disability pay gaps and building on Scottish Government work to break down barriers to employment

The Institute of Employment Rights published a Charter of Workers' Rights for Scotland after extensive consultation (including a Jimmy Reid Foundation submission), and it was launched at the STUC in

⁷⁷ Scottish Government, *A New Approach to Work*, (Oct. 2022), <https://www.gov.scot/news/a-new-approach-to-work/>

2019⁷⁸. This Charter focuses on the actions that can be taken under existing powers, moving Fair Work from voluntarism to enforceable standards. The recommendations in the Charter include a cabinet minister responsible for industrial relations, a robust system of enforcement, strengthening procurement and establishing sectoral collective bargaining. If employment were devolved, many of the constraints to the implementation of this Charter would disappear, and the Scottish Government could implement the IER's broader Manifesto for Labour Law⁷⁹ that recommends:

- Establishing a Ministry of Labour
- Restoring sectoral collective bargaining
- Strengthening trade union rights – including the right to strike
- Strengthening statutory rights
- Ensuring all people in employment are granted the full suite of rights from day one on the job
- Establishing a robust enforcement system

These proposals go further than UK Labour's current proposals on employment rights. If a Labour Government is elected later this year, unions will want to focus on the full and speedy repeal of the Trade Union Act 2016 and the Minimum Service Level legislation. Unions will also want to include other reforms, such as electronic pre-strike balloting, in that legislation. Labour's New Deal for Working People has specific commitments on employment rights, including banning zero-hours contracts, outlawing bogus self-employment, and ending qualifying periods for basic rights. This will include unfair dismissal, sick pay, and parental leave, giving working people under Labour rights at work from day one. Other proposals are somewhat vaguer, such as updating trade union legislation '*so it is fit for a modern economy and empower working people to collectively secure fair pay, terms and conditions.*'⁸⁰ Trade union experience implementing this sort of commitment in 1997 demonstrates that this may not be a quick process, and it has already been watered down in the National Policy Forum⁸¹. All unions (except Unite) on the NPF voted for the changes, but many share the concerns raised by Unite over implementation.

Even if the Labour plan is implemented, it falls short of creating the industrial relations structure the Labour Movement in Scotland aspires to. For example, in respect of sectoral bargaining, where a collective agreement covers all workers in each sector of the economy, which is the norm in

⁷⁸ IER, *Charter of Workers' Rights for Scotland*, (IER, April 2019), <https://www.ier.org.uk/projects/charter-of-workers-rights-for-scotland/>

⁷⁹ IER, *Manifesto for Labour Law*, (IER, 2016), <https://www.ier.org.uk/manifesto/>

⁸⁰ UK Labour, *A New Deal for Working People*, (Sept. 2022), <https://labour.org.uk/wp-content/uploads/2022/10/New-Deal-for-Working-People-Green-Paper.pdf>

⁸¹ Labour List, *Key NPF changes to Labour's New Deal for Working People*, (Sept. 2023), <https://labourlist.org/2023/09/labour-national-policy-npf-new-deal-workers-rights/>

Scandinavia, as the notoriously anti-union Elon Musk is currently discovering⁸². There, unions acting in solidarity can work (solidarity action was outlawed in the UK in 1982) to oppose a big corporation evading one of the pillars of the Nordic labour market model: collective agreements between employers and unions. These economies have managed to be socially inclusive and egalitarian, flexible, innovative and internationally competitive.

The strength of devolution is that a smaller administration can try new approaches that would be complex and slow to deliver across the UK. The Scandinavian model fits a country like Scotland both in scale and culture. Devolving employment law to Scotland would be an opportunity to develop an entirely new approach to industrial relations, recognising the place of trade unions within Scotland and acknowledging and supporting their role in the functioning of a decent society.

⁸² G.Bender, *Elon Musk doesn't understand Sweden's unions. If he did, he'd work with them*, (Guardian, 10 Jan. 2024), <https://www.theguardian.com/commentisfree/2024/jan/10/elon-musk-sweden-unions-tesla-labour-car>

5. Conclusion

This paper aims to set out a detailed policy for devolving employment-related law to Scotland, moving beyond the ambition of those who support devolution to address the practicalities.

This starts with the context of poor employment standards in Scotland and the efforts, using devolved powers, to improve them. We conclude that developing a new industrial relations and employment rights model requires the full devolution of employment-related law to Scotland with only a few exceptions. This includes the law related to employment rights, trade unions and industrial action, wages, equal opportunities and discrimination law, health and safety legislation and enforcement, the partial devolution of immigration policy and the regulation of health professions.

There is no purpose in devolving powers if they are not used for progressive purposes. We therefore outline how such powers might be used to improve working lives and build a stronger, more sustainable economy. The strength of devolution is that a smaller administration can try new approaches that would be complex and slow to deliver across the UK. It could introduce a new constructive model of industrial relations and modern employment rights to replace the failed model facilitated by poor legislation from Westminster. We offer this paper as a practical guide to delivering a new model through devolution.

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Author and Acknowledgements

Dave Watson is the Director of the Jimmy Reid Foundation. This think tank brings together different voices across Scotland to make a case for economic, environmental, political, and social equity and justice in Scotland and beyond.



Dave was closely involved with making the case for the devolution of employment law as the head of policy and public affairs with UNISON Scotland until his retirement in 2018. He also managed UNISON Scotland's legal services for many years. He was seconded to the Scottish Government in the early years of devolution to manage the implementation of a new HR strategy in NHS Scotland and was an expert advisor to the Christie Commission. He holds a Lifetime Achievement Award from the Scottish Living Wage campaign.

A graduate in Scots Law from the University of Strathclyde, he has written many publications and has been a government advisor on public service reform, health and energy policy. He is the author of previous Jimmy Reid Foundation papers on *Assessing Fair Work in Scotland* (2023), *Public Service Reform* (2017), *Municipal Socialism* (2018), and *Building Stronger Communities* (2020).

Born in Liverpool, he spent his teenage years in London before working for UNISON in Wales and Dorset and spent 29 years in Scotland, apart from government secondments. He lives in Ayrshire and is a published historian and secretary to the Socialist Health Association Scotland and the Keir Hardie Society. He is a Fellow of the Royal Society of Arts and an Associate Fellow of the Royal Historical Society.

The author acknowledges the contribution of the Reid Foundation Project Board, colleagues and employment law practitioners in the research for this report. Any errors or omissions are his alone.

Publication information

When citing this document, please use the following citation: Watson, D. *Devolving Employment Law to Scotland* (Glasgow, Jimmy Reid Foundation, 2024)

This report is published by the Jimmy Reid Foundation, 14 West Campbell Street, Glasgow G2 6RX,

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or email: contact@reidfoundation.scot