PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Sixth Delegated Legislation Committee

DRAFT EQUALITY ACT 2010 (AMENDMENT) REGULATIONS 2023

Wednesday 6 December 2023

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not later than

Sunday 10 December 2023

The Committee consisted of the following Members:

Chair: Mr Philip Hollobone

† Cates, Miriam *(Penistone and Stocksbridge)* (Con)
† Caulfield, Maria *(Minister for Women)*
† Clarkson, Chris *(Heywood and Middleton)* (Con)
† Courts, Robert *(Witney)* (Con)
† Dixon, Samantha *(City of Chester)* (Lab)
† Goodwill, Sir Robert *(Scarborough and Whitby)* (Con)
† Green, Damian *(Ashford)* (Con)
† Jenkinson, Mark *(Workington)* (Con)
† Kearns, Alicia *(Rutland and Melton)* (Con)
† McDonald, Stuart C. *(Cumbernauld, Kilsyth and Kirkintilloch East)* (SNP)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
Owen, Sarah *(Luton North)* (Lab)
† Quin, Jeremy *(Horsham)* (Con)
† Rimmer, Ms Marie *(St Helens South and Whiston)* (Lab)
† Shanks, Michael *(Rutherglen and Hamilton West)* (Lab)
† Strathern, Alistair *(Mid Bedfordshire)* (Lab)
† Wheeler, Mrs Heather *(South Derbyshire)* (Con)

Susie Smith, *Committee Clerk*

† attended the Committee

The following also attended (Standing Order No. 118(2)):

Cash, Sir William *(Stone)* (Con)
Millar, Robin *(Aberconwy)* (Con)

Sixth Delegated Legislation Committee

Wednesday 6 December 2023

[Mr Philip Hollobone *in the Chair*]

Draft Equality Act 2010 (Amendment) Regulations 2023

9.25 am

The Parliamentary Under-Secretary of State for Health and Social Care (Maria Caulfield): I beg to move,

That the Committee has considered the draft Equality Act 2010 (Amendment) Regulations 2023.

It is a pleasure to serve under your chairmanship, Mr Hollobone. This statutory instrument will reproduce select interpretive effects of retained EU law, in order to maintain equalities protections against discrimination. These protections are reproduced by making amendments to the Equality Act 2010.

It is important to make clear from the outset that the overwhelming majority of our equality law is contained in domestic legislation. The Equality Act 2010 was approved and voted on by our own Parliament, and so the interpretive effects of retained EU law have a bearing on our equality framework in only a limited number of areas.

This instrument uses the powers of the Retained EU Law (Revocation and Reform) Act 2023 to ensure that necessary protections are put into our statute. This will end the inherent uncertainty of relying on judicial interpretation of EU law and instead ensure that strong and clear equality law protections are set out in our domestic legislation. To be clear to hon. Members, this instrument applies just across Great Britain.

This statutory instrument safeguards and enshrines key rights and principles across a range of areas. First, it protects women's rights by maintaining equal pay protection where employees' terms are attributable to a single source but not the same employer; protecting women from less favourable treatment at work because they are breastfeeding; and protecting women from unfavourable treatment after they return from maternity leave, where that treatment is in connection with a pregnancy or a pregnancy-related illness occurring before their return. It ensures that women are protected against pregnancy and maternity discrimination where they do not have a statutory right to maternity leave, but have similar rights under alternative occupational schemes. It also ensures that women can continue to receive special treatment from their employer in relation to maternity; for example, ensuring that companies can continue to offer enhanced maternity schemes.

I am sure that all of us in the House will agree that women should not face discrimination for being pregnant or taking maternity leave, should continue to receive equal pay for work of equal value, and that they should not receive less favourable treatment in the workplace because they are breastfeeding. This instrument reproduces these principles in domestic law to ensure that women can continue to rely on these protections.

This instrument also maintains protections for disabled people in the workplace, so that they are able to participate in working life on an equal basis with other workers. It is, of course, important that disabled people have the same opportunities as everyone else to start, stay and succeed in work, and this amendment will mean that disability protections continue to apply where someone's impairment hinders their full and effective participation in working life on an equal basis with other workers.

Finally, this instrument maintains two protections that apply more broadly. The first of these maintains the status quo whereby employers and their equivalent for other occupations may act unlawfully if they make a discriminatory public statement relating to their recruitment practices, including when there is not an active recruitment process under way. This ensures that groups that share certain protected characteristics are not unfairly deterred from applying for opportunities in an organisation. The second maintains protections against indirect discrimination for those who may be caught up and disadvantaged by indirect discrimination against others, so that they are also protected when they suffer substantively the same disadvantage.

We intend that there will be no time gap and no break in protections between this law coming into effect and the removal of the special status and EU-derived features of retained EU law at the end of this year. By maintaining these important protections, we will ensure that our domestic equality framework has continuity. Importantly, these amendments do not add any regulatory burdens on business, as the legislation reproduces the status quo, meaning that the regulatory environment will not change. I hope that colleagues will join me in supporting these draft regulations and I commend them to the Committee.

Sir William Cash (Stone) (Con): On a point of order, Mr Hollobone. I want to be quite clear, as Chairman of the European Scrutiny Committee, that, as some may know, we are having a full inquiry into the implementation of arrangements regarding the revocation and reform of retained EU law. We are actually having inquiries on a continuing footing. Am I right in saying that, while this Committee will consider the issues concerned, the ultimate decision will be taken by the House? That would be very helpful indeed.

I say this very respectfully: is it possible for those of us who were not nominated for this Committee—my Friend the Member for Aberconwy and me—to speak but not vote? We will be as brief as we can, because I suspect that our hon. Friend the Member for Penistone and Stocksbridge has something that she would like to say. We just have a few thoughts that we would like to offer to the Committee as well. Is that all right?

The Chair: The answer to both your questions, Sir Bill, is yes. I am sure that the Committee will be delighted to hear from all three hon. Members, and others, in the course of the next 90 minutes.

9.31 am

Justin Madders (Ellesmere Port and Neston) (Lab): I will not detain the Committee too long, Mr Hollobone, because, like you, I am keen to hear what other hon. Members have to say. It is a pleasure to see you in the Chair this morning, and I am grateful to the Minister for her introduction.

The Opposition consider these draft regulations to be uncontroversial. We are satisfied that, as the Minister said, they do not constitute a change of policy approach. This is, though, just one of a flurry of sets of draft regulations being laid before the House by the Government in an effort to safeguard important protections derived from EU case law and ensure that they are retained before the end of the month. As we pointed out during the passage of the Retained EU Law (Revocation and Reform) Act 2023, retaining important principles from the interpretation of retained EU law is just as important as actually retaining pieces of EU legislation. Without the restatement of certain interpretative effects, many important rights derived from the EU could be in jeopardy from 1 January 2024.

The protections being restated today underline why this process is so important and our workers cannot lose the rights that are being reasserted in these regulations. As we have heard, they are massively important to women—protecting them through and after pregnancy, against pay inequality, and from discrimination. They are also crucial in providing people who have disabilities with protection against discrimination. These vital protections need to be retained. I agree with the Minister that it is also important that we give people and the law certainty by restating these principles. However, the fact that we are getting round to restating them only a matter of weeks before they could have disappeared is a little concerning. It presents some questions about the Government's wider approach to identifying which bits of important case law they wish to retain and then pass, through regulations, on to our statute book.

The most obvious question is how the identification process actually operates. Following the litany of failures with the original legislation, culminating in the fiasco of thousands of hitherto unknown pieces of retained EU law appearing on the dashboard, we know that there are sometimes problems in identifying exactly where EU law impacts on domestic law. Can the Minister tell us what measures the Government are taking to ensure that important decisions in terms of interpretative effects of retained EU law are being taken? Do the Government have an equivalent to the dashboard that was introduced for identifying statutory instruments for European Union judgments that have an impact on domestic law? What about actually restating these judgments in law? We have seen numerous draft regulations in recent months. Therefore, it is sometimes hard to keep up with exactly where we are up to with retained EU law. Would it not be sensible to have, in a manner similar to the dashboard, a central record of which changes have been made and where restatement is taking place, so that not just hon. Members but businesses and, indeed, individuals who would be benefiting from the restatement of rights can know exactly where they stand?

It is also worth asking what advice has been received from Government lawyers about the impact of restating certain bits of law and, most importantly, what criteria are being used to determine which judgments will be retained. How does one decide which ones will be kept and which ones will fall off the cliff at the end of the year? There is nothing controversial in what is being restated today, although there was a change of stance on the single source equal pay protections. We welcome the Government's U-turn on that, but we need to know exactly what the thought processes were to reach that point.

Turning to the content of the regulations, as we heard, regulation 2 reproduces the effects of retained EU law regarding discrimination related to pregnancy, maternity and breastfeeding. Among other protections, it restates important principles such as rights for women to make claims for direct sex discrimination at work on the grounds of breastfeeding. It also protects women against unfavourable treatment due to pregnancy or a related illness that occurs during the protected period.

As we heard, regulation 3 will ensure that those without a protected characteristic who suffer from a disadvantage, together with persons with the protected characteristic as a result of a discriminatory provision, criterion or practice, can continue to bring a claim. Regulation 4 updates the recent decisions in relation to protection from discrimination in access to employment.

Regulation 5 is probably the most important one in terms of Government policy decisions because that has reproduced the effect of the single source principle. In case Members are not aware, that principle sets the standard for a body that is in a position to ensure equal treatment between employees in respect of such terms. In practical terms, that means that tribunals and courts can continue to compare the pay of men and women who work for an enterprise or organisation that can control the terms under which they are employed, including pay, even though they may technically be working for different employers. That will hopefully send a clear message to employers that outsourcing obligations in respect of equal pay for men and women is not an acceptable response to the question of equality.

As we heard, regulation 6 relates to maintaining the interpretation of disability. We should be mindful that just because these laws are being restated and we are content that there is no detrimental change in the legal outlook, it does not mean that the battle for equality is over. The earnings gap between disabled and non-disabled people has increased. It is over half a century since the Equal Pay Act 1970 was introduced and we are still to reach pay equality. The most important element of the debate today is not necessarily what is being restated because we are in agreement with that, but what regulations are being made in a way that ensures that all the protections will be retained. What is the thought process that leads us to that? Can we be confident that we have everything covered?

Monitoring the effectiveness of the process is crucial to understanding whether the Government's objectives have been achieved. That is an important process, and possibly the Chair of the European Scrutiny Committee, the hon. Member for Stone, will have some thoughts on the Government's approach more generally. We need to be able to understand what the Government's principles are and then judge whether they are delivering them in practice.

I would imagine that the Department has dedicated large amounts of resource to identifying the particular elements of law that need to be retained, but we cannot be absolutely sure that everything has been picked up. Let us be clear: if something does slip through the net, the consequences could be serious for potentially millions of workers. It is important that we are clear on how the process operates and what monitoring is going on to ensure that all important elements of retained EU law will stay in place.

[Justin Madders]

Ultimately, we believe that the regulations are a positive step that draws cross-party consensus. We still believe that there is more to be understood about the Government's approach to retained EU law. We have no insight into how we have actually got here today; we just see a patchwork of instruments being presented. It does not fill us with confidence that the Government have a clear strategy or plan for how to approach EU law. We believe that the publication of a strategy on the matter is overdue, and that would approve accountability in this place. When the Minister responds, I hope that she can outline the principles that are being adopted when considering which elements of retained EU law to keep. That would give us all a useful guide about whether the Government have actually got a coherent approach to this, and whether they are actually sticking to it.

9.40 am

Miriam Cates (Penistone and Stocksbridge) (Con): Thank you, Mr Hollobone, for the opportunity to speak in this Committee. I do understand the Government's desire to ensure that there is no watering down of equalities law following Brexit and the retained EU law Act, but it appears to me that this statutory instrument is not only unnecessary but could have some serious and unwanted consequences by creating almost a carte blanche for individuals to bring indirect discrimination cases on almost any grounds and with unlimited potential damages. Far from protecting British citizens from discrimination, it would undermine the very idea of discrimination itself. I would be grateful to the Minister if she could answer a few questions about this legislation, particularly about regulation 3.

The explanatory memorandum and the retained EU law dashboard explain that regulation 3 reproduces the legal effect of a European Court of Justice case, which is referred to as CHEZ for short in the document. Briefly, in that case, a woman was living in a Roma-majority suburb of a Bulgarian town. She herself was not Roma. The electricity company installed electricity meters at 7 or 8 metres above ground level in the suburb—much higher than the usual 2 metres. That was deemed to be based on the fact that the population was majority Roma. The non-Roma woman alleged that she had suffered direct discrimination based on race. The Court found that she had suffered indirect discrimination on the basis of race. In that context, she herself did not have the protected characteristic of race to which the discrimination pertained. However, she was allowed to seek equivalent relief as if she did, because she had suffered the same negative impact as someone who was being discriminated against on the basis of their race.

My understanding of that CHEZ judgment is that it applies to the Equality Act now, has been applied twice by the employment tribunal and will remain domestic law by virtue of section 6 of the European Union (Withdrawal) Act 2018. There is no indication that the courts will overturn this, so my first question to the Minister is this: why do the Government believe that it needs to be enshrined in primary legislation?

The power to reproduce under section 12(8) of the Retained EU Law (Revocation and Reform) Act applies only to EU law that directly formed part of domestic UK law, without the need for implementing UK legislation. There is nothing in the CHEZ judgment that suggests it does have that direct effect, so why do the Government think that it does have that direct effect and therefore can be enshrined today in primary legislation?

My understanding is that the existing law on direct discrimination is enough to protect against this "same disadvantage" idea in cases like CHEZ. For instance, if a group of friends went to a restaurant and were refused service on the basis of the ethnicity of one of the members of the group, all of them would currently have a claim for discrimination. If that is enough to prevent that mischief in question, why are the Government proposing a new law that will put the existing law on steroids and have such disproportionate, unintended and unpredictable consequences?

My understanding is that, on the whole, UK courts have disregarded CHEZ because the existing law on direct discrimination does the job, and also because the real purpose of that CHEZ judgment was very specific: the Court wanted to address anti-Roma discrimination in central and eastern European member states. That is clearly not applicable here, so why are the Government treating this narrow, specific case-law judgment from another country as the basis for a general new law in primary legislation in the UK? I would be very grateful to the Minister if she could provide an answer to those questions.

In summary, the effect of this statutory instrument will be to undermine our understanding of discrimination rather than to strengthen it, because it will undermine our understanding of protected characteristics—which are there, obviously, to protect minorities—by gold-plating an obscure piece of foreign case law that essentially allows someone without a protected characteristic to piggyback off someone who does.

I very much regret that the Government have brought this legislation today. I have had engagement with the Secretary of State and I do believe that there is now some concern about this among Government. I understand that there is no technical case for asking for an adjournment of this debate today, but I think that that is a shame, because I do not think that it has been properly considered. I ask that the Minister urgently considers the long-term and unintended consequences of this measure, including the cost to businesses, because it will make it on to the desks of HR officials across the country and could potentially have quite a serious chilling effect.

9.44 am

Stuart C. McDonald (Cumbernauld, Kilsyth and Kirkintilloch East) (SNP): It is good to see you in the Chair, Mr Hollobone. I want to make a couple of short points. From my party's perspective, it is good that we are retaining important EU employment law rights in our domestic legislation and it is good that it is to be enshrined in primary legislation, although I rather object to the general rewriting of primary Acts of Parliament by statutory instrument. More fundamentally, from my party's point of view, it does seem that a hell of a lot of effort has been put into keeping things as they are. That is, of course, the inevitable result of Brexit, of the type of Brexit that was negotiated and the Retained EU Law (Revocation and Reform) Act 2023, all of which we absolutely opposed and continue to regret.

But we are where we are, and although we are restating the law as it stands, it is important to bear in mind that divergence is going to occur in future. EU law principles and employment law will continue to develop after 1 January next year, driving up minimum standards and protections. Those developments will not take place in the UK unless we replicate them. Perhaps the way we should respond to those developments is a debate for another day.

Turning to this SI, this is quite a technical task and it is difficult to scrutinise through a Statutory Instrument Committee. I echo the comments of the Equality and Human Rights Commission about this particular issue. It welcomed the enshrining of these protections in law, but stated that

"it is desirable that Parliament and other stakeholders have sufficient opportunity to scrutinise any proposals to avoid unintended consequences, such as through primary legislation."

But not only are we rewriting the Equality Act through a Statutory Instrument Committee, the explanatory memorandum explains that consultation was not deemed necessary by the Government. That is a wholly inadequate process and, given the limited scrutiny and the lack of consultation, how confident can the Minister be that there are no unintended consequences of these regulations in the light of these comments? Against that background, I very much welcome the work of the European Scrutiny Committee in looking at these particular statutory instruments, because I do not think an SI Committee such as this can really do that job properly.

The other point I want to make is to echo something that the shadow Minister, the hon. Member for Ellesmere Port and Neston, alluded to: there is a question about what is still missing from the Government's SIs. An article I read about this SI noted that there still has not been any incorporation of European Court of Justice decisions on issues such as the use of 90-day rolling periods when assessing if collective redundancy consultations are required or whether contracts can be split after a TUPE transfer. Those are just two examples of things that do not appear to be in this SI or any other. Is there to be another employment-related SI to come before the deadline at the end of the year?

We support what has been done. We support this SI, but we object to the process and not just to the process—the reasons behind the process being required in the first place.

9.47 am

Sir William Cash: I hope that everyone in this Committee, and indeed in this House, wants to protect women. That is a very important principle as expressed, for example, in my International Development (Gender Equality) Act 2014. On the question of the charter of fundamental rights, that has now been excised from our statute book by clear and explicit words. That is the issue that I want to address and that my Committee, the European Scrutiny Committee, is examining at the moment in a series of evidence sessions.

I listened with great interest to my hon. Friend the Member for Penistone and Stocksbridge because there is a lot of law in here that I will not regale the Committee with today. I think there is time enough for that. The bottom line is that in the Supreme Court judgment last month, which by any standards was an important judgment, the case of ASM was dismissed. It did not receive much attention, but that is what happened. The Court concluded that the statutory repeal under the Retained EU Law (Revocation and Reform) Act 2023 had the effect that provisions relating to his case had been, by clear and explicit words, effectively removed, so his case had to fall and was dismissed. That is very important indeed. It was reflected by what Lord Jonathan Sumption said on the "Today" programme only a couple of hours ago: he said that if the words are explicit and clear in the case of a repeal of, in this instance, retained EU law, the courts will of course carry out the instructions of Parliament where the intention is clear, unambiguous and explicit. That is the crucial test.

The question in this instance is whether that test is something that needs to be taken into account at the time the decision is taken on the Floor of the House. The procedure of the House can be a little opaque. It can be that we end up without having a full debate on the subject. I heard what my hon. Friend the Member for Penistone and Stocksbridge said—that there are questions still in the mind of the Government over this. In that event, I would suggest that the most appropriate approach in this instance would be to make sure that there is adequate time for consideration. In other words, we should not have a rushed decision on the Floor of the House about these regulations.

It is still open to the Government because, as you rightly said when I made my point of order, Mr Hollobone, this is a matter for the Committee to consider, rather than decide on. We want to be sure that when the decision is taken, account can be taken of, for example, what the European Scrutiny Committee may want to say about this. We will obviously look at it, because it has evoked a lot of interest and some concern. Rather than repeat what my hon. Friend the Member for Penistone and Stocksbridge has said, the best thing I can say is that my objective in being here today, while I obviously do not have the right to vote, is to take this opportunity to speak—for which I am extremely grateful to you, Mr Hollobone.

The subject matter is important, and there are principles here of great significance. There are questions of interpretation by the courts that could be taken at a later date. We want to be crystal clear that if serious objections have been and can be raised—and will be—as we proceed and as the situation evolves, the House can come to the right conclusion as to what interpretation will be placed on this provision.

Stuart C. McDonald: Is not the problem we now face as a Parliament that we have this deadline of the end of the year to get this sorted, and it is precisely because of that that we are left with pretty much no choice but to take what the Government deliver to us, or else lots of these employment protections will fall away?

Sir William Cash: The hon. Gentleman is super courteous, and he has put his finger on it, I have to say. In informal discussions with members of Government I have raised that I am concerned about the fact that this list of legislation has not yet been finalised. Some Members may recall that I took part in the ping-pong on this subject. The Government accepted an amendment that I put forward, which has also been put forward in

[Sir William Cash]

principle in the House of Lords to ensure that the list accurately reflects what we want to remove and what we do not.

That is something the hon. Gentleman quite rightly points to; we have had to wait an awfully long time for this list to appear. If it does appear, it seems to me that there are grounds for including this provision as one that should be revoked rather than allowed to go through by way of adaptation. I will not offer more thoughts on that for the purposes of this Committee.

I would just like to put on the record that a lot more consideration could usefully be done. We are not asking for an adjournment of this Committee or anything like that, but we would like the opportunity to deal with the issue properly and fully and for the Government's reappraisal of the position—if it is thought to be appropriate—to take place as the result of proceedings in the House. This is a very good example of the way in which this House operates compared to some foreign jurisdictions, where these matters are not properly looked into. It is tribute, if I may say, to the manner in which we conduct our procedures that these opportunities can be provided to clarify things and make sure we do not make any serious mistakes.

9.54 am

Robin Millar (Aberconwy) (Con): I thank you, Mr Hollobone, for the chance to speak in this debate, even though I too do not have a vote. Can I extend my thanks and gratitude to hon. and right hon. Members present? I know that these Delegated Legislation Committees are sometimes a bit of a chore, and as the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East has said, this maybe is not the best vehicle for examining some of the detailed legal considerations. Certainly it has been a challenge to me as I have looked at it. However, I do have some concerns about regulation 3 of the regulations before us.

I echo the concerns of my hon. Friend the Member for Penistone and Stocksbridge that the existing provisions will be, in her words, on steroids as a result of this. We all recognise the importance of the Equality Act 2010, and the provisions and protected characteristics within it. Likewise, we recognise the importance of provisions for addressing direct discrimination and indirect discrimination, but this seems to extend that further to be an associated indirect discrimination. I hence have this concern about a kind of gold-plating of the regulation that we have, which I would suggest works pretty well at the moment.

I have two particular concerns: one is to the direct effect and the other is to desirability. I will take direct effect first. The Minister proposes to make these regulations under section 12 of the Retained EU Law (Reform and Revocation) Act. Now, that section gives a "relevant national authority", in this case the Minister, power through regulations to reproduce the effect of any retained EU law that has direct effect. That is, EU law that, under section 2 of the European Communities Act 1972, has legal effect without further enactment. As the explanatory notes and the REUL dashboard make clear, regulation 3 reproduces the effect of the case that we referred to as CHEZ previously, which has been described by my hon. Friend the Member for Penistone and Stocksbridge. That decision expands the scope of indirect discrimination under the Equality Act, so as to confer a right of action on claimants who suffer alongside victims of indirect discrimination, even if the claimant does not share the same protected characteristic.

It is therefore unclear to me whether this judgment has direct effect in UK domestic law, and it follows then that it is unclear whether the Minister has powers under section 12(8) of the REUL Act to reproduce the effects of CHEZ. I ask the Government to delay enactment of the regulations until such time as this question has been fully explored and satisfied or, if I might refer to my hon. Friend the Member for Stone, at least until we have had time to be regaled by him on the points of law on that matter.

I will turn to the question of desirability. Regulation 3(2) provides that persons with the "relevant protected characteristic" must suffer "particular disadvantage", and people without it must suffer "substantively the same disadvantage". This begs the question, what does "substantively" mean, in the Government's view? Does it mean that the disadvantage has the same cause or that it is the same extent of disadvantage? It would be helpful to clarify this. This is important because regulation 3 does not actually safeguard the concept of discrimination, in so far as I understand it. The purpose of indirect discrimination is to protect minorities in particular, but instead of protecting minorities particularly, this new law protects anyone generally who suffers disadvantage. Why are the Government trying to protect discrimination by effectively diluting it into non-existence? I am happy to be challenged and corrected on these points but this is my understanding of it.

I will give an example. The law currently sets height requirements for police candidates, and says that those are indirect discrimination because they would put women at a particular disadvantage. The Government want to expand the law, it appears, so that short men will have the right to sue for sex discrimination because they then suffer the same disadvantage. It begs the question whether it is the purpose of equality law to protect short men or anyone who suffers a comparable disadvantage. There are important ramifications: I am concerned this new law will expose employers to unlimited damages, if they are then found liable. As somebody with an engineering, rather than legal, background, I hope my colleagues will forgive me if I have stumbled over this, but how will employers keep on the right side of the law? I am looking for practical application here.

Stuart C. McDonald: I welcome the incorporation of this judgment and I will give the hon. Gentleman a different example. Let us say that an employer has discriminated against LGBT members of staff, and actually that discrimination includes somebody who is not, in fact, LGBT, but is perceived by an employer to be. This judgment would surely then allow that person to also seek damages. I do not think that this would be objectionable from any point of view, would it?

Robin Millar: The hon. Gentleman has done two things: he has exposed my engineering, rather than legal, background, and he has raised a very good question, which I look forward to hearing people with a legal mind tear apart and pick apart in consequence. I thank him for that.

Miriam Cates: My understanding is that the protection already exists, as I explained in my speech, but the point of this new legislation would be to allow someone who is outside and not connected with that group of people who have been classed, perhaps incorrectly, as LGBT by the employer to claim the same discrimination. We already have that protection in our law, but this would put it on steroids, for additional people to claim who do not necessarily suffer the disadvantage at the moment.

Robin Millar: My hon. Friend, as usual, makes a thought-provoking point. The hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East talked about the limitations of a Committee discussing detailed legal points.

To return to the practical application, how can a human resources officer foresee all the individuals who might suffer some disadvantage under these regulations and bring a claim in the employment tribunal? That is unworkable. In particular, how will employers satisfy themselves that the disadvantage is justified in each case, when they cannot possibly foresee each case?

I am grateful for your indulgence, Mr Hollobone, and that of the Committee. I think these are profound questions. I tread softly and lightly into this space, but I think it has been important to raise these issues. I urge the Government to respond to them in a timely fashion so that these regulations are not enacted in haste.

10.1 am

Maria Caulfield: I am grateful to all hon. Members who have spoken. Britain has a proud history of justice and fairness and has some of the world's strongest and most comprehensive equalities legislation, thanks to the Equality Act 2010. By setting out these EU-derived protections in domestic law, we will ensure that our equality framework provides clarity and continues to protect the fundamental rights and freedoms of people in this country.

I assure the shadow Minister, the hon. Member for Ellesmere Port and Neston, that there is a cross-Government approach to retained EU laws. A publication on progress on that work is planned for January as part of the statutory six-month reporting requirement. The EU law dashboard on gov.uk, which was last updated on 8 November, sets out the laws that we are retaining. I take his point that more information on that would be helpful to Members across the House. I reiterate that the retained EU law powers are available until June 2026, so we can continue to review the EU laws, and even if we do not retain them now, we have the potential to do so in future.

On the comments by my hon. Friends the Members for Penistone and Stocksbridge and for Aberconwy, I reiterate that the CHEZ ruling is already the basis of law across Great Britain. Whether or not we agree with the judgment, it was made in 2015, before the implementation period, and therefore falls under section 4 of the European Union (Withdrawal) Act 2018. Because of that, it falls under section 12(8) of the Retained EU Law (Revocation and Reform) Act 2023, which enables the Government by regulation to reproduce to any extent the effect of anything that was retained EU law by virtue of section 4 of the European Union (Withdrawal) Act. That is why it comes under the Retained EU Law (Revocation and Reform) Act, and why we have been able to table these regulations.

Section 3 of the Retained EU Law (Revocation and Reform) Act gives Ministers powers not just to replicate but to amend laws as they are put on the statute book. That is not specific to this instrument. That power was voted on in Parliament.

Sir William Cash: On a point of information, regardless of what happens with these regulations, which are only for consideration in this Committee and will be subject to final approval on the Floor of the House after fuller consideration, does the Minister agree that if the argument is made as clearly and thoroughly as it can be—thanks to my hon. Friend the Member for Penistone and Stocksbridge, the case has been made more clearly and more explicitly—it could be included in the Government's list of items for revocation in their entirety?

Maria Caulfield: My hon. Friend is suggesting that we revoke the legislation that we are considering, which provides the protections that I set out in my opening speech. It is certainly the Government's view that it is important that we retain those protections, whether they relate to discrimination against women going through pregnancy, disabled people or others with protected characteristics. To clarify, the way the instrument interprets the CHEZ ruling is not new legislation. As I set out, the CHEZ judgment was before the implementation period, so it is already a basis on which judgments are made. Because it falls under the Retained EU Law (Revocation and Reform) Act, this statutory instrument just puts that on a domestic footing.

Robin Millar: I fully acknowledge the challenge of debating such a detailed subject in this setting, but given that the ruling exists, why do we need to enact the measure through regulations now? There is provision in place.

Maria Caulfield: The reason is that the provisions currently fall under section 4 of the European Union (Withdrawal) Act 2018 and that if we do not replicate them under the Retained EU Law (Revocation and Reform) Act, they will fall. That would mean that protections for women who are pregnant or breastfeeding fall at the end of the year. That is why we need to replicate them.

Let me touch on the point about whether the measure provides expanded powers—I think "power on steroids" was the phrase that was used. The legal advice is that CHEZ can be interpreted as already giving horizontal rights, so we are not introducing such rights through this statutory instrument. Even if it did not give such rights, section 13 of the Retained EU Law (Revocation and Reform) Act, which Parliament voted on, gives Ministers powers to resolve ambiguities and remove doubt or anomalies to facilitate the improvement of the law. That is the power that that Act provides. We believe that the CHEZ ruling already gives horizontal rights, but even if it did not, the Act gives leeway to Ministers to tidy up those provisions.

Miriam Cates: Is the Minister saying that she believes that the legal probability is that the CHEZ judgment already has direct effect in UK law? On my understanding,

[Miriam Cates]

that is the only situation in which the power can be used to reproduce the judgment in primary legislation. It is not clear to me that it did have direct effect. At the moment, there is clearly no case in the UK courts to suggest that.

Maria Caulfield: The legal advice is that it is arguable that it can be interpreted as giving horizontal rights, and that is why the instrument reflects that.

The basis of this argument was that we believed that, in leaving the EU, it was fundamental that Parliament made decisions about which laws we retained, repealed or amended. That is exactly what we are doing today. We may differ over whether we believe that the protections are needed or whether they go too far, but it is now Parliament that is making that decision.

Sir William Cash: The Minister is making an interesting case, and I understand that she prepared her notes and thoughts before she came to the Committee. At the same time, questions have been raised with regard to matters of ambiguity or uncertainty in interpretation that could apply in this instance. It is possible for the Government to consider their position on the merits of the issue—on the basis of another understandably important opportunity to look at the legal implications of the instrument—after the Committee has finished its consideration. They cannot make the decision now. There is an opportunity for these matters to be looked at more carefully and with great legal analysis in a way that I am quite sure will throw up some further points, which can then be taken into account when the final decision is about to be made. I am sure that the Minister would agree with that. Otherwise, there would be very little point in the procedures.

Maria Caulfield: I take my hon. Friend's point, but if we had not left the EU, the CHEZ ruling would still be the basis of the way in which decisions are made right now on discrimination cases. Any law can be challenged in courts and precedents can be set, but that does not mean that we should not set out the law as we determine it should be interpreted. Obviously, case law can change that, but the CHEZ case was back in 2015, so it falls under the European Union (Withdrawal) Act. We have decided as a Government to retain those protections. Let me set them out for hon. Members: they are around maintaining equal pay for pregnant women; protecting women from less favourable treatment because they are breastfeeding; and helping pregnant women facing discrimination with being able to return to work.

Miriam Cates: I completely agree with the Minister about the need to protect equal pay, pregnant women and so on; I do not think there would be any disagreement on that. The problem is the unintended consequences.

I will come back to the example of the hon. Member for Cumbernauld, Kilsyth and Kirkintilloch East. At the moment, let us say that a group of people were thrown out of a pub because of a homophobic landlord who thought that they were all LGBT. Let us say that they were not LGBT; the people who were not would currently, under UK law, have a case for discrimination, and rightly so.

The problem is that the effect of this legislation would be that if someone else walked into the pub who was not LGBT, and the landlord did not think he was LGBT but still threw him out, he would be able to claim that he suffered the same effect of discrimination, even though he did not have the protected characteristic. That is the impact. The lady who won the CHEZ case was not Roma, and nobody thought that she was Roma. She experienced the same discrimination as Roma people, but she was still able to claim. That is the difference between existing law and what this legislation potentially puts into practice, and that is the unintended consequence.

Maria Caulfield: That is open to interpretation, and that is exactly what the courts are there for: to decide how existing laws are interpreted. However, the CHEZ judgment is part of existing case law. It is the basis of how discrimination is determined right now. If we did not have this instrument and we had not left the EU, that would continue to be the case. At the end of this month, if we do not retain the law, those protections for pregnant women, disabled people and those with protected characteristics will fall completely. The CHEZ judgment is actually the basis of case law.

Stuart C. McDonald: Will the Minister give way?

Maria Caulfield: I do not wish to test your patience, Mr Hollobone, but I will take a final intervention.

Stuart C. McDonald: I am trying to be helpful to the Minister here. Putting aside all those arguments, I am not an employment lawyer, and I did not prepare on this particular case in advance. However, a more fundamental point is that that judgment is part of UK law just now. It would be outrageous if, through the statutory instrument procedure, we just decided to dump it overnight. If people have a beef with that particular case, they should promote a private Member's Bill or encourage the Government to bring in another bit of legislation. Today is about a statutory instrument preserving the status quo. Any other course of action from the Government would be completely unacceptable.

Maria Caulfield: Absolutely; I agree with the hon. Gentleman on that point. I hope that in debating the statutory instrument, colleagues will realise that whatever we think about which laws we retain or revoke, it is based on the CHEZ ruling of 2015. That will not change after the statutory instrument is approved on the Floor of the House. There is no change: it is still based on the exact same principles since the CHEZ ruling of 2015. It is really important that we retain those protections, because without them vulnerable groups will be left without protection and face discrimination. I hope that colleagues will join me in supporting the regulations, which I commend to the Committee.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Equality Act 2010 (Amendment) Regulations 2023.

10.14 am

Committee rose.