



## BRIEFING

### Thoughts on Brexit and employment law

Very little is clear following the vote on 23 June 2016 to leave the EU. What we say below is our best guess of the likely implications of Brexit for employment law in the UK.

#### Possible implications of Brexit

A significant proportion of the UK's employment law comes from the EU, including discrimination rights, collective consultation obligations, transfer of undertakings regulations, family leave, working time regulations and duties to agency workers. It is unlikely that all this law will be repealed and it is probable that EU law will continue to exercise a significant influence.

There are various reasons for this:

- Some EU employment laws were already provided by UK law. For example, UK equal pay, race and disability discrimination laws preceded EU anti-discrimination obligations. Similarly, there was a UK right of return from maternity leave before EU maternity leave rights were implemented.
- Even where there was no pre-existing UK right it is unlikely that in the current climate those laws would be repealed. Laws such as family leave, discrimination rights and the right to paid holiday are generally thought of as a good thing by society in general. It is often the case that the UK is sufficiently enthusiastic about the rights in question that the rights are enhanced beyond the EU requirement. For instance, family leave rights go further than the EU requires and the statutory minimum holiday entitlement is 8 days longer than the EU minimum requirement.
- It may be that the result of the Brexit negotiations is that certain minimum employment law standards are maintained. The UK is likely to want an ongoing trade relationship with the EU, which is its biggest export market. The price of a free trade agreement with the EU may well be acceptance of EU social and employment regulation. This is the case, for example, for the non-EU members of the European Economic Area (EEA), such as Norway. Such states are obliged to accept most of EU employment law without being part of the EU decision-making process. The EFTA court (which interprets EEA rules) is also bound by ECJ decisions. Switzerland, which has negotiated a series of agreements with the EU, is in a similar position.

Looking at some specific employment laws in light of the above.

#### Agency workers

The most obvious candidate for complete revocation is the Agency Workers Regulations 2010 (*SI 2010/93*) which are complex, unpopular with businesses and have not yet become embedded in a way that might make them politically difficult to remove.

## **Collective redundancy consultation**

Collective redundancy consultation obligations were reduced by the last government. The obligation is now not particularly onerous and trade unions are likely to fight any plan to remove it altogether. It is not obvious what would happen to this obligation following Brexit. It is possible that it could be watered down further or done away with, particularly as many employees arguably do not feel particularly strongly about this right. On the other hand, it is not clear to what extent businesses regard this obligation as a burden. Similarly, other collective consultation rights such as works councils and transnational works councils are possible candidates for removal, but the obligations imposed by them on UK businesses are relatively light.

## **Data Protection**

It seems unlikely that the UK would repeal or significantly modify the *Data Protection Act 1998* (DPA 1998), which implements the *Data Protection Directive (95/46/EC)* (DPD 1995) when it leaves the EU. The DPD 1995 directs that personal data must not be transferred to a country outside the EU unless that country ensures an adequate level of protection for the rights of the data subject. If UK businesses want to operate in the EU (or EU businesses in the UK), they will have to transfer personal data between the UK and EU member states and there will need to be adequate protections equivalent to the current ones. If the UK does decide to abide by the EU regime, it will have to update the DPA 1998 to take account of the new General Data Protection Regulation, which is due to be implemented in 2018.

## **Discrimination law**

The Equality Act 2010, which implements the UK's laws against discrimination, is primary legislation, so would remain in force even if the legislation that incorporates EU law (the European Communities Act 1972) is repealed. This law could be repealed but is there an appetite in the country to permit discrimination? Nevertheless the law could be amended. There is currently no cap on compensation for discrimination claims. A cap similar to the cap on claims for unfair dismissal could be imposed. Another possibility is that the government could change the law to allow positive discrimination in favour of under-represented groups in a way that is not currently permissible under EU law.

## **Holidays and working time**

A wholesale repeal of the Working Time Regulations 1998 (*SI 1998/1833*) (WTR) is unlikely. The concept of paid holiday appeals to most people's sense of fair play and an attempt to reverse the position is likely to meet with opposition. That said decisions around sick pay, holiday pay and bonuses have proved irritating for employers and the government may want to legislate to address these issues – for instance by limiting holiday pay to basic pay.

## **Parental leave and pay**

Rights to parental and family-related leave in the UK are a mixture of rights deriving from the EU and rights originating in the UK. UK maternity leave and pay preceded the EU rights and are more generous than those rights in some respects. The right to shared parental leave and the right to request flexible working are UK laws. It would seem unlikely that there will be political appetite to change these laws.



## **Transfer of undertakings**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (*SI 2006/246*) (TUPE) is derived from EU law but the concept that employees in a transferred business or undertaking should transfer with it is common across a number of legal jurisdictions. It seems unlikely that the government will want to do away with this right altogether although it could make small changes to make it more business friendly. For example, it might choose to make it easier to harmonise terms following a TUPE transfer.

## **Unfair dismissal**

Unfair dismissal rights derive from UK legislation. They have been longstanding rights in the UK and it seems unlikely that the government will want to do away with these rights altogether.

## **Freedom of movement**

There are currently large numbers of UK nationals living and working in other EU countries and many nationals of other EU member states living and working in the UK. Following Brexit, these individuals would no longer have the automatic right to do this. This is a political “hot potato” and it is anyone’s guess how it will turn out at this stage.

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