Brexit: what does it mean? Does anyone know yet?

Whilst employment laws such as those dealing with minimum wage and unfair dismissal are unrelated to the EU, a significant proportion of UK Employment Law comes from the EU. This could be either through EU Directives the UK is required to implement or decisions of the Court of Justice of the European Union (CJEU) which interpret EU derived employment rights.

The outcome of the referendum was for the UK to leave the EU but the current uncertainty leaves open the question of how such an exit would be achieved, if indeed an exit occurs. Until there is an actual exit (that is to say the UK formally leaves the EU, whether by triggering the ‘Article 50’ process or otherwise) all existing UK and EU employment law legislation remains unaffected and in place.

When (and if) Brexit occurs, it will be open to the UK Government to reform, or potentially repeal, the substantial number of legislative provisions relating to employment law which derive from EU legislation. In practice, we believe this highly unlikely since there appears to be a broad political consensus amongst UK political parties to maintain the employment law status quo. Even if this were not the case, it is likely that given their pronouncements during the referendum debates, the Labour and Liberal Democrat parties would insist on maintaining the majority of EU-derived worker protection rights. In light of this, we believe that if and when Brexit occurs, substantial change to the suite of existing UK employment laws is unlikely to occur.

This does not mean that all EU-derived legislation will remain unchanged. There will certainly be an opportunity to tidy up and rationalise existing EU-derived UK legislation and we set out below some areas where this might apply.
Discrimination

There has been a constant trend towards further protecting individual's rights not to be discriminated. Indeed, during the recent Pride Festival, further calls were made to ensure individuals are not treated less favourably because of their sexuality or otherwise. As such, the main thrust of discrimination laws are likely to remain in place.

One area that may be subject to change is compensation for discrimination. Currently awards made by an Employment Tribunal for discrimination are uncapped as a result of EU case law. Following Brexit, the government may consider introducing a cap similar to that for unfair dismissal but, given the opposition to the introduction to Tribunal fees, such a move would likely attract much criticism.

TUPE

The Transfer of Undertakings (Protection of Employment) Regulations (better known as TUPE) implements the EU's Acquired Rights Directive (ARD) which seeks to safeguard employee rights on a business transfer. TUPE is often referred to as 'gold plating' the ARD by going further than the EU Directive and also applying to service provision changes. Employees are further protected by restrictions on the harmonisation of terms and conditions post-transfer. Whilst TUPE is sometimes viewed by companies as burdensome and restrictive, the fact that TUPE goes further than is required by EU law suggests that there will be little appetite to repeal TUPE in its entirety but we may see some changes allowing greater harmonisation of terms.

Holiday

The EU's Working Time Directive (WTD) provides that employees must receive a minimum of 20 days' paid leave a year. The UK's Working Time Regulations (which implements the WTD) has again gone further than the EU-minimum by providing employees with 28 days' paid annual leave. This, coupled with the fact that reducing holiday entitlement would likely prove unpopular with trade unions and employees, means it is unlikely that the UK will reduce holiday entitlements.

Various European cases over the past couple of years have widened the scope of holiday entitlement so that employees continue to accrue holiday whilst on long-term sick leave and that holiday pay is calculated on the basis of wider-remuneration and not just basic salary. These decisions have proved unpopular with businesses and, in the case of calculating holiday pay, still remain uncertain. This may be a potential area for review post-Brexit as may the limits on hours worked (although the UK already has the 48 hours per week opt-out).
Agency workers
The Agency Workers Regulations (AWR) were introduced in 2010 and have been viewed by many as unduly complex and unpopular with businesses. Unlike other areas, the AWR have not yet become so entrenched in UK employment law that this may be an area in which it is politically easier to make a change. This needs to be balanced against the fact that the AWR are extremely popular with trade unions, putting unionised agency workers on an equal footing with permanent staff so there may still be resistance to change in this area.

Collective consultation
Due to relatively low uptake, amendments may be made to collective consultation rights and works councils introduced by the Information and Consultation of Employees Regulations. However, the obligations imposed on UK businesses are not overly onerous so this one may be pushed to the end of the queue.

Collective redundancy consultation requirements in the UK were reduced in 2014. Any further dilution of collective consultation obligations are likely to be opposed by trade unions which may prevent any further amendments being made.

Case law
Even if there is little amendment to UK employment legislation itself once the UK exits the EU, the UK courts will no longer be bound to follow the decisions of the CJEU. It is through this separation of the UK courts from the EU that we may see the greater changes to UK employment law with UK case law potentially moving away from that of the CJEU and other EU Member States.

The greater impact in the short-term is likely to be the uncertainty caused to businesses and consumers and the repercussions this may have on the UK economy with possible redundancies and restructuring of workforces.

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