

ARTICLE

2016/35 What does Brexit mean for UK employment law? (UK)

On June 23 2016 the UK voted to leave the EU. The vote highlighted significant regional differences, with much of England and Wales voting to leave (with the exception of London) and Scotland and Northern Ireland voting to stay. This difference may have constitutional implications for the UK with Nicola Sturgeon, First Minister for Scotland, suggesting that Scotland should have another independence referendum and be allowed to remain in the EU, although it seems unlikely that the other EU states would permit this. Furthermore, both the British and Irish governments have made it clear they would like to retain free movement of people between Northern Ireland and Ireland irrespective of what is agreed with the rest of the EU. These are difficult issues and it is not yet clear how they can be resolved but much must depend upon what new arrangement the UK comes to with the EU.

There is disagreement amongst commentators about why people voted to leave and it is likely that they had different reasons. A concern about high levels of immigration (particularly from Eastern Europe) has been cited as a factor but this analysis is complicated by the fact that many areas with low immigration voted to leave (for example, Wales) whilst others with high levels (such as London) voted remain. One argument by Brexit campaigners that seemed to resonate with voters was that the money paid into the EU budget could be better spent on other things, particularly the National Health Service. Other explanations are that it was a desire to 'take back control' of the UK's laws from an unaccountable EU bureaucracy or a 'protest' vote provoked by regional economic decline and income inequality.

The vote to leave could have huge ramifications for British workplaces, as a significant proportion of UK employment law comes from Brussels. Once out of the EU, the UK government could theoretically repeal laws such as those related to discrimination, collective consultation, transfers of undertakings, family leave, working time and duties to agency workers.

Possible implications of Brexit

Many EU employment protections – such as equal pay, race and disability discrimination laws, and the right to return from maternity leave – existed in some form in the UK before

they were imposed by Europe and it seems unlikely that a UK government would rescind rights that pre-date European laws. Another reason that the government might be reluctant to repeal employment law protection is that much of it is regarded – by employers, employees and even politicians – as a good thing. Employment rights such as family leave, discrimination rights and the right to paid holiday are now widely accepted; indeed, family leave rights in the UK go further than those required by EU directives.

Another, pragmatic, reason for the UK to continue to follow European employment law is so that it can continue to have a trading relationship with the EU, its biggest export partner, but without full EU membership. The arrangements that Switzerland and countries in the European Economic Area such as Norway have with the EU involve adherence to a significant amount of EU employment law. Any trade agreement between the UK and the EU is likely to require something similar.

It will take some time for the UK to extricate itself from the EU. Once the UK has given the EU formal notification of its withdrawal (which has not happened at the time of writing), there will be a two year period in which the parties will negotiate the terms of departure and possibly put in place new trading arrangements. Some commentators believe that it will take considerably longer to agree exit terms but, unless both the UK and the European Council agree to extend negotiations, the UK will simply cease to be a member of the EU at this point. Even after the process has been completed and the UK has left the EU (and assuming no other restrictions imposed by another free trade agreement), European law may continue to apply in one way or another because disentangling it from UK law will take some time. Some EU-derived laws are contained in secondary legislation made under powers granted by the European Communities Act 1972, the law that implements EU law in the UK. If the European Communities Act is repealed, all secondary legislation made under it (e.g. the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)) will fall away unless preserved by another piece of legislation. The repeal of the European Communities Act would not, however, affect EU law implemented through primary legislation, such as the Equality Act 2010. Primary legislation would remain in force until it was repealed piece by piece.

It is therefore unlikely that all EU law will be removed at once. A gradual approach is more likely, with legislation being repealed or merely modified over time. So, if freed from European constraints, what is it likely that the government would actually change?

Freedom of Movement

There are currently large numbers of UK nationals living in other EU countries and nationals of other member states living and working in the UK. Following Brexit, these individuals will

no longer have the automatic right to live and work where they are. It would not seem to be in anyone's interests (whether the individuals' or their employers') to order them all to return to their country of origin and a recent UK survey suggested that the majority of Britons favour allowing EU migrants currently in the UK to stay. It seems likely then that the UK government will agree an amnesty, whereby existing EU migrants could stay (at least for a reasonable period) in return for permission for UK citizens abroad to remain where they are. In the medium term it could be that these individuals are given sufficient time to obtain citizenship in the country they are residing in and that if they fail to do so, they must return 'home'. The UK might then introduce an immigration system similar to the one it uses for non-EU citizens, whereby skilled workers and students can gain permission to stay for a limited period. This would help to lower immigration to the UK from its current historically high levels (barring unforeseen consequences, such as an increase in illegal immigration). However UK businesses might be unhappy with a ban on the labour they are used to accessing from the EU. Yet another question is whether in practice the UK could renegotiate a trade agreement with the EU without agreeing to the free movement of persons which is regarded as fundamental by EU states such as France and Germany.

Agency workers

The most likely contender for complete revocation is the Agency Workers Regulations 2010. These are unwieldy, unpopular with business and not noticeably popular with workers either.

Discrimination and family leave

Any wholesale repeal of equality protection or family leave seems improbable. Although the government could repeal the Equality Act after exiting the EU, it would be a controversial move. It is difficult to imagine many employers arguing that they should be free to discriminate and any change to the existing regime of direct discrimination, indirect discrimination and harassment seems unlikely. There may, however, be some small modifications. Compensation for unlawful discrimination in the UK was initially subject to a cap, in the same way as damages for unfair dismissal. It became uncapped following a decision of the European Court of Justice (ECJ). It is possible that, following Brexit, a cap could be re-imposed on discrimination compensation. 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 currently impermissible under EU law.

Rights to parental and family 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 in some respects. A new right to shared parental leave and a right to request flexible

working are both purely domestic in origin. Accordingly, although some critics consider all these rights to be a burden on business, there seems little political appetite to repeal them or even to water them down.

Transfer of undertakings

TUPE can attract a bad press in the UK, but the principle that employees should transfer when a business changes hands or is contracted out is often useful for business and is incorporated and priced into many commercial outsourcing agreements. For this reason, although some businesses might like to get rid of TUPE, it seems more likely that the government will make some small changes to make it more business friendly, such as permitting the harmonisation of terms following a transfer. This is currently quite difficult in the UK because of the way in which certain ECJ decisions, particularly Daddy's Dance Hall, have been interpreted.

Holidays and working time

The right to statutory paid holiday under the Working Time Regulations 1998 is now broadly accepted. However, there are aspects of this right, and of other rights under the Working Time Regulations, that the government might want to amend if not prevented from doing so by EU membership. Various ECJ decisions on holiday pay are unpopular with UK businesses – for example, the right to keep accruing holiday while on sick leave and the fact that holiday pay should be based on all aspects of remuneration, not just basic pay. The government might choose to tweak these laws to make them more commercially acceptable, such as by retaining a right to paid holiday based on basic pay while limiting rights to accrue and carry over holiday pay. The UK may also wish to remove the cap on weekly working hours under the Working Time Regulations. It is less clear that there is demand to limit the Working Time Regulations rights to other rest breaks or the protections for night workers.

Collective redundancy consultation

Collective redundancy consultation obligations were reduced by the last government. The requirement is now not particularly onerous and it is not clear what might happen to it following Brexit. Trade unions are likely to fight against any proposal to remove it altogether, but employees arguably do not feel strongly about this right (and many do not know about it). On the other hand, it is not obvious that businesses regard it as a burden that should be removed. Similarly, other collective consultation rights such as national and transnational works councils are possible candidates for repeal, but the obligations they impose on UK businesses are relatively light.

Legal precedent

If the UK retains some EU law following Brexit, the UK courts are likely to continue to regard judgments of the ECJ on those laws as persuasive, even if not binding. In any event, pre-Brexit UK court decisions incorporating ECJ reasoning would remain binding on lower courts and tribunals. It is not clear how far UK courts would be able to treat exit from the EU as a material circumstance that would allow them to depart from precedent. They might do so, but could feel obliged to follow precedent to preserve legal certainty.

Comment

It seems likely that UK employment law will not change significantly, particularly in the short term.