Employment Law And The UK's EU Referendum

UK employment lawyer Juliet Carp takes a look at the interaction of EU membership with UK employment law and the potential impact of UK withdrawal from the EU.

Imposing consistent minimum employment law standards across the EU is intended to facilitate the European market. Put simply they help create a level playfield. In Eurospeak they prevent "social dumping". "Bad" employers who are subject to less stringent employment laws should not be given competitive advantage over "good" employers who pay higher employment costs associated with "better" laws. In theory, at least, we would expect businesses located in countries with advanced employment laws to benefit.

European employment laws can only be imposed on people in the UK where the European Treaty allows for this. This, and the economic focus of the EU, has meant that European law does not bite evenly across UK employment law. In some areas, such as discrimination, European law is key. In others, such as industrial relations, the impact of EU law is minimal.

Which UK Employment Laws Are Most Affected By Europe?

The following are examples of areas where UK legislation was introduced to comply with, or is underpinned by, European law:

- **Equality:** sex, race, disability, sexual orientation, religion and belief, and age discrimination laws are all underpinned by European law.
- **Family Friendly Laws:** minimum maternity pay and leave, parental leave and time off for "domestic emergencies" are all required under European law
- **A-Typical Working:** part time, fixed term and agency working are all regulated by European law
- **Transfers Of Undertakings:** UK laws protecting employees on sale of a business or outsourcing (known as "TUPE") are based on an EU directive, although they now reach beyond the minimum requirements of European law
- **Collective Consultation:** European law has brought us national works councils; European Works Councils; collective redundancy and TUPE-related collective consultation obligations
- **Working Time:** UK regulations implementing European law require minimum holidays and restrict working time, night work and shift patterns.

The following are examples of UK law where European law is less relevant:

- **Dismissal:** minimum notice periods, statutory redundancy pay and unfair dismissal laws are home grown. EU law generally does not interfere with dismissal laws unless they are discriminatory
- **Whistleblowing:** Whistleblowing legislation was introduced by the UK.
- **MinimumWage:** Europe does not set any minimum wage, and is unlikely to
- **Industrial Relations:** The European Union has interfered very little with industrial relations systems, which vary widely across Europe. UK collective bargaining, recognition and strike laws are our own. There are some cross-over constraints, for example, some competition-related EU case law has developed in relation to cross-border industrial action.

The interaction of UK and European law is in many places more nuanced. For example, by comparison with its European neighbours, 1970s Britain had advanced race and sex discrimination laws. The subsequent influence of Europe on UK discrimination law has, nonetheless, been very significant. It was European law that brought so many poorly paid part-timers pension rights for the first time, and that established the principle that women and men should retire at the same age. Similarly, we had UK maternity legislation long before the Pregnant Workers Directive. That directive extended the availability of paid maternity leave and led to a raft of smaller changes to maternity laws through the 90s. Since then European case law has continued to push the boundaries, in some cases at considerable inconvenience and expense to employers. The impact goes beyond the concrete results for affected employees and employers. Attitudes to discrimination and parenting have changed so much in the last twenty years that it would be hard to find anyone who has not been affected in some way.

What Would Happen If The UK Left The EU?

If the UK were no longer bound by the European Treaty, then it would be possible for Parliament to amend or withdraw legislation governed by European law and to pass legislation to change case law developed under European law. It seems likely, though, that much of the existing legislation will be retained. For example, it would be difficult for any government to remove discrimination laws or holiday rights that most citizens now regard as normal. While there might be some tinkering around the edges, it seems likely that the core of existing EU-based laws would stay.

More Or Less Stable?

Employers often say that the content of new laws is less of an issue than the frequency of change and ongoing uncertainty. It is generally acknowledged that change places a heavier burden on small businesses.

There is always some tension between the EU and UK legal systems. European law is not common law. UK precedent rules do not apply and European directives are often (deliberately) drafted loosely or in aspirational terms. This can sometimes lead to surprising developments in case law, such as seen recently in relation to the interaction of commission and compulsory holiday pay. In the round though, European law is stable. New directives are negotiated at length with stakeholders before they are adopted; implementation periods are long (two years is typical); and employers cannot fairly argue that they are taken by surprise by the final text of a new directive. Surprises for employers are more likely to arise from the domestic implementation process or developments in subsequent case law.

It is worth making the comparison with the more democratic domestic alternative. Employment law affects ordinary working people and business every day: it is intrinsically political. Governments with different political makeups naturally look to make changes – and in areas that do not touch on European law those changes can

be implemented very quickly. Domestic changes are not always "progressive" in the sense of moving in one direction. UK unfair dismissal laws are a good example of this, with changing political views on the importance of "cutting red tape" or "fair" processes requiring substantial adaptation by employers within relatively short time frames.

More Of The Same?

A large number of quite significant directives relating to employment law have been introduced over the last 20 years. That trend is unlikely to continue over the next few years. In 1973, the UK joined a fairly homogenous core group of six Western European countries. There are now 28 member states, many of whom have had to accommodate a substantial body of European employment law in a relatively short space of time. Moreover, the economic situation has prompted a trend towards employment law deregulation across Europe, so that even countries that are comfortable with existing laws have little appetite for more. As time goes by it becomes increasingly difficult for politicians, European institutions and stake holders to come up with good ideas for new law that would be acceptable to sufficient Member States – and it is increasingly hard for lawyers to think of new ways to push the boundaries of existing case law. In this context, it seems likely that EU employment legislation going forward will be relatively stable.

So Where Does This Leave Us?

The pace at which new European laws are introduced has already slackened and significant additional demands are unlikely to be made of the UK. Existing European employment law has largely become part of normal UK working lives, so it seems likely that we would want to keep many laws with European roots.

There can be tension between democracy and stability and it is true that UK citizens have less democratic control over UK employment law while the UK is a member of the EU, but in the main the practical results have been positive and the advantages to UK business and employees of maintaining the status quo should not be underestimated.

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