

UK Employment Law Post-Brexit

Since the UK's decision to leave the European Union, uncertainty surrounding the legal implications has been widespread; particularly within the UK employment law landscape. As a substantial component of UK employment law is grounded in EU law, withdrawal from the EU could translate into UK employment rights currently safeguarded by EU law no longer being guaranteed.

This current state of uncertainty is undesirable for both employees and employers, and the approach pursued by the government until now has followed a sense of continuity. Both the Prime Minister, Theresa May, and Secretary of State for Exiting the European Union, David Davis, have been at pains to offer reassurances that the rights of workers will remain largely unchanged post-Brexit. However, the politics of the situation dictate that this rhetoric may not translate into reality in practice.

The mechanism which the government has devised to undertake the complexities of the legislative landscape once Article 50 has been triggered, will lead to minimal change immediately post-Brexit. Furthermore, the forces within the party which helped drive the move towards EU withdrawal still carry momentum. Emboldened by the Brexit vote itself, and determined to procure a 'hard' Brexit, it can be assumed that leading Brexit advocates will seek radical changes to employment laws from the outset; as EU driven employment law has long been seen as a barrier to business and its growth.

The implications of the Great Repeal Bill – the instrument through which the government intends to deal with the legislative fall-out following EU withdrawal – must also be considered. The bill, announced in October, will have a dual purpose once enacted two years after Article 50 has been triggered. The first will be the repeal of the European Communities Act (ECA) 1972 and the second will impact employment law. The enforcement of the bill will enable all current EU legislation to be preserved in UK law, in turn leaving the government free to repeal, retain or amend individual aspects of that law. Connotations of irony emerge, as the 'repeal' bill will in effect be a continuity bill, resulting in minimal changes in terms of employment law, particularly in the short to medium term. Arguably, the Great Repeal Bill

was designed by the government to satisfy the demands of the pro-Brexit lobby in mainly symbolic terms (since the bill will not be enacted until after the UK leaves the EU, hence the repeal of the ECA will be strictly cosmetic), at the same time as avoiding the legislative chaos likely to result following a repeal of EU legislation.

As with so many aspects of Brexit, the practical details of how this process will be undertaken are unclear and open to speculation. According to a briefing paper 'Legislating for Brexit: the Great Repeal Bill', which was placed in the House of Commons Library on November 21st of this year:

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In effect, individual ministers will have the power to repeal or amend the legislation which has been absorbed into

UK law without the changes having to be scrutinised or passed by Parliament. The House of Commons Library itself describes it as 'potentially one of the largest legislative projects ever undertaken in the UK'. The complexity of the task is exacerbated by the requirement to seek parliamentary approval for each step, emphasising the significance placed upon executive power. For those attempting to second guess the direction that Brexit will take, consider that the attitudes to employment legislation set out in the past, particularly by those with pro-Brexit views. These must be taken seriously as indicators of possible future actions. Comments such as the following, from the Foreign Secretary, indicate that pledges to preserve current employment legislation cannot be taken at face value:

"I envisage there being absolutely no regulation whatsoever – no minimum wage, no maternity or paternity rights, no unfair dismissal rights, no pension rights – for the smallest companies that are trying to get off the ground, in order to give them a chance." – Andrea Leadsom, 2012.

"The weight of employment regulation is now back-breaking: the collective redundancies directive, the atypical workers directive, the working time directive and a thousand more." – Boris Johnson, 2014.

Whilst the concept of the Great Repeal Bill gave rise to a sense of certainty, the High Court ruling on 3rd November 2016, stating that the government does not have the power to begin exit negotiations from the EU without parliamentary approval, has undermined this to an extent. The precise ramifications of this ruling remain to be seen. The aforementioned determination to maintain executive control over as much of the process as possible may be threatened, and the triggering of Article 50 itself seems set to be delayed.

Whilst it is clear that nothing in the field of employment law looks set to change in the short to medium-term, the longer-term prospects remain likely to be impacted by the kind of political and ideological machinations which fuelled Brexit in the first place.

The current state of flux, which includes a second court action launched in November by the pressure group British Influence, claiming that it will be illegal for the UK government to leave the wider European Economic Area (EEA) as part of leaving the EU, could lead to those in the employment sector being complacent. However, certain situations such as recruiting people from

overseas or retaining those EU nationals already in place, could become more difficult once the full ramifications of Brexit become evident. Presently, many EU nationals working in the UK do not feel safe; a situation likely to continue as long as the government holds back on issuing a guarantee of their status, regarding this as a valuable bargaining chip in future negotiations. Whether seeking to reassure current employees or making plans for the future, it is vital to set structures in place, or at least begin the process of doing so, at the earliest possible opportunity.

Indeed, there is a chance that a Brexit at the 'softer' end of the spectrum may result in minimal changes in the rules regarding visas. However, establishing systems to monitor any changes that are introduced will allow for a sense of preparedness if changes ultimately occur. Integral to the consequences of the longer-term approach would be the implementation of accessible lines of communication, enabling employees to ask any questions associated with the likely impact of Brexit. One of the side effects of the uncertainty surrounding the practicalities of Brexit has been the creation of an information vacuum, which in turn has been filled with speculation, rumour and the more lurid pronouncements of some sectors of the media. The need for

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concrete facts, and correct information to be circulated amongst employees, is ever more critical to ensure that the increasing rumours and speculation do not have a detrimental impact and supersede the need for reassurance during this uncertain time.

Whilst the final form of Brexit may take many years to become apparent, the impact on employment law seems set to be a reflection of political machinations as much as anything else. The wisest stance to take, whilst it seems that anything is possible, is to prepare for all possible scenarios.



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