

Brexit – What could the future look like?

Richard Thomas of Capital Law (who will be a speaker at the HR Director Summit on 31 January – 1 February 2017) sets out his thoughts on the potential legal implications of the withdrawal process of the UK from the European Union.

One of the more interesting (or frightening) aspects of the recent EU referendum was that those advocating “Brexit” could not put forward any clear blueprint or model as to how the UK would govern its legal and trading relations once outside of the EU.

This was in contrast to the Scottish Independence referendum (in 2014) when the then Scottish Government published a prospectus detailing how an independent Scotland would exist and function.

So far, the UK Government's position (under new Prime Minister Theresa May) is that “*Brexit means Brexit and we are going to make a success of it*”.

Therefore, it seems certain that the UK will at some point during 2017 invoke the well-known Article 50 of the Treaty of Lisbon to serve irrevocable notice of its intention to leave the European Union.

This will then trigger the 2 year negotiation period in which to conclude a withdrawal agreement.

The legal implications of such a withdrawal for the UK's current laws are considerable. For example, all the treaties, directives and regulations (and rulings of the European Court of Justice) will cease to apply in the UK unless their affect is specifically preserved by UK national law. Furthermore, the EU Court will no longer have jurisdiction over the UK and UK citizens will no longer have the rights of EU citizens.

What is clear in that there will be significant practical difficulties associated with the need to disentangle EU derived requirements from non EU derived requirements, especially where case law has for over 20 years drawn on the UK Courts interpretation of EU directives and ECJ rulings.

In the employment law field, a significant amount of UK legislation and case law developments have derived from the EU and this has strengthened workers individual rights in areas such as working time, annual holidays, family friendly policies, anti-discrimination legislation, employment protection in the event of a change of employer and agency workers.

Worker collective rights have also been strengthened by EU directives in the areas of collective redundancies, TUPE, European works councils and information and consultation obligations.

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Therefore, these are our predictions for change, if the UK has full freedom to repeal all European employment laws.

TUPE

TUPE will remain. It is part of accepted employment protection now, and the UK gold-plated it when introducing service provision change in 2006.

But there would be tweaking, for example a relaxation of consultation provisions, and probably allowing post-transfer harmonisation of terms and conditions (which the UK can't do now because of a European case called Daddy's Dance Hall).

Redundancy consultation

The 20+ redundancy collective consultation laws stem from an EU Directive. These are unpopular with employers and we suspect will be watered down, for example requiring collective consultation only if over, say, 100 people being made redundant (rather than 20, which is the current threshold). But this will not be a legislative priority.

Working Time Regulations

Most of the Working Time Regulations will remain. Paid holiday will certainly stay, and of course the UK gold-plated the European 4 weeks' paid annual leave with 5.6 weeks in the UK.

But legislation will be passed to reverse some of the holiday time cases, for example accruing holiday during long-term when sick leave.

We also suspect a 'weeks pay', which currently includes commission and overtime following ECJ rulings, will be pared back to the position it was a few years ago, with just basic salary being paid as holiday pay.

We also think the maximum average 48 hour working week will be abolished, as it is universally unpopular and commonly ignored.

Agency Worker Regulations

These implement the EU Temporary Agency Workers Directive, which requires employers to offer equal terms & benefits to agency workers once they've been working for 12 weeks.

These are massively unpopular and will probably be repealed. The CBI dislikes them, and unions are ambivalent about them (as very few temporary workers join unions, so the unions have no members' interests to protect). But watch out for future developments from Theresa May's Government on workers' rights and dealing with the "Gig Economy"

Discrimination

The 2006 EU Equal Treatment Framework Directive currently binds the UK. As a result, the UK introduced protected characteristics including religion and belief.

But the UK had already legislated to prohibit sex discrimination, race discrimination and disability discrimination (and others) long before Europe required it to do so. We very much doubt there will be any appetite for removing any of the protected characteristics.

Having said that, a few years ago, there was a call for discrimination compensation to be capped (as unfair dismissal compensation is capped).

That couldn't be done, because the UK's membership of the EU forbade it. If there is another such call, and the UK has left Europe, there will be no such impediment. Watch this space.

Family Friendly

There are unlikely to be any reduction to family friendly rights. The UK exceeds EU rights considerably, for example 52 weeks maternity and shared parental leave.

Immigration

There are currently large numbers of UK nationals living and working in other EU countries and vice versa.

Following Brexit, EU nationals would no longer have the automatic right to continue to work in the UK. It seems likely that the UK Government will agree with the EU a position whereby an existing EU migrants can stay (at least for a reasonable period) in return for permission for UK citizens working in the EU to remain where they are. It is also likely that the UK will introduce an immigration system similar to the current system for non EU citizens, whereby skilled workers and students can gain permission to stay for a limited period. Clearly, this could have an impact on some UK businesses if significant restrictions are imposed on their ability to recruit labour from the EU.

Data Protection

It seems unlikely that the UK will repeal or significantly modify the Data Protection Act 1998 which implements the EU data protection directives. However the data protection directive stipulates that personal data must not be transferred to a company outside the EU unless that country ensures an adequate level of protection for the rights of the data subject.

Clearly if UK businesses want to operate in the EU (or vice versa) there will be a need for the transfer of personal data between the EU member states and the UK and therefore, there will need to be adequate protections equivalent to the current ones.

Therefore, the UK will need to decide whether or not it will continue to abide by the EU data protection regimes. If it does do so, it will need to update the Data Protection Act 1998 to take account of the new General Data Protection Regulation which is due to be implemented in 2018.

Richard Thomas of Capital Law will be presenting an update concerning the legal implications of a Brexit and its potential impact on recruitment, employment and immigration at the forthcoming HR Summit.

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