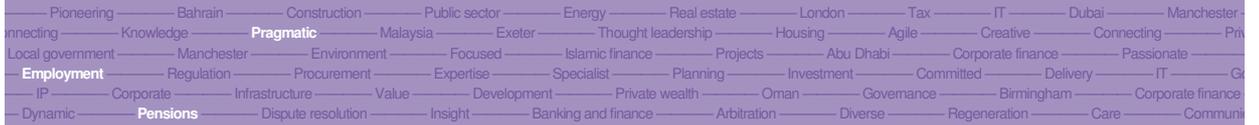




Legal update — October 2016

Employment and pensions Brexit update



After a temporary hiatus, Brexit is firmly back on the agenda. Following the Prime Minister's announcement at the beginning of this month that Article 50 will be triggered before the end of March 2017 it seems that it's full speed ahead!

Meanwhile, as instant proof of the fact that the process will have to undergo considerable finessing, Home Secretary, Amber Rudd's suggestions that companies should publicise the number of foreign workers that they currently hire (as part of a process of a duty to employ national workers) have been roundly criticised and speedily abandoned. We have also had the High Court hearing on whether the Government needs Parliament's approval to trigger Article 50 and await the Judges' decision.

The Great Repeal Bill

In addition to announcing the triggering of Article 50, Theresa May stated that the next Queen's Speech will include a Great Repeal Bill. This Bill will repeal the European Communities Act 1972 (ECA 1972). Although the Great Repeal Act will be on the statute book before a Brexit takes place it won't actually take effect and repeal the ECA 1972 until Brexit day, now expected in the Spring of 2019.

The ECA 1972 gives effect to EU law in the UK, but also priority to EU law over UK law, including over Acts of Parliament. This means that in the event of a conflict between EU law and the laws of a member state it is EU law which needs to be respected.

In essence the Great Repeal Bill will enable Parliament to absorb the parts of EU legislation that it wishes to keep into UK law, while scrapping elements that it does not wish to keep. It will also end the jurisdiction of the European Court of Justice (ECJ) in the UK once it takes effect.

Do we have any clarity on the employment law implications?

The House of Commons has recently published a Brexit briefing paper on employment law. This provides a

useful discussion of UK and EU employment law and the way in which they currently sit together. It quotes the Prime Minister's commitment in her speech to the Conservative Party conference earlier this month, "...existing workers' legal rights will continue to be guaranteed in law - and they will be guaranteed as long as I am Prime Minister". So far so reassuring, but what happens when Theresa May's premiership comes to an end? In the short term it seems that existing employment rights will remain intact, but in the long term the position is unclear.

In some cases EU law has entrenched provisions that already existed in UK law. In other cases, new categories of employment rights have been transposed into domestic law to comply with new EU obligations. Withdrawal by the UK will mean, subject to the provisions of any withdrawal or trade agreements negotiated, that UK employment rights will no longer be guaranteed by EU law. As a result these rights could be amended or removed by Parliament in due course.



Source: Fotolia

Although EU-derived employment rights contained in primary legislation would be relatively immune from the effects of leaving the EU (such rights will only be capable of alteration by primary legislation), those contained in secondary legislation (which could be revoked by secondary legislation) would be more susceptible to change.

Rights contained in primary legislation include the equality rights in the Equality Act 2010, protections relating to the processing of and rights of access to personal data under the Data Protection Act 1998, the right to enforcement of a protective award on a

Published by
Trowers & Hamblins

Trowers & Hamblins LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

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collective redundancy, and to the protection of workers' rights guaranteed by the State in the event of an employer's insolvency. Secondary legislation implementing EU laws includes TUPE, the Agency Workers Regulations 2010, the Fixed-Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

Employment rights contained in secondary legislation made under the ECA 1972 are likely to be saved before the UK leaves the EU via the Great Repeal Bill. If such rights are moved into primary legislation then they will be less susceptible to change or revocation, but if they remain as secondary legislation then the permanence of their status will be dependent on the degree of power the government will have to remove employment rights via secondary legislation post-Brexit.

Case law: a strange dichotomy?

UK courts are currently bound to follow ECJ case law. There is a significant body of case law which, over the last few months alone has obliged the UK to include commission payments in the calculation of holiday pay, and confirmed that a worker can carry forward annual leave they are unable to take due to sickness to the next holiday year. It has also held that the right to respect for private life and correspondence is compatible with an employer's monitoring of employees' personal communications at work, and is due to resolve the live issue of potentially discriminatory dress codes.

Once we have exited the EU UK courts will no longer be obliged to follow existing and future decisions, and may just view them as having persuasive force unless something is included in the Great Repeal Bill which codifies existing case law. Without it controversial decisions could be re-litigated; the various ECJ holiday pay decisions would be prime candidates.



Source: Fotolia

Although post-Brexit the UK will no longer have to transpose new EU law into domestic law, it is likely to retain laws which have already been implemented. It may well find itself in the strange position where ECJ decisions interpreting these laws will have no binding effect and can be ignored. Although the UK may

continue to share many employment laws in common with the EU, the interpretation could become increasingly contradictory.

Brexit Secretary questioned about intentions regarding employment law

The situation surrounding Brexit is still extremely uncertain to say the least! Recently the Shadow Foreign Secretary, Emily Thornberry, and the Shadow Secretary for Exiting the European Union, Sir Keir Starmer QC, raised 170 questions concerning Brexit to David Davis, the Brexit Secretary.

Amongst the employment-related queries raised, they have asked the government to guarantee all existing employment rights underpinned by EU legislation will not only be fully transposed into EU law via the Great Repeal Bill, but will also be retained for the long-term. They have asked for a guarantee that employment rights for women that derive from EU legislation and ECJ rulings will be retained in full, as well as all existing anti-discrimination rights for disabled people underpinned by EU legislation. They have asked for judgements of the ECJ to be enshrined in law, as well as asking the Government to give a legally-binding guarantee that citizens of other EU countries currently living, working and using public services in the UK will be able to continue to do so with all their rights intact (with a reciprocal guarantee for UK citizens living elsewhere in Europe).

It remains to be seen what assurances David Davis will be able to offer, but hopefully his responses will go some way to clarifying the Government's position.

Meanwhile, litigation continues...

The litigation continues around the question of whether an Act of Parliament is needed to trigger Article 50. The High Court hearing finished on 18 October, and is expected to move quickly to the Supreme Court (probably in early December), via a "leapfrog appeal" (one that bypasses the Court of Appeal).

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For more information please contact

Emma Burrows
Partner
t +44 (0)20 7423 8347
e eburrows@trowers.com

Richie Alder
Partner
t +44 (0)20 7423 8593
e ralder@trowers.com

Nicola Ichnatowicz
Partner
t +44 (0)20 7423 8565
e nihnadowicz@towers.com

Rebecca McGuirk
Partner
t +44 (0)121 214 8821
e rmcguirk@towers.com

John Turnbull
Partner
t +44 (0)1392 612370
e jturnbull@towers.com

Helen Cookson
Senior Associate
t +44 (0)161 838 2081
e hcookson@towers.com
