Brexit Untangled
The employment law implications

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While much of British employment law derives from Europe, some areas are purely UK provisions. So to what extent would existing laws be affected by a Brexit? Here, we have identified six areas that stand to change should the UK vote to leave the EU - our employment law 'Brexit sextet'…

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Whole swathes of British employment law derive from Europe. On the face of it, 'Brexit' could give the UK power to repeal or reshape areas of employment legislation that some businesses dislike. Will it happen? Unlikely. Most of it was not imposed on the UK; rather, the UK leads the way. We exported our discrimination legislation to Europe: 'they' didn't impose it on 'us'.

Leaving Europe might give political cover for structural reform, but it will not be easy. Moreover, some areas of employment law such as unfair dismissal, whistleblowing and individual redundancy rights are purely UK provisions that will remain unaffected by the outcome of the referendum.

That said, we have identified six areas that stand to be affected to varying degrees should the UK vote to leave the EU – the employment law 'Brexit sextet'…

The Brexit sextet

At number 1 – Working Time

The poster-child for complaints that EU regulations undermine flexibility, increase costs of hiring staff and cause unnecessary red-tape – The Working Time Directive (WTD). Indeed, some say that the WTD was a major factor in the Conservatives' falling out of love with Europe. Having negotiated an opt-out from the Social Chapter in the 1990's, the John Major administration was furious to see this legislation badged not as 'social' but as 'health and safety'.

The WTD governs average working hours, rest periods and annual leave. While unlikely to face the chop altogether, it is the prime candidate for severe scaling back.

Businesses would be particularly keen to see the repeal of the maximum 48-hour working week and the removal of working time record keeping requirements. Also high on the list would be the reclassifying of so-called 'inactive on-call time' as rest time.

While even the most fervent opponents of the Working Time Regulations 1998 would not suggest the whole-scale removal of statutory annual leave rights, greater freedom on the accrual and calculation of holiday pay would most likely be on the 'revise' list.

The right of workers on long-term sick leave to continue to accrue and either take or carry over paid annual leave would no doubt come under attack amidst cries of "holiday from what!". An attempt to address the discrepancies between the European case law and the wording of the Regulations was considered in the Modern Workplaces consultation back in 2011, but to date is still sitting in the Government's 'too difficult' pile.

A return to holiday pay based on basic contractual pay - rather than the current hot topic of holiday pay calculations needing to include regular albeit fluctuating voluntary overtime and/or commission payments - would also be highly likely. The use of rolled-up holiday as a practical solution to calculating holiday pay for casual and zero-hour contract workers could also see a legal resurrection.

At number 2 – Agency Workers

The most likely candidate for complete revocation is the the Agency Workers Regulations 2010. Removing the requirement for agency workers to be paid the same rate for the job as permanent staff once they have been in post 12 weeks could reduce business costs and record keeping requirements. This would no doubt be a tempting 'quick win' with businesses for the Government following a Brexit. As these rights do not appear to be embedded in the national psyche for UK workers as say rights to paid holiday and rest breaks, this would appear to be a potential easy target.

At number 3 – TUPE

TUPE could be seen as a prime target for attack, freeing up organisations to operate without European constraints in acquisitions and outsourcing scenarios.

However, the principle of employees transferring can be helpful and organisations often prefer certainty in planning. While TUPE derives from the Acquired Rights Directive, the broad principles are generally well incorporated and understood by organisations who have adapted to TUPE, particularly in the outsourcing world. In fact, the UK has already implemented legislation on service provision changes that goes beyond that required by the EU.

Relatively recently (2011- 2014), the Government conducted a full-scale consultation and review on the effectiveness of TUPE. This resulted in some amendments to TUPE, aimed at giving more flexibility, but there was wide-spread opposition from business to the proposed removal of the service provision change concept.

More recently, we have, perhaps, seen increased cases of organisations looking to avoid the application of TUPE but it seems unlikely that there would be a major overhaul of the TUPE principle post-Brexit.

It is more likely that there would be amendments to TUPE, to make it more employer-friendly; in particular, a review of those areas where EU law prevented the Government from making the changes it wanted. There are two particular areas the Government would look at.

Firstly, EU law prevents businesses ‘harmonising’ terms and conditions of employment following a TUPE transfer. The response to the Government’s Call for Evidence on TUPE found that businesses find their inability generally to harmonise employment contracts a burden. The Government believes that the current situation can cause resentment within businesses and inefficiencies in their operation, which can ultimately harm their competitiveness and undermine long term job security. It believes that

the UK economy would benefit from a fair framework to allow individuals (or their representatives) and businesses to agree mutually beneficial changes to terms and conditions which may lead to harmonisation following a transfer.

The Government has already expressed its frustration at being limited by Europe on this issue. In 2013, it said: “The Government will engage with European partners to demonstrate the potential benefits of a harmonisation framework for individuals and the economy”. We have not heard anything since, but this seems to be a prime area where changes may be made.

The second area is collective redundancy dismissals under TUPE. This is another sticking point that the Government might tackle post-Brexit. The timing of a dismissal in a collective redundancy scenario is still one of most difficult practical issues an organisation may face in a transfer. The latest amendments to TUPE (under the Collective Redundancy and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014) went some way to help. It is now possible to conduct pre-transfer collective redundancy consultation (required where the transferee is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less). However, any dismissals still need to be made after the transfer to avoid being automatically unfair. The practical difficulties with that are particularly acute in a re-location, for example, an outsourcing to a new provider located elsewhere.

Other TUPE requirements which the Government could change post-Brexit include dealing with collective agreements, collective consultation obligations, changes to terms generally and widening the circumstances where it is possible to fairly dismiss an employee.

Of course, the extent of any changes will depend on the arrangement with the EU, post-Brexit. So, while TUPE may continue in essence, it may not be quite as we know it, and over time there may become a wider divergence between the position in the UK and the EU.

All that said, Norway, sometimes held up by Brexit campaigners as the paradigm relationship with the EU, has TUPE.

At number 4 – Discrimination

Anti-discrimination legislation is here to stay. The Equality Act 2010 is primary UK legislation that will remain in force regardless of the outcome of the referendum. It incorporates EU law and the more recent anti-discrimination ‘protected characteristics’ of age, sexual orientation, religion and belief, and resulted from the need to meet EU requirements. However, prohibitions on race, sex, marital status and disability discrimination were in force long before the UK was required to implement such legislation by EU directives.

Modern social attitudes make any significant roll-back of discrimination protections politically unpalatable. Nigel Farage's suggestion in the run-up to the election that race discrimination legislation could be repealed was quickly withdrawn following fierce criticism.

Any change to the existing regime governing direct discrimination, indirect discrimination and harassment seems unthinkable but there is one area that could be up for change – compensation.

Currently compensation for discrimination is based on the loss suffered by the claimant, including financial loss and injury to feelings without limit. Unlike in most unfair dismissal cases, there is no

upper limit on compensation. Post-Brexit there would be scope to impose a cap on discrimination compensation similar to that for unfair dismissal.

Such a move is currently incompatible with EU law. Indeed, the UK used to have a cap but this was struck down by the English court on precisely this ground.

The CBI in particular has suggested that a cap would curb claimants' unrealistic expectations about the compensation they might receive and make it easier to settle claims at an earlier stage. However, there is a political consensus on the need to improve diversity at senior levels in UK plc: it is likely that the legislation will retain some teeth – which probably means relatively generous compensation limits - if that consensus is maintained.

Another possibility is that the Government could change the law to allow a positive discrimination in favour of under-represented groups akin to US-style affirmative action. While limited 'positive action' is permitted 'positive discrimination' is currently impermissible under EU law. It is hard to suppose that this is what Brexit's most ardent campaigners are seeking, but it could be an unintended consequence nonetheless.

At number 5 – Family friendly measures

Rights such as those provided for new and expectant mothers are criticised by some as examples of business-unfriendly EU legislation. In practice, however, existing rights to maternity, paternity, shared-paternity and parental leave and pay 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 than required by EU law.

It seems highly unlikely that a post-Brexit government would be keen to scale back such rights in any meaningful way – or that larger employers would want to abandon their existing family friendly policies anyway, given their significance as a recruitment and retention tool. Last year saw the significant updating of maternity/paternity rights with the addition of 'shared parental' leave and pay as an additional option for parents. Indeed in the Budget, the Government confirmed its intention to further expand the scope of shared parental leave to allow sharing with grandparents. Maternity/paternity rights are here to stay.

One area that could possibly see a scaling back is the right to 18-weeks per parent, per child of unpaid parental leave. As a type of leave that is derived purely from EU law it may be a target, but given it is unpaid a change is unlikely save for exemptions for micro-employers.

At number 6 – Collective redundancy consultation

The statutory duty on employers to inform and consult the workforce about proposed redundancies, contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), was introduced in order to implement the provisions of the EU Collective Redundancies Directive. Employers must consult where they are proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.

Relatively recently (2011- 2013), the then government conducted a review and consultation on reform of the collective consultation obligations and steps taken to address the concerns of businesses. As a result, in April 2013 the previous 90-day minimum period before which the first redundancy can take

effect (if there are 100 or more redundancies) was reduced to 45 days. In addition, expiry of fixed-term contracts were taken outside the scope of collective redundancy consultation.

Collective consultation rights are well embedded in the psyche of UK industrial relations. A proposal to remove the consultation obligations altogether appears unthinkable. Such a proposal would be hotly fought by trade unions and severely damage industrial relations in the UK. However, some further tweaking may be possible. In particular, clarification as to the trigger point for when an employer is considered to have 'proposed' redundancies, free from considerations of the current unclear European case law may be welcomed.

Other collective consultation rights, such as works councils and transnational works councils, little used in the UK are more likely possible candidates for removal.