UK: Employment Update

Welcome to the May Employment Update in which we take a look at potential employment law developments in the post general election landscape, including an initial look at the implications of a UK exit from the EU. We also consider the ECJ's decision in relation to the meaning of "establishment" in the context of an employer's collective redundancy consultation obligations.

Key issues

- Post election employment law proposals?
- Employment law implications of a UK Brexit
- ECJ clarifies the position on collective redundancy trigger

Post election employment law proposals?

As David Cameron returns to Downing Street for another term, we take a closer look at the employment law changes proposed by the newly-elected government. The Conservatives will continue the efforts of the Coalition government by passing commencement orders to give effect to the employment law provisions contained in the Small Business, Enterprise and Employment Act 2015 which received Royal Assent on 26 March 2015.

Employment Tribunals

The Employment Tribunals Act 1996 will be amended to permit financial penalties to be imposed on employers who do not pay employment tribunal awards or sums due under a COT3. This is to address the problem that currently only around half of all claimants who are successful at tribunal are actually paid their tribunal awards.

In order to reduce delays in Tribunal proceedings new legislation will:

- Provide that where a party has been granted two previous postponements of hearings in the same case, any further applications by that party for a postponement will only be granted in exceptional circumstances;
- Provide that any application for a postponement presented less than seven days before the relevant hearing or made at the hearing itself shall only be granted in exceptional circumstances; and
- Oblige tribunals to consider the imposition of a costs order or a preparation time order against a party that is granted a late postponement (i.e. less than seven days before the date of the hearing).

The timeframe for implementation of these changes is not yet known.

Mandatory gender pay gap reporting

As part of its commitment to promote full gender equality, the Conservatives will by Spring 2016 implement regulations requiring companies with more than 250 employees to publish the difference between the average pay of their male and female employees. A consultation will be launched on the detail of the new reporting framework.

Paid volunteering leave

It is proposed that the Working Time Regulations 1998 will be amended to introduce an additional three days paid volunteering leave each year for all public sector employees and those in the private sector working for employers with at least 250 employees.

Zero hours contracts

Exclusivity clauses in zero hours contracts which prohibit a worker from doing work or performing services under another contract or under any other arrangement, or doing so without the employer's consent, will be unenforceable.

Public sector exit payments

Statutory changes will also require high earning public sector employees (earning above £100,000) to repay, on a pro rata basis, termination payments that relate to loss of employment in circumstances where such employees return to the public sector within 12 months. The Conservatives have also previously indicated that new legislation will be introduced to cap public sector enhanced redundancy payments to £95,000.

National Minimum Wage ("NMW")

The National Minimum Wage Act 1998 will be amended to allow for the maximum financial penalty of £20,000 to apply in respect of *each* underpaid worker, rather than to each employer.

The Conservatives have also followed the recommendations of the Low Pay Commission and pledged to increase the NMW from £6.50 an hour to £6.70 by this autumn with a view to increasing the NMW to over £8 an hour by the end of 2020. They also propose to introduce a new law that will increase the tax-free personal allowance automatically in line with the NMW.

Trade unions and industrial action

The Conservatives aim to prevent "disruptive and undemocratic strike action" by introducing the following reforms:

- A tougher threshold for strike action in the health, transport, fire and education sectors. Industrial action would require a minimum turnout of 40% of all those entitled to take part in strike ballots, in addition to a majority vote by all those who turn out to vote;
- Ensuring strike action cannot be called on the basis of old ballots (previously, the Conservatives have suggested a three-month time limit);
- Repealing legislation that prevents employers from using agency workers to cover striking employees;
- Tackling the intimidation of non-striking workers;
- Introducing legislation to ensure a transparent opt-in for union subscriptions by trade unions; and
- Tightening the rules around "facility time" (i.e. time off to take part in trade union duties) for union representatives and reforming the role of the Certification Officer.

Other

- *Fitness to work***:** The Conservative manifesto refers to helping those suffering from long-term yet treatable conditions, such as obesity or addictions, back into work by ensuring they receive the right medical treatment. If they refuse a recommended treatment, their benefits may be reduced.
- *Apprenticeships:* The Conservatives also pledged to create an extra three million apprenticeships over the next five years.
- *Work and families:* From 2017 the Conservatives will increase to 30 hours the entitlement to free childcare for all working parents of three and four year olds.

The Employment law implications of a UK 'Brexit'

The new Conservative Government is now in a position to act on David Cameron's campaign pledge to renegotiate the conditions of the UK membership of the EU and to hold a public referendum by the end of 2017. Any referendum may in fact come forward to 2016 to avoid clashes with 2017 elections in France and Germany and therefore any impact on employment law within the UK may be witnessed sooner rather than later. Indeed a referendum bill is to be published on 28 May after the Queen's speech.

At first glance, it would appear that a 'Brexit' would have substantial implications on UK employment law as much of it is derived from EU law including maternity and paternity leave, paid holiday and the protection of employment upon the transfer of a business.

Employers may regard a Brexit as the opportunity to be rid of certain EU derived domestic legislation such as the Working Time Regulations, which are perceived by some to have led to increased compliance and administrative costs for businesses.

In reality the extent to which current employment legislation will be affected (repealed, revised, and interpreted) will be dictated by the nature of the 'Brexit'. Will the UK: (i) remain in the European Economic Area (EEA) and the European Free Trade Area (EFTA) like Norway; or (ii) adopt the Swiss model, i.e. remain in EFTA (but not as a member of the EU or EEA) and concludes bilateral treaties with the EU on a sector by sector basis; or (iii) forge closer trade relations outside the EU/EEA with e.g. the Anglosphere (with other English speaking jurisdictions)?

Remaining an EEA/EFTA state

EEA/EFTA states are obliged to accept the majority of EU legislation without being able to participate in, or

influence, the EU decision making process or having any right of veto. The EEA Agreement incorporates a number of employment law directives including the Equal Treatment Directive, the Collective Redundancies Directive, the Part-Time Workers Directive, The Fixed Term Workers Directive, the Parental Leave Directive, the European Works Council Directive, the Acquired Rights Directive (from which Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is derived), the Working Time Directive and the Agency Workers Directive. In addition, the EFTA Court which interprets EEA Rules is obliged to follow ECJ case law.

Swiss Model Brexit

If the Swiss model was adopted, the UK would almost certainly be required to accept certain EU rules (via bilateral agreements); whether this would include employment related rules would depend on the UK's negotiating strength and stance, but it seems unlikely that all EU employment rules would be excluded from the scope of the bilateral agreements. Access to the EU markets without a requirement to maintain certain 'employment' standards is improbable.

Total Brexit

Only in the event of a total EU exit is there potential for a significant change to the UK's EU derived employment law. European law has been incorporated into the UK's domestic legislation in a variety of ways. Under the powers conferred by the European Communities Act 1972 (EC Act) some legislation has been implemented via regulations including TUPE and the Working Time Regulations. Other European legislation has been implemented via primary legislation such as the Equality Act 2010.

If the Government repealed the EC Act would this have the effect of automatically repealing regulations implemented under it such as TUPE? Yes, if an enabling Act is repealed regulations made under it will lapse unless they are continued in effect. This will be the case even if the regulations regulate matters and/or confer rights beyond the scope of the EU Directive. The Government would therefore have the option of preserving all or part of the regulations. In practice, an immediate revocation of all EU derived secondary employment legislation is likely to be an unattractive, giving rise to inconsistency, confusion and uncertainty in the business community. Commercial agreements will have been drafted to take into account the existing legislative regime, for example, long term outsourcing, PPI etc. agreements where pricing will have been dictated by the commercial risks under the prevailing employment law regime.

Primary EU derived legislation would remain in force until such time as the Government elected to repeal or revise it. If all such EU legislation is repealed upon a Brexit this would give rise to a significant volume of simultaneous legal change that business would have to address in one go which is also likely to be deeply unattractive, burdensome and give rise to considerable legal and commercial uncertainty. A more practical reality is a piecemeal revision of existing legislation to address specific business and government concerns. This is likely to take time and be costly and there is no guarantee employment law will be prioritised over other areas of law that would also require updating following an exit.

Following a total EU exit it remains to be seen how the domestic courts will interpret EU derived legislation that is not revoked or repealed. Will they continue to consider themselves bound by the pre and post Brexit decisions of the ECJ? For example, in relation to holiday pay claims, domestic courts have read words into the legislation in order to give effect to the decisions of the ECJ. Will this approach continue to be adopted? They may do so for the sake of legal certainty and consistency until such time as the legislation is amended. Clearly, where legislation has been drafted to give effect to ECJ decisions then that will continue to be binding until such time as it is repealed or revised.

In practice, it is likely that much EU derived legislation will remain in force either as a short term interim arrangement, or, in some cases for the long term. The political ramifications of repealing some legislation, e.g. legislation conferring the rights to equal pay and paid holiday, may be too unpalatable. It may be that there is some tinkering around the edges, for example, in relation to the calculation of holiday pay and the carrying forward of holiday pay. To the extent that the Government has expressed dissatisfaction to date or a light touch approach to European derived employment legislation this may be an indicator of those areas that might be susceptible to change post Brexit.

An added complication is that notwithstanding any repeal of domestic legislation some EU derived rights may have been incorporated into employment contracts and company policies (e.g. paid holiday). In most cases a unilateral revocation of such contractual rights would give rise to breach of contract claims as well as potentially significant industrial relations.

ECJ clarifies position on collective redundancy trigger

As widely reported in the press, thousands of people made redundant by the closure of Woolworths are now unlikely to receive compensation following a ruling from the European Court of Justice that has clarified when the trigger for collective redundancy consultation arises.

Trade Union Labour relations (Consolidation) Act 1998 (TULRA) obliges employers to inform and collectively consult with employees where they are proposing to make 20 or more employees "at one establishment" redundant within a period of 90 days or less. Failure to comply with this information/consultation obligation can result in a protective award of 90 days' pay (uncapped) per affected employee. In 2013 the Employment Appeal Tribunal (EAT) held that the words "at one establishment" should be disregarded as TULRA failed to properly implement the European Collective Redundancies Directive (the Redundancies Directive). The result of this decision was that when assessing whether the collective redundancy consultation trigger threshold had been reached employers had to aggregate proposed redundancies across the entire workforce, not just at local business units. This clearly had significant practical implications for employers resulting in collective redundancy consultation with disparate groups of employees or the risk of protective awards if collective consultation was not carried out.

The ECJ has now confirmed that the number of dismissals does not have to be aggregated across all of an employer's establishments in order to determine whether the 20 employee threshold is met (and TULRA therefore properly implements the Redundancies Directive). The ECJ also confirmed that an 'establishment' should be understood as the local unit to which the workers are assigned to carry out their duties. The ECJ has upheld this reasoning in two further decisions handed down in early May.

The Court of Appeal must now determine, on the facts, whether each branch of Woolworths were local units (i.e. establishments) to which the relevant employees were assigned to carry out their duties. The first instance Tribunal held that the local branch was the establishment, however, the EAT found that if it had to decide the issue it would have interpreted the word 'establishment' broadly to mean the whole of the retail business rather than each of its stores. It seems likely that the individual branches of a large retail chain will be considered as separate establishments (although complications may arise where the retail chain has multiple outlets in one shopping centre, for example).

In any event, the decision provides clarity and certainty to employers implementing redundancies in different locations across the country.

[USDAW and Anr v VW Realisation 1 Ltd (in liquidation), Ethel Austin and Anr]

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