THE EMPLOYMENT LAW IMPLICATIONS OF 'BREXIT'

At first glance, it would appear that the 'Brexit' vote will have substantial implications for UK employment law, and the immigration system in the UK. In reality the extent to which current employment legislation will be affected (repealed, revised, and interpreted) will be dictated by the nature of the 'Brexit' which has not yet been determined.

There is no immediate change to employment legislation as a consequence of the vote. The UK remains a member of the EU and will have two years to negotiate the terms of its exit. This briefing explores some of the key questions that arise in relation to employment law issues.

Key issues

- Can I continue to employ EU citizens?
- What employment legislation will be affected by the Brexit vote?
- How will employment contracts be affected?
- What does this mean for pay restrictions in the financial services sector?
- What will be the impact on the approach of the courts to employment cases?

CAN I CONTINUE TO EMPLOY EU CITIZENS?

Yes: There is no immediate change to the UK's relationship with the EU or the rest of the world in relation to its visa and immigration rules; non UK employees (whether EU/EEA/EFTA or other) who can currently lawfully work in the UK will continue to be able to do so unless and until their immigration status changes.

Further down the line some immigration requirements may change. Mention has been made of an Asylum and Immigration Control Bill to end the automatic right of EU citizens to enter the UK in the transitional period before the Brexit takes effect.

From a practical perspective employers should in due course undertake an audit of their domestic workforce to identify which workers (or key workers) rely on the UK's membership of the EU to work in the UK to assess possible areas of vulnerability. The same exercise should be carried out to identify British citizens in any overseas workforce.

WHAT EMPLOYMENT LEGISLATION WILL BE AFFECTED BY THE BREXIT VOTE?

This remains to be seen; if the UK elects to remain as an EEA/EFTA state or to adopt a Swiss Model Brexit it is likely that many of the EU employment provisions will continue to be applied to some extent with little or no change to current legislation.

Only in the event of a more radical approach to 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 European Communities Act 1972 (EC Act) some legislation has been implemented via regulations including the Transfer of Undertakings

(Protection of Employment) Regulations 2006 (TUPE) and the Working Time Regulations. Other European legislation has been implemented via primary legislation such as the Equality Act 2010.

The Government could repeal the EC Act in its entirety and this would have the effect of automatically repealing regulations implemented under it such as TUPE. Alternatively the Government has the option of preserving all or part of the regulations implemented under the EC Act.

In practice, an immediate revocation of all EU derived secondary employment legislation like TUPE is likely to be unattractive; not least because it will give 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, PFI and other agreements where pricing will have been dictated by the commercial risks under the prevailing employment law regime.

Primary EU derived employment legislation will remain in force until such time as the Government elects to repeal or revise it. If all such EU legislation is repealed at the same time (and there is no current suggestion that this is the plan) this would give rise to a significant volume of simultaneous legal change that business would have to address in one go. This would be burdensome and give rise to 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 there is no guarantee employment law will be prioritised over other areas of law that will also require updating following Brexit.

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, the carrying forward of holiday, compensation limits in discrimination cases and collective redundancy consultation obligations. In practice, it is likely that much EU derived legislation will remain in force in the short term and in some cases for the long term.

HOW WILL EMPLOYMENT CONTRACTS BE AFFECTED?

An added complication is that even if domestic legislation is repealed or revised 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. Thought will need to be given to the strategy to be adopted in the event that there is a desire to revise contractual provisions.

WHAT DOES THIS MEAN FOR THE RESTRICTIONS ON PAY IN THE FINANCIAL SERVICE SECTOR?

Material changes to the various "remuneration codes" affecting financial services firms are fairly unlikely in the short term. The precursor to the PRA (the FSA) was an early adopter of remuneration rules for financial services firms, and introduced a voluntary version of the remuneration code in 2011, before the EU required member states to adopt these rules. Since then, the PRA has also introduced requirements that go beyond those contained in the

relevant EU directives (for example the 7 year clawback requirement; enhanced deferral for certain senior managers).

Whilst the PRA/FCA did lobby against the imposition of the bonus cap, and have maintained the stance that they should be permitted to disapply the bonus cap to certain types of financial services firms, it is unlikely (in our view) to make substantive changes to the other remuneration provisions. Even in if it was minded to abandon the bonus cap, their ability to make changes will be tied up in whether the UK negotiates ongoing participation in the existing EU "passporting" regime (which, in general terms, allows financial institutions approved by a regulator in one member state to carry out business in another member state, on the basis that they are all subject to equivalent regulatory standards).The bonus cap cannot therefore be looked at in isolation by the UK regulator.

WHAT WILL BE THE IMPACT ON THE APPROACH OF THE COURTS TO EMPLOYMENT CASES?

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? The courts may do so for the sake of legal certainty and consistency until such time as the legislation is amended. Indications are that early steps will be taken to "limit the role of EU judges in British Law". Legislation that has been drafted to give effect to ECJ decisions will continue to be binding until such time as it is repealed or revised.

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