



Legal update — November 2018

Employment

Brexit update: what does it all mean for employment?



Ever since the full text of the draft EU-UK withdrawal agreement was published, the press has been rife with reports of a beleaguered Theresa May. So what happens next? The short answer seems to be anyone's guess! However, in terms of procedure there are a number of steps that need to be taken before we have any certainty.

First the text of the draft agreement is subject to legal verification. Negotiations on the full political declaration continue and the aim is to reach a successful conclusion this week. A meeting with the European Council is due to take place on 25 November to finalise and formalise the agreement.

Perhaps the more complicated part of the process is the government's ratification of the withdrawal agreement. The House of Commons will have to pass a resolution approving the withdrawal agreement and the framework for the future relationship. Assuming that this happens (although according to reports of internecine strife within the Conservative party, and ominous rumblings from the DUP that the deal does not have their support this appears to be far from certain) an Act of Parliament will be passed which contains provision for the implementation of the withdrawal agreement. The European Parliament must also give its consent to the draft withdrawal agreement by simple majority vote before the Council of the European Union can conclude the withdrawal agreement by qualified majority vote on behalf of the EU.

European Union (Withdrawal) Act 2018

The European Union (Withdrawal) Bill received Royal Assent on 26 June 2018. It repeals the European Communities Act 1972 and makes a range of legislative provisions in connection with the UK's withdrawal from the EU on 29 March 2019. It is anticipated that around 800 pieces of secondary legislation will be introduced under the enabling powers in the Withdrawal Act. Alongside the secondary legislation, government departments are also working on a further package of

primary legislation to deliver policy changes required as a result of Brexit.

The new Act provides the legislative basis for a "hard Brexit", but if the draft withdrawal agreement is agreed there is provision for regulations to be made which would make consequential amendments to the Act until the end of a transitional period ending on 31 December 2020. The draft withdrawal agreement also makes provision for an extension to the transition period to be agreed.

The Withdrawal Act 2018 states that while not being "bound", courts and tribunals may "have regard to" anything done on or after exit day by the ECJ (and the EU itself) "so far as it relevant to any matter before the court or tribunal".

Under the provisions of the draft withdrawal agreement the ECJ will continue to have jurisdiction for any proceedings brought before it by or against the UK, and to give preliminary rulings on requests from UK courts and tribunals referred to it, by the end of the transition period. Until the judgments and orders of the ECJ in all proceedings and requests for preliminary rulings have become final, the UK may intervene and participate before the ECJ in the same way as a Member State.

In a White Paper on the future UK-EU relationship, published on 12 July 2018, the government proposed maintaining current UK employment laws so that existing workers' rights are unchanged following exit day. It suggested that the UK and the EU commit to the non-regression of employment law standards and to uphold their obligations that derive from their International Labour Organisation (ILO) commitments. The ILO has formulated a number of conventions embodying key principles of employment protection. These conventions are legally binding international treaties ratified by individual ILO Member States.

Note on equalities legislation

A note has been published specifically on equalities legislation which provides that:

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- The government has made a firm commitment to maintaining the UK's long-standing records of ensuring rights and liberties are protected.
- The government has committed to ensuring that the protections covered in the Equality Act 2006 and the Equality Act 2010, and equivalent legislation in Northern Ireland will continue to be available the day after EU exit, as the day before.

This means that all the protections in the Equality Act 2010 against discrimination, harassment and victimisation for those with "protected characteristics" will continue to be available in full.

Department for Exiting the European Union publishes technical note on workplace rights if there's no Brexit deal

The Department for Exiting the European Union has published a technical note, 'Workplace rights if there's no Brexit deal' (23 August 2018). This essentially informs "businesses, workers and citizens of the UK's plans to continue workplace protections in the unlikely event that the UK leaves the EU in March 2019 with no agreement in place".

In a "no deal" scenario, there will be implications in relation to European Works Councils (EWCs) and the insolvency of some employers. However, the note finishes with a positive slant, stating that the Department expects to negotiate a successful deal with the EU.

Back in July 2017 the Government published factsheets alongside the draft Withdrawal Bill (now an Act). 'Factsheet 7: Workers' rights' stated that the government will ensure that workers' rights that are currently enjoyed under EU law will continue to be available in UK law after the UK has left the EU.

Draft statutory instruments

Earlier this month two draft statutory instruments were published making various technical amendments to employment legislation. These statutory instruments, the Employment Rights (Amendment) (EU Exit) Regulations 2018, and the Employment Rights (Amendment) (EU Exit) (No.2) Regulations 2018 do not make substantive changes to existing employment rights.

The statutory instruments will only take effect if there is no withdrawal agreement.

What could potentially happen to employment rights?

Through the Withdrawal Act, the government should largely maintain continuity of employment legislation.

As discussed above, even in the event of a "no deal" scenario, the Act will guarantee the vast majority of EU-derived employment legislation at the point of exit.

The Withdrawal Act does not retain the Charter of Fundamental Rights within UK law. The Charter includes broad commitments such as the right to access to justice and has been used as the basis for successful claims in the UK's domestic courts. An example of this is the *Benkharbouche* case, where the Supreme Court relied on the charter to disapply the State Immunity Act 1978, to the extent that it gives embassies immunity from EU-derived employment rights for non-UK staff.

The Withdrawal Act will maintain current employment rights on "day one" after Brexit. Under the draft withdrawal agreement the transition period until 31 December 2020 will allow the UK to continue to adopt the entirety of the accumulated legislation, legal acts and court decisions which constitute EU law, including all the employment legislation. However, after this point, EU-derived employment legislation will only be governed within the constraints of the future partnership.

The government might take the opportunity to amend some areas of employment law to reduce regulatory burden on companies, including:

- Amending or repealing the Agency Workers Regulations 2010.
- Introducing a cap on compensation for discrimination similar to that for unfair dismissal.
- Amending TUPE to make it more business friendly (e.g. by making it easier to amend terms following a TUPE transfer).
- Addressing the issue of whether employees accrue holiday while off sick.
- Removing the cap on maximum weekly working hours.

The position of EU nationals

Assuming that the withdrawal agreement (or a version of it) is adopted, the status of EU citizens and their families living in the UK will not change until the end of the implementation period.

EU citizens and their family members living in the UK will soon be able to start applying for UK immigration status through the new EU settlement scheme. The scheme is beginning to be open in a phased way and will be fully open by 30 March 2019. The first private pilot of the scheme, involving 12 NHS Trusts and 3

universities in the North West of England has taken place, and the next phase of the roll-out of the EU Settlement Scheme will run from 1 November to 21 December 2018, with a significant increase in the number of participating organisations, including staff in the higher education, health and social care sectors across the UK.

People who are living in the UK by 31 December 2020 will have until 30 June 2021 to make an application for status under the scheme.

From 1 July 2021 EU citizens and their family members in the UK must hold or have applied for UK immigration status to be here legally. Those who have not yet lived in the UK for five years will be granted pre-settled status and be able to apply for settled status once they reach the five-year point.

Close family members (a spouse, civil partner, unmarried partner, dependent child or grandchild, and dependent parent or grandparent) living in the UK or overseas are also eligible for the scheme.

In May 2018 confirmation was given to the House of Commons' Home Affairs Select Committee that the government intends to introduce its EU settlement scheme via Immigration Rules before the end of 2018, so it looks likely that these protections will be fixed even if there is no overall agreement on withdrawal.

Post-Brexit immigration for EEA nationals

On 27 July 2017, the government commissioned the Migration Advisory Committee (MAC) to "examine the contribution made by EU nationals to the UK economy and society" and to "draw up proposals to align the UK immigration system with a modern industrial strategy". The MAC reported back to the government in September 2018.

As far as a sense of what the immigration framework might be in the future, this report is the main thing we have to go on as the government has not yet published a promised white paper on immigration.

The MAC report, 'EEA Migration in the UK: Final report' concludes that, while EEA migration has had impacts, many of them seem to be small in magnitude when set against other changes.

The report concludes that the small overall impacts mean that EEA migration as a whole has had neither the large negative effects claimed by some nor the clear benefits claimed by others. There are ways in which migration policy could be changed to increase the benefits and reduce the costs. The MAC report states that if immigration is not to be part of the negotiations with the EU and the UK is deciding its future migration system in isolation, it recommends moving to a system

in which all migration is managed with no preferential access to EU citizens. This would mean ending free movement.

The report states that if the UK is in a position where it is deciding the main features of its immigration policy, the MAC's recommendation is that there should be a less restrictive regime for higher-skilled workers than lower-skilled workers in a system where there is no preference for EEA over non-EEA workers. The MAC does not see the need for a work-related scheme for lower-skilled workers, pointing out that most of the existing stock of such workers would remain and "there would likely be a continued flow through family migration or the existing youth mobility scheme".

The main changes to current immigration policy which are likely to be implemented are as follows:

- EU citizens will be treated the same as those arriving from outside the EU.
- The cap of 20,700 per year on the number of new highly skilled migrant hires from outside the EU who are paid less than £159,600 will be abolished.
- Applicants will need to meet a minimum salary threshold to ensure they are not completing for jobs that would otherwise be recruited in the UK. Currently for highly skilled migrants this stands at £30,000 but the MAC has suggested that it should only apply to those with salaries lower than £50,000.
- Sponsorship might expand to include dependents. A Conservative Party press release prior to the party's 2018 conference stated that highly skilled workers' family members could only come if sponsored by the individual's future employer.
- There will not be much provision for low-skilled workers if the MAC's recommendations are followed.

Time will tell....

In this volatile political climate it's very hard to predict what will come next. As far as employment law is concerned there are unlikely to be any significant changes in the short term, but as to long-term predictions it seems that only time will tell!

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