Proskauer

Brexit: The Consequences for UK Employment Law

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On 23 June 2016 the people of Britain voted in favour of leaving the European Union – the so-called "Brexit." The result has created uncertainty and speculation as to the implications of Brexit and what happens next.

As always, amongst all the noise, much gets lost: there is a danger that we lose sight of certainties that remain as we try to work out what the future may hold.

Employment law has often been cited as an area where European legislation dominates with the implication that departing the EU will radically change UK employment law. We disagree. Although exiting the EU will have implications for UK employment law, we consider that much that is in place will remain in place, not just in the short-term but in the medium and long-term too.

There are three main reasons for this:

- In the short-term, until such time as the UK leaves the EU it will remain bound by European legislation which will therefore remain in force as it is now.

- In the medium-term, much EU-derived employment legislation is enacted by way of domestic legislation. Even after leaving the EU, most of this legislation will remain in place unless it is repealed.

- Most significantly, and in the long-term, a large proportion of UK employment legislation is either UK specific and even when based upon EU law, some of the most significant provisions in the UK (and in particular anti-discrimination legislation) are derived from UK legislation whereas some of the provisions most at odds with the UK framework for employment law (such as works council legislation) are rarely, if at all, invoked in the UK.

Short-term

The referendum result has no immediate impact on employment law. It does not repeal laws that derive from the EU.

Rather, the referendum was an advisory referendum and the result has no direct legal effect. The UK is still a member of the EU. It will continue to benefit from the EU free trade area and be bound by EU employment and other laws until it leaves.

In terms of next steps, the expectation is that the referendum result will trigger the UK government notifying the EU of its intention to leave. This would then trigger a two-year period during which the terms of exit will be negotiated (the "**Negotiation Period**"). There is naturally uncertainty and speculation as to how this process will take shape and what the outcome will be – it has never happened before. Indeed, many consider that the Negotiation Period could extend beyond two years. However, importantly, during the Negotiation period, the UK will continue to benefit from the EU free trade area and be bound by EU employment and other laws.

In other words, our expectation is that for at least the next two years, the status quo will remain.

Medium-term

Brexit will not automatically repeal EU-based legislation. This means that even after the Negotiation Period ends, UK legislation implementing EU legislation (the vast majority of which is enacted by way of domestic legislation) will remain in force. It will therefore remain in place unless it is repealed. Nothing we have seen to date indicates that making significant changes to employment law will be a legislative priority post-Brexit.

Long-term

Exiting the EU may give parliament greater flexibility to change employment legislation (albeit this will depend on the relationship between the EU and the UK post-Brexit where one quid pro quo for a free trade agreement may be agreement by the UK to comply to EU employment law). Insofar as this flexibility emerges, once the dust has settled, we consider it plausible that political parties will start to scrutinise employment legislation with a view to changing or repealing legislation derived from the EU. However, we do not expect this to create any radical changes to the overall UK employment framework. This is for the following reasons.

Much existing UK employment law legislation is UK-specific without any (or any significant) European legislative input, including the following: unfair dismissal (statutory protection against being terminated), the notice of termination to which employees are entitled, whistleblowing protection, the law of industrial action and trade union recognition (notwithstanding limited EU overlay) and the national minimum wage.

Other significant areas of UK employment law currently based on EU legislation, and in particular protection against discrimination, are very much modelled on pre-existing UK domestic legislation (which itself borrowed heavily from U.S. legislation). For example, the concepts of direct discrimination, indirect discrimination and victimisation (the equivalent to retaliation) on the grounds of gender and race, were part of UK domestic law long before European law afforded similar protections. Over time, the EU has refined the finer points of the legislation, expanded the classes of those protected by anti-discrimination legislation and expressly included harassment as a new category of conduct that is prohibited. However, these concepts are so enshrined in UK employment law and culture, that it seems highly unlikely that there will be any move to change anti-discrimination legislation in any significant way.

Similarly, while the EU has been a proponent of family-friendly rights, such as paid maternity, paternity and parental leave, the UK has introduced legislation that goes significantly beyond EU minimum standards, as illustrated through the relatively recent introduction of shared parental leave (the right for the parents of a child to pool and then share their leave entitlements on the birth or adoption of a child) and the right to request flexible working.

The limited ability of EU legislation to change the fundamental nature of the UK employment relationship is also illustrated by lack of works councils in the UK. In 2004, the UK enacted EU legislation giving workers the right to set up works councils at a time when none existed in the UK. At the time, the expectation was that this right would be widely exercised and would change the face of employment relations in the UK bringing it more in line with many other European jurisdictions such as France, Germany and the Netherlands, where works councils play a critical part in the employment relationship. This never happened. In over a decade, less than a handful of applications to establish works councils have been made and works councils play no significant part in the UK employment relationship.

In other words, many of the most significant employment rights, namely, protection against dismissal, protection against discrimination and harassment, family-friendly rights, whistleblowing, minimum wage, trade union recognition and industrial action, will not be directly impacted by leaving the EU and we do not anticipate material changes in these areas.

This is not to say that the UK will not scrutinise employment rights derived from the EU, such as protections for part-time, agency, fixed-term and other atypical workers. Indeed, in this regard, the flexibility to re-think these protections may be to the advantage of the UK, especially given the proliferation of the on-demand economy, the increasing number of atypical workers and the increasingly fragmented nature of the working relationship of on-demand workers.

Conclusion

All political changes impact employment law and we expect Brexit to be no different. However, amidst all the noise and the feeling that everything is about to change radically, we do not consider that Brexit itself will fundamentally change the nature of the employment relationship or employment law in the UK, whether in the short, medium or long-term.