



THE EFFECTS OF BREXIT & REVIEW OF EMPLOYMENT LAW DEVELOPMENTS IN THE LAST YEAR

KEITH POTTER & DAVID SEALS

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- Discrimination
- Transfers of Undertakings
- Working Time
- Holidays and Holiday Pay
- Collective Consultation Obligations
- Agency Workers
- Data Protection
- Freedom of Movement

How much of this will be affected?

- Equal Pay – 1970s
- Discrimination on grounds of sex and race – 1970s
- Discrimination on grounds of disability – 1990s

- Contrary to prevailing culture and no political advantage in limiting scope of law on:
 - equal pay
 - discrimination on grounds of sex, race, disability, age, pregnancy and maternity, sexual orientation, marriage and civil partnership, religion or belief
- A cap on compensation for discrimination - as exists for unfair dismissal?
- But UK never had such a cap in the pre-existing legislation. Hard to see any government wanting to make a case for one now

- No pre-existing legislation
- Current legislation on this part of UK law for 18 years - regarded either as uncontroversial or as a positively good thing
- No reason to expect significant change in main aspects of legislation



- Possibility of change on matters of detail such as:
 - Calculation of holiday pay – whether based on basic pay or whether overtime is taken into account
 - Accrual of statutory holiday entitlement during sick leave - an area of concern for some employers
- Not a political priority to introduce change. UK will wish to maintain a harmonious relationship with EU and to establish trade agreements



- Prior to original TUPE Regulations of 1981 UK had legislation preserving continuity of employment where an employee worked for a business which was sold and was retained by the new owner – but did not provide for automatic transfer of employment relationship
- After 35 years it is hard to see any government wishing to overturn employee's right to be retained in employment upon sale or transfer of business
- Possible areas for change:
 - Modifying the law on service provision changes, particularly contractor to contractor transfers
 - Making it easier for employers to harmonise terms and conditions of employment of incoming employees after TUPE transfer

- Law modified to some extent in 2013
- Employers contemplating redundancies would still have to undertake individual consultation to comply with unfair dismissal case law developed over past 35 years
- For large employers contemplating large numbers of redundancies it may be easier to carry out collective rather than individual consultation
- Some large employers will have collective agreements in place with trade unions governing the way in which collective consultation will be carried out. Repeal of legislation would not affect such agreements
- Works Councils or Transnational Works Councils – change unlikely

- Possible candidate for repeal
- Complex – widely thought to be unpopular
- Not an accepted part of landscape



- In force in UK since 1998 - significant change unlikely
- EU Data Protection Directive requires that personal data must not be transferred to a country outside the EU unless that country ensures an adequate level of protection for the rights of the data subject
- UK businesses operating in the EU (or EU businesses in the UK) will have to transfer personal data between the UK and EU member states. There will need to be adequate protections equivalent to the current ones
- EU's General Data Protection Regulation – see the Guidance issued by the ICO



- EU citizens currently in UK and UK citizens in EU states are unlikely to be required immediately to return to country of origin
- Likely outcome is that EU citizens in UK will be given time to seek indefinite leave to remain in UK or UK citizenship and will be required to return to country of origin if they fail to do one or other
- Controls on new EU immigrants - an immigration system similar to the current system for non-EU citizens, to allow skilled workers and students to gain permission to stay and/or work for a specified period



- After Brexit, ECJ will no longer have jurisdiction over the UK courts and its future decisions will not be binding
- Currently, a body of UK case law interprets EU-derived law in accordance with ECJ decisions. In principle this case law would remain binding on lower courts, subject to the possibility of distinctions being made on the particular facts of each case
- To what extent might UK courts treat the fact that they are no longer obliged to apply ECJ judgments as a reason not to follow EU-derived precedents?
- Courts seem likely to follow existing precedents in order to preserve legal certainty. Even future ECJ decisions may be regarded as persuasive, even though not binding



REVIEW OF EMPLOYMENT LAW DEVELOPMENTS IN LAST 12 MONTHS

- ***Underwood v Wincanton plc*** – interpretation of public interest test in context of qualifying disclosures – EAT
- ***Morgan v Royal Mencap Society*** – complaint that cramped working conditions were adversely affecting knee injury and other medical conditions – EAT
- ***Kilraine v London Borough of Wandsworth*** – distinction between disclosure of information and allegations – EAT
- ***Eiger Securities LLP v Korshunova*** – need to identify and verify source of legal obligation which is allegedly breached - EAT
- **Review by Public Concern at Work**

- ***Patural v DB Services (UK) Ltd*** – challenge to level of discretionary bonus and comparison with colleagues who were entitled to guaranteed bonus based on a formula – HC
- ***Hills v Niksun Inc*** – Court entitled to interfere with employer's assessment of commission entitlement – CoA
- ***Department of Transport v Sparks and others*** – Absence management provision in staff handbook incorporated into employees' contracts of employment – CoA



- ***Holmes v Qinetiq Ltd*** – no application to cases where poor performance is a consequence of genuine illness – EAT
- ***Phoenix House Ltd v Stockman and another*** – no application to cases of SOSR dismissal for breakdown in working relationship – EAT



- ***Snell v Network Rail*** - compensation for breach of SPL regs – ET
- ***G4S v Powell*** - can protecting pay be a reasonable adjustment? – EAT
- ***Bougnaoui v Micropole & Achbita v G4S*** - Muslim headscarfs and religious discrimination - AG
- ***Blackwood v Birmingham*** - Work placements and discrimination claims in the ET - CoA



- ***Peninsula v Donaldson*** - childcare vouchers during maternity leave - EAT
- ***Kelly v Covance*** - is banning foreign language at work race discrimination? - EAT
- ***Waddingham v NHS*** - was requiring competitive interview a failure to make reasonable adjustments? – ET

- ***Gorka Salaberria Sorondo v Academia Vasca de Policia Emergencias*** – Upper age limit of 35 lawful – ECJ
- ***Henry v Dudley Council and Hillcrest School*** – when is work stress a disability? – EAT
- ***York Council v Grosset*** – is knowledge of consequences of disability required for discrimination arising from disability? - EAT

Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individual characteristics, excluding or restricting members of the category on the basis of race, sex, or age.

- ***Private Medicine Intermediaries v Hodgkinson*** - would raising concerns with employee on sick leave be constructive dismissal? - EAT



- ***Bandara v BBC*** – dismissal unfair where final written warning had been inappropriate – EAT
- ***Tykocki v NHS*** – Tribunal failed to consider broader impact of procedural failings – EAT
- ***Stratford v Auto Trail VR Ltd*** – dismissal fair even though ER relied on expired warnings - EAT



- *Lock v British Gas* - CoA
- *Brettle v Dudley* – ET
- *Grange v Abellio London Ltd* - EAT



- ***Aslam v Uber BV*** – self-employed drivers held to be ‘workers’ - ET
- ***Dewhurst v CitySprint UK Ltd*** – self-employed cycle courier held to be ‘worker’ - ET
- ***Bellman v Northampton Recruitment Ltd*** – employer wasn’t liable for MD’s assault on colleague at staff drinks - HC

- Changes to taxation of termination payments
- Judicial assessments
- Justice committee on ET fees





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Downs Solicitors LLP, 156 High Street, Dorking, Surrey, RH4 1BQ and The Tanners, 75 Meadrow, Godalming, Surrey, GU7 3HU
T: 01306 880110 F: 01306 502283 E: enquiries@downslaw.co.uk www.downslaw.co.uk