More than your job's worth?

***Alexandra Carn** discusses how Brexit may lead to changes in UK employment law, with some involving a possible watering down of workers' rights*

An essential part of the UK's exit from the European Union will be a repeal of the European Communities Act 1972 – the primary legislation that incorporates European law into domestic UK law. This is pivotal for industrial relations because a weighty proportion of the UK's labour law derives from the EU. The UK government has already committed to converting all employment legislation into domestic law so, at least in the short term, the effect should be negligible. But there is still plenty of uncertainty around.

Dilution of rights

A central concern raised by workers' representatives is that when EU law is transferred into domestic legislation it will be implemented by way of regulations, rather than Acts of Parliament. [See *Sharpen Your Clause*, *FW*, June/July 2017.] This means that it will bypass the parliamentary debate phase, running the risk of being watered down into reduced rights or into legislation that employers, and their legal advisers, find easier to exploit. The TUC, in particular, has expressed concerns in this regard. It believes there is a general failure on the part of the government to keep pace with the changing nature of the economy and to preserve the rights of workers on the fringes of the mainstream workplace, such as agency workers or those in "gig" jobs.

> *Rights concerning the transfer of a business are considered to be ripe for dilution*

Rights considered particularly ripe for dilution include those concerning the transfer of a business and those under discrimination law. The Transfer of Undertaking (Protection of Employment) Regulations 2006 – the regulations that preserve employment protection on the sale or transfer of a business – are perennially unpopular with employers. Although these regulations are unlikely to be repealed, there is a suggestion that harmonisation of terms (something currently very difficult) may be made much more straightforward, allowing a new employer to impose less favourable terms on a workforce.

Protection from discrimination is far too deeply enshrined (much of the UK legislation pre-dates that of the EU) to be repealed, but there is concern that a cap on compensation might be applied – as exists for unfair dismissal claims.

In an unfair dismissal claim, compensation is capped at one year's gross pay or about £80,000, whichever is lower. But, where discrimination has led to dismissal, compensation is potentially unlimited. Given that the costs of even a straightforward Employment Tribunal claim can be upwards of £50,000 and the general rule in such proceedings is that, win or lose, both sides bear their own legal costs, litigating an unfair dismissal claim alone is seldom economically rational. But in discrimination claims, where compensation can run to seven figures, the landscape is very different. If a cap were imposed on discrimination compensation, it is likely that far fewer cases would come to trial.

Rights concerning holiday and working time are firmly enshrined in UK law, but there are some anomalies arising under EU law that employers find unattractive. For example, workers on sick leave are able to continue to accrue holiday. This means a worker who is absent on sick leave for a year can still "take holiday", during which time they are entitled to receive their normal full pay. Understandably, this sits awkwardly with many businesses.

Role of the ECJ

Post-Brexit, the UK will fall outside the direct jurisdiction of the European Court of Justice (ECJ). This must be absolute, as ceding jurisdiction to another polity would contradict the principle of respect and recognition for a sovereign state. But that does not mean a legal *tabula rasa*. The government's

Future Partnership Paper, published on 23 August, 2017, states that all ECJ decisions that pre-date Brexit will have the same precedential value post-Brexit as decisions of the UK Supreme Court. This is important because following established precedents is needed to preserve legal certainty and, at present, the UK courts must interpret law derived from the EU in accordance with judgments of the ECJ. The most significant shift is that arguments based on the supremacy of the ECJ will no longer be valid. UK courts will continue to use ECJ decisions for guidance but they will not be legally binding. The UK Supreme Court will become the court of last resort.

The draft of the European Union Withdrawal Bill 2017 provides that no references can be made to the ECJ after the "exit day", and although courts and tribunals may have regard to EU case law in making determinations, they are not bound to do so. There is also a power under the bill to rectify any "failure of retained EU law to operate effectively". While there are certain restrictions on when this power may be exercised, there are no fetters regarding removing or amending employment law.

Migration

The Office for National Statistics Quarterly Report for August 2017 reported that the long-term net migration estimate for the year ending March 2017 (of +246,000) was the lowest since March 2014. A survey by the Recruitment and Employment Confederation in September 2017 also reported that salaries of permanent staff rose in August 2016 at the fastest rate since October 2015, partly down to a need to offer more money to secure relevantly skilled people, a position exacerbated by Brexit. The strain in this is very much on financial services: EY reports a rise of 50 per cent in finance workers who say they will move out of the UK and Reuters reports a loss of 9,000 City jobs. The favoured alternative locations are rumoured to be Frankfurt, Dublin and, perhaps more surprisingly, Warsaw. But it is not easy for workers to up sticks and relocate to a different country and it may be that many remain in the UK, "working from home" most of the week, although based at an EU head office.

London has benefited from being an industry cluster of interlinked companies sharing knowledge, access to clients and specialised labour. Post-Brexit, the City's competitive advantage may still remain thanks to its favoured legal system, business environment and skilled labour.

Furthermore, the EU bonus cap introduced in June 2013 under Capital Requirements Directive IV, which limits the amount of bonus that can be paid to banking staff to 100 per cent (or 200 per cent in some circumstances) of base salary, may not be continued in the UK after Brexit. If it is removed, it may allow the UK to return to its laissez-faire approach whereby the market plays the primary role in deciding remuneration.

> *"The EU-imposed bonus cap may be scrapped in the UK after Brexit*

Without the bonus cap, the City would be free to pay many multiples of salary in bonus. London banks would subsequently be less hampered by punitive fixed costs and free to vary pay in accordance with revenues. This in itself could make London an appealing place to base staff compared with continental Europe.

The other side to the coin is that the UK may need to maintain the bonus cap in order to claim "equivalence" with EU regulations to maintain access to EU markets. But even if the cap is not removed, there is scope for the UK to be more imaginative. The bonus cap is not applied unilaterally across the City. The Prudential Regulation Authority and the Financial Conduct Authority divide companies into three tiers based on capital assets. Tier three companies are not covered by the cap and, once outside of the EU, the UK could also choose to exempt tier two companies.

Much of the UK's bonus legislation is also currently more punitive than the EU's. UK regulators demand that bonuses are deferred for seven years with three years' additional clawback, for example. In the EU, it is three years now, moving to five years in 2017, and clawback rules are limited.

Some of the less enlightened have suggested that, post-Brexit, employers may be able to insist on workers having a British passport. Nationality is different from a right to work in the UK and refusing to engage someone because of their nationality will contravene the race equality provisions in the Equality Act 2010.

Although, in theory, all employment law based on EU rules could be repealed post-Brexit, it is clear that the EU will continue to exercise a significant influence for two reasons. First, the fact is that many laws perceived as European actually pre-date the European legislation. Second, there is an overwhelming business rationale to maintain an ongoing relationship with the EU. To do this, the UK is going to have to adopt a large amount of EU legislation.

Hard boiled or soft boiled, Brexit is coming. It can only be hoped that, like the curate's egg, parts of it, if not excellent, are at least good. ■

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Agony Uncle

Can you help me to become a non-executive director ?

Dear Nadim,

I have more than 35 years' experience of banking and am currently working for a large company leading on ring-fencing and project management. My leadership experience is significant and I have managed major change projects throughout my career. But I have a reached a point in my life where I would like the freedom of not being weighed down by a full-time job, but still want to work. My wife is about to retire, my children are grown up and I am financially secure, so I could make the change. What I had in mind was a portfolio career. I would be grateful for some advice on how, in particular, I could become a non-executive director. How do I get started? What should I consider?
Jim, 56, London.

Nadim says:

Dear Jim,

Many banking and finance professionals often want to develop a portfolio approach to work as they progress their career. Professionals who step towards being a non-executive director generally see it as a natural progression of all the experience and contacts they have developed. But what many executives fail to realise is that the role of a non-executive director really demands full use of that experience and that, more importantly, there are potentially serious implications if things go wrong. You should only consider this career path if you are clear about the risks that come with the job and are willing to bear them. Consider the following before you think about embarking on this career path.

What do you have to offer?

If you are passionate about helping businesses develop and feel like you have substantial expertise to offer, then building a non-executive director portfolio can be rewarding. According to the Institute of Directors, if you advise a small or unquoted company, you can make between £15,000 and £20,000 a year, and more than £40k a year for big listed companies. So that you can clearly demonstrate the sort of help you could offer, carry out an audit of projects you worked on where you supported excellent results, be it financial or in leading change/teams. If you strongly believe you have the skills, then go for it.

Strength of character to challenge the board

The role of a non-executive director can be lonely at times as you are expected to challenge the company's strategic direction and policies. That means you will need strength of character and fearlessness to be able to question the decisions made by leadership teams within the organisation.

Are you a strategic thinker?

Non-executive directors need to be able to provide expert advice on the direction that companies should take. You need to be comfortable with, and have experience of, strategic thinking and innovation.

Understand the key responsibilities and risks

Non-executive directors carry a huge responsibility for financial, legal and compliance risk. Research is central when understanding what the responsibilities are and it is essential that you are 100 per cent convinced that you want to take these on.

Be financially literate

Non-executive directors need to possess a strong understanding of complex financial functions. They have to be able to read accounts and spot anomalies, as well as to challenge and advise on financial performance and planning. While you do not need to be a qualified accountant, it does help if you have a strong background in dealing with finance.

Educate yourself about the non-executive director market

If becoming a non-executive director is a long-term goal of yours and you are in an executive leadership position, then it is probably worthwhile for you to undertake some professional development. Executive MBA courses are good ones to consider and there are an array of them available by searching online.

Decide on the type of board you want to work for

Are you more interested in SMEs or in larger companies? The portfolio that you build early on will effect your future prospects, so make sure you have researched the current market and explored a number of possibilities.

A career as a non-executive director can be rewarding but you must only consider this path if you are willing to take the legal risks associated with the role. Most importantly, do it for the right reasons and be genuinely interested in taking the time to understand your organisation. ■

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