

UK EMPLOYMENT LAW – 2021 AND BEYOND

EU law has significantly influenced and contributed to UK employment law, both directly through EU Regulations and decisions of the European Court of Justice and indirectly through Directives and provisions of the various EU Treaties, which have then been implemented into UK law by the UK Government.

In general, the approach of the EU has been to champion and protect workers' rights, often to the dismay of some Member States and employers within them due to the associated increased workforce costs and administration. Indeed EU-derived workers' rights are globally acclaimed and one only has to look to the less generous labour laws in the US to recognise the relative strength of EU workers' rights.

Some of the workers' legal rights we enjoy today that are derived from EU law include:

- The right to a written statement of particulars of employment – i.e. a written employment contract
- Various rights in relation to working time, such as the maximum number of hours in a working week, minimum rest periods and minimum amounts of paid annual leave
- A raft of rights relating to equality
- Collective rights in relation to transfers of employment from one business to another and in collective redundancy situations
- Enhanced obligations relating to health and safety at work
- Protections from discrimination between different categories of worker (e.g. agency, fixed-term or part-time workers), so that they do not get a worse deal than their full-time, permanent colleagues

What will happen on 1 January 2021?

At present, nothing will change in UK employment law despite the "transition period" coming to an end on 1 January 2021. The European Union (Withdrawal) Act 2018 does however provide some key pointers as to where and how change may arise:

- *Legislation:*
 - All domestic legislation that was passed as an implementation of EU Directives shall remain in place – for example, the Working Time Regulations and TUPE.
 - Directly-applicable EU law (i.e. EU laws that did not need to be implemented by the UK Government passing implementation legislation, such as GDPR) shall continue to apply and prevail over UK laws after 1 January 2021, unless and until it is formally repealed or replaced by the UK Parliament. Some EU law has already had the 'off switch' prepared, most notably the freedom of movement for EU citizens coming to the UK, and UK citizens travelling to and within the EU.
 - EU law's supremacy over UK law will also continue in respect of modifications to pre-Brexit UK laws, even where those modifications are made after the end of 2020.
 - In general terms, all fresh post-Brexit UK legislation shall prevail over EU law.
- *Court decisions:*
 - All pre-Brexit case law from the European Court of Justice (**ECJ**) will be retained within UK law and continue to be binding on our courts and tribunals in relation to any EU law that has not since been superseded domestically.
 - **However**, the Supreme Court, the Court of Appeal and the Scottish High Court of Justiciary can depart from ECJ decisions by applying the same test that allows them to override themselves (i.e. if it appears to the Court to be right to do so), so it is possible that the judicial system may override ECJ decisions that have shaped recent employment law in the UK.
 - In terms of post-Brexit ECJ decisions, no UK courts or tribunals will be bound by these, although they may have regard to an ECJ decision if it is relevant to the issues at hand.

Likely targets for change

While Brexit has inevitably generated industry and political debate about amending or restricting certain EU-derived workers' rights, there are in fact a number of examples where the UK has taken the EU's prescribed minimum standard

and provided in domestic law for better workers' rights over and above that standard. For example, the EU Working Time Directive required Member States to provide full-time workers with a minimum of 4 weeks' annual leave per year, but the UK went beyond that in implementing the Directive through the Working Time Regulations 1998, which provides for a minimum of 5.6 weeks' annual leave for full-time workers (i.e. 4 weeks plus the 8 standard bank holidays in England and Wales).

Whilst it therefore seems unlikely that any EU-derived workers' rights will be ripped up in the immediate future, we believe the following areas may be in the crosshairs for change:

- **Discrimination** – while it is almost impossible to conceive of a UK Government seeking to remove protections from discrimination, it is widely expected that a cap on damages may be introduced for discrimination claims, much like the cap that exists for unfair dismissal claims. This would remove much of the incentive that currently exists for claimants to try and include discrimination elements within employment claims in order to try and increase the amount of compensation that can be awarded if they are successful at trial.
- **TUPE** is often seen as a complicated spanner in the works of outsourcing arrangements and corporate transactions. While many of the more fundamental workers' rights are unlikely to be subject to change, such as the right not to be dismissed for a reason connected to the transfer, it is possible that more flexibility may be introduced to facilitate change to employees' contracts and there could be more scope for employees to object to being transferred to a new employer.
- **Holiday pay** has been the subject of a huge amount of ECJ litigation in recent years, with the general upshot being that an increasing number of elements of pay need to be included when an employer is calculating the amount of a week's pay, for the purposes of paying holiday pay for workers with variable remuneration. It is possible that the position may be simplified, which may in turn reduce the amount that those workers receive by way of holiday pay.
- **Working time** – it is possible that the maximum weekly working limit will be abolished, or increased, not least as so many employers simply include standard wording in their contracts under which the employee waives their right to a maximum number of weekly working hours.
- **Collective redundancy** – it is also possible that the fixed minimum consultation periods for collective redundancies may be made more flexible.

If you need any assistance with the issues raised in this note, please contact Alex Brooks in our Employment team.



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