Brexit – What (Theresa) May happen now?

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The divorce

At present, the UK remains a full member of the European Union until the UK Government serves notice pursuant to Article 50, and then theoretically there is a two year notice period during which the terms of the divorce will be negotiated.

It is clear that the European Union wants to see an imminent

notification. They wanted that '*in order to prevent damage and uncertainty for everyone and to protect the Union's integrity*'. However, our present Prime Minister, David Cameron, having stepped down the morning after the outcome of the EU Referendum, passed the decision of when to invoke Article 50 to his successor.

Theresa May thinks there should be '*no decision to invoke Article 50 before the British negotiation strategy is agreed and clear, which means Article 50 should not be invoked until the end of this year*'.

We therefore have an impasse as any guidelines for the negotiations of any agreement with the UK cannot begin until Article 50 has been invoked.

What will the new relationship be like?

Who knows? There's no plan, as was candidly admitted by the Treasury's most senior civil servant last week. So, whilst businesses had been making contingency plans prior to the EU referendum vote, the Government did nothing except print leaflets for the Remain campaign.

Cabinet Office minister Oliver Letwin MP has now been appointed to head the new civil service Brexit unit. The unit faces a shortfall of expertise and numbers running into hundreds, including negotiators. We'll need some highly skilled migrants to help us out here.

Meanwhile, in Europe, a Brexit negotiation team comprising three people has been put in place by the European Parliament.

There are many models that have been discussed as to how the UK-EU relationship will look, including which rights and freedoms the UK will need to sign up to in order to retain access to the EU single market. All of that is, as yet, unknown.

However, the European Council has already laid down a firm marker in respect of the substance of the negotiations on the UK's withdrawal. They have said there will be no access for the UK to the internal market without acceptance of the four freedoms of people, goods, services and capital. So the starting point is that there will be no exceptions, much to the dismay of Brexiteers.

As good negotiators know, there will need to be give and take on both sides to reach a fair bargain if both parties are entrenched. Think RMT and London Underground negotiating 500 new collective agreements and you'll get a flavour of what's in store, possibly for the next four to five years.

Employment law implications of Brexit

What we do know is that European Union law is pervasive in employment law and, certainly in the next two or three months, it is unlikely that much will alter. However, there are some clues as to what, in the short term, may be changed, and then perhaps changed again, when we know the terms of our exit and (possibly) entrance back into the single market.

In order to make UK PLC more competitive, the Conservative party will continue to seek to "*lessen the burden of regulation and cost*" for employers wanting to remain and those wanting to set up business here. Cutting corporation tax is the start.

The Conservative Party does not speak with one voice and, even with Theresa May named as the next Prime Minister, much will depend on which personalities wind up in the relevant departments, namely Business Innovation and Skills, the Ministry of Justice and the Treasury.

Just to give you a flavour of what some leading Tory figures have said:

Theresa May has generally been rather quiet about her stance

on employment rights. However, yesterday she announced proposals intended to reduce '*boardroom excess'*, including appointing a workers' representative to the board and making shareholder votes on executive pay legally binding. The announcement received a mixed response from business leaders.

In 2012, Andrea Leadsom called for the minimum wage, unfair dismissal rights and maternity pay to be scrapped for small businesses employing three or fewer employees. She envisaged no regulation whatsoever.

On Monday last week, she said workers' rights would be protected and enhanced, but did not say which workers and what rights.

So what she said then and now are different, and whether what she says matters at all is another question.

Priti Patel, our present Employment Relations Minister, argued as part of her "Vote Leave" agenda that departing the EU would be an opportunity to cut EU social and employment protections. She took a slash and burn approach saying, "*If we could just halve the burdens of the EU social and employment legislation we could deliver a £4.3 billion boost to our economy and 60,000 new jobs*." The TUC have questioned from where these economic forecasts derive.

Boris Johnson said it was "*very disappointing*" that Britain had not made "*changes to employment law*", complaining that we "*need to weigh in on all that stuff, all that social chapter stuff*". He wanted to scrap the social chapter. What he said probably does not matter very much now either.

Despite the UK's health and safety framework being robust and having the fewest workplace fatalities of any member state, Michael Gove said he wanted to reduce health and safety laws. He didn't say which laws. Whether what he says has any impact is another unknown.

It’s difficult to discern how much of this is rhetoric, but fact is stranger than fiction right now.

With the so-called party of workers’ rights (the Labour Party) not able to organise themselves at the moment, there may be trouble ahead for workers and a boon for businesses following this time of uncertainty that is good for no-one.

What’s likely to change in employment law either under a Conservative Government’s continuing deregulation agenda or Brexit?

The starting point is that it is impossible to know how much (if any) EU-derived employment law will continue to apply following any trade deal with the remaining member states. Nor can we know from when the changes will take effect – this could be three to four years away. For the present, the Government has to continue to abide by EU law as if we were always going to maintain our membership.

Early indications are that Theresa May’s agenda as Prime Minister will be an inclusive, pro-equality, Modern Conservative one. She seems to be trying to appeal to working class Brexit voters, which suggests that a scaling back of employment law, particularly discrimination law, may not be on her to-do list.

However, assuming some loosening of the reins, what are the principal pieces of legislation in the firing line?

Atypical workers’ rights

In terms of employment law, the Agency Workers Regulations 2010 may be repealed following Brexit, but not before. These provide for the provision of basic working and employment conditions for assigned temporary workers that are no less favourable than if they had been recruited direct by the hirer. This covers pay, paid holiday, working hours, overtime, maternity and anti-discrimination provisions and, potentially,

pension contributions, collective consultation and vocational training.

Atypical workers' rights include part-time, fixed term workers and posted workers' provisions. Freeing businesses from the burden of these regulations may well fall within any new government's deregulation agenda.

These rights were unpopular with businesses because of the associated cost and administrative burden.

Working Time

Working time has been a perennial target of attacks from UK Governments. The directive applies to every worker and contains, in broad terms, rights to daily and weekly rest, limits on maximum weekly working time, paid annual leave of at least four weeks, and measures to protect night workers. The UK Government had been consistently opposed to the directive, and even brought proceedings challenging its legality in the European Court of Justice (ECJ), and it only enacted the legislation in domestic law (the Working Time Regulations 1998 (WTR)) two years after the deadline.

That said, cutting workers' holidays is not a known vote winner. It is likely the Government will be more delicate in the cuts it makes. The much-maligned decisions of the ECJ requiring commission payments to be reflected in holiday pay are a prime candidate to be overturned along with the cases that say that employees on maternity leave or long term sick leave continue to accrue holiday.

Whilst this will not affect existing contractual rights, once the underlying protection of the directive is removed there will be no safety net for the employee other than market practice.

Equality rights and uncapped damages

The extent of compensation for discrimination is a target. As part of its employment law review, the Government gave a commitment to review the law in order to address business' fears about high awards. However, the Government acknowledged that because discrimination law derives from European legislation, it is prohibited from setting a fixed cap on discrimination awards. It is implicit in that that if the Government were not constrained by EU law, it may well have capped discrimination awards.

This would leave whistleblowing damages as the main statutory right capable of giving rise to uncapped damages, unless this too were capped under the Government's deregulation agenda. Whilst this may be unpopular and counter-intuitive given the onus now being placed on individuals to blow the whistle and reveal corruption and illegality, the Government wouldn't have to wait for Brexit to cap these awards given that the protections stem from domestic law. Cameron was keen to protect whistleblowers. Whether May feels the same way, we are yet to find out.

Protection against sex, race and disability discrimination in the UK pre-dated EU law and has gained sufficient political consensus that it is unlikely any government would repeal the law in the foreseeable future (even if it becomes possible to do so). That is not to say that as a result of the strong deregulation agenda the legislation could not be amended, but it is difficult to predict in what way.

Collective Consultation

Collective consultation obligations at the moment arise when there is a sale of the business or outsourcing or where 20 or more staff are affected by a redundancy programme over a 90 day period in any one establishment. These provisions could be dismantled altogether or the threshold of the number of staff affected could be increased and the period changed.

What should employers do now?

The most important thing is not to rush to any particular action. There is just simply too much uncertainty and the timescales are too languid to justify knee-jerk reactions.

With the uncertainty about the immigration status of so many people, it may be wise for employers to take the trouble to understand the composition of their workforce and staff in key posts in terms of whether they are British, EU or non-EU nationals. They may wish to assist non-British EU nationals working in the UK to apply for permanent residence by referring them to immigration advisers and provide reassurance to prevent a brain drain.

Business Secretary, Sajid Javid, announced recently that a new inter-ministerial group has been established to co-ordinate engagement with the business community following the EU Referendum. It is important that businesses make their concerns known to Government and to organisations such as the Institute of Directors, Federation of Small Business, CBI and also to their local MPs so that the Government is fully cognisant of the impact of Brexit on various sectors and has regard to these issues in future negotiations.

The referendum result may have been announced, but the real decision making has barely begun.

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