Countdown to a bonfire of employment rights?

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On 22 September 2022, the Government published the Retained EU Law (Revocation and Reform) Bill. The purpose of the Bill is to remove the presence and influence of EU law within UK law. This will affect all areas of law, including employment law, and could lead to a significant downgrading of workers' rights by the end of 2023.

What is the Bill about?

A large proportion of the UK's legal framework – including its employment law framework – was underpinned by the law of the European Union, primarily a type of law known as a "directive". EU directives had to be implemented into UK law, either as an Act of Parliament or a statutory instrument. Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws – for example, the rights set out in EU Treaties had what is known as "direct effect". Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament implementing EU directives remained in place, but Parliament would, in theory, have the option of repealing them if, and when, it wished to do so (although this would require another Act of Parliament). However, all the relevant statutory instruments would automatically fall away once the European Communities Act 1972 was repealed. To avoid legal chaos when Brexit happened, the Government decided to retain these statutory instruments and transfer them into UK law. It also chose to retain directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, these laws and decisions are referred to as "Retained EU Law".

The Government has decided that the time is right to look

again at whether Retained EU Law should be kept or repealed. The Bill provides that:

- all retained EU law contained in statutory instruments; and
- all retained directly applicable EU law,

will automatically expire on 31 December 2023 unless it is preserved (there is a mechanism to extend this until 2026).

Any Retained EU Law which is kept will be "assimilated" into UK law. In practice this means that certain EU law principles that govern how these rights operate will disappear. On top of this, the Bill makes a number of other provisions which are aimed at downgrading the continued impact of EU law on UK law, for example, by making it easier for the courts and tribunals to depart from previous EU case law decisions.

What does this mean for employment law?

Retained EU Law includes a number of important employment law protections including in the following areas:

- working time and paid holiday rights;
- rights upon the transfer of a business / an outsourcing;
- part-time workers' rights;
- fixed-term employees' rights;
- agency workers' rights;
- posted workers' rights; and
- information and consultation rights.

It will be for Government departments and the devolved administrations to decide which, if any, of these laws are kept. It is not yet clear how this will be done, or whether there will be any element of consultation with business and trade unions. In theory, the rights in these areas could simply fall away at the end of next year. In practice, what seems more likely is that they will be retained but with a reduction in the level of protection. We discuss below three

areas where we think reform is likely.

Working Time Regulations 1998

It is hard to imagine that there could be a complete deregulation of working time and paid leave entitlements in the UK. Not only would this be hugely unpopular with most of the UK workforce, but it would also not be welcomed by employers who benefit from operating on a level playing field. However, we think that the rules stipulating a maximum 48-hour working week and governing the calculation of holiday pay could be removed (indeed **press reports** have suggested that this is the Government's intention). This would mean that workers could be permitted to work in excess of 48 hours per week without the employer needing to enter into an express "opt out" agreement with the worker. It would also mean that holiday pay could be limited to basic pay only, with other components of pay excluded, such as overtime and commission payments.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

TUPE provides that upon a business transfer or outsourcing, employees automatically transfer to the purchaser or new supplier on the same terms and conditions of employment. In addition, they have the right to be informed and consulted about the transfer and are protected from dismissal. Again, a total deregulation of this area seems unlikely. Not only would it be unpopular, but it would also pull the rug out from under those employers who had entered into outsourcing agreements on the basis that TUPE applied and would do so in future.

Yet one likely candidate for change could be the introduction of a rule which permitted the harmonisation of terms and conditions post-transfer. When the TUPE regulations were reviewed in 2013, businesses reported that the inability to

harmonise the terms and conditions of the inherited workforce was a significant burden. The Government agreed that the ability to harmonise terms was desirable, but said its hands were tied by EU law. Now, they have the opportunity to make this change.

Agency Workers Regulations 2010

The Agency Workers Regulations 2010 entitle agency workers to basic employment rights comparable to that of a permanent employee once they have completed a 12-week qualifying period. These rights cover areas such as pay, annual leave, working hours and maternity rights. These regulations are widely considered burdensome by employers and, as a result, the Government may simply allow them to expire.

What does this mean for employers?

This Bill could lead to sudden and radical overhaul of employment rights. On the other hand, it could mean a series of relatively moderate tweaks made over a period of several years. At present, the precise path the Government will take is unknown. Nor is it clear what voice employers and workers will have in this process. All of which means that employers need to brace themselves for yet more uncertainty.

The first reading of the Bill is due to take place on 11 October 2022. We will provide further updates as the Bill progresses through Parliament.

Retained EU Law (Revocation and Reform) Bill

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