ADDLESHAW GODDARD

BREXIT

Employment law consequences of Brexit

INTRODUCTION

1. On 23 June 2016, the United Kingdom (**UK**) voted to leave the European Union (**EU**). The precise timing of the formal exit process remains unclear. However, in due course, the UK Government will have to give notice of the decision to leave pursuant to Article 50 of the Treaty of the European Union. This would provide formal notification to the European Council of the decision to leave. It will also start the clock ticking on a 2-year period for negotiating the mechanics of the exit.

2. It is highly likely that the UK would wish to maintain some form of relationship with the EU following its withdrawal from the EU. The 2-year negotiation period would also be used to determine the nature of any future relationship between the UK and the EU.

3. In this article we consider what impact the three main alternative relationship models would have on UK employment law. It is likely that the Government would come under pressure from the business lobby to obtain some concessions in this area. The British Chamber of Commerce's 2013 "EU Business Barometer" survey found that employment law was their members' top priority for any renegotiations between Brussels and the UK.

A. The alternative relationship models

4. There are six possible alternative relationship models. We discuss the three most likely models in depth below. These are:

- Membership of the European Free Trade Association (**EFTA**) and the European Economic Area (**EEA**) (the **EEA model**)

- Membership of the European Free Trade Association (EFTA) and negotiation of bilateral treaties (the **Swiss model**)

- "Full Brexit" - World Trade Organisation model (the **WTO model**)

- A Customs Union (the **Turkish model**)

- A system of Free Trade Agreements with the EU (the **FTA model**)

- A bespoke model, for example, an "EEA plus" model combining the EEA model with additional characteristics (e.g. amended free movement of persons).

Below, we consider the EEA, Swiss and WTO models, and the impact for employment law. If you would like to learn more about the Turkish and FTA models you can read our briefing here.

Option 1: The EEA model

5. The UK could maintain a relationship with the EU by way of EFTA, a common market consisting of four European countries (Iceland, Lichtenstein, Norway and Switzerland) operating in parallel to the EU. All four EFTA member states participate in the single market, although this is achieved via two different routes, one of which is the EEA model.

6. EEA membership means:

- **Trade:** the UK would have access to the single market and would be able to freely trade its goods and services with the EU.

- **Immigration:** the UK would have to agree to the free movement of persons. Significantly, this would mean no change to the rights of EU nationals to live and work in the UK.

- **EU law:** the UK would have to comply with most EU legislation, including all existing and future EU employment law. It would not be bound by policies relating to agriculture, fisheries, energy, transport and security, although in practice, the UK may elect to observe some of those policies to avoid the further disruption that withdrawal from those areas could cause.

- **Status of ECJ decisions:** the UK would continue to be bound by relevant decisions of the ECJ, which bind the EFTA Court.

- **Influence:** the UK would have no representation in the institutions of the EU such as the European Commission and the European Parliament.

7. In speeches since the referendum result was announced, leading Leave campaigner and possible future Prime Minister, Boris Johnson, has hinted that the EEA model would be the preferred relationship model for the UK following Brexit. Yet this may turn out to be politically unacceptable given that this model will result in:

- no change to the rights of EU migrants to live and work in the UK. Although the EEA model does permit members to take "safeguard measures" (which would potentially allow them to temporarily suspend parts of the EEA agreement, including the free movement of persons) such measures are intended to be a temporary solution rather than a policy tool; and

- the UK losing influence over the EU, whilst, at the same time, having to obey most of its laws.

Option 2: The Swiss model

8. Switzerland is a member of EFTA, but not the EEA. Instead, it has negotiated over 100 bilateral treaties with the EU and free-trade agreements with the EFTA states. The consequence is that large parts of EU law are applicable in Switzerland.

9. A Swiss-style model means:

- **Trade:** the UK would not have access to the single market and would not be able to freely trade its goods and services with the EU. However, this could be negotiated.

- **Immigration:** the UK would not, in principle, be bound to agree to the free movement of persons, meaning it could introduce controls on the numbers of EU migrants entering the UK. However, in practice, the UK may well be forced to accept free movement of persons as part of the bilateral negotiations. In 1999, Switzerland and the EU put in a place a bilateral agreement on the free movement of persons entitling EU nationals to enter, live and work in Switzerland (and vice versa).

- **EU law:** the UK would continue to be bound by very large parts of existing and future EU employment legislation. By virtue of its bilateral agreement on the free movement of persons, Switzerland has had to introduce equivalent employment legislation to that in operation in the EU. For example, Switzerland has legislation implementing the Acquired Rights Directive (TUPE in the UK), the Working Time Directive, the Equal Treatment Directive and the Collective Redundancies Directive.

- **Status of ECJ decisions:** the UK would not be bound by decisions of the ECJ, although they would be persuasive and, in practice, are likely to be followed in most cases.

- **Influence:** the UK would have no representation in the institutions of the EU such as the European Commission and the European Parliament.

10. In speeches since the referendum result was announced, Boris Johnson and Nigel Evans MP have indicated that access to the single market would be an essential feature of any future UK / EU relationship. However, the EU may refuse to grant the UK access to the single market without the reciprocal acceptance of the free movement of persons. The Swiss model may, therefore, be unpalatable for the UK. Further, negotiating the bilateral treaties would inevitably be a labour intensive and time-consuming process. This may not sit well with the UK Government's clear imperative to quickly offer clarity and calm uncertainty about the terms of the new relationship.

Option 3: The WTO model

11. The WTO model would represent a complete exit of the UK from the EU with no agreements put in place to govern the future relationship. This would mean that the default WTO rules would apply to the UK's right to trade goods and services with the EU.

The WTO model means:

- **Trade:** the UK would not have access to the single market and would not be able to freely trade its goods and services with the EU.

- **Immigration:** the UK would not be bound to agree to the free movement of persons, which would mean that it could introduce controls on the numbers of EU migrants entering the UK.
- **EU law:** the UK would not have to comply with EU law, including employment law.
- **Status of ECJ decisions:** the UK courts would not be bound by decisions of the ECJ.
- **Influence:** the UK would have no representation in the institutions of the EU such as the European Commission and the European Parliament.

12. A complete Brexit may align with the vision of many Leave voters, in that it would enable the UK to regain complete control of its borders. This would mean that EU nationals working in the UK, may become subject to the same visa restrictions as non-EU nationals. This would largely restrict migration to high-skilled migrants (entering via a points-based system) and would reduce the flow of migrant workers performing low skilled jobs. It is not clear whether existing EU workers would be allowed to remain in the UK. If they were to be expelled at the time of withdrawal, this would cause large-scale disruption to businesses employing them. Geographical impacts would also differ (e.g. areas such as London where there is a high concentration of EU migrant workers). By the same token, British nationals living and working in EU member states could also be affected and may be expelled from the member state in which they reside.

13. The difficulty with a complete Brexit, however, remains the inability to access the single market. As above, the strong indications are that the UK Government will want to retain access to the single market.

B. What will happen to EU-derived employment legislation under the different models?

14. A large proportion of the UK's current employment law framework is underpinned by EU directives, for example, in the following key areas:

- Protection for agency workers – the Temporary Workers Directive
- Business transfers – the Acquired Rights Directive
- Collective redundancies – the Collective Redundancies Directive
- Discrimination and equal pay – the Equal Treatment Directive
- European works councils – the European Works Councils Directive
- Family-friendly rights – for example, the Parental Leave Directive and the Pregnant Workers Directive
- Regulation of working time and the right to paid annual leave – the Working Time Directive.

15. EU directives have been implemented in the UK by both primary legislation (e.g. the Equality Act 2010 and TULRCA 1992) and secondary legislation introduced by way of powers granted under the European Communities Act 1972 (e.g. TUPE 2006 and the Working Time Regulations 1998).

Under the EEA Model

16. If the UK adopted the EEA model, it would be bound by existing and future EU employment legislation, meaning it is unlikely that there would be any changes to EU-derived employment laws in the UK. Further, our courts and Tribunals would continue to be bound by ECJ decisions.

Under the Swiss Model

17. If the UK adopted the Swiss Model, this would not have the effect of automatically repealing primary legislation of Parliament. Rather, each Act would have to repealed individually. In practice, this is unlikely to happen. At most, the Government may seek to make some amendments to the primary employment legislation. However, the end result would turn on the nature of the negotiated bilateral agreements with the EU.

18. As far as secondary legislation is concerned, the repeal of the European Communities Act 1972 would automatically repeal the secondary legislation which had been passed under it. From an employment law perspective, this would mean that some of the employment legislation discussed at Section C below would fall away, unless the Government

took steps to retain it. Again, it is unlikely that the Government would allow key aspects of the employment law landscape to disappear. There may be some degree of amendment to the secondary legislation, but the final picture would depend on what was agreed with the EU, and whether the UK Government has an appetite to remove the relevant employment legislation in any event (see paragraph 21 below).

Under the WTO model

19. If the UK opted for a "full Brexit", adopting the WTO model, this would not have the effect of automatically repealing primary legislation of Parliament. Rather, each Act would have to repealed individually.

20. The repeal of the European Communities Act 1972 would automatically repeal the secondary legislation which had been passed under it. From an employment law perspective, this would mean that some of the employment legislation discussed in Section C below would fall away, unless the Government took steps to retain it.

21. However, even upon a full Brexit, it is unlikely that the Government would seek to repeal all primary and secondary employment legislation which gives effect to EU-derived law. This would involve a radical change to the employment law framework in the UK, with a significant reduction in employment protections, and in the regulatory burden for employers. Such a prospect is likely to be strongly resisted by trade unions and the public. Further, some degree of employee unrest, particularly within unionised workforces, would be likely to occur. It would also have a negative impact on agreements and contractual policies based upon the assumption that EU laws apply (e.g. redundancy policies which enshrined a collective consultation process; and diversity/equality policies reflecting anti-discrimination laws).

22. A more realistic option is that transitional measures would be put in place to ensure that the legal framework was not removed overnight. The Government could then consider relevant legislation on a case-by-case basis. It is likely that employers' organisations would lobby to have unpopular employment legislation repealed or amended (in particular, the Working Time Regulations 1998 and the Agency Worker Regulations 2010). At the same time, trade unions would also lobby to halt the paring back of employment rights. The ultimate outcome would depend on the political stance of the Government at the time.

23. Employment laws which are not derived from EU law would be unaffected by Brexit (e.g. the right not to be unfairly dismissed, protection for whistleblowers, the right to be paid in accordance with the national minimum wage etc). That said, employers' organisations may lobby to have such rights pared back given the financial uncertainty that accompanies a post-Brexit economy.

C. Which areas of UK employment law are susceptible to repeal or amendment?

Agency workers

24. The Temporary Workers Directive (**TWD**) regulates the working conditions of temporary workers by providing that basic working conditions for assigned temporary workers (i.e. agency workers) are no less favourable than for ordinary employees. This covers areas such as pay, annual leave, working hours, maternity and discrimination. Such workers are also entitled to equal access to employment, collective facilities and vocational training. The TWD was enacted in the UK by way of the Agency Workers Regulations 2010 (**AWR**), under which agency workers gain these rights after they have completed a 12-week qualifying period.

25. The AWR have been consistently unpopular with employers since they were introduced. In the event of a full Brexit, it is possible that the Government would not retain the AWR, either in the current form or otherwise. This would reduce the burden on employers to equalise certain employment conditions for agency workers. Conversely, it would weaken the protection for agency workers in the UK and may mean that agency working is seen as a less attractive option.

Business transfers and outsourcings

26. The Acquired Rights Directive (**ARD**) safeguards employees' rights on the transfer of a business. The ARD was enacted in the UK by way of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**). TUPE provides that affected employees are automatically transferred to the transferee employer on the same terms and conditions of employment. They are also protected from dismissal and entitled to be informed and consulted about the transfer.

27. In theory, a full Brexit would mean that TUPE would fall away. This would mean that employees would no longer automatically transfer to a transferee on a business transfer (whether a business sale or a service provision change).

This would reduce the burden on transferee employers (i.e. employers purchasing a business and employers providing services in outsourcing situations) since they would no longer automatically inherit the affected employees and the associated rights and liabilities. Instead, they could potentially "cherry pick" the employees they wished to offer employment and they would be free to specify the terms of the offer. Transferor employers would be freed from the obligation to inform and consult with affected employees. Instead, they would retain the affected employees and may need to commence a redundancy exercise, which would attract its own information and consultation obligations.

28. However, it is unlikely that the Government would permit the complete deregulation of this area. Such a move would be extremely unpopular with trade unions and employees. Further, many commercial outsourcing agreements have been priced on the basis that TUPE applies and/or will do so in future. A more realistic prospect is that the Government would retain TUPE, but would seek to amend it to make it less burdensome on business. One likely area of change would be to make it easier to change terms and conditions of employment post-transfer (also known as "harmonisation"). The TUPE provisions governing changing terms and conditions were slightly relaxed in 2014 but did not go as far as permitting harmonisation.

Collective redundancies

29. The Collective Redundancies Directive regulates the steps employers must take to inform and consult with employees when it is proposing large-scale redundancies. This Directive is implemented in the UK by a primary act of Parliament, the Trade Union and Labour Relations (Consolidation) Act 1992. As such, this would remain in place following a full Brexit, unless it was actively repealed. This legislation is firmly entrenched in the UK's employment law landscape and there would be considerable trade union opposition to any repeal, or paring back, of the protections in the Act.

Discrimination

30. The Equal Treatment Directive established the framework for equal treatment for workers with certain protected characteristics. This Directive is implemented in the UK by a primary act of Parliament, the Equality Act 2010. As such, this would remain in place following a full Brexit, unless it was actively repealed.

31. Protection from discrimination is now embedded within UK society and there is likely to be little support for a reduction in discrimination and equal pay protection within the workplace.

European Works Councils

32. The European Works Councils Directive (**EWCD**) requires a "Community-scale undertaking" (or group of undertakings) which has a workforce exceeding certain thresholds within the European Economic Area to establish either a European Works Council (**EWC**) or a procedure for informing and consulting employees about transnational issues. The Transnational Information and Consultation of Employees Regulations 1999 (and the Transnational Information and Consultation of Employees (Amendment) Regulations 2010) govern the application of the EWCD where the central management of the undertaking is based in the UK.

33. These regulations would fall away upon a full Brexit. This would mean that employers based in the UK who fulfilled the definition of a Community-scale undertaking would not be obliged to commence negotiations to establish an EWC if requested by their employees. This would remove a potentially onerous burden from the shoulders of relevant employers. However, where a valid EWC agreement was already in place, it is possible that this would survive a Brexit. This would depend on the specific terms of the EWC agreement.

Family-friendly rights

34. Different EU Directives establish the framework for "family-friendly rights" – for example, the Parental Leave Directive and the Pregnant Workers Directive. These rights are implemented in the UK by way of a variety of secondary regulations. In theory, these would fall away upon a full Brexit.

35. However, as with discrimination protection, family-friendly rights are now embedded in our employment law framework. Indeed, the UK has exceeded many of the minimum EU requirements, for instance, when it introduced the system of shared parental leave in 2015. It would be an unpopular move to allow such protections to fall away.

Working time

36. The Working Time Directive (**WTD**) regulates working time, for example by stipulating minimum levels of annual leave, how such leave is to be paid, and maximum periods of working time. The UK enacted the WTD by way of the Working Time Regulations 1998 (**WTR**). In theory, a repeal of the European Communities Act 1972 would mean the WTR would fall away upon Brexit. This would mean that, subject to health and safety considerations, employers

would not be obliged to provide minimum periods of paid annual leave or to limit the number of hours that workers' worked within certain periods (e.g. maximum working hours per day and week).

37. However, it is unlikely that we would see the complete deregulation of working time in the UK. Such a move would be unpopular with trade unions and employees. Indeed, many employers would be reluctant to support a move which would remove the "level playing field", in terms of the minimum amount of paid leave that must be offered. A more realistic prospect is that the Government would retain the WTR but repeal some of the more unpopular provisions such as:

- **The maximum 48-hour working week:** this would mean that workers could work in excess of this amount without the employer needing to enter into an express "opt out" agreement with the worker.
- **Record-keeping obligations:** this would remove the employer record-keeping obligations.
- **Provisions on calculation of holiday pay:** the existing provisions on the calculation of holiday pay are subject to shifting ECJ case law on what should be included in the calculation (e.g. overtime and commission payments). A full Brexit would mean that ECJ decisions would no longer bind our Courts and Tribunals and the Government would be free to introduce new regulations governing the calculation of holiday pay, perhaps limiting it to basic pay only and excluding overtime, commission and other fluctuating payments.

Conclusion

38. At the time of writing, the indications are that the most likely new relationship between the UK and the EU will be the EEA model. If we follow this path, and do not secure additional concessions (i.e. we do not secure a bespoke "EEA plus" model), we can expect to see little change in the UK's employment law landscape.

39. The Swiss model offers greater scope for change, however, it is difficult to predict the extent of such change, since the final picture will depend on the nature of the bilateral treaties negotiated with the EU. Whilst it is possible that the UK may be able to negotiate some exemptions from some aspects of EU employment law, the EU is unlikely to permit the UK to obtain a competitive advantage over other EU member states by having lower employment standards (e.g. removing paid holiday). Therefore, the practical impact on UK employment law is likely to be minimal.

40. Naturally, the WTO "full Brexit" model would, in theory, permit wholesale reform of EU-derived employment law. In practice, this is unlikely to occur. We would expect the majority of EU-derived employment law to remain in place, with, at most, some moderate reforms to some of the less-favoured pieces of legislation. However, given the likelihood that Brexit will mean a very crowded Parliamentary agenda for years to come, it's doubtful that any such reforms will be a top priority.

addleshawgoddard.com

Doha, Dubai, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office