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"BREXIT MEANS BREXIT": ITS EFFECT ON BRITISH LABOUR LAWS

On 23rd June 2016 a Referendum was held on whether the UK wished to remain or to leave the European Union. A turnout of 72.2% representing thirty million people resulted in a majority vote of 52% wishing to leave the European Union against 48% wishing to remain. Mrs Theresa May, the Prime Minister, coined the three word expression "brexit means brexit." Although initially this expression was vague, some seven months after the Referendum was held the Prime Minister gave some details by way of an explanation. She confirmed that the UK (a) would not remain in the single market and instead would negotiate for "a new comprehensive free trade agreement" which would give the UK "the greatest possible access to the single market." Furthermore, (b) the UK would leave the customs union but at the same time would enter into "a customs union agreement with the EU." (c) On immigration, Brexit must mean "control of the number of people who come to Britain from Europe." (d) Regarding the jurisdiction of the Court of Justice of the European Union (CJEU), the UK will no longer be bound by its decisions after Brexit although its jurisprudence would be persuasive. (e) British labour laws enacted by the Westminster Parliament will eventually (as required in accordance with Government policies) replace, delete, amend, or alter, European laws transposed into British laws (f) Regarding the UK's contributions to the European budget, this would cease altogether although an appropriate contribution would be made to enable the UK to take part in various EU schemes.

Negotiations between the UK and the EU Commission commenced at the end of March 2017 when Article 50 of the Treaty of the European Union¹ was triggered. This article provides for a two year consultation period with a possible extension if the remaining EU Member States agree. While negotiations with the EU are ongoing, all rights and obligations of EU membership will continue, thus the UK will continue to contribute to the EU budget, the primacy over British laws of European laws and judgements of the CJEU will continue to apply to the UK. In other words the *status quo* will remain until the UK departs from the EU.

I - IMPLICATIONS AND RISKS OF BREXIT ON BRITISH LABOUR LAWS

A tentative answer will be attempted as to what future changes are likely to take place as a result of Brexit in the European social laws currently incorporated into British labour laws. It is thanks to an important input by European social legislation that UK workers and employees enjoy significant rights additional to those originally granted to them by British labour laws. The speculative element needs to be stressed. Not knowing how Brexit will

¹ This article provides for the procedure to be followed where a Member State wishes to depart from the EU.

affect those implemented laws much of what will be said will be based on speculation. It should also be noted that not all European social laws translated into British labour laws are acceptable to British employers, hence the reason why eventual changes may take place in the long term. Such changes in British labour laws will also depend on the colour of the government in power. Thus a Conservative government would have a tendency to diminish workers' rights while a Labour government would encourage their increase. It is proposed to divide this phenomenon into two categories. Category 1 will treat current laws which are likely to be heavily amended or repealed while category 2 will discuss laws which will require either minor amendments or remain unchanged.

A - CATEGORY 1 - LAWS WHICH COULD BE HEAVILY AMENDED OR REPEALED.

a - AGENCY WORKERS, FIXED TERM WORKERS AND PART-TIME WORKERS

The Agency Workers Regulations 2010, which derive from the Temporary Agency Workers Directive 2008, is an obvious candidate for complete repeal or severe amendment. The Regulations confer upon agency workers basic rights which are enjoyed by permanent workers. From their first day of employment agency workers have a right to shared facilities and services provided by the employer. After twelve weeks in employment the agency worker enjoys the same rights as permanent employees, namely equal pay, paid annual leave, statutory maternity pay, discrimination rights, etc.

The Fixed- Term Employees (Protection of Less Favourable Treatment) Regulations 2002 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 which put into effect the Framework Directives on fixed-term and part-time workers, lead to important improvements in terms and conditions of employment, including wages, better access to occupational pensions with regard to temporary employees who also enjoy better job security and the possibility of improved access to permanent employment.

With the complexity of all the above workers' rights, these laws are unpopular amongst employers by reason of being immensely burdensome, costly and lacking flexibility and therefore being less attractive for many companies. The employer lobby could have the effect of influencing a Conservative government to repeal this legislation or substantially reform it.

b - WORKING TIME

Another obvious candidate for repeal or severe amendment after Brexit is the working time legislation.² The Working Time Regulations 1998 which put into effect the Working

² See Jo Carby-Hall "Working Time: The British Experience" in "Regnare, Gubernare, Administrare" (Professors S. Grodzinski and A. Dziadzio (Eds)) 2012 AFM at pp. 367-395.

Time Directive is renowned throughout the EU for its opt-outs.³ British employers would wish to repeal the 48 hour week and the legal obligations imposed on them where workers on sick leave accrue and either take or carry over paid annual leave. They would also wish to reverse CJEU decisions on holiday pay calculations where overtime and commission have to be included in the holiday pay.

Each of those and other issues spells additional expense on the employer with a desire to repeal or amend heavily this legislation this legislation.

c - COLLECTIVE REDUNDANCY CONSULTATIONS

The British government carried out a call for evidence on collective redundancy laws in 2011. The result was (i) that employers were concerned that the rules delayed their ability to respond to challenges and opportunities and (ii) on fixed term contracts, confusion was identified. Reductions in consultation times to 45 days were therefore made by the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013. As such, the consultation obligation is not particularly onerous on employers. Any suggestion to eliminate the consultation obligation post Brexit would displease trade unions and cause industrial relations problems. It would therefore be wise to allow current laws to continue in their present state.

B - CATEGORY 2. LAWS WHICH WILL REQUIRE EITHER MINOR AMENDMENTS OR REMAIN INTACT

a - TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 known as TUPE owes its existence to the Acquired Rights Directive 1977, consolidated in 2001. As a result of government consultations in 2011-2014 on the effectiveness of TUPE companies were generally favourable towards this law. There is however a problematic issue which may be affected by Brexit and where amendments to TUPE, albeit minor ones, could take place where employers need to harmonise terms and conditions of employment *after* the transfer takes place and the difficulty faced by the employer to dismiss employees *prior* to the transfer. These do not constitute any fundamental changes to the law post Brexit.

b - DISCRIMINATION COMPENSATION

Recognising the harm which sex, race, sexual orientation, age, disability, equal pay, marital, religion or belief, gender reassignment, etc. discrimination can cause to a victim, EU law imposes no upper limit to a compensation award made by a court or tribunal. The Equality Act 2010 which puts into effect EU laws is unlikely to change post Brexit but a cap could well be imposed on compensation thus limiting it to a given figure.

3 See Jo Carby-Hall "Opt outs and Variations in Working Time - British Style" in "Le Travail Humain au Carrefour du Droit et de la Sociologie" (Professors Christian Mestre, Corinne Sachs-Durand and Michel Storck (Eds)) 2014 Presses Universitaires de Strasbourg at pp. 53-71.

c - FAMILY FRIENDLY LEGISLATION.

Rights to maternity, parental leave, paternity, shared paternity, pregnancy, ante-natal appointments and pay are an amalgam of rights derived from both European and British laws and jurisprudence. These are unlikely to change post Brexit. Nor is it anticipated that the European social partner work-life balance consultation relating to obstacles to the participation of women in the labour market will be affected post Brexit.

d - WRITTEN PARTICULARS OF TERMS AND CONDITIONS OF EMPLOYMENT.

The Written Statement Directive 1991 which lists the important features of the contract of employment, for example, job title, work description, start date, working hours, shifts, overtime, wages, etc... be given to the employee has been transposed into British law. It should be noted that under British law the written particulars are not the contract of employment.

The EU Commission is currently consulting on changes to be made to the Directive to take into account the numerous novel and atypical forms of employment which have developed as for example zero hour contracts.

It is unlikely that after Brexit there will be any changes made to the British written particulars laws but it is likely that atypical contracts, such as zero hour contracts, if included in European law following the consultation, would be repealed.

e - HEALTH AND SAFETY AT WORK.

The UK enjoys a long pedigree of health and safety legislation dating back to the industrial revolution in the 19th century. The Health and Safety at Work Act 1974 (as amended) incorporates the provisions of the Health and Safety Framework Directive 1989. After Brexit, it is suggested that the British health and safety laws will remain in place and that only a few cosmetic changes may take place reason being that the transposition of the EU laws have experiences very few problems and that evidence shows that these laws have not been burdensome upon employers.

f - CONSULTATION UNDER THE EUROPEAN WORKS COUNCIL DIRECTIVE

The European Works Council Directives 1994 and 2009 provide for information and consultation in specified undertakings.⁴ The Transnational Information and Consultation Regulations 1999 implement the EU Directives. These provisions are not onerous on British employers for they require only an exchange of views between the social partners. It is not thought that Brexit would necessitate changes to the current requirements.

⁴ The European Works Council Directive and the Information and Consultation Directive (see below) form part of the European social dialogue which constitutes a much wider concept. For an appreciation of its meaning in the UK see J.R.Carby-Hall "The Social Dialogue in the UK and its Effectiveness" in "Przyszłość Prawa Pracy" (Professors Z.Hajn and D. Skupień Eds)) 2015 Wydawnictwo Uniwersytetu Łódzkiego at pp. 601-643.

g - INFORMATION AND CONSULTATION

The Information and Consultation Directive 2002 has been implemented in the UK by the Consultation of Employees Regulations 2004. The consultation required is minimal and includes information and consultation on developments in the undertaking and its effects on employees as for example redundancies, lay-offs, overtime, voluntary part-time work, weekend work and so on. Trade unions and workers have dubbed this legislation as generally ineffective and weak as hardly any changes have been made in establishments as a result of such information and consultation. That being the situation it is unlikely that post brexit any changes would be made unless the legislation is repealed by the very reason of its effectiveness.

II - JUDGEMENTS OF THE CJEU AND THEIR INTERPRETATION

Upon Brexit occurring the British courts and tribunals would no longer have to interpret British laws in accordance with decisions of the CJEU. British judges would therefore have more flexibility to interpret decisions in accordance with British rather than European laws. It is however suggested that that decisions of the CJEU would have a significant persuasive authority on the British courts and tribunals.

An important feature of the British common law system is judicial precedent. As such, the process is a slow one and it may take many years before these British court decisions “percolate” as they go through the appellate court procedure.

CONCLUSION

It will be noticed that a significant proportion of the UK’s labour laws originate from the EU. In principle the British government can, if it wishes repeal, amend or re-write any of EU laws after Brexit has come about. Granted that some laws which originate from the EU may be repealed, heavily amended or slightly amended as the case may be, it is more likely that the majority of these will either suffer minor or no changes. Some however are likely to be repealed or be heavily modified.

The British labour law landscape will not metamorphose overnight in any fundamental manner, in the short time at least. It should be borne in mind that such modifications will depend on the political landscape of the government in power at the time of Brexit and/or thereafter. A Labour government is not likely to make any significant changes to the current social laws because of all the rights enjoyed by workers. A Conservative government however may well make changes to please businesses. A Coalition government may act in accordance with policy decisions resulting from inter-party political bargaining.