

## **Transfer of Undertakings and Brexit**

The British referendum on the country's continued membership of the European Union (EU) has dominated the political and media landscape both in the UK and abroad for the last few months. There has been a plethora of academic commentary on the possible consequences of a British exit ('Brexit'). On 23 June 2016, based on a turnout of 72%, 52% of the electorate voted for Leave, while 48% supported Remain. This narrow majority disguises dramatic differences between different regions: Scotland, Northern Ireland and large parts of London voted to Remain whereas substantial sections of Wales and most of England voted to Leave.

Over the last 43 years, the EU has been one of the most significant drivers of law and policy in the workplace. The EU affects UK employment law in a number of different ways. First, article 45 of the Treaty on the Functioning of the European Union guarantees the free movement of workers. Second, European employment laws underpin key aspects of UK employment law. These include substantial individual and some collective rights.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')<sup>1</sup> provides protection for workers against dismissal due to a transfer of undertaking. In essence, TUPE preserves the continuity of employment for employees where there is a change of employer by automatically transferring the contract of employment from one employer to another. TUPE has its origins in the Acquired Rights Directive<sup>2</sup> (ARD) which was adopted in 2001 although legislation protecting workers' rights in the event of a transfer of undertaking dates back to the late 1970s. The (then) European Economic Community adopted Directive 77/187/EEC – implemented in the UK through the TUPE Regulations 1981 and subsequent amendments in line with EU developments – with a view to support and protect workers' rights in the case of corporate restructurings which would necessarily occur as a consequence of internal market integration throughout Europe. At the time of their introduction, the TUPE provisions marked a radical break from the common law of employment in the UK and provided much greater protection to employees. Over the last thirty years, the TUPE provisions have been interpreted progressively by British courts and legislative amendments in the UK have tended to 'gold-plate' the ARD by providing additional protections to a wider class of employees than required under EU law.

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<sup>1</sup> SI 2006/246.

<sup>2</sup> 2001/23/EC

The ARD, as interpreted by the Court of Justice of the European Union, applies to a wide range of transfers of undertakings, including ‘atypical’ business restructurings or reorganisations (such as ‘contracting out’, ‘outsourcing’ or ‘contracting in’), in both the private and public sectors. The ARD’s provisions will be well known to UK employment lawyers: it preserves continuity of employment and protects employees against variations of their terms and conditions owing to the transfer. In addition, the ARD also makes provision for information and consultation proceedings before a transfer is to take place. The UK has, in the past, through TUPE provided enhanced protection in relation to restrictions on changes to terms and conditions and introduced the concept of a ‘service provision change’. Although the former example of ‘gold-plating’ was removed in 2014, the latter still stands as an exclusively UK enhancement to the minimum requirements of EU law.

What then might the implications be of Brexit for TUPE?

Much depends on the future relationship between the EU and the UK. Potential options include (continued) membership of the European Economic Area (EEA) and/or the European Free Trade Association (EFTA); a series of bilateral deals with the EU; or a ‘hard’ Brexit whereby the UK’s relationship with the EU is governed only by the World Trade Organisation’s rules. Should the UK negotiate (continued) membership of the EEA, then most EU laws on workers’ rights, including the ARD, would continue to apply. In addition, any future laws adopted by the EU in the field of employment law may apply to the UK. Finally, the case law of both the EFTA Court and the Court of Justice of the European Union would be of relevance.

In the case of the UK negotiating a series of bilateral deals with the EU in order to gain enhanced access to the single market, it is also likely that the UK will continue to have to abide by EU employment laws, including the ARD, so as to prevent distortions of competition. Should the UK choose to leave the EU completely, a UK government would be free to apply- in the sense of mirroring in UK law and practice – any future EU employment laws where it agrees on its content. Based on long-standing opposition of some past UK Governments to certain EU social rights, one independent legal opinion commissioned by the Trades Union Congress (TUC) in the run-up to the referendum vote (M. Ford QC, *Workers’ Rights from Europe: The Impact of Brexit*, 10 March 2016) identified a number of EU-

derived employment laws which would be especially vulnerable to repeal and/or amendment. These include parts of TUPE such as the rules providing for collective consultation or rules restricting harmonisation of terms following a transfer.

In the absence of an obligation to abide by harmonised EU rules, there is a risk that the UK will seek competitive advantages by abolishing employment laws that are onerous for employers. In this case, TUPE may be subject to amendment as part of a general deregulation agenda in order to make ailing businesses more attractive to potential foreign investors by abolishing the protections afforded to workers in the event of a transfer of undertaking. As Ford points out in his advice to the TUC, “Brexit offers the real possibility, highly detrimental to many precarious workers, of a return to the [pre-TUPE] position in which transfers terminated employment *tout court*, with no more than the low levels of redundancy pay payable to those with sufficient continuity, or in which an employer can readily adjust terms downwards post-transfer by the simple device of dismissal and re-engagement.” (p. 39).

However, one must question the extent to which a future Government will actually repeal existing rights once given the chance, especially as the UK’s labour market is already one of the least regulated in the EU. According to the OECD’s employment protection index, the UK comes in at 31 out of 34 rich countries. There is little evidence to suggest that TUPE deters foreign investors or purchasers of undertakings, as employees who are surplus to requirements can usually be made redundant with relatively little difficulty.

Following Brexit, though, there will no longer be access to the CJEU for individual claimants (currently through the preliminary rulings procedure) and EU law provisions (such as article 19 TFEU) which require Member States to provide effective procedures and remedies for the enforcement of employment rights will cease to have effect. The future applicability of decisions of the CJEU which has progressively interpreted the ARD and thereby provided for enhanced protections for workers under TUPE is also not clear. UK common law has shown itself as remarkably adept at expanding the common law where necessary in order to make TUPE effective. It may well be, therefore, that judges, following Brexit, will continue to find ways to uphold those rights which have become part of UK employment law.

The uncertainty surrounding Brexit makes it difficult to predict the future status of TUPE. It would therefore be prudent to be aware of the potential for changes when tendering for new contracts that may have an expiry date past a likely Brexit.