Employment Law Brief

with

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Just last month an Employment Tribunal in Watford referred a question to the European Court of Justice asking whether a subcontractor was entitled to paid annual leave under the Working Time Directive.

The reference focuses on the inclusion of a 'substitution clause' in the contract allowing subcontractors to send someone else to work in their place. Under UK law that is sufficient to prevent the contractor from being a 'worker' with the result that he or she would not be entitled to paid annual leave. The question is whether EU law requires a different result. All else being equal this would be a really important case on employment status and we would await the result eagerly. But given the fact that the UK is about to leave the EU - isn't it a bit pointless?

Well not necessarily. It is not just that Brexit is not yet (at the time of writing) an absolute certainty. The future of the case also depends on the terms on which the UK leaves the EU. The Withdrawal agreement reached by Boris Johnson contains a provision allowing cases referred to the ECJ by a British Court before the end of the transition period – December 2020 - to continue. That would mean that a year or two after Brexit (the process of taking a case to the ECJ can be quite a slow one) we would still be waiting for the ECJ to rule on whether UK law was compatible with EU law.

If we were to leave without a deal, then the ECJ will not be able to hear the case and it will be left to the Watford Employment Tribunal to decide the issue on its own. In doing so, however, it will still have to interpret the right to paid annual leave in accordance with the Working Time Directive and the case law of the European Court of Justice. This is because the Withdrawal Act 2018 provides that all EU laws stay in place post-Brexit until they are amended or repealed by the UK Parliament. This means that employment law derived from the EU – such as TUPE, the Working Time Regulations and the Agency Workers Regulations – all remain in place. Not only that but the courts will continue to give precedence to EU law in the sense that UK law will continue to be interpreted so as to comply with EU law. All of the case law of the ECJ concerning paid annual leave for example, will continue to apply even where that involves departing from the words of the Working Time Regulations themselves. Brexit, per se, does not involve any change to employment law.

This will frustrate some for whom the freedom to go our own way on employment law is an important benefit of Brexit. The Working Time Directive in particular has long been a particular bugbear for many Eurosceptics. This is one reason why, for them, the new deal negotiated by Boris Johnson has its attractions. Under Theresa May's deal, the backstop arrangements designed to protect Northern Ireland would have meant that the whole of the UK remained very closely aligned with the EU. As a result, all EU employment law would have continued in place,

potentially indefinitely. Under the new deal it is only Northern Ireland that will be legally obliged to retain EU employment law. The rest of the UK will be technically free to go its own way.

Nevertheless, the political declaration – although it is not legally binding – contains what are called 'level playing field' provisions committing the UK to maintaining the high social and employment standards in place at the end of the transition period. This at least suggests that any move away from EU standards would have consequences for our trading relationship. The abolition of the Working Time Regulations would, therefore, make it harder to negotiate a free trade deal with the EU. Certainly, the Government is currently keen to stress that employment protection will not be undermined as a result of the UK leaving the EU. Whether that remains Government policy when the ECJ eventually answers the questions posed to it by the Watford Employment Tribunal, however, is a different question.

We are however clearly heading for an early general election – and there is no doubt that employment law will be a key battleground issue. It would seem that the Conservatives will not be advocating sweeping changes. The measures proposed in the Queen's speech – gradual increases to the minimum wage and a renewed commitment to implement the results of the Taylor Review of modern working practices – do not suggest that the Government is proposing a programme of deregulation of employment law. In contrast, however, there is nothing modest about the proposals that are likely to be made by the Labour party. In his conference speech back in September, shadow chancellor John McDonnell promised that on the issue of working time, Labour would go well beyond the Directive. Not only would the opt-out from the 48-hour week be abolished, but over a ten-year period the limit on working time would be steadily reduced until it stood at 32 hours per week – with a guarantee that workers would not lose pay as a result. Labour is also committed to an immediate hike in the minimum wage for all workers aged 18 and over, wider protection against unfair dismissal and a radical overhaul of trade union law.

Brexit itself may not involve any change to employment law, but the political situation that it has created certainly might. Which direction the law takes may well be decided in the next few months.

Don't forget to check more about Darren Newman on his blog at A Range of Reasonable Responses or on twitter at @DazNewman