A newsletter from irwinmitchell

Edition 9 - Summer 2016

# Focus on Employment

Brexit READY

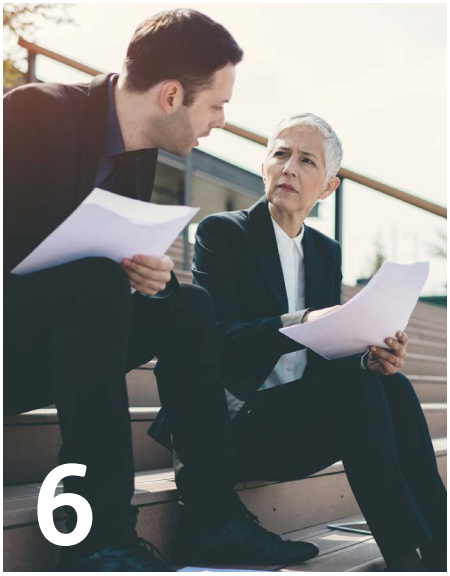
## Brexit
## How will employment law change?

>> Dealing with the backlash following Brexit

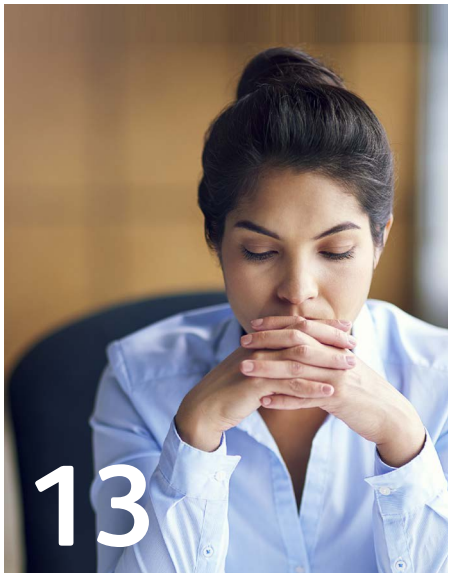
>> Brexit checklist for your business

>> Are your staff worried about their jobs following Brexit?

# CONTENTS







LEGISLATION TRACKER:

# Summer and autumn 2016

| 2016 | | |
|---|---|---|
| **12 July onwards** | Changes to immigration controls | The Immigration Act 2016 extends the criminal offence of employing an illegal migrant to employers with "reasonable cause to believe" that the person is an illegal worker and will introduce a new offence of illegal working.<br><br>Other provisions, not yet taking effect, include a requirement for workers engaged in the public sector with public-facing roles to be able to speak fluent English or Welsh.<br><br>The Secretary of State will also be able to introduce an immigration skills charge on employers who sponsor skilled workers from outside the EEA. |
| **1 October** | Increases to National Minimum Wage rates | Workers aged 21 to 24 - £6.95<br><br>Workers aged 18 to 20 - £5.55<br><br>Workers over compulsory school age under 18 - £4.30<br><br>Apprenticeship rate - £3.40<br><br>The National Living Wage for workers aged 25 and over will remain at £7.20 |
| **Expected 1 October** | Gender Pay Reporting | Section 78 of the Equality Act 2010 enables the Government to make regulations requiring employers with over 250 employees to publish information about their gender pay gap. Draft regulations have been published.<br><br>Pay will include basic pay, paid leave, sick pay, area allowances, shift premium and bonuses. It will not include overtime, redundancy payments, salary sacrifice schemes or benefits in kind.<br><br>The first period for assessment is expected to be 30 April 2017 but employers will have until 29 April 2018 to publish their report. |

Back to contents

| 2016 | | |
|---|---|---|
| **Date TBC** | Repayment of public sector exit payments | Public sector exit payments include those paid for loss of employment, such as enhanced redundancy payments, discretionary payments to buy out actuarial reductions to pensions and severance payments. It does not apply to payments in lieu of notice, contractual bonus payments or those made in connection with incapacity, or payments awarded to the individual by a court or tribunal.<br><br>Qualifying individuals are those who earned £80,000 or more within 12 months of receiving their exit payment.<br><br>Repayment will be tapered, so for example, an employee returning within two months of receiving an exit payment will repay more than an employee returning nine months after receiving the payment. |
| **Date TBC** | Exit payments and apprenticeships | The Enterprise Act 2016 will introduce:<br><br>• A £95,000 cap on exit payments made to public sector workers to end six-figure payoffs<br><br>• Regulations to restrict the use of the word "apprenticeship" to Government-accredited schemes and to increase the number of public sector apprenticeships offered. |
| **Date TBC** | Trade unions | Proposed changes to balloting rules for industrial action (including enhanced rules for "essential public services" (not yet defined)), removing the prohibition on using agency staff to cover striking employees, measures on picketing, facility time, political donations and additional powers for the Certification Officer. |
| **Date TBC** | Tax treatment of termination payments | Proposals include treating all payments in lieu of notice as taxable. The Government's response to the recent consultation is expected later this year. |
| **Expected October** | Company directors | All company directors should be natural persons (not corporate entities). There will be a 12 month grace period after which corporate directors will cease to be directors by operation of law. |

Back to contents


### Institute of Directors predicts that Brexit will cause widespread hiring freeze

A snap poll by the Institute of Directors (IoD) has found a quarter of companies will impose a hiring freeze after the UK's decision to leave the EU. It surveyed 1,000 of its members, revealing that one-third would keep hiring at the same pace, and 5% would cut jobs. One in five are considering moving some of their operations outside of the UK.

### Presenteeism - not such a bad thing?

A report by the *Institute for Employment Studies* has challenged the idea that workers have to be 100% fit before going back to work. It argues that returning to work can have a beneficial effect on rehabilitation and recovery, even for workers with more serious health conditions.

### Court of Appeal to hear holiday pay case

The on-going saga of whether commission should be included in holiday pay, in the case of *Lock v British Gas*, has been heard by the Court of Appeal.

Despite an ECJ judgment in favour or Mr Lock, British Gas is seeking to argue that UK legislation cannot be interpreted to give effect to EU law.

The outcome of the case will be reported in the autumn edition of Focus on Employment.

### Toolkit helps to manage older workers

An interactive resource developed by *Age Action Alliance* has launched a toolkit to help employers manage older workers. It includes information relating to retaining, retraining and recruiting older workers and also provides legal advice on flexible working applications.

### Review of tribunal fees says they are too high

The House of Commons Justice Committee has published its *review into court and tribunal fees*. It suggests that Employment Tribunal fees should be "substantially reduced". The Ministry of Justice has conducted a separate review and findings will be released shortly.

### House of Commons gathering evidence on workplace dress rules

The House of Commons has launched an inquiry into high heels and workplace dress codes after a disgruntled worker collected almost 150,000 signatures calling for a ban on employers being able to force women to wear heels at work.

The joint inquiry, held by the House of Commons Petitions Committee and Women and Equalities Committee, also includes the wider issues of gender dress codes and discrimination. Once all evidence has been collated it will make recommendations to the Government. *Read more on the petition.*

### Banning Muslim headscarf justified

The Advocate General has given an opinion that a Belgian company's dress code banning employees from wearing any visible religious, political or philosophical symbols in the workplace, which was used to prevent a Muslim employee from wearing an Islamic headscarf, did not amount to direct discrimination. The ban affected all employees equally; it was not based on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. *The European Court of Justice will determine the issue in due course.*

### Court finds UK gangmaster liable for modern slavery victims

A British company has been found liable for six victims of modern slavery it engaged to catch chickens. The judge ruled that the men were owed compensation for the company's failure to pay the agricultural minimum wage, for the charging of prohibited work-finding fees, for unlawfully withholding wages, and for depriving the workers of facilities to wash, rest, eat and drink.

The amount of compensation will be assessed at a future date but is expected to run to hundreds of thousands of pounds for unpaid wages. *Read more details in The Guardian.*

### Crackdown on legal highs

The fate of so-called legal highs has taken a new turn. The Psychoactive Substances Act is now in force, making it an offence to make, supply, offer to supply, import or export any of these substances where they are intended for human consumption.

The legal highs include stimulants, 'downers', or hallucinogens. They are dangerous and while the use of some may be less easy to spot than others, employers are advised to keep a close eye on workers' changing behavioral patterns. *ACAS has provided useful information on the matter.*

Back to contents

# Brexit

## How will employment law change?

The UK is starting to come to terms with the brave new world of Brexit and the Government has a huge amount of work to do to make the UK an attractive place to work and do business amid the uncertainty that will prevail until new agreements are reached.

Withdrawing from Europe is unprecedented, and is likely to be a hugely complicated and lengthy process. The exit rules provide that countries have a minimum of two years' to achieve this and time starts to run from the date the Government serves formal notice to exit the EU. Notice to leave the EU does not have to be issued immediately after the referendum and the timing of it is strictly a political decision for the UK Government.

Teresa May has said that she will not trigger Article 50 until there is an agreed UK wide approach (also backed by Scotland) and clear objectives for negotiation. Senior Government officials have been told to work to a timetable under which Article 50 is expected to be triggered by the end of the year.

There is still much that we don't know (and probably will not know for a while yet) and speculation is almost at fever pitch, but we thought it would be helpful to start with what we do know:

1. The UK will continue to be bound by EU laws until another agreement is reached or we unilaterally withdraw from the EU (which cannot be earlier than two years from the date the exit notice is served).

2. Businesses will have to continue to follow all existing UK laws that derive from the EU during this two year period. European Directives, such as those regulating working time and holidays, TUPE, collective redundancies, discrimination and agency workers have been implemented via primary legislation in the UK and the UK Government will have to decide whether to amend or repeal these. They will not fall away automatically, simply because of Brexit. However, EU laws that have direct effect in the UK without the need for implementing legislation will fall away unless the UK Government passes new legislation transposing these into UK law. Similarly, the 5,000 statutory instruments passed by the EU may also fall away unless new legislation is introduced by the UK to replace them.

3. In the context of employment, any rights that have contractual effect between employer and employee will (at least for the time being) remain unaffected by Brexit, embedded as they are in our UK law. Employers will not therefore suddenly be able to insist that their staff work over 48 hours per week or take fewer holidays.

4. The European Convention on Human Rights which was incorporated into domestic law by the Human Rights Act 1998 will continue to apply (unless it is repealed) as it is not an EU instrument and is enforced by the European Court of Human Rights in Strasbourg.

However, there is a lot we don't know. The reason why there is so much uncertainty is because we don't yet know what agreement the UK Government will reach with the EU.

The leave campaign advocated a number of trade models, some or which require the contracting countries to adopt certain EU freedoms, such as the free movement of goods, services, persons and capital. If negotiations fail, or the Government decides to go it alone, the UK will remain a member of the World Trade Organisation and will be subject to trade tariffs but will not be subject to any EU laws.

Many businesses are concerned about what will happen if the UK ultimately pulls up the drawbridge and imposes strict immigration controls using an Australian style points system (which is already in place and severely restricts the ability of non EU residents to live and work in the UK).

The borders will not automatically be closed to non UK residents and transitional arrangements will have to be negotiated as part of a post Brexit regime. Depending on the outcome of those negotiations, there may be no automatic right for UK citizens to travel and work outside the UK, or for UK businesses to freely recruit staff from the EU, which will potentially cause major problems for some UK businesses already struggling to fill certain skills gaps.

We may also see a surge in the numbers of EU workers already working in the UK applying for indefinite leave to remain in the UK so that they can avoid any immigration restrictions that are imposed. Currently, they will need to demonstrate that they have lived in the UK for at least five years, although it is possible that the UK will increase these requirements.

Individuals who wish to work in the UK may have to satisfy immigration controls imposed by the UK Government and UK citizens who wish to work in the EU may have to satisfy the immigration policies adopted by the country in which they wish to work.

Back to contents

Dealing with the backlash following

# BREXIT

The result of the referendum has revealed that we are a divided nation: divided by region, divided by age and divided by education and wealth.

As the UK struggles to pick up the pieces and forge a way forward, voters have turned on one another. Calls for both sides to work together have largely fallen on deaf ears and social media is awash with vitriolic comments, name-calling and abuse.

**What should employers do if such polarised views spill out into the workplace?**

Employees are entitled to a private life and to hold opinions that their employers and others with whom they work do not agree with, but this does not mean that they have an absolute right to say what they like. Most employers have workplace policies and rules, which spell out the behavioural standards staff must meet. These will usually require staff to treat each other with dignity and respect. Calling a colleague a "moron" (or worse) for voting a different way, ridiculing them for their "mistaken" beliefs or clearing the desk of an EU worker "as a joke" will cause problems and may amount to bullying and potentially discrimination.

Under UK law, an individual can complain of bullying or harassment if comments are "unwanted" and create a hostile or intimidating working environment. Generally, you take your victim as you find them and it is not a defence to say that the comments were "banter" or that the victim is too sensitive or that the comments were not directed at them.

Employers have a duty to dampen down any conflict in their workplace and should remind staff to respect each other's opinions and not allow their own political/philosophical opinions to affect their work or the relationships they have with their colleagues. If problems arise, you must take swift and effective action to prevent problems escalating.

Back to contents

If you have undertaken thorough diversity training, your workforce should recognise that making derogatory comments about an individual or a group of people based on their nationality, race or philosophical beliefs is likely to get them into trouble (and in serious cases may result in dismissal). However, they may not necessarily consider that teasing someone for holding different political beliefs may also amount to bullying and you may therefore have to spell this out.

### Is a belief in the EU or sovereignty of the UK a protected belief?

A belief in the EU or alternatively the sovereignty of the UK might be capable of being a "philosophical belief" protected under UK discrimination law. Whilst a "belief" has to be more than simply an opinion, employees who believe that they have been bullied for holding a contrary view on Brexit to the majority of their colleagues, may try and bring claims based on their beliefs if no action is taken to protect them. Previous cases have found that a belief in climate change, anti-fox hunting and left wing democratic socialist beliefs have all been held to be capable of protection.

### Protecting the business from claims

Organisations will only avoid liability for harassment and bullying carried out by their staff if they can demonstrate that they have taken all reasonable steps to prevent it. Whilst bullying is not a legal claim in its own right (unless it amounts to harassment as the bullying is discriminatory), it can amount to a potential fundamental breach of contract giving rise to potential constructive dismissal claims, if the employer fails to take action and, for example, the employee loses all trust and confidence in their employer to deal with matters or provide a safe system of work. Whilst a policy will help, you must also demonstrate that you have trained staff and dealt with all incidents appropriately.

### Protecting your staff from abuse from the public

In the week following the referendum there was a dramatic increase in reported racist attacks and hate crimes and businesses in some areas of the UK have already reported that staff recruited from outside the UK (and in some cases outside the EU) have been abused or threatened by customers or other members of the public.

Employers have a duty to protect the health, safety and welfare of their employees and must do whatever is reasonably practicable to achieve this. This means making sure that workers are protected from anything that may cause harm, effectively controlling any risks to injury or health that could arise in the workplace. Lone workers may be particularly at risk and they should be provided with basic safety training and support.

Back to contents


**It is expected to take a minimum of two years for the UK to negotiate its exit from the European Union, and the eventual shape of the agreements between the UK and the EU will determine how this will affect your business. That said, there are a number of areas that it is advisable for you to start considering now:**

## Your business: Commercial contracts

- ☐ **Long-term contracts:** the type of contract most affected will be long-term cross-border agreements irrespective of whether they are with EU or other countries (remember that the UK is likely to have to negotiate new trade agreements with non-EU countries). If possible, seek to amend them now or at a suitable time over the next two years (e.g. when a contract variation is being agreed). If this is not possible, you will need to assess and seek to mitigate the likely risks that will flow from them.
- ☐ **New contracts:** new contracts are where you can do the most to minimise your Brexit risk. As a business you will need to consider whether you wish to enter long-term agreements that will bridge the likely date of any Brexit or whether you want a shorter term agreement, a right to break the agreement early or a price adjustment provision that deals with cost changes arising from a change in law following Brexit.
- ☐ **Force majeure:** review your force majeure clauses. In itself Brexit is unlikely to be a force majeure as it is not expected to prevent a party from performing its contractual obligations. Changes in specific laws or the imposition of quotas via international trade agreements, may cause a force majeure provision to be invoked.
- ☐ **Pricing:** the effect on the world financial markets as a result of the Brexit vote has emphasised the need to be clear on pricing and the assumptions that are built into any price. At present, this is as important in short-term contracts as it is in long term ones. Factors to consider include:
  - o what is your choice of currency?
  - o have you dealt with currency fluctuations?
  - o have you included an appropriate index linking mechanism?
  - o how is the cost of legal / regulatory change, and its effect on price, dealt with?
- ☐ **Import / export costs:** all international supply agreements will need to apportion the cost of import and export tariffs. Make sure you are aware as to which party is responsible for these risks and, in new contracts, negotiate accordingly. Remember that Incoterms and other similar standard terms will apportion these costs if they are incorporated into your contract.
- ☐ **VAT:** there is a potential that the scope, and rates, of VAT may change post-Brexit. Make sure that your pricing mechanism minimises the impact of such changes on you.
- ☐ **Territory:** make sure that references to the EU being the "territory" are clear as to whether this includes England, Wales, Scotland and Northern Ireland both before and after any Brexit. In view of the possibility of further moves by Scotland for independence, ensure that references to the United Kingdom are stated to include all four countries (and again, whether they should still do so after any Scottish independence).
- ☐ **Funding:** is your counterparty directly or indirectly funded by EU grants? If so, consider how it will continue to fund itself in the event that those funds decrease or cease? If your counterparty requires private funding to perform its obligations, are you confident that it has such funding or that it is in a financial position to obtain it?
- ☐ **Hedging:** speak to your trade financier about managing potential risk through interest rate hedging.

Back to contents


- [ ] **Supply chains:** once you are clear on the risks in your customer relationships, review how such risks are passed down your supply chain and, if they are not, consider passing them down to your suppliers at your next re-procurement. Ensure that critical suppliers have in place business continuity plans that cover any disruption that may be caused by an eventual Brexit.
- [ ] **Governing law clauses:** when negotiating new contracts think carefully about the dispute resolution and governing law clauses. These clauses should be drafted to make it clear which courts are to have jurisdiction in the event of a dispute and which law is to govern the contract.
- [ ] Follow the Financial Conduct Authority on Twitter to keep abreast of any regulatory changes @TheFCA.

## Your financial position: Insolvency

- [ ] As UK insolvency law is not derived from EU law, the effect on businesses domiciled and trading solely in the UK will be minimal. However, businesses should identify whether they have significant exposure to businesses in the EU.
- [ ] Businesses with a parent or subsidiaries in other EU countries need to understand the solvency of these entities as recognition of local insolvency office holders could end.

## Protecting your assets: Data Protection and IP

- [ ] Identify whether you trade with individuals in the EU or 'monitor behaviour' of individuals in the EU for example, by placing cookies on websites. If so the new General Data Protection Regulation (GDPR) will still apply to you even though you are based in the UK. You should continue with your GDPR readiness program.
- [ ] Identify whether your use of personal data is restricted to UK based individuals only. If so, the Data Protection Act 1998 will continue to apply to your activities for the time being, however the Information Commissioner's Office has indicated it will seek UK law reform in this area.

## Your people: Employment and Immigration

- [ ] Identify any members of staff who work outside the UK and within the EU and EEA. We don't yet know if free movement of workers between the existing EU and EEA states will continue, but if not, visas may be required.
- [ ] Identify any members of staff recruited from the EU. Such staff are entitled to continue to work in the EU for the time being. Consider whether key individuals should be encouraged to apply for a permanent residence card to remain in the UK (they will need to have lived in the UK for at least five years to apply for this). EU staff resident in the UK for less than five years should consider applying for a registration certificate.
- [ ] It is still possible to recruit EEA nationals without work visas, but if your business relies heavily on unskilled labour from the EEA, start to consider how you may be able to fill any vacancies from the UK labour market. If you are recruiting staff you must continue to consider any applications from EU nationals and cannot prioritise candidates from the UK.
- [ ] Review all employees' contracts of employment and identify those who have refused to opt out of the 48 hour working week. The Working Time Regulations restrict individuals from working an average 48 hour working week unless the worker has opted out of this. If this restriction is removed, employers may (depending on the contractual terms agreed between the parties) be able to insist that their workforce work longer hours.
- [ ] Review the holiday pay arrangements in place for all staff. The issue of holiday pay has been particularly contentious and the Government may decide that workers are only entitled to receive their basic pay (excluding overtime and commission payments) when they take a holiday. Legislation will be needed to clarify the position given recent binding case law in this area.

Back to contents


## Securing the future: Pensions

- [ ] Work with your scheme trustees /managers to assess and refresh your funding strategy in order to minimise risk from any current market volatility.

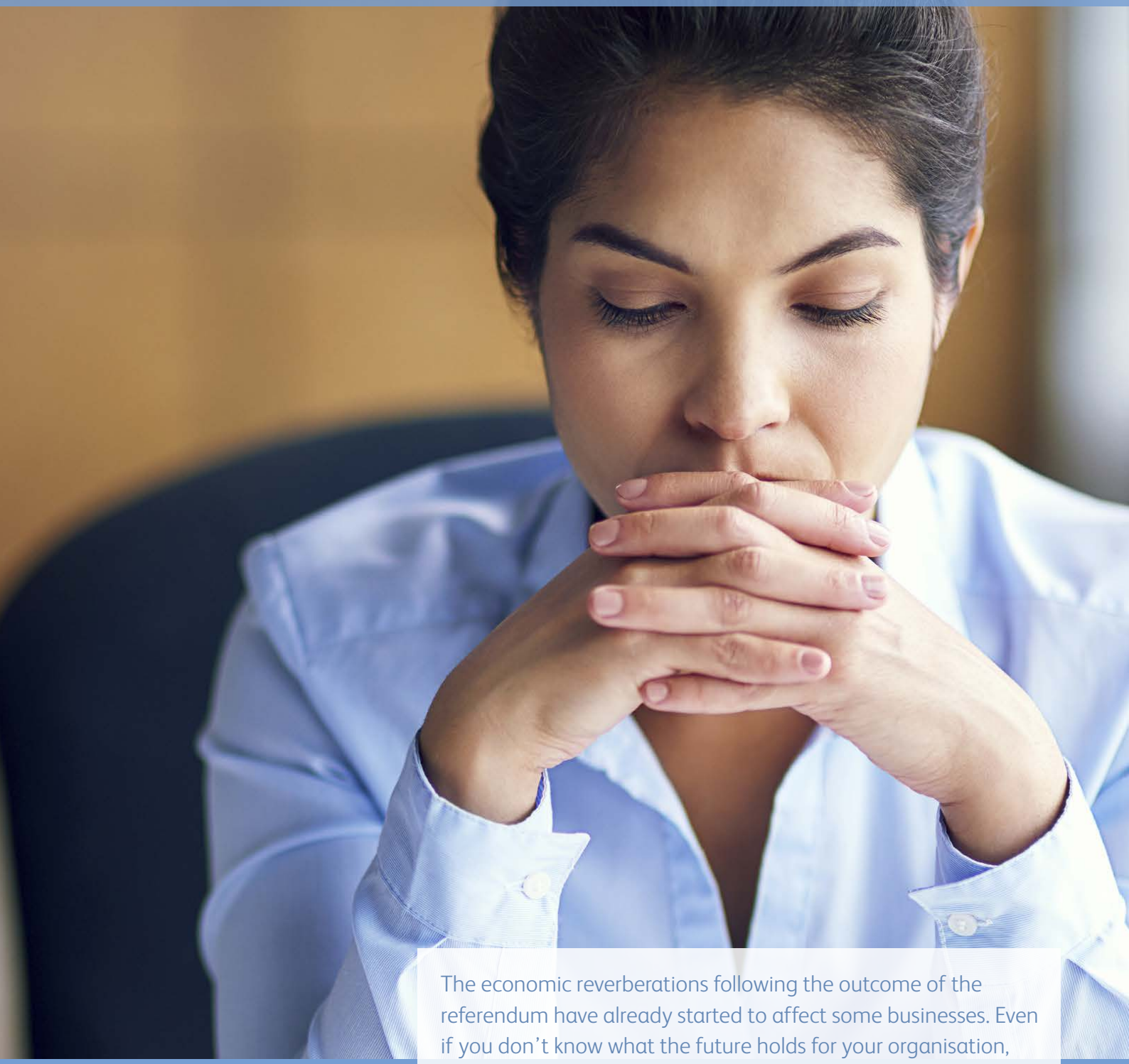
## Financial position: Tax

- [ ] The UK tax regime relies on European law in a number of respects, in particular in relation to VAT. If your corporate structure includes subsidiaries based in EU member countries, you may well be affected by withholding tax on dividends or royalties or domestic taxes relating to cross border payments. These are all areas which in due course could be affected by our departure from the EU.

**For all Brexit enquiries please email:** eu-experts@irwinmitchell.com

Back to contents

# Are your staff worried about their jobs following Brexit?



The economic reverberations following the outcome of the referendum have already started to affect some businesses. Even if you don't know what the future holds for your organisation, how do you reassure your staff and send out the message that, for the time being, it is business as usual? Use our staff **Q&A** to help alleviate immediate concerns.

## What Brexit means for employees

The UK has voted to exit from the European Union. Whilst the withdrawal is likely to be a hugely complicated and lengthy process, we would like to provide initial information on what the impact of Brexit could mean for you as an employee.

**Q1: How long will it take for the UK to exit the EU?**
The exit rules provide that countries have a minimum of two years' to negotiate their withdrawal from the EU and time starts to run from the date the Government serves formal notice to exit the EU. Notice to leave the EU has not been issued and the timing of it is strictly a political decision for the UK Government.

**Q2: Will my terms and conditions of employment change as a result of Brexit?**
We do not anticipate making any changes to your terms and conditions of employment as a result of Brexit, but cannot guarantee that your terms and conditions will remain completely unchanged in the future. This is because the terms of the UK's exit from the EU remain uncertain and a number of laws which have until now governed UK employment law have been defined or shaped by our membership of the EU.

**Q3: How will Brexit affect UK employment law and as a result our people policies?**
The decision to exit the EU will be unlikely to necessitate any immediate and major employment law policy changes in the UK due to the fact that:

- The UK will continue to be bound by relevant EU laws until another agreement is reached or until the UK unilaterally withdraws from the EU (which cannot be earlier than two years from the date the exit notice is served). This means that we will continue to follow all existing UK laws that derive from the EU during this two-year period.
- Depending on the UK's relationship with the EU following Brexit, the Government may be required to retain EU employment law as part of any new deal.
- Many UK laws, which originate from the EU, have become workplace norms, therefore it would not be in the political interest of any Government to initiate wholesale change or removal. These include some discrimination laws and working time practices including the right to paid holidays.
- Some current UK employment laws exceed minimum EU requirements (for example, family leave, including maternity and paternity rights), or fall outside EU competence (such as unfair dismissal rights). In these cases there is unlikely to be any change as a result of Brexit.
- As the political landscape becomes clearer we will continue to review our policies in line with any Government decisions and any changes to legislation and we will of course discuss any proposed changes and the impact of these with our employees.

**Q4: I am an EU citizen but do not have a UK passport. Will I be able to continue to work for in the UK?**
The borders will not automatically be closed to non UK residents and we expect transitional arrangements to be negotiated as part of a post Brexit regime. Depending on the outcome of those negotiations, you may need a visa to continue to work in the UK and satisfy any immigration controls imposed by the UK Government. If you have any concerns in this regard, please contact the HR Department.

**Q5: Should I apply for permanent residence to avoid any immigration restrictions that might be imposed by the UK Government?**
Currently, you need to demonstrate you have lived in the UK for at least five years to apply for indefinite leave to remain in the UK and pay the fee. Further guidance is available on the Government's website.

**Q5: Will the business be making any redundancies or restructuring as result of Brexit?**
We have no current plans to make any redundancies or to restructure as result of the vote to exit.

**OR**

We are considering our position and will comply with all relevant EU and UK laws if we do consider that redundancies are necessary.

Obviously, we can't predict the future and do not yet know what trading agreement the UK Government will reach with the EU and how this may affect our own business.

Please contact HR if you have any additional questions or concerns not considered in this Q&A.

Back to contents

# The impact of Brexit on the residence and working rights of EU citizens in the UK

Following the outcome of the referendum, many businesses are concerned that they may lose the skills and expertise of staff engaged from the EU. Our employment specialist, Omer Simjee explains the current legal status of EU staff and provides some tips on helping them protect their right to continue to work and live in the UK.

**Current UK immigration rules for citizens of EU member states**

One of the fundamental principles of EU law is freedom of movement and establishment, under which citizens of all EU member states have the right to freedom of movement for workers within the EU.

Under the present law, while the UK remains a member of the EU, citizens of EU states have the right to enter and remain in the UK. As this is a right that derives from EU law, they do not require a permit from the UK to exercise that right. However, once resident in the UK, they may apply for a registration certificate that proves that they are exercising their rights to live or work in the UK.

EU citizens who have resided in the UK for five continuous years acquire the right of permanent residence in the UK. After a further 12 months of UK residence, a holder of permanent residence may apply for British citizenship.

## The effect of Brexit on UK visa rules for EU citizens

The rights of EU citizens to move freely to and live and work in the UK are based on EU law. When the UK leaves the EU, those rights will therefore fall away.

It is not yet clear whether the UK would (or could) negotiate special agreements with the EU or other individual states to deal specifically with the right of their citizens to live and/or work in the UK. The possibilities, as I see them, are:

- The UK will enter into agreements with the EU or with Ireland and other individual EU countries that will allow their citizens to live and work in the UK either on a wholly visa-free basis or a less restrictive basis than applies to other countries. For example, such agreements may allow citizens of other EU countries to come to the UK if they have a pre-existing job offer in the UK or are financially independent of the UK state
- There will be transitional arrangements under which EU citizens and their families who are resident in the UK and have been UK resident for a specified minimum period or are in full-time employment will be given visas to remain until their employment or residence ceases. New EU entrants to the UK will need to have a visa in the same way as non-EU citizens do now or will have new rights under new agreements negotiated between the UK and their home countries
- There will be no transitional arrangements and no useful agreements will be negotiated. Instead, within a specified period, all EU citizens will need to apply for fresh visas using the existing non-EU visa categories and leave the UK if they are not granted. New entrants to the UK will need to have a visa in the same way as non-EU citizens do now. In my opinion, this is an unlikely outcome as it would cause chaos in the employment and financial markets and probably breach human rights law in many instances.

## What can EU staff living in the UK do to safeguard their positions?

At present, the UK remains a member state of the EU and unless and until exit actually occurs, their rights to live and work in the UK should not be affected. The position after Brexit takes place is not yet clear and will depend upon what arrangements are put in place by the UK Government. However, there are some steps they may be able to take now to put them in a better position. They are:

- EU nationals that have been resident in the UK for five years or more can apply for a permanent residence card. This shows that they have a right of permanent residence in the UK. The right is derived from EU law but in my view it is unlikely that permanent resident status will be withdrawn from EU citizens who have acquired it.
- To apply for a certificate of permanent residence, individuals will need to complete an application form and provide documentary evidence proving that they have been living and exercising their EU Treaty rights in the UK for the past five years, together with a fee of £65.
- Family members may also qualify for permanent residence if they meet the requirement. They will need to complete their own separate application forms.
- EU nationals that have been resident in the UK for less than five years can apply for a registration certificate showing they are exercising their EU rights to be in the UK. In the event that the UK enacts transitional rules that allow EU citizens who are resident at the time of Brexit to remain in the UK, such a certificate may be useful in showing UK residence.
- To apply for a registration certificate, individuals will need to complete an application form. This form is then submitted to the Home Office with the relevant supporting documentation and an application fee of £65. Alternatively, they can make the application in person at the Croydon Premium Service Centre for an additional charge. The application will be assessed on the same day if they elect to use the premium service.
- Direct family members (for example husband and wife) may also qualify for a registration certificate or a residence card as a family member of an EU national. The application process is similar to an EU national's.
- EU nationals who already have permanent residence can apply for naturalisation as a British citizen. Citizenship has advantages over permanent residence as it cannot be withdrawn, whereas permanent residence may cease if the holder ceases to have a home in the UK.

## Irish Citizens

The UK has a Common Travel Area (CTA) with the Republic of Ireland that predates its entry into the EEC/EU. The CTA allows free movement between the UK and Northern Ireland and UK. There have been various assurances from pro-Brexit politicians that following exit, the CTA would remain in place. This would allow Irish citizens continued freedom of movement between the UK and Ireland. However, this is subject to further discussion between the UK and Ireland as exit arrangements are negotiated and put in place.

## Other countries

Switzerland is not a member of the EU or European Economic Area and Norway, Iceland and Liechtenstein are members of the EEA but not the EU. However, each of these states has entered into reciprocal agreements with the EU regarding free movement. I assume that the post-Brexit UK immigration arrangements for citizens of Switzerland, Norway, Iceland and Liechtenstein will be the same for as for citizens of EU states.

**For further information, please contact our immigration specialist Omer Simjee.**

**Omer Simjee**
Partner
**T:**+44 (0)121 214 5406
**M:** +44 (0)7711 155 985
**E:** omer.simjee@irwinmitchell.com

Back to contents

# CASE LAW update

### Is attention deficit hyperactivity disorder a disability?

Not on the facts according to the Scottish Court of *Session in JC v Gordonstoun Schools Ltd*

### Facts

A 16 year old female boarding school pupil with attention deficit hyperactivity disorder ("ADHD") was found having sex with a male pupil. The school principal decided to exclude both of them.

The mother of the child with ADHD claimed that her child had a disability and that the school's decision to exclude her amounted to unlawful discrimination. The Additional Support Needs Tribunal for Scotland originally heard the case and it rejected the claim because it did not consider that the female pupil was in fact disabled for the purposes of UK equality legislation. The mother appealed.

### Held

The Scottish Court of Session rejected the appeal. It found that the original tribunal had been entitled to decide that ADHD did not meet the tests required i.e. it did not have a substantial and long term effect on her ability to carry out normal day to day activities. They also found that there was not a causal link between the female pupil's condition and the fact that she had sex with another pupil. There was evidence in this particular case that the pupils' had planned to have sex and it was not an impulsive act.

### Comment

This decision does not however mean ADHD is not, or cannot be classified as a disability. The symptoms of ADHD include inattentiveness, hyperactivity and impulsiveness and people with this condition may also have additional problems, such as sleep and anxiety disorders. It is likely that these symptoms (if sufficiently serious) are capable of amounting to a disability as the threshold is not that high (and, in fact, it is quite unusual to see cases being litigated on the basis of whether a particular condition is a disability). In most cases it is safer to assume that ADHD is a disability and will be protected under UK Equality legislation. Each case should therefore be treated on its merits, including considering whether or not as an employer, reasonable adjustments need to be made in the context of individuals with potential disabilities.

In the context of an employment relationship, there must be a link between the condition and the detriment complained of and it will not be automatically assumed that the individual's disability featured in the decision making process.

Back to contents

### Does the ACAS Code of Practice on Discipline and Grievances apply to ill health dismissals?

No, according to the EAT in *Holmes v Qinetiq.*

### Facts

Mr Holmes was a security guard who had been dismissed for no longer being able to do his job because of poor health. The employer conceded that Mr Qinetiq's dismissal was unfair (on the basis that it had failed to obtain an up to date occupational health report), and the case proceeded to a hearing to determine compensation. Mr Qinetiq unsuccessfully sought an uplift of up to 25% because his employer had unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance. The Tribunal held, however, that the Code did not apply to ill health dismissals.

### Decision

The EAT agreed this wasn't a disciplinary case. Mr Holmes wasn't to blame for his inability to do his job. Culpable conduct is key to the Code applying and, therefore, to the possibility of increased compensation.

### Comment

Things might not always be this clear-cut. What begins as genuine ill health could become misconduct (which particularly is an issue in instances of short term rather than long term ill health) or culpable poor performance, or vice versa. The real risk here for employers is in not keeping a close eye on the issues as they develop. This case does however provide some helpful clarification for employers that in genuine ill health cases where there is no disciplinary or culpable conduct element (i.e. something that calls for correction or punishment), the Code won't apply – although a fair dismissal in those circumstances is obviously preferable to arguing simply over compensation and whether uplifts are available which is what this case was about.

### Does the ACAS Code of Practice on Discipline and Grievances apply to Some Other Substantial Reason (SOSR) dismissals involving a break down in the working relationship?

No, according to the EAT in *Phoenix House Ltd v Stockman and another.*

### Facts

Following a reorganisation, Ms Stockman was appointed to a more junior role. She complained that she had been treated unfairly and after raising a formal grievance, she confronted her manager when he was engaged in another meeting. This was treated as misconduct and she was given a 12 month written warning. Ms Stockman unsuccessfully appealed against the written warning.

The business was concerned that the relationship between Ms Stockman and her manager had irretrievably broken down and terminated her employment arguing it was entitled to do so for some other substantial reason, namely the irretrievable breakdown in the relationship. This was found to be both procedurally and substantively unfair and was also found to be in breach of the ACAS Code of Practice. The business appealed.

### Decision

The EAT upheld the finding of unfair dismissal, but found that the ACAS Code does not apply to SOSR dismissals. The Claimant could not therefore benefit from an uplift in compensation.

### Comment

This decision applies to all SOSR dismissals, not simply those based on the breakdown in relationships at work. However, with regard to SOSR dismissals based on the breakdown of working relationships, the EAT said that employers must fairly consider whether the relationship had deteriorated to such an extent that the employee cannot be reincorporated into the workforce without unacceptable disruption. In this case the employer had closed its mind to that and had, in effect, put the onus on the employee to prove that she could continue to work harmoniously with her manager.

If you are contemplating dismissing a member of staff for a similar reason, you should consider other options to minimise contact between the two individuals and perhaps set a short trial period to see if these work out before deciding to dismiss. Even though the ACAS Code does not apply, you must still act fairly before dismissing which will at least require holding a meeting and allowing the employee to make representations before you make any decision to terminate their employment on this basis.

### Can an employee be prosecuted for taking confidential information from their employer before moving to a new job?

Yes. The Information Commissioner has recently successfully prosecuted a former employee for unlawfully obtaining personal data in a case heard against Mark Lloyd at Telford Magistrates Court.

### Facts

Mr Lloyd worked at a waste management company in Shropshire and emailed the details of 957 clients to his personal email address as he was leaving to start a new role at a rival company. The documents contained personal information including the contact details of customers, as well as purchase history and commercially sensitive information that would have been useful to him in his new business venture.

His employer complained to the Information Commissioner who brought criminal proceedings against him for breaching the Data Protection Act 1998.

### Decision

Mr Lloyd pleaded guilty to the offence and was fined £300 and ordered to pay a surcharge and costs.

### Comment

Reporting an employee who has unlawfully taken personal data to the Data Commissioner is a useful weapon in an employer's armoury, particularly if you do not have any contractual restrictions in their contract of employment that you can enforce.

Back to contents

Many employees simply forget that stealing personal information is a crime and they will receive a criminal record if they are convicted and a fine of up to £5,000. Even if you do have appropriate contractual restrictions, or are seeking to rely upon an implied term to keep information confidential, threatening to report an employee to the Data Commissioner for taking confidential personal information and obtaining an undertaking from him/her that they have not retained any copies may, in appropriate cases, be quicker and cheaper than seeking injunctive relief.

The Data Commissioner has made a number of successful prosecutions against former employees and this case demonstrates that it does not simply enforce breaches that affect larger businesses.

### Can a court order an ex-employee to destroy confidential information belonging to their former employer to prevent misuse?

Yes, according to the High Court in *Arthur J. Gallagher Services (UK) Limited and others v Skriptchencko and others*.

### Facts

The employer in this case provided insurance brokerage services. It suspected that a former employee had taken confidential information for the benefit of his new employer and after it brought a claim against him and his new employer (for inducement of a breach), he admitted to taking a client list. His new employer admitted using it to contact 300 clients.

The old employer sought interim relief in the form of an injunction and, as part of that process, Mr Skriptchencko was ordered to deliver up his electronic devices for inspection by a forensic IT expert. The expert found that Mr Skriptechencko and his new employers were misusing his former employer's confidential information. The employer asked the court for an order that any confidential information belonging to it should be deleted.

### Decision

The High Court granted the order on the basis that the defendants had admitted taking and misusing the information, had sought to cover this up and could not be trusted to delete the material themselves.

It decided that the old employer would be able to establish a claim of breach of confidence if the case proceeded to trial and this approach would involve the least risk of injustice if it turned out to be wrong so ordered its deletion at the injunction stage.

### Comment

Businesses sometimes mistakenly believe that including post termination restrictions is a waste of time as they are rarely enforced. This case demonstrates that well drafted restrictions are capable of enforcement. Businesses must however be able to demonstrate that they have a legitimate interest that is appropriate to protect and the protection sought is reasonable.

This will be judged at the date the restrictions were entered into and not the date the employer seeks to enforce them.

Businesses often go wrong by not regularly reviewing the contractual terms of key members of staff, or by reproducing standard restrictions that have travelled from one contract to another.

**Irwin Mitchell's IM Protect, helps businesses understand restrictive covenants, draft covenants and ensures businesses are properly protected in the future. To find out more, please contact:**

**Glenn Hayes**
Partner, Employment
**T:** +44(0)113 218 6484
**E:** glenn.hayes@irwinmitchell.com

Back to contents

0370 1500 100
www.irwinmitchell.com
@irwinmitchell

For a list of our offices visit our website



BLS-EMP-0041-NL