

# The legal fallout

**Victoria Brown** discusses the potential impact Brexit could have on UK employment law.



**M**uch of the commentary surrounding Brexit has focused on the economic uncertainty, but there have been questions raised as to what leaving the European Union will mean for UK employment law too. Much of the current regulation in this country stems from the EU including provisions relating to workplace equality, working time, agency workers, TUPE as well as family leave and pay rules.

Some of the EU laws were implemented as primary legislation meaning it would remain effective even after the UK leaves the EU. Others were implemented as secondary legislation meaning it



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would, technically speaking, cease to take effect following a Brexit unless it is deliberately retained. Then there are laws which are a mixture of EU and UK derived law, for example those in relation to leave and pay.

UK employment law is also heavily influenced by jurisprudence, and what is decided by the European Court of Justice. The judgments handed down effect how the UK courts interpret EU derived law. If we do leave the EU as intended, future decisions of the European Court of Justice will no longer be binding on employment tribunals. However, it seems likely that the courts will continue to apply current decisions of the European Court of Justice in order to provide certainty and consistency as to the approach to be taken.

## Changes

Given how effectively employment laws have operated and the amount of uproar that would follow from employees and trade unions alike if any fundamental changes were

made, it seems unlikely that existing EU based provisions will be repealed in their entirety. It seems far more likely that the current legislation will continue to take effect, potentially under a new guise or modified to some extent.

There have been suggestions for changes on the basis that they may benefit employers and support economic growth and stability. One proposal was that it may be worth considering a cap for discrimination claims. The compensation that can be claimed by an employee in claims of this nature is currently uncapped. Another suggestion was changing our stance on issues which have proven unpopular with some employers, such as employees having the right to accrue annual leave during a period of absence (as decided in a recent ECJ case). There also have been suggestions that the TUPE regulations (which require you to retain staff on the same terms and conditions when acquiring a dental practice) could be amended.

A great deal will depend on what is negotiated in relation to the arrangements formalising Brexit and whether, in order to have continuing trade deals with the EU, we will be required to continue to implement certain legislation or similar provisions or to continue to at least consider the decisions which are handed down by the ECJ.

#### **Freedom of movement**

A significant percentage of the UK's dental professionals (dentists, nurses, and auxiliary staff) come from within the European Union. If all EU residents in the UK were required to leave the UK it could lead to a situation where dental practices would be severely understaffed. If there were staff shortages this may lead to an increase in vocational trainees.

It can already take a longer period of time for an EU dentist to lawfully commence work at a practice than a British colleague. Would this process be extended, perhaps to the point of taking an

overseas registration exam?

There have been various suggestions as to approaches that may be agreed following Brexit negotiations: that freedom of movement will remain in order to facilitate a trade deal with the EU; or that a new system will be drawn up whereby EU nationals can apply for rights to remain for a specific period or citizenship, on the basis that they are skilled, employed workers. Many have speculated that agreeing continued freedom of movement will be pivotal to a trade deal with the EU and that may well be the case.

#### **What next?**

Unfortunately, it's still very much a case of watch this space! Theresa May has stated Article 50 will not be invoked until 2017, and the negotiation period (unless an agreement is reached) could take up to two years. Realistically, there are very few implications in the short term, other than the initial economic uncertainty.