



XpertHR Podcast

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- Ellie Gelder: Hello and welcome to this week's XpertHR podcast with me, Ellie Gelder. We now know that the 23rd June is the date for the referendum on whether or not the UK should remain in the EU, but how does EU law affect UK employment law as we currently know it, and what would a departure from EU mean for employment law in the UK?
- With me to discuss the potential implications is Nicky Stibbs, employment lawyer and one of our updating authors on XpertHR's Employment law manual. Good morning Nicky.
- Nicky Stibbs: Hi Ellie.
- Ellie Gelder: So first of all then, to give us a little background, just how significant is membership of the EU to employment law in the UK? [0:00:49.3]
- Nicky Stibbs: Well, the starting point is it is really, really significant. An awful lot of our employment law is based upon European law. Effectively, our membership of the EU means that we have to implement EU employment law.
- Ellie Gelder: So currently, how is European law incorporated into UK law? What are the mechanics? [0:01:06.4]
- Nicky Stibbs: Well most European law comes about through directives, and then in turn, the UK has to implement those directives. Generally speaking, this is done through regulations.
- Ellie Gelder: So can you give us a few examples of some of the most important UK employment laws that derive from EU directives? [0:01:21.3]
- Nicky Stibbs: Sure, there are plenty to choose from. Just to pick two significant examples, one is TUPE and the other, the Working Time Regs, and both of those derive from EU directives.
- Ellie Gelder: Okay, so the role of EU employment law is really significant. But that's not the full picture, is it? There are some big areas of UK employment law that don't derive from EU directives. [0:01:41.6]
- Nicky Stibbs: Absolutely. So there's the law of unfair dismissal and there's also the right to request flexible working, and both of those in their current form are purely domestic, home-grown. And it's not just that. To look at the fuller picture, the UK was legislated in certain areas long before we had any requirement to do so by virtue of European law.

Ellie Gelder: Can you give us an example of where that's happened? [0:02:02.2]

Nicky Stibbs: Yeah, so looking at the field of race relations, the Race Relations Act came into force in 1968 and that was a long way before the relevant equality directives or the directives on discrimination in the workplace came into effect in Europe.

Ellie Gelder: And there are also instances of where the UK has built on directive rights to give more generous rights than are provided for in the directive, aren't there? Also known as gold-plating? [0:02:25.5]

Nicky Stibbs: Yeah, absolutely. So gold-plating, one example of that is under the Working Time Regs again, and their directive requires us to have 20 days' paid leave as a minimum and our UK Regulations actually give us 28 days.

Another example is in relation to maternity rights, and again, the UK gives a more generous paid maternity leave than required under the EU minimum.

Ellie Gelder: And what about the role of the European Court of Justice or the ECJ? [0:02:51.4]

Nicky Stibbs: The ECJ is hugely influential on the employment law landscape in this country. Many HR practitioners are going to be familiar with the situation where we've waited for a judgment to come down from the European Court and that judgment is about interpreting directives and also making sure that our regulations have properly complied with those directive rights. And it's worth pointing out that those ECJ judgments then will bind our tribunals and our courts.

Ellie Gelder: And just to be clear that that could also include situations where another EU country has made a reference to the ECJ on a point of law. The resulting decision from the ECJ would also bind the UK courts and tribunals? [0:03:29.4]

Nicky Stibbs: Absolutely. Yeah, the origin doesn't matter as long as it's within the EU.

Ellie Gelder: Okay, so can you just talk us through a recent example, just to show the importance of ECJ judgments and how they affect the decisions of UK courts? [0:03:40.3]

Nicky Stibbs: Sure. So we've had a number of cases that have been referred up to the European Court in relation to Working Time Regs and recently an example that springs to mind is *Lock and British Gas*, and this is where the ECJ was asked to form a view as to whether our regulations were compatible with the directive in how we calculate holiday pay, and this all turned on the issue of commission and whether that should be included in those holiday pay calculations. ECJ said yes, it should be, so the decision then went back down to the tribunal in this country and the tribunal effectively read additional words into the regulations to give that effect.

Ellie Gelder: Okay. So European law and ECJ judgments form a really significant part of employment law in the UK, as we currently know it. But if the referendum goes in favour of leaving the EU – or more popularly

referred to as Brexit – what will the impact be on UK employment law? [0:04:30.4]

Nicky Stibbs: Well this is unprecedented territory so there's plenty of uncertainty surrounding what it's actually going to look like. One thing we do know is that not a lot's going to happen in the immediate aftermath and the general consensus is that a decision in favour of Brexit is going to be politically binding on the Government.

Having said that, though, there's then going to be quite a long process 'til we actually see any changes on the ground.

Ellie Gelder: What would that process look like? [0:04:53.4]

Nicky Stibbs: Well under the Lisbon Treaty, which is the relevant EU treaty here, a member state can exit from the EU. It's got to give two years' notice to the European Commission, so effectively the UK Government would write, giving notice for that two-year period.

Ellie Gelder: So nothing should change for at least two years, then? [0:05:09.3]

Nicky Stibbs: Absolutely, but during those two years there's going to be negotiations about our exit. There's also going to be negotiations about the future relationship we'll have with the EU and with the individual member states, and this is all going to be about seeking to retain our trade links.

Ellie Gelder: And presumably those new arrangements may have a bearing on whether or not the UK is still required to apply European law? [0:05:29.1]

Nicky Stibbs: Absolutely. We don't know what it's going to look like, but it might be worth having a look at some of the current examples of those countries who are outside the EU but for whom EU law is still really significant.

Ellie Gelder: Okay, so these are countries outside the EU that have agreements with the EU and those agreements include obligations relating to EU employment law? [0:05:49.7]

Nicky Stibbs: That's right, exactly. So both Norway and Switzerland fall into that category and they have to apply a lot of European employment law by virtue of their agreements with the EU.

Ellie Gelder: So the thinking behind that is for the purposes of trade, to have a level playing-field within the single market, so that one country can't undercut the other one for lesser employment protections.

So if the directives didn't apply in the UK, what would happen to all the case law which is based on ECJ judgments, like *Lock and British Gas*, the decision you mentioned earlier? [0:06:18.6]

Nicky Stibbs: Well there are differing views on this, but the general view is that that case law is still going to be in effect in the UK until it's either repealed through new legislation or it's overturned by decisions of our higher courts.

- Ellie Gelder: Okay, so can you give us a run-down of the areas of employment law that might change as the result of a Brexit? [0:06:36.7]
- Nicky Stibbs: Well it's really, really unlikely there's going to be a wholesale, immediate repeal of the EU-derived employment law. These laws are just so well embedded into our employment law landscape.
- Ellie Gelder: But what are some of the areas that people are saying may well be in the firing line if a Brexit happened? [0:06:51.8]
- Nicky Stibbs: Well an area that's often highlighted is the Working Time Regulations, and in particular where these have been developed through judgments of the ECJ. In particular we're looking at the carrying over of leave from one leave year to the next, and also the inclusion of commission in holiday pay, so again going back to the *Lock and British Gas* decision we talked about earlier.
- Another area that seems to be getting a lot of attention is the Agency Workers' Regs 2010, and in particular the right for an agency worker to receive the same pay and basic conditions as a directly recruited colleague after that agency worker's been doing the job for 12 weeks.
- Ellie Gelder: Okay, so two big areas of employment law that might be in the firing line. What about discrimination law, because that's quite a hot topic for some employers? [0:07:34.9]
- Nicky Stibbs: Well at the moment damages for discrimination are uncapped and you can contrast that with the damages that you could get for an unfair dismissal, which is subject to a statutory cap. We can't cap those damages for discrimination in the UK because of European law, so that's an area that might change in the future.
- Ellie Gelder: And any other areas that might be for the chop if Brexit happened? [0:07:57.8]
- Nicky Stibbs: Well TUPE is often cited as being particularly unpopular with businesses and a particular provision in TUPE which is likely to be targeted could be the restriction on harmonising terms and conditions after a TUPE transfer.
- Ellie Gelder: And just finally, how would the free movement of people be affected by a Brexit? [0:08:16.5]
- Nicky Stibbs: At the moment, EU citizens have got the right to live and work in any EU country without a work permit or a visa, and again, this is something that could end as a result of Brexit. Having said that, the same considerations apply, as we talked about, in relation to European employment law. This is just something that's going to be up for negotiation.
- Ellie Gelder: Okay, so it looks like even if the UK votes in favour of a Brexit come 23 June, we're not going to see any changes to employment law as a result for a good while, and the UK Government's ability to change current employment law that derives from EU law is very much going to depend on the terms of any agreements it strikes.

So to sum up then, Nicky, what are the main points that those working in HR need to bear in mind in relation to a potential Brexit?
[0:09:00.6]

Nicky Stibbs:

So the key thing really is we're not looking at any big changes for at least two years following a vote in favour of Brexit. Then areas to keep an eye on might be Working Time Regs, TUPE and possibly discrimination law.

Ellie Gelder:

Thank you for that really useful insight, Nicky. Now that was just a brief overview of Brexit and its potential impact on employment law. We will be continuing to monitor Brexit and its consequences for the world of HR, so do look out for further information on XpertHR's homepage.

That brings us to the end of this week's XpertHR podcast, which you've been listening to with me, Ellie Gelder. We'll be back next Friday but until then, it's goodbye from us.