



Brexit – a political update

By **Mark Callaghan** - 26 September 2019

Earlier this year, we wrote about the state of Brexit negotiations in the United Kingdom, and concluded that “with just over a month to go until Brexit takes effect” it was still “bewilderingly unclear” what form Brexit would take and how exactly employers should prepare.

Six months on, and the position (if not the political landscape) is much the same, if not more bewildering! The revised Brexit deadline – that is, the day on which the UK will formally leave the EU – is October 31. This date was hastily agreed in early March, when it became clear that Parliament would not accept the deal negotiated between Prime Minister May’s Government and the EU.

Halloween now looms ever closer, in much the same way as the March 29 deadline did back in February. We have a new Prime Minister, new constitutional challenges, but a very similar set of possibilities. In short, the UK could leave the European Union with a “deal” which would dictate the terms of its transitional withdrawal from the EU (a “Withdrawal Agreement”), or it could leave without a deal and revert to trading on WTO terms (an option which the Government says it wants to keep open, but which is feared by business leaders), or it could apply for a further extension to Brexit negotiations and hope that doing so helps to break the impasse.

The past 6 months can be neatly summarised as extremely busy, politically and constitutionally speaking, but very quiet indeed, in terms of concrete information on post-Brexit labour law development. What follows is therefore a canter through the currently political landscape.

A political update

Following the rejection of Mrs. May’s version of the Withdrawal Agreement by Parliament (the UK’s legislature) in February and March, her Government (its executive) was forced to ask EU leaders for an extension to the Brexit deadline. The purpose of this delay was to avoid a “do or die” or “no deal” Brexit, which was at that time seen as an entirely disastrous possibility.

Mrs. May then resigned, paving the way for a leadership contest in the Conservative Party and, therefore, for the Prime-Ministry. In the UK, the leader of the party which can command a majority in the legislature becomes Prime-Minister and head of the executive, and so a mere 90,000 Conservative Party members became responsible for choosing Mrs. May's successor. Boris Johnson, previously a mayor of London and latterly a supporter of a "do or die" Brexit-at-all-costs, was duly elected, and formed a Government in August 2019.

Mr. Johnson then took steps to renegotiate the Withdrawal Agreement that Mrs. May had spent almost 2 years negotiating. He came up against the same challenges as Mrs. May did before him; the foremost of these being the incompatibility of (i) the EU's requirement that free movement is guaranteed between the European continent and the Republic of Ireland, (ii) the requirement of the Good Friday Agreement that the border between the Republic and Northern Ireland (and thus the UK) is kept open, and (iii) the UK's desire to cease freedom of movement between the EU and the UK. The legal mechanism in the Withdrawal Agreement for dealing with these contradictory aims (known as the 'Irish Backstop') is unacceptable to many Brexit-supporting MPs, but no other suitable proposition has been forthcoming. Mr. Johnson appears (despite his assurances otherwise) to have made no discernible progress towards agreeing a revised deal ahead of October 31, although the Government claims progress is being made.

In fact, whilst it does not admit it, Mr. Johnson's Government now seems to have accepted a hard Brexit as acceptable, and is making efforts to ensure that the UK leaves without a deal at the end of October. It is unclear whether this is a bluff or genuine preparation for this end.

Supreme Court drama

Controversially, the Government announced in late August that it would "prorogue" (suspend) Parliament for a period of 5 weeks commencing on September 9 and ending on October 14. Whilst the Government claimed that it did so as matter of normal Parliamentary procedure, it seems almost inconceivable that this was not done in order to prevent Parliament from scrutinising the Government's progress and from passing legislation to compel the Government to avoid leaving the EU without a deal.

On September 11, the highest court in Scotland found that the Government lied about the true purpose of the prorogation, and last week the Supreme Court heard arguments on the same issue. This week, on September 25, the Supreme Court delivered a unanimous decision, declaring firstly that the courts had jurisdiction to decide upon the extent and limits of a prerogative power and secondly that prorogation in this case was unlawful due to the lack of a reasonable justification.

This decision, which interprets the UK's unwritten constitution, will be viewed as one of the most significant rulings in recent history. Its importance should not be downplayed - the Supreme Court found, unanimously, that the Government had acted unlawfully. Although Mr. Johnson said he strongly disagrees with the judgment, he has confirmed that he plans to abide by it. At the time of writing, he remains Prime Minister and has not yet declared any intention to resign.

Whilst the Supreme Court decision was a dramatic moment in UK constitutional history, it does not alter the looming Brexit deadline. It does however allow MPs a greater opportunity to perform its constitutional function of holding the executive to account during this crucial period.

International observers should note that Parliament did not wait for these legal challenges to conclude before taking action against Mr. Johnson. When the Government announced their prorogation plan, Parliament hurriedly passed a bill which will force the Government to seek a further extension to Brexit by 19 October, if no Withdrawal Agreement has been reached. With no apparent Withdrawal Agreement in sight, that bill may yet turn out to be the defining moment of six dramatic months in UK politics.

What to do?

The key concern for many employers (and employees) in the UK and in the EU remains the immigration status of employees who are either UK citizens working in the continental EU, or employees from the EU who are currently resident and working in the UK. The Government's EU Settlement Scheme is still open. It is expected to apply, whether or not the UK leaves the EU with no-deal (although some deadlines will vary depending on whether a deal is reached or not). Littler has recently published a downloadable PDF, available [here](#), which sets out the latest position. There are also concerns about European Work Councils based in the UK.

As we have written previously, the wider body of employment law currently derived from the EU will not change in an instant on the 31 October, regardless of whether the UK leaves without a deal. The European Union Withdrawal Act 2018 will transpose EU law into the UK, so that on Brexit national law will essential replicate current EU requirements and most directly-applicable EU law. EU decisions will still affect pre-exit day legislation long after exit day. Over time, the UK would be able (subject to any future agreements

with the EU) to diverge from EU law on issues governed by the EU such as free movement or certain employment rights, and so gradual changes may occur.

Otherwise, employers must continue to watch for political updates. If a further extension is agreed, the UK may itself in the same situation in a further 4 months' time.