Implications of Brexit for pensions law

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Summary

• Nothing much changes on exit, which means ...
• It’s time to start planning to equalise impact of GMPs
• It’s time to think about VAT reclaims under PPG
• Discrimination law could change but how far?
• Impact on case law may take decades to sort out
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What does the EU Withdrawal Bill do?

• Abolishes ECA 1972
• “EDL”: EU-derived domestic legislation is “saved”
• “Direct EU legislation” is “incorporated”
• Other acquired rights and obligations are saved
  – excludes “unrecognised Directive rights”
• General principles of EU law incorporated
• Effectively, whole “acquis communautaire” is adopted
Current sources of UK law

Parliament

Other Statutes

European Communities Act 1972 (ECA)

Directly enforceable rights (eg equal pay) & rules (eg data protection regulation)

Directives (eg equal treatment)

UK Govt must make law

Regs

Statute

Regs

Under ECA

Other statute

UK citizens

Francovich claims
... post exit, without Withdrawal Bill - red areas go
... post exit, under Withdrawal Bill – red goes, green is saved
Reclassifying laws: EU-derived domestic legislation

• “EDL” is preserved

• Enactment made under s2(2) ECA “so far as made under it”

• Or operating for a purpose in s2(2) ECA:
  – implementing UK’s EU obligations
  – matters arising from those obligations or directly enforceable rights under 2(1) (includes equal pay)

• Or relating otherwise to EU or EEA

• Very wide definition
Cascade of EU legacy law

Is it EDL?
• Very wide term – may include a lot of statute and regs you might expect to be “direct EU legislation” (Equality Act, TUPE, Data Protection Bill)

Is it direct EU legislation?
• Includes very little? Marginal provisions not covered in UK statutes?

Acquired rights or obligations?
• Excludes unrecognised Directive rights
Regulation-making powers

- Clause 7 – fixing deficiencies in retained EU law
- Clause 8 – complying with international obligations
- Clause 9 – implementing the withdrawal agreement
- Clause 17 – consequential power
- Current procedures for secondary legislation offer little scrutiny
- In some cases no procedure will be required
“Henry VIII” powers

• Proclamation by the Crown Act 1539

• Govt will be able to make regs
  – “Such provision as the Minister considers appropriate in consequence of this Act” (Clause 17)

• Includes modifying statute
  – including the Withdrawal Act itself

• Not (explicitly) linked to or limited to retained EU law
What about case law?

• All current case law is retained (Clause 6)
• ECJ rulings have Supreme Court status
• SC can depart from its precedent if it thinks it “right to do so”
• No new referrals to ECJ post exit
• But UK pipeline continues
• Courts can have regard to ECJ rulings after exit (UK or non-UK)
• UK alone can’t make a referral – probably?
Hierarchy of case law

Pre exit
- ECJ
- Supreme Court
- Court of Appeal
- High Court

Post exit without Bill
- ECJ
- Supreme Court
- Court of Appeal
- High Court

Post exit under Bill
- Supreme Court (incl pre-exit ECJ rulings)
- Court of Appeal
- High Court
- Future ECJ rulings?
**ECJ pipeline**

- Hampshire (Turner & Newall) referred July 2016
  - PPF compensation cap means under 50% for some
- MB (referred August 2016) – claim for state pension at 60 but no formal gender reassignment to female
- Safeway – retrospective amendments where permitted under domestic law
- Men v women mostly sorted – marital status, gender reassignment not
Does EU supremacy continue for pre-exit law?

• Supremacy does continue for pre-exit law so far as relevant to interpretation or disapplication

• If pre-exit law is modified, supremacy “not prevented from applying” if “application of the principle is consistent with the intention of the modification”
Making sense of law post exit

• General principles (“GPs”) of EU law still relevant in deciding on validity or meaning of retained EU law if:
  – unmodified
  – modified and consistent with the intention

• GPs of EU law include proportionality, no retroactivity, fundamental rights

• UK courts will have a lot of scope/responsibility

• Lord Neuberger’s plea for guidance
What does all this mean in practice?

• Not a lot falls away
• Let’s consider some examples of how it might work:
  – Barber
  – Equalising effects of GMP
  – Rights of recovery for VAT
Could Barber be reversed by the UK courts?

• No because Barber is in UK statute now
• Though closure of Barber window is for the Courts
  – Safeway referral to ECJ – reinterpreting the temporal limitation
  – ECJ will decide on this before or after exit
Could Barber be reversed by Parliament?

- Parliament is supreme and could abolish equal pay going forward
- Human Rights Act 1998 protects property rights
- A1P1 of HRA also relevant at least where pensions and discrimination combine – see Brewster case (judicial review)
- Ministers have to confirm HRA conformity (or otherwise)
- ECHR contains treaty obligations
- So not likely given politics and treaty obligations?
Could Barber be reversed by Government?

• Regulation-making powers in Withdrawal Bill
• Clause 17 – very broad but this would not be consequential
• Despite breadth, probably not
The requirement to equalise effect of GMPs

• S.67 Equality Act 2010 implies equality rules in schemes
• All “terms” must be equal but Degnan v Redcar (CA):
  – can look at a financial term as a whole
  – best of both worlds would give both sexes what neither had before
  – not what equality was designed to achieve
• Kenworthy case – Ombudsman says reasonable to wait
• Lloyds Banking Group case 2018
The arguments against GMP equalisation

• Cost burden
• Unfairness (State pensions could be unequal)
• Limitation defences
• Bridging pensions are allowed (but rebalance inequality)
• No comparator (Allonby) – might work in some situations
• Forward-only rulings like Barber a pragmatic EU doctrine
Could unequal GMPs be permitted after exit?

- Equality Act 2010 and, by 2019, High Court ruling too?
- EDL and retained domestic case law
- Affects benefits accrued 1990-97
- Parliament could legislate rights away?
- Government can’t regulate rights away
- Explicit legislative requirement more likely, with prescribed methodology (safe harbour)
The PPG rules on VAT recovery

- PPG case will stay in UK law
- Post PPG, more recovery is allowed
- But HMRC interpretation imposes new conditions
  - even though UK schemes meet PPG requirements?
- Announcement expected offering 70/30 continuation option
- Are time limits running?
- Can we find another solution eg rule amendments?
Some speculation about changes post exit

• Age regs – challengeable elements safe after exit?
• Cross border schemes may return (Only 1 member State)
• IORP II falls away if unimplemented
• PPF compensation levels could reduce
• Sex-based actuarial factors could come back
• Scheme funding and section 75 could change
• TUPE tinkering, Beckmann could go
Conclusions

• New legal framework will give continuity and flexibility
• Most pensions issues have been dealt with
• Henry VIII powers have little relevance
• Discrimination law likely to continue to develop in line with EU
• Equal pay and no retrospection will remain key principles
• We need to start planning
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