Is Brexit the beginning of the U.K. deconstructing its renowned safety regime?

The government has recently issued its draft proposals for the Regulations which are intended to allow the UK to leave the EU without leaving gaps within safety legislation: **The Health and Safety (Amendment) (EU Exit) Regulations 2018 ("the Regulations")**.

The Regulations plug and make the necessary changes in domestic law to allow a range of current regulations to continue to operate. They also allow for certain changes to certain current regulations, including the Control of Major Accident Hazards Regulations 2015, the Control of Substances Hazardous to Health Regulations 2002 and the Offshore Installations (Offshore Safety Directive) (Safety Case etc.) Regulations 2015. The short to medium term aim of the Regulations is ensuring a degree of continuity for safety legislation, but as with all other aspects of 'taking back control', this opens the door to potential changes in safety regulation now that there is no longer a legal obligation to remain consistent with the EU.

The UK has long had safety legislation, from the various Factories Acts through to the Health and Safety at Work Act 1974 (HSWA) and has had a reputation as a leader in safety regulation. The UK's regime both pre-existed and is broader than the EU's Health and Safety Framework Directive (89/391/EEC) and its five “daughter” directives which established the broad-based obligations on member states to ensure that employers evaluate, avoid and reduce workplace risks in consultation with their workforce, whereas in the UK this is extended via section 3 HSWA.

It is interesting that of the 65 (yes 65!) new British health and safety regulations introduced between 1997 and 2009, 41 originated from the EU. The UK government has previously had to make a number of modifications to bring UK legislation in line with the provisions of the Framework Directive, including the Health and Safety (Consultation with Employees) Regulations 1996, which arose from the threat of infraction proceedings and extended worker representation to unionised workplaces.

So while the EU has undoubted shaped safety law, what will be the position as we go it alone?

Since the Brexit vote, the government has advised that later it “will be able to decide which elements of that law to keep, amend or repeal”. As with the rest of the Brexit process, the government is unwilling to provide assurances for any legislation post-EU withdrawal, but it is fair to assume that in the short term that nothing much will change. With so many other high profile issues to address, and no clear mandate or business case to change safety regulation, it is doubtful that the government will be looking to this area for change; especially with high profile incidents such as the Grenfell Tower fire reinforcing the public's view that maintaining protection is key.

Brexit negotiations

While the future of health and safety legislation will, as with all EU derived law, for a large part be determined by the nature and range of the final agreement struck between the UK and the EU, it is very unlikely that there will be any substantial short term divergence.

For businesses with pan-EU supply chains achieving a deal as close to the status quo as possible is most attractive. There has been discussions of a vast range of potential models that could be adopted and Canada plus plus plus seems to be the favoured option.

What is clear is that Brexit offers soundbites a plenty, but precious little certainty and even less clear government policy – beyond Brexit meaning Brexit.

Certain senior Tories and serving Ministers have indicated an intention to roll back on certain EU derived legislation imposed on employers, albeit not specifically at safety legislation. Boris Johnson, before leaving his post, said *"We should go into those [EU] renegotiations with a clear agenda: to root out the nonsense of the social chapter – the working time directive and the atypical work directive and other job-destroying regulations".*

Michael Gove talked about *"battery of job-destroying European measures from the Working Time Directive, to the varied provisions of the social chapter."*

For some voters, the hope of removing red tape was a central reason for voting Brexit and these voters will expect the government to deliver certain rollbacks. Dissatisfaction with EU principles is not uncommon, with David Cameron's government previously calling the Working Time Directive "unnecessary EU regulation"; but that often conveniently ignored that in many areas our regulatory regime is what the EU used for inspiration.

There is political pressure for Britain to opt out of the "Social Chapter". This is included in Title X on Social Policy (article 153) of the xsTreaty on the Functioning of the European Union, which contains eleven issues that the EU agreed to address. The first of these *is "improvement in particular of the working environment to protect workers' health and safety".* If the current government stays in power then, it is an easy vote winner to call for a reduction in the regulatory burden and burning of the "red tape". This is not however new, it is an agenda that is well over 10 years old through the work of the Better Regulation Executive, the one-in, one–out principle of regulation (which then changed to one-in and two out), as well as schemes like Primary Authority amongst many others aimed at reducing the regulatory burden on business.

Any weakening of the law or reduction in the powers of safety regulators will be contrary to the will of unions, as well as the professional body for health and safety professionals, IOSH. IOSH recently concluded that *"the current portfolio of health and safety legislation and Approved Codes of Practice (ACoPs) have contributed immeasurably to health and safety in the UK and will continue to do so".*

Opportunity for change?

Regardless of your political view on Brexit, this is a unique time in history and it presents a unique opportunity to reshape our legal framework to make it fit for purpose for the future and address issues that have previously held us back.

Consider, for example, the reverse burden of proof for defendants under the Health and Safety at Work Act 1974. Under the Act, a defendant may avail himself of the defence under s40 by proving that it was not reasonably practicable to do more than in fact was done to satisfy the duty – the duty is on the defendant to discharge rather than for the prosecution to show that they should have done more.

The Court of Appeal in *Davies v Health and Safety Executive* held that the legal burden placed on the employer was justified, proportionate and accordingly compatible with the European Convention. It made that finding on the grounds that:

1. the protection of employees under the Act was necessary to achieve the social and economic purposes of the legislation;

2. employers have chosen to operate within a sector regulated by statutory controls;

3. that the initial burden remains on the prosecution to show the existence of a duty and that the relevant standard of care has been breached;

4. the facts relied upon by the employer should be within his knowledge;
5. the prosecution would otherwise be in considerable difficulties if the burden was placed on it; and

6. the defendant does not face imprisonment for the offence.....(contrast the current position now though!)

In the Court of Appeal, Lord Justice Tuckey referred to the ECHR decision in the case of *Salabiaku -v- France* (1988) 13 EHRR 379 para.28 in which it was stated:

"Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does however require the contracting [sic] States to remain within certain limits in this respect as regards criminal law…Article 6 does not therefore regard presumptions of fact or law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".

The reverse burden of proof principle has drawn criticism amongst legal practitioners, including a significant number of the Health and Safety Lawyers Association, who argue that a requirement for defendant's to prove their innocence is contrary to European Convention on Human Rights and the UK's Human Rights Act 1998.

Free from binding EU case law, Brexit may be seen as an opportunity for further lobbying around a change to the reverse burden of proof principle.

Other likely candidates for eventual revision or abolition post-Brexit include the much criticised Construction (Design and Management) Regulations, particularly the removal of duties for domestic clients. The construction industry's lobbying will surely gather pace once the Brexit process is completed.

The government has also expressed an interest in changing requirements for written risk assessments for smaller businesses, in what it sees as low-risk sectors, as well as the longstanding frustration with the Working Time Regulations.

Conclusion

The vast majority of safety law did not need transposition into UK law on Brexit, and it is reassuring that there is a limited range of safety law that required amendment in order for the body of safety law to continue to apply as before.

The future policy direction is now ours to shape. Faced with a once in history opportunity to adjust the entire body of law, it is quite possible that change might occur in safety legislation. But, it is equally true that safety legislation is unlikely to be near the top of the list for

parliamentary time to deliver that change – so we predict that there will not be any substantive short term changes. Safety will, in our view look very similar after Brexit as it does today.

It is difficult to see how there would be political appetite for any substantial dismantling of protections. That said, moving forward, is there any real reason why some judicious housekeeping of the body of law cannot occur? For example with the requirements of Management Regulations could be subsumed into the Act and any overlap removed from the statute book?

Whatever your view, it will be critical that whatever changes are proposed that your voice is heard and we ensure that the tomorrow's safety regime is even better than today's.

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