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SCOTTISH INDEPENDENCE: EMPLOYMENT AND PENSIONS LAW IMPLICATIONS

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Legal Briefings – By **Tim Smith, Samantha Brown, Christine Young and Sian McKinley**

As the prospect of an independent Scotland climbs up the political agenda, we are publishing a series of briefings on the implications of Scottish independence for business, which will be available at our new hub here. This briefing considers the potential implications for business in relation to employment and pensions law and regulation.

EMPLOYMENT

While we cannot draw any firm conclusions about what the employment law landscape would look like post-Scottish independence, the retention of EU law in the UK post-Brexit provides some suggestions.

There are of course already differences between employment law in Scotland and employment law in England and Wales (both in terms of procedure in the Employment Tribunal and in some substantive law, such as relating to the interpretation of contracts). However, most domestic statutory employment rights, and rights and obligations arising from European law in the employment sphere are the same in Scotland as in England and Wales and have been interpreted in the same way by the courts and tribunals.

Immediately following implementation of Scottish independence we would expect the position to remain largely the same. As with Brexit, we would expect a snapshot of the law in Great Britain as it applied in the UK on the date before independence to be retained and preserved for legal continuity, for at least a short period.

Thereafter, it is safe to expect there would be some divergence between the position in employment law in Scotland and the position in the rest of the UK. The specifics can only be guessed at as this stage, but this could be similar to Northern Irish employment law. In practice, most employees' employment rights are the same in Northern Ireland as in Great Britain, albeit bestowed by Northern Ireland-specific legislation. However, in some places, there is some substantial divergence, such as the one year qualifying period for unfair dismissal claims or the lack of a two-year backstop limit on holiday pay and other unlawful deduction claims.

It is notable that in the 2013 White Paper the Scottish Government set out proposals for changes to employment law which are more employee friendly than the current law. One possibility is that the Scottish government decides to implement a form of "gold-plating" on the position in UK law where the UK has diverged from EU law post-Brexit.

An example of what this could look like arises from post-Brexit employment law. In 2020 (during the Brexit transition period), the Court of Justice of the European Union (CJEU), considering the Acquired Rights Directive, held in *ISS Facility Services NV v Govaerts* that, where a contract is fragmented, it is possible for an employee to transfer to more than one transferee on a pro rata basis. This decision was noteworthy at the time as it was contrary to a decision of the Employment Appeal Tribunal (EAT) in the UK which had held that each employee can only transfer to one transferee.

The TUPE Regulations implement the Acquired Rights Directive in the UK. The Employment Tribunals and the EAT should continue to interpret the TUPE Regulations in accordance with decisions of the CJEU. However, there are two types of transfer possible under the TUPE Regulations: (i) a business transfer (ie a transfer of an economic entity); and (ii) a service provision change.

The CJEU's decision in *Govearts* only applied to business transfers, as these are the only type of transfer derived from the Acquired Rights Directive, and not to service provision changes which derive from domestic legislation.

In March 2021, the EAT considered the issue of fragmentation as part of a service provision change in *McTear Contracts Ltd v Bennett; Mitie Property Services UK Ltd v Bennett* and decided to follow the decision of the CJEU in *Govearts*. Overturning the previous position in UK law, the EAT noted that, while there was no requirement to apply *Govaerts* to domestic derived concept of service provision change, it would be undesirable for there to be a difference in approach depending on the type of transfer. The result is a "gold plating" of the UK law, despite the practical challenges this approach to fragmentation is likely to cause for employers.

PENSIONS

Prior to the referendum in 2014, the Scottish Government committed to maintain "continuity of laws" in the immediate aftermath of independence. On this basis we would expect the automatic enrolment rights of workers in Scotland and the broad framework governing the funding and regulation of workplace pension schemes to be maintained. Having said that, new regulators would need to be established to take on the functions of the Financial Conduct Authority and the Pensions Regulator in protecting workplace pension schemes and savers. A replacement for the Pension Protection Fund (the 'lifeboat' for members of defined benefit schemes where the employer becomes insolvent) would also need to be established.

Scottish independence could have significant implications for pension providers and other financial services firms (including banks) which have their headquarters in Scotland. In its 2018 report, the Sustainable Growth Commission recommended that an independent Scotland should implement a financial services regulatory framework which mirrors the UK's. As part of this, it recommended that a new Scottish Central Bank should establish a Scottish Financial Services Compensation Scheme (SFSCS) similar to the UK's. However, in relation to banks, it suggested that the SFSCS should only apply to Scottish customers. If this was also the case for pension providers and other financial services firms it would raise significant questions about the protection afforded to pensioners, savers and investors in the rest of the UK that have purchased annuities or other investment products with or that have pension savings held by Scottish providers. Any lack of protection provided to non-Scottish pensioners, savers and investors may force Scottish pension providers and financial services firms to consider restructuring their businesses or moving their headquarters.

Following independence, the Scottish Government would have the ability to modify the pensions tax system. One area where it might seek to depart from the existing UK-wide approach would be to modify the system of pensions tax relief by, for example, moving to a flat rate of tax relief for all workers, something which proponents have been calling on the Treasury to do for many years.

Schemes that have the benefit of an asset-backed funding arrangement (**ABF**) may need to review those arrangements. Typically, an ABF structure involves the use of a Scottish Limited Partnership in order to address technical restrictions relating to employer-related investments under the Pensions Act 1995. However, this relies on Scotland being part of the UK. We would expect most of these arrangements to provide for what would happen in the event that the structure was no longer permitted. However, any such arrangement would need to be reviewed to assess its continued validity or the terms on which it is to be unwound.

More on scottish independence

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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