

Online Update

Essential Information for Employers



September 2010

In the News

Time up for retirement

The Government has announced plans to abolish the default retirement age by October 2011 and to begin phasing it out from April 2011. The news has been welcomed by charity Age UK but criticised by employer bodies, raising the question of what this will mean for employers.

Currently, employers who retire staff at or above 65 (or at or above the employer's normal retirement age if this is over 65), are protected from unfair dismissal and age discrimination claims, provided a statutory retirement procedure is followed. From 1 October 2011, employers will lose this protection, meaning retirement will have to be justified or dismissals will have to be based on other grounds, eg performance or conduct.

Employers wishing to retire an employee turning 65 before 1 October 2011 must, under current proposals, issue the employee a notice of retirement by 6 April 2011. Going forward, employers may also wish to review their retirement policies to decide if they can be justified or should be changed.

Employers wishing to justify a retirement policy beyond October 2011 should carefully consider why it is important and ideally have evidence to support this. Some comfort can be taken from the recent case of *Seldon v Clarkson Wright and Jakes* where the Court ruled that retirement at age 65 could potentially be justified on the basis of workforce planning considerations and ensuring promotion opportunities for more junior staff (see Case Watch below).

By contrast, there may be other implications if employees work beyond 65. For example, insured benefits can be very expensive for older workers (eg life assurance, medical cover, income protection and permanent health insurance). However, providing these only to younger workers would be age discriminatory and is unlikely to be justified on the basis of cost alone. One alternative might be to consider a flexible benefits package where employees can choose their own benefits from a selection or "pool" up to a certain limit or "budget".

Employers concerned about the changes can also put forward their views as part of a Government consultation which runs until 21 October 2010 (see Consultations below for details).

Case Watch

Justifying retirement

Retirement of employees is currently an exception to age discrimination, but the exception does not apply to partners. This case involved a partner of a law firm who was made to retire at the end of the year in which he turned 65, in accordance with the partnership deed. He submitted a proposal to continue working beyond retirement but this was rejected and he brought a claim of age discrimination. The firm had to show that his retirement was objectively justified, ie it was a proportionate means of achieving a legitimate aim.

The Court of Appeal ruled that the firm's policy of retiring partners at 65 was potentially justified on the basis of the following aims:

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- to help attract and retain more junior lawyers by ensuring they had the opportunity of partnership
- to facilitate partnership and workforce planning
- to contribute to a congenial and supportive culture by avoiding the need to expel partners through performance management.

Evidence was not needed to support the first two aims, but evidence that performance tails off around 65 would be needed to support the third. The Court also confirmed that employers can rely on aims based on their own business, rather than public interest aims, provided they are consistent with the broad social policy aims of maintaining economic competitiveness and the integrity of the labour market by facilitating job opportunities and career planning. The Court also ruled that although the firm could have chosen an age higher than 65 as its cut off, this did not make 65 disproportionate – any age would be discriminatory to some extent and 65 was consistent with retirement in the employment context. It also mattered that partners with equal bargaining power had signed up to retirement at 65 in the partnership deed.

This case provides some support for employers seeking to justify their own normal retirement age after October 2011, when the default retirement age is abolished. The policy aims of facilitating workforce planning and providing promotion opportunities are likely to be relevant to many businesses. However, the rationale for choosing 65 might disappear once the default retirement age is removed. Employers seeking to justify retirement should, therefore, choose an age or date that is supported by evidence. Although the statutory duty to consider requests to work beyond retirement will also be abolished, employers should still consider such requests to ensure that any retirement dismissal is procedurally fair.

Seldon v Clarkson Wright and Jakes

Maternity and special treatment

The employee was a male solicitor at a law firm. He was placed at risk of redundancy along with one of his female colleagues who was on maternity leave. A scoring exercise was conducted to decide which of them would go. As well as several other criteria, a score was given for "lock up" – the time it took for the solicitor to secure payment from clients for work done. The score was taken as a "snapshot" on a certain date. Because the female colleague was on maternity leave on that date, the firm awarded her the maximum points for this criterion. The male employee received a lower score based on his actual figures, giving him the lowest score overall. He was dismissed and claimed unfair dismissal and sex discrimination.

The Employment Tribunal ruled that artificially inflating the female employee's score made the male employee's dismissal unfair and also amounted to sex discrimination. Instead of inflating her score, the firm could have chosen not to use this criterion or based the scoring on another period when both employees were at work.

The employer in this case was caught between a rock and a hard place. If the female employee had suffered any detriment because of her maternity leave this would also have amounted to sex discrimination. The case highlights the need to tread carefully in these circumstances. Employers must aim to strike a balance between male employees' rights not to be treated less favourably and female employees' rights not to suffer detriment due to pregnancy or maternity.

In some areas, the law does require more favourable treatment – eg an employee made redundant on maternity leave has priority over other employees in relation to suitable alternative work. In these situations, a male employee cannot complain of "special treatment". Nor could a male employee use this case to say they are entitled to the same treatment in terms of statutory maternity rights (the position on enhanced maternity rights is less clear). The decision is being appealed and Online Update will report any significant changes.

De Belin v Eversheds Legal Services Limited

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Snooping on staff off sick

The employee was an automotive engineer employed as a part-time college lecturer. He also ran a local garage. The college was aware of this and did not object. However, the college suspected he was working at his garage during a period of sickness absence when he had been signed off with stress and hypertension. Because he was receiving contractual sick pay, the college arranged for private investigators to follow him. The investigators produced a video showing him at the garage and, following a disciplinary hearing, the employee was dismissed. He brought an unfair dismissal claim but lost.

The Employment Appeal Tribunal ruled that it was fair to dismiss the employee for doing paid work while he was on paid sick leave. Contractual sick pay is paid on the basis that the employee has lost the opportunity to earn, which is not the case if the employee has earnings from another source. In addition, working for someone else might hinder the employee's swift recovery. The EAT also said that the covert surveillance carried out on behalf of the college did not breach the employee's right to privacy and so did not render the dismissal unfair.

Monitoring an employee who is off sick can be a breach of their privacy and render an otherwise fair dismissal unfair. This will not be case if the surveillance is proportionate and goes no further than is necessary to protect the employer's interests. On this basis, surveillance in public places, eg a street or car park, can in some circumstances be justified. In practice, the more damning the evidence uncovered, the more likely it is an Employment Tribunal will allow it. However, employers who uncover evidence should be wary of assuming that the employee is not sick. Activities such as unpaid work, light gardening or even taking a holiday might be consistent with genuine illness, particularly if the illness is work-related stress. By contrast, it will usually be fair to dismiss an employee who is doing paid work for themselves or someone else whilst also receiving contractual sick pay.

McCann v Clydebank College

Holiday and sickness

The employee had accrued six weeks' holiday in 2008, including an additional two weeks' carried forward from the previous year by agreement. He went off sick in May 2008 and did not work again until his resignation in August 2009. He had not asked to take any holiday in 2008 or 2009 and, on termination, was paid in lieu of the untaken holiday from 2009 only. He argued that he should also have been paid in lieu of the six weeks' holiday from the previous year which he could not take due to illness.

The Employment Tribunal ruled that the employee was not entitled to the six weeks' holiday from 2008. The employee could not carry forward unused holiday from 2008 as he had never asked to take it and so had never been denied it. Employees on long-term sickness absence are only entitled to carry forward their holiday entitlement from previous holiday years if it has been denied.

The Tribunal also ruled that the employee's claim for the previous year's holiday was out of time. The employee argued that the failure to pay holiday was a continuous series of deductions from his wages, and his claim only had to be brought within three months of the last deduction. However, the employer had paid for holiday in 2009 and this "broke" the series of deductions, rendering the claim for the previous year out of time.

Where an employee's sickness spans several holiday years, this case suggests employers can defeat claims for holiday from previous years by paying in lieu of any accrued holiday in the latest holiday year. Any claims brought more than 3 months from the previous holiday year would be out of time. However, the case is open to challenge, so the position could change. In the meantime, employers should ensure that any accrued but unused holiday in the final year of employment is paid in lieu on termination, as this may defeat claims for previous holiday years.

Khan v Martin McColl

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New Law

National minimum wage

As reported in the May 2010 [Online Update](#), on 1 October 2010, the national minimum wage will increase to £5.93 per hour for workers aged 21 and over (the adult rate, which currently applies only to workers aged 22 and over, is being extended to cover 21-year-olds). The national minimum wage will also rise to £4.92 for workers aged 18-20 and to £3.64 for workers aged 16 to 17. A new minimum wage of £2.50 per hour will be introduced for apprentices aged 16 to 18 and those aged 19 and over in the first year of their apprenticeship. All other apprentices already receive the national minimum wage based on their age.

Equality Act guidance

The Equality and Human Rights Commission has issued guidance on the Equality Act explaining its provisions and providing practical examples of the changes it will introduce from 1 October 2010. The guidance is non-binding and is intended to help employers, workers, service providers and service users. A separate statutory code of practice is also due to come into force on 1 October 2010 but a final version has not yet been published. Once in force, the code will also be non-binding but can be taken into account by Employment Tribunals in discrimination claims.

Cutting business regulation

The Government has confirmed that, from 1 September 2010, Ministers will not be allowed to introduce new regulations imposing costs on businesses or the voluntary sector without identifying an equivalent cost to be removed. This "one in, one out" rule will apply initially only to domestic regulations, not those derived from European rules, and will not apply to regulations made in response to emergencies or to address systemic financial risks. The independent Regulatory Policy Committee (RPC) has been asked to examine evidence supporting future regulatory proposals and the Government has agreed a set of principles that apply when considering the effect on businesses. The "Your Freedom" website has also been created to allow members of the public to nominate onerous regulations that should be removed or changed (yourfreedom.hmg.gov.uk).

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Consultations

Default retirement age

As reported above, the Government has launched a consultation on its plans to abolish the default retirement age by 1 October 2011. Under current proposals, employers who issue notices of retirement on or after 6 April 2011 would not be protected from age discrimination or unfair dismissal claims. The Government is seeking public views on these proposals, including the impact on insured benefits and leaver provisions in employee share schemes. The consultation will run until 21 October 2010 and the Government intends to publish its response in November 2010. We will be submitting a response to the consultation - please let your usual Employment Department contact know if there are any views or opinions you would like to be included, or alternatively email adam.rice@traverssmith.com.

Time off for training

A new right to request time off for study or training was introduced on 6 April 2010 (see January 2010 [Online Update](#) for details) applying to businesses with more than 250 employees. However, as part of the Government's pledge to reduce regulatory burdens on businesses, the Government is reviewing this right. A short consultation has been launched asking employers, businesses and other interested parties for their views on whether the right should be repealed, should continue to be limited to employers with more than 250 employees, should be extended to all employers as planned or should be amended in other ways to make it less burdensome. Employers only have until 15 September 2010 to respond to the consultation.

Financial sector pay

The FSA is currently consulting on the UK implementation of new European rules on pay in the financial services sector. The FSA has published proposals to revise its Remuneration Code, which currently only applies to 27 large banks, building societies and investment banks, but from 1 January 2011, will apply to 2,500 financial sector firms. All banks and building societies, most brokers, quoted investment managers and hedge fund managers will be caught, as well as some UCITS investment firms and private equity firms. Employers who are FSA regulated will need to identify whether the Code applies to them and what effect it will have on their bonus and other pay arrangements.

The Code contains a number of new rules, including requirements that:

- variable remuneration (bonuses, share awards, etc) should not be guaranteed, except in exceptional circumstances for new hires in the first year of service
- at least 40% of any variable remuneration (or, for particularly high earners, 60%) should be deferred for at least three years
- at least 50% of variable remuneration should consist of shares or share-linked instruments or other equivalent non-cash instruments of the employer
- variable remuneration must be paid or vest only if it is sustainable according to the financial situation of the employer.

The rules described above will apply to staff whose activities have a material impact on a firm's risk profile, except those who earn £500,000 a year or less (in total) and whose variable remuneration is no more than one-third of this total. The FSA will also have the power to void contractual provisions which breach the restrictions on guaranteed bonuses or the requirements of deferral. A more detailed note on the proposals has been produced by our Financial Services and Markets team – please speak to your usual Employment Department contact or email adam.rice@traverssmith.com if you would like a copy.

Watch This Space

Additional paternity leave

The Government is reviewing the right to additional paternity leave which is due to come into force for fathers of babies due on or after 3 April 2011 (see May 2010 [Online Update](#) for details). Comments made by the Minister for Women and Equalities suggest that the right could be postponed or redrafted. Under the current regulations, fathers would be able to take up to 6 months' additional leave only if the mother has ended her maternity leave early. One possibility is that the Government will allow greater flexibility and even allow parents to take leave simultaneously – in its coalition agreement, the Government stated it would "encourage shared parenting from the earliest stages of pregnancy – including the promotion of a system of flexible parental leave". Proposals will be announced as soon as possible this year to give employers some certainty.

National strike action

According to recent news reports, the Trades Union Congress (TUC) is coordinating a national rally in March 2011 against public sector spending cuts. The rally will involve protests and may involve coordinated industrial action across various public sector employers. Several trade unions are calling for a "national day of action" on 20 October 2010, when the spending cuts will be announced, but the TUC general council reportedly believes a rally in March once the cuts have been felt will be more effective. Some trade unions, including the Public and Commercial Services Union, may press ahead with action on 20 October and are trying to persuade other unions to participate in a mass national demonstration on 23 October. Industrial action in the public sector is likely to follow over the autumn and winter. A Europe-wide day of action is being coordinated for 29 September 2010 but there is no suggestion at this stage that the TUC plans to encourage participation in this.

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Our Work

Since the last edition of **Online Update** our work has included:

- reviewing an outsourcing agreement to consider the effect of TUPE provisions
- defending a disability discrimination claim made by an employee during employment
- advising a client on claims of unfair dismissal and discrimination on the grounds of sexual orientation
- advising on a collective redundancy process arising out of the closure of an office
- analysing alleged breaches of post-termination restrictive covenants and advising on options relating to enforcing them
- advising on a collective redundancy process and associated TUPE transfers arising on the loss of a major public sector contract
- defending a whistleblowing claim brought by an ex-employee of a bank.

If you have any queries on this edition of **Online Update**, please contact any member of the Employment Department

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