

# EMPLOYMENT LAW UPDATE

August 2010

## WHAT'S NEW.....

### THE END IS NIGH FOR THE DEFAULT RETIREMENT AGE—OR IS IT?

At the end of July, the Government announced that the Default Retirement Age (DRA) will cease to exist by October 2011. The current plan is to phase the DRA out from April 2011 (whereby no new notices of intended retirement may be issued after 6 April) and for it cease completely by 1 October 2011. The proposed changes will also remove the administrative burden of statutory retirement procedures, which currently include employees having to give a minimum 6 months notice of retirement.

The Employment Equality (Age) Regulations 2006 currently allow employers to make staff retire at 65 regardless of how healthy or able they are. However, due to demographic change and the pension 'black hole', the Government is keen to assist and positively encourage people to remain in employment for longer.

Other steps the Government is looking to take include raising the pension eligibility age to 66 and re-introducing the link between the basic state pension and earnings.

The proposals have been published for consultation and views are sought as to whether the Government can provide support for employees and employers about how to manage without the statutory procedure or DRA. Views are also expected to be expressed in terms of the effect the above will have on employee share plans or insured benefits i.e. unintended consequences.

The Pensions Minister, Steve Webb, has put a positive spin on the proposals by saying "Many older people want to work after age 65 and have a wealth of skills and experience that are not being used. We want to get rid of the Default Retirement Age so that if they want to work they can do so. By spending longer in the workforce they can also have a better pension in retirement."

Whilst some people will welcome these proposals, other individuals and employers will be horrified by them. For example, some individuals will simply be physically unable to continue working beyond age 65 and yet presumably won't be eligible for the State pension until the following year.

Similarly there will be certain jobs that may be unsuitable for people beyond the current DRA, for example, police officers. In the light of this, the Government has said that it will still be possible for employers to operate a compulsory retirement age provide it can be objectively justified.

A Court of Appeal ruling on 28 July 2010 (*Seldon v Clarkson Wright & Jakes*) echoed this by finding that a law firm could force one of the partners to retire once they had reached age 65 as it was satisfied that the age discrimination was objectively justified. Part of the reasoning was based on the law firm's arguments that the decision to dismiss Mr Seldon was because they wanted a balanced workforce whilst also creating opportunities for younger employees.

Business leaders in the private sector can at least breathe a sigh of relief because of this ruling as the DRA



New Government proposals could mean an increase of the state pension age to 66

looks set to live on provided of course that the retirement age can be justified as a means to achieving a legitimate aim.

However, concerns have been voiced that regardless of what sector you are in, the Government's proposed timetable to phase out the DRA gives businesses very little time to prepare for its impact.

Employers are also concerned that the changes will lead to an increase in disputes as employers and staff will be uncertain about where they stand. In turn, it is anticipated that employment litigation will increase as the removal of the legislative framework will mean that retirement age dismissal will only be legitimate if it is considered fair and reasonable.

If anybody wishes to become involved in the consultation process, it is open until 21 October 2010. For further details please visit the BIS website at:

[www.bis.gov.uk/retirement-age](http://www.bis.gov.uk/retirement-age).

For further information about the above article, please contact Steven Meyerhoff on 01254 828300 or via email at: [steven.meyerhoff@backhouses.co.uk](mailto:steven.meyerhoff@backhouses.co.uk)

## In the pipeline...

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### MIGRANT WORKERS- TO CAP, OR NOT TO CAP: THAT IS THE QUESTION

A key part of the Conservative's election campaign promised to tackle immigration levels. However, the majority of immigrants arriving in the UK come from EU countries and are protected by the freedom of movement legislation. Accordingly, the political focus must be on non-EU immigration.

Since the Coalition Government has come into force, it has launched several consultations many of which share a common goal of seeking ways to help save taxpayers' money and / or alleviate the many pressures on the state's public services.

The issue of non-EU workers is one area currently under scrutiny, specifically the effect of a permanent annual limit on the number of such workers entering the UK.

At the end of June, the Government announced a 12-week consultation with businesses inviting their views on how a limit on immigration would work along with suggestions on practical implementation. For further details please see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/limits-on-non-eu-migration/>.



The consultation is open until 17 September 2010.

Understandably, employers are not entirely at ease with the proposals, particularly as there have been suggestions, for example, that employers should pick up the tab for private health care treatment for non-EU workers so as to avoid overburdening the NHS. It is therefore anticipated that proposals such as this one will be strongly objected to by business leaders.

Some employer groups have also voiced concerns that the proposed annual limit will restrict and even damage the UK's ability to compete effectively.

John Cridland, CBI Deputy Director-General, said:

"Introducing a cap for work permits is a valid way of balancing the need for skilled workers with the social pressures caused by immigration. But it's important that we get the structure right. It should be designed so that very highly-skilled people who are essential to work being done in Britain can get a permit more readily. As well as setting the cap at the right level, the Government should also be able to adjust it in future to meet changing economic circumstances."

In the meantime, there is a temporary limit in place which is aimed solely at the Tiers 1 and 2. Those Tiers cover highly skilled and skilled workers respectively.

The interim measures:

- \* Amend the existing points-based system so that the level of Tier 1 migrants is capped at current levels and the number of points needed for those highly skilled workers has increased from 95 to 100; and
- \* Limit the amount of certificates of sponsorship licensed employers can give to applicants who wish to fill skilled job vacancies.

Whilst many employers will be frustrated by this cap on the categories of workers that are generally the most sought after, they are at least relieved to know that Tier 2 Intra-Company Transfers are excluded from the interim measures. It is unknown whether this will remain the case when the permanent changes come into force next year.

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## Case Bulletin

### ASSESSING PENSION LOSS—IS IT AS EASY AS IT LOOKS?

When considering pension loss compensation claims, Tribunals can take either the simplified approach or the substantiated approach.

In the case of *Sibbit v The Governors of St Cuthbert's Catholic Primary School*, the Claimant (Mrs Sibbit) was dismissed at the age of 58 on the grounds of gross misconduct.

#### THE FACTS

The Claimant worked from 1985-2008 as a teacher at the Respondent primary school and had intended to retire within 12 months of her dismissal. She subsequently brought a claim for unfair dismissal and won.

The Tribunal then had to assess how much compensation to award her and part of that assessment included calculating the pension loss element of her award. Incidentally, her pension was based on receiving 1/80th of her salary for each year of pensionable service.

The Tribunal decided to follow the simplified approach under the Employment Judges' (EJ) guidelines which resulted in the award for pension loss being considerably less than what would have been awarded had the substantiated approach been taken.

The Claimant appealed on the ground that the incorrect approach had been followed and the Employment Appeal Tribunal (EAT) agreed with her.

The EAT said that the starting point when assessing loss was to do what was "just and equitable in all the circumstances having regard to the loss sustained ..." (Employment Rights Act 1996 s.123(1)).

The next step the EAT had to consider was which of the three options it should take to decide what to award the Claimant in this particular case: applying the Ogden



The pension loss assessment approach taken by Tribunals can have a significant impact on the value of a Claimant's pension

table or the EJ guidelines or simply coming to its own conclusion.

The EAT said that the Tribunal had been correct to use the EJ guidelines but had incorrectly adopted the simplified approach.

The EAT relied on the following passage when deciding to use the substantial approach:

*"4.13 [...] the substantial loss approach may be chosen in cases where the person dismissed has been in the Respondent's employment for a considerable time, where the employment was of a stable nature and unlikely to be affected by the economic cycle and where the person dismissed had reached an age where he is less likely to be looking for new pastures".*

These criterion were applicable to the Claimant as she had been employed in a stable job for 23 years; was a public sector teacher and therefore unlikely to be affected by the economic downturn; and only one year away from retirement so unlikely to be seeking alternative employment. Additionally, her loss was quantifiable— she would either receive 23/80 of her salary as a pension via the simplified

approach or would receive 24/80 via the substantial approach.

Accordingly, the EAT set aside the Tribunal's judgment involving pension loss and instead awarded the greater amount. They also commented that where the amount of loss is objectively plain, the substantial approach should be followed.

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- Commercial Contracts - Terms & conditions, Supply agreements etc; and
- Agency, distribution and franchise agreements.

## Case Bulletin continued...

### TUPE: SCOPE OF ETO DEFENCE EXPLORED

As a matter of general principle, if an employer can establish an economical, technical or organisational (ETO) reason for a dismissal following a TUPE transfer, then it is potentially fair. For example, a change in job function or workforce size might be deemed necessary for the business to survive.

The case of *Nationwide BS v Benn & Others* considered amongst other things the scope of the ETO defence after claims for automatic unfair dismissal were brought following the TUPE transfer of Portman Building Society's employees to Nationwide Building Society.

The EAT upheld Nationwide's Appeal and remitted the case to the same Tribunal as it had made findings on the issue of consultation despite not having heard sufficient evidence.

The EAT also found that "TUPE applies not only to a transfer of an undertaking but also to a transfer of part of an undertaking." Therefore an employer's ETO defence to an unfair dismissal claim does not have to be a reason that affects the entire workplace and in this case, a transferred body of employees would suffice.

### HOLIDAY PAY—NEW TACTICS FOR EMPLOYERS?

Ever since the *Stringer* decision last year (where the House of Lords found that a failure to pay accrued holiday leave whilst an employee was on sick leave could amount to an unlawful deduction from wages—see our August 2009 update for further information), employers have been uncertain about its full impact.

However, hope has been raised in the case of *Khan v Martin McColl*, whereby the Employment Tribunal heard and dismissed a holiday pay claim brought by a worker who had been on long-term sick leave.

#### The facts

Mr Khan (the Claimant) went on long-term sick leave in May 2008 (at which point he had accrued 6 weeks holiday—2 were carried over from 2007 by agreement) and resigned in August 2009. On termination of his employment, the employer paid the Claimant in lieu of the holiday which accrued during 2009 prior to his resignation.

The Claimant then brought unlawful deductions from wages claims to recover the 6 weeks holiday pay (2 carried over from 2007 and 4 weeks from 2008) he claimed had been "denied" him under the Working Time Regulations 1998.

The Tribunal found that whilst employees were entitled to be paid in lieu of accrued but unused holiday, the Claimant's claims must fail because they were made out of time. In other words, the last deduction from wages occurred when the right to holiday pay for 2008 expired—31 December 2008.

#### Comment

Whilst this decision is not binding on other Tribunals or Higher Courts, it does offer interesting and encouraging points for employers.

Firstly, employers can defeat holiday pay claims for previous leave years by making a payment in lieu of unused holiday covering their most recent leave year.

Secondly, the Claimant claimed he had been "denied" the right to

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take his holidays, however, the Tribunal found that as he had not actually requested holidays he accordingly had not been "denied" them.

This case therefore gives employers tactical opportunities to avoid unlawful deduction from wages claims as, for example, many employees will not know their full holiday entitlement whilst on sick leave until after their employment has terminated.

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