

EMPLOYMENT LAW UPDATE

October 2011

WHATS NEW....

Response to the abolition of statutory Retirement Procedure



A survey of employers' attitudes to the abolition of the statutory retirement procedure suggests that the majority of employers are doing without a default retirement age. The survey of senior HR professionals in the UK, reveals, among other things, that only three per cent of employers intend to retain a default retirement age, and 22 per cent believe they now have less capacity to take on younger employees.

The survey's results are included in a report, 'A retirement revolution - Life after the default retirement age'. Other findings include:

- 46 per cent of employers felt that the phasing out of the default retirement age will have a negative impact on their business, making it harder to manage older employees out of the business
- 86 percent of employers are letting employees over the age of 65 continue in the same role
- nearly half of employers are considering flexible working arrangements for over 65s
- 76 percent of respondents have not given line managers any additional training on retirement conversations
- 11 per cent of employers recognise the potential benefit of retaining experienced employees more easily.

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 mean that any purported retirement dismissal notified since 6 April 2011, if not objectively justified, amounts to age discrimination.

Transitional provisions mean that retirements notified before 6 April 2011, but taking effect after it, may be lawful, but only if the employee reaches 65 by 1 October 2011. Therefore the last possible date on which an employee can be retired under the old provision is 1 October 2012. Employers should be careful to comply with all transitional provisions or face a claim for age discrimination.

Employers Warned to get to Grips with Agency Worker Regulations

ACAS has told employers that falling foul of the Agency Workers regulations could result in fines of £5,000 at an employment tribunal, which would be multiplied if more than one temporary worker at the organisation is found to have received unequal treatment under the regulations.

The Agency Worker regulations, which came into force this month, will give temporary workers the right to the same basic employment conditions as direct recruits after 12 weeks in the role.

They will also be entitled to the same access to job vacancies as permanent members of staff and collective facilities, such as staff canteen, childcare facilities and transport services— from the first day of their assignment.

Also, with recent statistics from the recruitment and Employment Confederation revealing that the

demand for temporary staff is expected to remain strong after the regulations are expected to come into force, a high proportion of employers are likely to be affected by the changes.

Comment

It is important that businesses get a grip of the changes as failure to do so can be very costly. Hiring and re-hiring temporary staff on a succession of shorter periods is risky given the new provisions within the Regulations.

Guidance on Gender Pay Gap

ACAS launched new guidance on gender pay reporting in September to help organisations identify and address the gender pay gap. The guide, "Voluntary gender equality analysis and reporting" is aimed at the private sector and voluntary organisations that are unsure how to address the gender equality issues.

There is still a significant gender pay gap, with women who are working full time on the public sector being paid on average 10% less than men; and that figure rises to 19.8% in the private sector.

Employers must ensure their organisation is adhering to the required gender pay requirements as the Home Office will be conducting a survey of employers with 150 or more employees to monitor the number of employers that are carrying out gender equality reporting, and report its findings in September 2012.



In the Pipeline...

As promised by the Coalition government they have been attempting to cut the red tape for UK businesses and therefore there are a number of proposed changes which could signal a new era for employers after a recent 'doom and gloom' around the introduction of agency Workers Regulations and abolition of the default retirement age.

New Fees for Tribunals from 2013

A fee for bringing an employment tribunal will be charged for the first time from April 2013, Chancellor George Osborne has announced.

The amount that will be charged and how it should be paid will be subject to consultation starting at the end of November 2011, albeit, it is proposed that any fee payable will be refunded if the applicant is successful.

There is currently no fee for an applicant who wants to make an employment tribunal claim and this has led to an increased amount of vexatious claims that have no reasonable prospect of success. It is hoped that the introduction of this fee will reduce the amount of vexatious claims, however, it is proposed that the low-paid, or those without an income, may have the fee waived or reduced at the start of the process, under the new scheme. We therefore need to wait and see whether this fee will have any impact on the amount of claims made to the Employment Tribunal.

New Unfair Dismissal Qualifying Period Extended

It has also been confirmed that the qualifying period for an employee to bring a claim for unfair dismissal will be extended to two years following the proposed introduction of legislation which is due to come into force 6 April 2012. At present employees only need to have been



working for one year. Under the new legislation, workers will still be able to take action immediately if they suffer discrimination, but by reducing the risk of tribunals for unfair dismissals the government hopes employers will feel more confident about hiring people.

Last year there were 236,000 employment tribunal claims - of which only some were unfair dismissal claims, with an average award for successful complainants of £8,900. In 2010-11 the cost to the taxpayer of running employment tribunals and the Employment Appeal Tribunal in England, Wales and Scotland was more than £84m, according to the Ministry of Justice.

The Treasury said that more than 80% of applications made to an employment tribunal did not result in a full hearing. Almost 40% of applicants withdrew their cases, but employers still had to pay legal fees in preparing a defence. More than 40% settled out of court and there was no record of how much applicants settled for.

The changes may have mixed results. Someone who has not worked long enough to claim unfair dismissal may claim they are a

whistleblower or a victim of discrimination instead, causing employers even more hassle than before. However, people who have to pay to bring a claim may regard this as a significant disincentive to litigating a dispute

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- Commercial Contracts - Terms & conditions, Supply agreements etc;
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- Commercial Property Services.

CASE BULLETIN

Contract Variation based on Mistaken Belief was not related to a TUPE transfer

In *Smith and Ors v Trustees of Brooklands College*, an employment judge was entitled to hold that an agreed variation of the claimants' salary, based on the employer's incorrect belief that they were being overpaid by mistake, was not for a reason connected with a TUPE transfer more than two years earlier. The EAT observed that the steps taken by the employer could have been taken at any stage, irrespective of TUPE.

Facts

The Claimants were employed as teaching and learning assistants. Although they only worked between 22 and 25 hours per week for 43 weeks of the year, they received, by agreement with the College, full-time salaries equivalent to someone doing a 36-hour week. The staff were TUPE transferred to the Respondent in August 2007.

After a period of time the HR director of the merged colleges started to examine staff salaries and discovered the unusual pay arrangement which the Claimants enjoyed. Believing that it was a mistake and that they had been overpaid an agreement was secured with the Claimants for a phased reduction of their salary commencing on 1 January 2010. The Claimants subsequently brought an unauthorised deduction from wages claim in the Employment Tribunal. They argued that the variation in pay was rendered void by



Regulation 4(4) of TUPE, in that the sole or principal reason for it was the transfer or a reason connected with it.

Decision

The Employment Judge found that the variation was unconnected with the transfer and that the real reason for the reduction was H's mistaken belief that the Claimants had been erroneously paid a higher rate than their hours warranted, and that this was out of step with the rest of the sector. He accordingly rejected the claims, a decision which the Claimants appealed.

Appeal

The EAT was satisfied that the employment judge had made findings of fact that were open to him. He had made an assessment of the time that had elapsed between transfer and variation, and the question of what was going on in the Respondent's mind. Once those findings had been made, a legal assessment followed as to whether the reason was connected to the transfer. In the EAT's view, the judge had made the correct decision as a matter of law — that the variation was not caught by Regulation 4 (4).

Applying the European Court of Justice's approach to the

EU Acquired Rights Directive (No.2001/23) in *Martin and Ors v South Bank University*, the EAT noted that, where the sole or principal reason for the variation is a desire to harmonise terms and conditions, Regulation 4(4) is engaged. However, this was not the reason for acting in this case - the steps taken by the employer could have been taken at any stage, irrespective of TUPE. Therefore, the Claimants' appeal was dismissed.

Comment

It is important to recognise that when a variation of terms is accepted, especially where a TUPE transfer is also involved at or around that time, employees do have the ability to go behind the agreement if the reason for the variation is connected with the TUPE transfer.

Employer cannot be vicariously liable for whistle blowing victimisation by employees

In *NHS Manchester v Fecitt and Ors* the Court of Appeal has held that the EAT was wrong to hold an employer vicariously liable for its employees victimising a whistleblower. The Court of Appeal has made clear that an employer can only be vicariously liable for the legal



CASE BULLETIN CONTINUED.....

wrongs of its employees. As there is no provision making employees personally liable for victimising whistleblowers, the claim could not succeed.

Facts

F, who had responsibility for staff at a NHS centre, told her line manager, C, that a colleague, S, did not have the qualifications he claimed to have. S apologised and said the lies would not be repeated and C was prepared to leave it at that. F sought to pursue the matter further, leading to some colleagues siding with S and acting in a hostile way towards F, taking the view that she had subjected S to a 'witch hunt'. The workplace became 'dysfunctional' but senior management made no real attempt to stop the situation escalating. F lodged a grievance and was eventually redeployed, while a bank nurse who supported her was no longer offered shifts. At an employment tribunal they claimed that both the redeployment and failure to prevent victimisation breached their right in S.47B of the Employment Rights Act 1996 not to be subjected to any detriment by any act or omission on the ground of

having made a protected disclosure.

They also claimed that the employer was vicariously liable for their victimisation by their co-workers.

Decision

It was not disputed that the disclosure was a protected disclosure as defined by S.43A ERA. Applying the 'reason why' approach to causation, the Tribunal found that the employers failure to prevent F's harassment by other staff did not amount to a deliberate failure to act so as to come within S.47B. Further, F's redeployment was not because she had made a protected disclosure but to resolve the 'dysfunctional' situation. The Tribunal failed to consider vicarious liability. F appealed.

Appeal

Allowing the appeal, the EAT held that the Tribunal had adopted the wrong standard of proof in relation to causation. An employer must show that the treatment was 'in no sense whatsoever' on the ground of a protected disclosure. Although protection of whistleblowers is a creation of domestic law, the EAT felt obliged to follow the Court of Appeal's decision in *Igen v Wong* setting down the correct test in relation to

EU discrimination law. The case was remitted for the Tribunal to consider the burden of proof. The employer appealed.

The Court of Appeal allowed the appeal. The EAT was wrong to hold the employer vicariously liable for victimisation by its employees. As there is no provision making it unlawful for co-workers to victimise whistleblowers, the claim could not succeed. There was nothing in the Tribunal's decision inconsistent with the standard of proof required by the EAT.

Although the Court of Appeal did not have to decide whether the EAT applied the proper test of causation, it rejected the argument that the EAT was wrong to draw an analogy between whistleblowing legislation and legislation giving effect to EU law. It considered that the principle that discriminatory considerations should not have any influence on an employer's decisions is equally applicable where the objective is to protect whistleblowers. It also refused to accept that the test should be aligned with that for unfair dismissal, i.e. where the protected disclosure is the employer's sole or principal reason for acting. In the Court's view, S.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

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