

The End of Enforced Retirement at Age 65

The last date on which an employer could lawfully notify an employee of a retirement dismissal using the statutory Default Retirement Age (DRA) provisions laid down by the Employment Equality (Age) Regulations 2006 was 5 April 2011. Under transitional provisions, retirements that were notified on or before that date can continue through to completion provided the DRA provisions are followed.



Employers now have two options. They can either stop retiring people and use other dismissal options where necessary or, where they can demonstrate that it is necessary to have in place a compulsory retirement age, they can opt to use an Employer Justified Retirement Age (EJRA).

Use of an EJRA is only lawful where the employer can demonstrate that retirement at that age is objectively justifiable under the Equality Act 2010, which means that its use must be a proportionate means of achieving a legitimate aim. This is not an easy test to pass. To defeat a claim for both age discrimination and unfair dismissal, it will be necessary to provide evidence that the chosen EJRA is not based merely on assumptions. The employer must be able to demonstrate that no alternative or less discriminatory action could have achieved the same result. Employers who do opt to use an EJRA must follow a fair procedure, giving the employee adequate notice of their impending retirement and, if circumstances permit, consider any request to work beyond the EJRA as an exception to the normal policy. However, it is important to have procedures in place to ensure consistency of treatment of employees who request to stay on.

Older employees can retire voluntarily at a time of their choosing and draw any occupational pension to which they are entitled under the rules of the scheme. If an employee has given formal notice that they wish to retire, the employer is under no obligation to let them withdraw their notice should they change their mind. If, however, an employee has only told their employer that they plan to retire, they can change their mind before formal notice is given.

Great care must be taken if an older employee is underperforming. Procedures for dealing with performance issues must be fair and applied consistently across all age groups. Any dismissal must be for one of the reasons for fair dismissal under the Employment Rights Act 1996. Care must also be taken that any decision made by the employer does not discriminate against an employee who has a condition that constitutes a disability under the Equality Act. In such cases, the employer has a duty to make reasonable adjustments to remove any barriers to the employee's performance.

Group risk insured benefits are exempt from the principle of equal treatment on the grounds of age, so employers who provide such benefits can cease to provide or offer them to employees aged 65 and above, even if they continue to work beyond that age. The age at which group risk insured benefits can be withdrawn will increase in line with increases in the State Pension Age.

The Advisory, Conciliation and Arbitration Service (ACAS) has useful guidance on this topic, entitled 'Working Without the Default Retirement Age'. This contains advice on conducting workplace discussions that will help identify an employee's future aims, so as to enable the employer to plan workforce requirements to meet future business needs without asking questions that could be seen as discriminatory. The guidance can be found on the ACAS website at <http://www.acas.org.uk>.

For advice on the law relating to any termination of employment, please contact us.

The Government's Plan for Growth – Changes to Employment Law



The Government has announced that it is to repeal regulations that were due to come into force on 6 April 2011 extending the right to request flexible working to parents of children under the age of 18. The right is currently available to parents of children aged under 17, parents of disabled children under 18 and carers of certain adults.

The decision is just one of the measures included in the Government's 'Plan for Growth', which aims to allow businesses to grow, free from excessive and overly burdensome regulations. The number of employees that would have benefited from raising the upper age limit to 18 was estimated at 288,000, at a cost to business of £0.5 million.

The Plan for Growth also states that:

- the right to request time to train will not be extended to employees of small and medium-sized businesses – i.e. those with fewer than 250 employees. It is estimated that this measure would have cost businesses up to £350 million a year;
- the dual discrimination rules contained in Section 14 of the Equality Act 2010 will not now be implemented. This would have cost businesses an estimated £3 million a year; and
- a consultation exercise will take place on removing the 'unworkable' requirement in the Equality Act for businesses to take reasonable steps to prevent persistent harassment of their staff by third parties, as they have no direct control over it. This move will save an estimated £0.3 million.

There will also be a moratorium to exempt businesses with fewer than ten employees and genuine start-up businesses from new domestic regulation for three years, affecting all regulation due to start from 1 April 2011 onwards.

The Equality Act – Positive Action in Recruitment and Promotion

Provisions contained in the Equality Act 2010 that allow positive action specifically in the process of recruitment and promotion, in limited circumstances, came into force on 6 April 2011. Positive action applies to all the protected characteristics covered by the Act.

The new provisions mean that it is not unlawful to recruit or promote a candidate who is of equal merit, in

relation to the specific job or position for which they have applied, to another candidate for the same post if the employer reasonably thinks that:

- the candidate has a protected characteristic that is under-represented in the workforce; or
- people with that characteristic suffer a disadvantage connected to that characteristic.

This kind of positive action is only allowed where it is a proportionate way of addressing the under-representation or disadvantage. The Act does not allow an employer to appoint a less suitable candidate just because he or she has a protected characteristic that is under-represented or disadvantaged.

Contact us if you would like advice on how the Equality Act affects your business.

Statutory Maternity, Adoption and Paternity Pay Increases

The standard weekly rate of Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay increased from £124.88 to £128.73 from 3 April 2011.

The weekly rate for days of sickness absence commencing on or after 6 April 2011 is increased from £79.15 to £81.60.

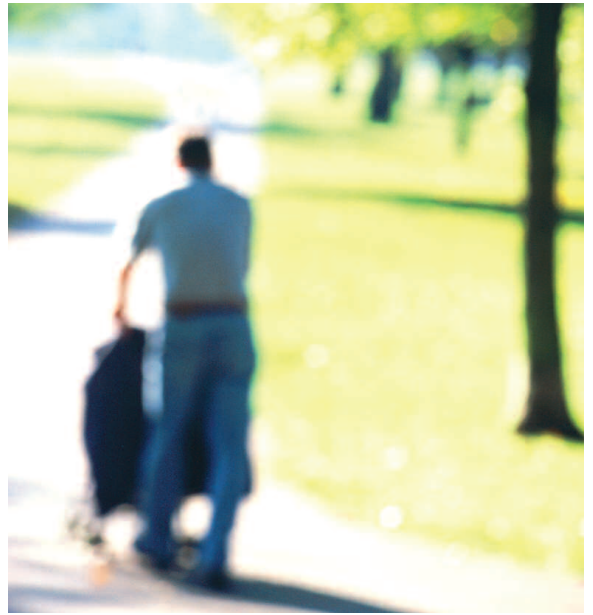


Additional Paternity Leave for New Fathers

Employers are reminded that new rights apply to parents of children due to be born, or those notified that they have been matched with a child for adoption, on or after 3 April 2011.

The Additional Paternity Leave Regulations 2010 give new fathers the right to take additional paternity leave during the period which begins 20 weeks after the child's date of birth and ends 12 months after this date if the mother chooses to return to work with maternity leave outstanding and the father has the main responsibility for caring for the child. Some of the father's leave may be paid if it is taken during the mother's 39-week maternity pay period. The period of leave must be continuous; the minimum allowed is two weeks and the maximum 26 weeks.

The changes also apply to spouses, partners and civil partners of a child's mother or of an adoptive parent who has elected to take adoption leave.



Insolvency and TUPE – EAT Provides Clarification

Whilst the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to protect the employment law rights of employees when there is a relevant transfer of a business or part of a business, Regulation 8(7) provides that where insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to liquidation of the assets, the transfer provisions of TUPE do not apply. In such circumstances, employees do not automatically transfer to the new owner and any dismissals are not automatically unfair.

In an important case (*OTG Ltd. v Barke and Others*), the Employment Appeal Tribunal (EAT) has provided clarification on the application of Regulation 8(7) with regard to administration proceedings under Schedule B1 of the Insolvency Act 1986. The EAT heard five appeals, four of which arose from 'pre-pack' sales by administrators, which raised the same primary issue, which was whether or not administration proceedings are capable of constituting bankruptcy proceedings instituted with a view to the liquidation of the assets of the transferor.

In reaching its decision, the EAT gave full consideration to the EC Acquired Rights Directive, which TUPE gives effect to, and relevant case law of the European Court of Justice (ECJ). From this it was clear that the ECJ made a deliberate distinction between proceedings aimed at the disposal of the undertaking and/or its assets and proceedings aimed at its continuation in the same hands.

The EAT declined to follow the decision in *Oakland v Wellswood (Yorkshire) Ltd.*, in which a different EAT had

taken a fact-based approach to the issue and held that the transfer provisions of TUPE did not apply in a case where the administration had clearly been instituted with a view to the eventual liquidation of the old company's assets. The EAT ruled that this approach was incorrect. In such cases, an absolute approach is required. It is clear from the provisions of the Insolvency Act that the primary purpose of an administration under schedule B1 is to give the administrator the opportunity of rescuing the company as a going concern. This is his first duty, even though it is not the only use that can be made of the administration proceedings – as evidenced by their use for pre-pack sales. It cannot formally be said, therefore, that at the moment of the institution of any proceedings, the administrator's object is to liquidate the assets. Furthermore, the primary purpose of the Directive is to protect employees in the event of a transfer and, in particular, to ensure their rights are safeguarded. On a fact-based approach, it would often be difficult for those affected to know where they stand. Such an approach also increases the likelihood of disputes arising over who is liable for the transferor's obligations and such disputes generate cost, delay and uncertainty.

In the EAT's view, therefore, TUPE will always apply to the sale of a business by an administrator and the rights of transferring employees are thereby protected under the Regulations.

Subject to any further appeal, clarification on this issue is welcome. In *Oakland v Wellswood*, although not asked to rule on the point, the Court of Appeal made it clear that, in its view, there were strong grounds for thinking that the EAT's approach to the issue had not been correct.

Supreme Court Hands Down Landmark Mesothelioma Ruling

The Supreme Court has handed down its judgment in two cases concerning women who died of mesothelioma. In each case, there was a sole known source of exposure to asbestos dust and the extent of the exposure was found to be very small.

Mrs Enid Costello was exposed to asbestos whilst working for Greif (UK) Ltd. at its factory in Ellesmere Port between 1966 and 1984. Mrs Dianne Willmore was exposed to the substance whilst a pupil at Bowring Comprehensive School in Merseyside during the 1970s.

The current state of knowledge regarding mesothelioma is that it is always, or almost always, caused by inhalation of asbestos fibres. Because medical science cannot, as yet, pinpoint which asbestos fibre or fibres caused a person to develop the disease, the conventional causation test – whereby a claimant must show that it is more likely than not that the harm suffered was caused by the defendant's breach – does not apply in mesothelioma cases. The rules are

relaxed in such cases so that the test for liability is whether or not the claimant has been wrongfully exposed to asbestos, thus creating a 'material increase in risk' of them developing the disease. Where a defendant is found liable in a mesothelioma case, they are liable for the whole of the damage caused to the victim. Where more than one party is held to be responsible for the exposure to asbestos, the defendants are held to be jointly and severally liable.

Although there is no known minimum level of exposure to asbestos below which there is no risk of developing mesothelioma, the defendants argued that the relaxation of the rules did not apply in cases where there was only one defendant and the level of the exposure to asbestos was very low.

The Supreme Court dismissed the appeals. There are special features associated with mesothelioma which justify the unique approach in such cases and the current test for causation should stand. Were there to be



advances in medical knowledge of mesothelioma in the future, however, the courts might then revert to the conventional causation test if appropriate.

If you would like further information on any of the topics covered in this newsletter or advice on any employment law matter, contact us.



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