



Employment Law Spring Seminar

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Proposed Changes To The Tribunal System

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In January 2011 the Department for Business Innovation and Skills published "Resolving workplace disputes: A consultation".

The Government made it clear that the purpose of the consultation was to assist businesses to thrive:

"The Government wants the UK to be the best place to start and grow a business, and to remove barriers to recruitment so that businesses have the incentive and ability to expand, ensure they provide maximum flexibility and promote competition without compromising fairness. This consultation is a significant first step in taking forward the Government's review of employment law, which will make a major contribution to achieving these objections".

One of the key policy aims is to support and encourage parties to resolve disputes earlier - where possible, in the work place - to try and preserve the working relationship between employer and employee.

The consultation closed on 20th April 2011.

One of the repeated complaints about the Tribunal system is the lack of consistency in judgments across the country.

In the foreword to the consultation paper the ministers emphasised their desire to ensure consistency in approach. The Ministers see the work done by BIS as central to the more modern workplace. The foreword contains the following description of what the future holds:

"BIS is developing a progressive vision of the modern workplace that transforms the traditional but distinct, workplace interventions in employment relations and skills into a more long-term positive, co-ordinated approach. A key element of this single 'joining-up' is the focus on

improving leadership and management skills. We want to see a reduction in workplace disputes as a result of line managers being able to manage conflict successfully."

Key Features

Mediation

Because the Government wants to enable greater use of alternative dispute resolution tools such as mediation the consultation sought to obtain more information about current use, costs and benefits, and barriers.

Early Conciliation

The work ACAS has already done in pre-claim conciliation is regarded as having been successful. The Government asks for views on introducing a requirement that all claims be submitted to ACAS in the first instance rather than the Tribunal service.

Tackling Weaker Cases

A consistent criticism (perhaps unfounded) of the Tribunal system is that weak cases take up much time and money. The Government asked for views on giving the Tribunals greater powers to strike out weak cases.

Encouraging Settlements

The Government asked for views on ways in which settlement of disputes might be encouraged specifically thinking of provision of more information and formalising offers to settle (to replicate the judicial tender system used in the Scottish Courts).

Shortening Tribunal Hearings

At this point the distinction between the Tribunals in Scotland and those in England and Wales becomes apparent. South of the border witnesses will be expecting not only to provide a written

witness statement in advance but they will not now be asked to read it. Their evidence will, therefore, begin with cross-examination.

At present the Tribunal pays the expenses of witnesses. The Government wonders if the payment of expenses is withdrawn parties might be a bit more prudent about how many witnesses they called.

The Government also asked whether or not the use of the lay member resource could be reduced.

Finally, the Government asked for views about the use of legal officers (rather than judges) to deal with certain case management functions.

Introduce Fee Charging

The consultation paper reveals that there will definitely be a fee regime introduced in the Employment Tribunal system.

Increased Qualification Periods

The Government reckon that by introducing the qualifying period for unfair dismissal from one to two years there will be between 3,700 and 4,700 fewer claims made each year.

Introduce Financial Penalties for Employers

The Government are considering introducing financial penalties which will be levied against any organisation which is found to have breached employment rights. It is felt this is a means of increasing compliance with Employment Law.

Age Discrimination And Retirement Issues

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Abolition Of The Default Retirement Age

- Employer's ability to compulsorily retire employees at age of 65 has been phased out.
- The Government used the powers set out in Section 2(2) of the European Communities Act 1972 to phase out the DRA from 6th April 2011.
- From April 2011, employers are now only able to have a compulsory retirement age for employees if they can objectively justify that having a particular compulsory retirement age is a proportionate means of achieving a legitimate aim.
- No more notices of compulsory retirement can now be served following the coming into force of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 on 6th April 2011.
- Only people who were correctly notified before 6th April 2011, and who attain 65 years of age before 1st October 2011, can be lawfully compulsorily retired under the former statutory procedure.

Introduction

Under the Employment Equality (Age) Regulations 2006, the statutory default retirement age at which employers could force an employee to retire under the Regulations was 65. However, this provision was abolished as of April 2011 (except for "transitional" arrangements) by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011. Set out in this section 1) the previous regime under the 2006 Regulations, 2) the transitional provisions and 3) the new regime as of October 2011 with particular focus on Employer Justified Retirement Age (EJRA). Whereas under the previous regime, it was an issue for the employer to determine when the employee should retire, the new Regulations leave matters in the hands of the employee; or employer who can justify retirement. Under the former statutory retirement regime, if the statutory procedures were followed, there was a presumed retirement and no discrimination on the grounds of age. However, the previous certainty and freedom for

employers will now be replaced by a large element of risk and Tribunal claims.

1) Previous Regime

Under the Employment Equality (Age) Regulations 2006, a dismissal would not be unlawful where the employee was over the age of 65 and the reason for dismissal was retirement (Regulation 30(2)). An employer could have a retirement age which was below 65 if they could justify the retirement age as a proportionate means of achieving a legitimate aim. Where an employer decided to compulsorily retire an employee who was at or over the age of 65, they did not have to justify the decision provided they followed the statutory process.

The 2006 Regulations introduced a statutory duty on employers to consider a request by an employee to work beyond their normal retirement date. Compliance with the statutory procedure would determine whether or not a retirement dismissal was treated as being fair and not age discriminatory.

The procedure included:

- (i) The duty to notify the employee
- (ii) The employee's right to request not to retire
- (iii) The employer's duty to consider an employee's request

2) Transitional Provisions

The default retirement age will be abolished in October 2011, however, no more notices of compulsory retirement could be served after 5th April 2011. That said, there are various transitional provisions that will apply in the 12 month period from 6th April 2011.

During the transitional period, a retirement may still be lawful provided that the notice was served by 5th April 2011 and the employee has attained or will attain the age of 65 by 30th September 2011. If notice to retire has been given to an employee before this date, the notice period must be at least six months for the notice to be effective. If at least six months notice hasn't been given, the employer will not be protected and will now have missed the boat. Anyone who has been given longer notice of between six months and a year shall be lawfully retired under the statutory procedure even though it will take them

beyond 1st October 2011. The default retirement age will therefore cease in practical terms on 5th April 2012 (the latest date at which a valid 12 months' notice period could possibly expire), however, the right still remains for an employee to request to work beyond 65 during this transition period. Accordingly, this may result in a six months' extension under the old regime until 5th October 2012 at the very latest.

Furthermore, the procedure under the Employment Equality (Age) Regulations 2006 which is illustrated above must still have been followed. For example the employee must be given an opportunity to request to continue working. The employee must of course be over the age of 65 or be over the employer's normal retirement age if this is higher than 65.

Where employers granted a request to work on for over 6 months, or indefinitely, they will no longer be able to rely on the old regime as, in these circumstances, it requires a new notice to be intimated. This will now no longer be possible, so the employer will instead have to rely on an EJRA (see below).

The provision which allowed a two week notice of retirement has also been repealed and ceased to have effect on 6th April 2011.

3) New Regime

Following the introduction of the new Regulations on 6th April 2011, the default retirement age is no longer available to employers and all associated statutory procedures will be removed including the duty to give six months' notice of retirement and the right of employees to ask to work beyond retirement age.

Pensions

With many employees now likely to be working beyond 65, it is essential that employers consider their entitlements to benefits as these will have to be uniform across age groups to ensure there is no age discrimination present, unless different treatment can be objectively justified. Employers will require to consider the rules of their pension scheme and how these deal with workers who work beyond 65 in terms of contributions and tax implications.

Employee Share Schemes - Good and Bad Leavers

It may be the case that your organisation offers your employees the opportunity to participate in an employee share scheme. It is common for such schemes to distinguish between good leavers (for example, as a result of ill health, redundancy or retirement) and bad leavers who have been dismissed or leave voluntarily. These bad leavers will typically lose their entitlement to the shares. In light of the new Regulations, employers should review and if necessary amend their schemes to ensure clarity in the distinction between an employee dismissed for capability when over 65 and an employee who is retired.

EJRA (Employer Justified Retirement Age)

Employers will now only be able to have a compulsory retirement age for employees if they can objectively justify that having a particular compulsory retirement age is a proportionate means of achieving a legitimate aim. An employer justified retirement age is known as an EJRA.

Employers need to be very careful about using an EJRA and remember that the burden of proof will be on them during any Tribunal proceedings to prove that imposing that retirement age was a proportionate means of achieving a legitimate aim. The tricky issue is what exactly is meant by "a proportionate means of achieving a legitimate aim"? Broken down, the employer must ask itself (i) what are the legitimate aim(s) being pursued and (ii) is that being done proportionately; and is there some less discriminatory way in which that legitimate aim can be achieved? Guidance has been issued by the Equality and Human Rights Commission which provides that a legitimate aim may include:

- economic factors such as the needs of and efficiency of running the business;
- the health, welfare and safety of the individual; and
- the particular training requirements of the job.

The ACAS guidance also adds some context and provides that a legitimate aim may include workforce planning, the need to recruit, retain and provide promotion opportunities, succession management and ensuring compliance with health and safety measures. Employers will need evidence to back up such an assertion.

On the second question (is the aim being achieved proportionately?) the EHRC guidance states that proportionate means that:

- what the employer is doing is actually achieving its legitimate aim;
- the discriminatory effect should be significantly outweighed by the importance and benefits of the aim; and
- the employer should have no reasonable alternative to the action it is taking. If the legitimate aim can be achieved by another or less discriminatory means, they must opt for that route.

As you can see, proving that an EJRA is in the proportionate pursuit of fulfilling a legitimate aim will not be a straightforward task. To quote the government's consultation paper *"it is not easy to demonstrate that a retirement age is objectively justified so the employer should be confident it can be objectively justified before deciding to use a retirement age."*

The ACAS guidance published in relation to the DRA also advises that this test may not be an easy one to pass and employers should be ready to provide evidence if there is a dispute. The Guidance goes on to state that before implementing an EJRA employers should consider:

- why they wish to have the measure;
- if there is good evidence to support the measure; and
- whether there is an alternative, less discriminatory way of achieving their aim.

Where an employer has an EJRA then any dismissal on this basis will be for "some other substantial reason (SOSR)" as stipulated in section 98(1)(b) of the Employment Rights Act 1996. It is again important that employers remember to follow a fair procedure when retiring an employee. They should give the individual notice that they are obliged to give under the employee's contract and which is fair and, if appropriate, consider an employees request to continue working. If an EJRA is not used, employers will have to rely on the "usual" potentially fair reasons to dismiss employees eg. capability, conduct, redundancy.

Use of EJRA

Employers may consider introducing an EJRA only for certain jobs, sectors or departments which involve more physically demanding positions; however it would be difficult to justify a blanket approach like this because, as we know, not everyone of the same age or age group has the same physical ability. They may also consider setting an older retirement age for their workforce e.g. between 66 and 70 depending on their evaluation of the workforce or business needs and demands. As you can see, it

is a decision for each individual employer to assess the age to which its employees can continue to carry out their work to the requisite level; and in doing so, the possible justification for that. Various factors to consider will be the functions performed, the market in which the work is being performed, the size and resources of the employer and the pension provisions.

A further situation to bear in mind is where a first rate employee who is integral to the business comes up for retirement. The lack of flexibility of an EJRA dictates that it would be very difficult to treat this one employee differently to any other and would effectively undermine the policy itself. If this person were to receive preferential treatment, another employee may seek to rely on this in a subsequent Tribunal claim for unfair dismissal and/or age discrimination.

If an employer does wish to have an EJRA in place, we would certainly recommend actioning this as soon as possible, ideally before October this year. Employers should assess the proposed retirement age, its potential impact, and review the intended justification for it. Whatever internal decision is made, educate and train your employees about the reasons. Transparency will be key to avoiding any potential tribunal claims. Employers should consult with any trade union or employee representatives prior to implementation as agreement or an attempt to reach agreement. This will assist in proving objective justification of the EJRA. If your EJRA can be agreed with the unions it will significantly strengthen your position in the event of any tribunal claims raised. Conversely, even if you do not reach agreement with the unions, the tribunal will certainly look favourably upon an employer's attempts to consult and agree on the issue.

Where an employer does not adopt an EJRA, this does not mean that it will be out of the firing line. A decision to dismiss an employee aged 65 or over may still attract Tribunal claims for unfair dismissal, age discrimination or disability discrimination.

Unfair Dismissal

If relying on an EJRA, as previously identified, the reason for the dismissal would be SOSR which is potentially fair but in need of justification. If a dismissal appears to a Tribunal to be discriminatory, the burden of proof lies on the employer to show that it is not; or is justified. The employer must have sufficient rationale in support of its EJRA and be able to demonstrate advantages to the business. Although the employer may succeed in establishing that it had SOSR, this could still result in a finding of unfair dismissal if there is procedural unfairness.

Also if it is not relying on an EJRA, it is fundamental that the employer takes care that any redundancy,

capability or conduct dismissal is not seen as a method of back-door retirement.

These points are crucial to bear in mind considering that the maximum compensatory award for unfair dismissal is currently £80,400. However, compensation for discrimination is potentially uncapped.

Age Discrimination

If an employee is treated less favourably because of their age, or age group (for example, by being dismissed) or if any policies or benefits of the business have the effect of disadvantaging people of a particular age or age group, an employee will have a basis for raising a claim for age discrimination. It goes without saying that any forced retirement has the potential to be challenged on grounds of direct and indirect discrimination. In the case of age discrimination in the form of an EJRA, as mentioned above, this may potentially be objectively justified. Employers should also be aware of possible direct discrimination claims arising from capability and redundancy dismissals where the employee argues that the real reason underlying the dismissal is their age. This has the potential to cause serious problems for employers given that discrimination awards are uncapped.

Disability Discrimination

A further type of claim of which employers should be aware is disability discrimination. It is widely accepted that there is a higher probability that older workers will suffer from increased ill health and experience deterioration in physical strength, etc. Disability discrimination claims can sometimes arise out of capability dismissals, in redundancy situations and also enforced retirement.

The objective justification of EJRA's is definitely an area to watch and we will be keeping a close eye on the case law to assess the position the Tribunals and appeal courts will take on this issue.

European Case Law

Having said that, there have been some cases in Europe over recent years which assist employers. One such example is the case of *Rosenblatt v Ollerking Gebäudereinigungsges* which involved a collective agreement providing for compulsory retirement of employees who were either entitled to receive a retirement pension or who were 65 years of age or over. Although this was a provision in a collective agreement which is uncommon in the UK, the arguments that were raised and ultimately accepted as legitimate aims for the compulsory retirement are undoubtedly of interest to employers.

The German Government put forward the following case:

"The termination of the employment contracts of those employees directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment. The rights of older workers are, moreover, adequately protected as most of them wish to stop working as soon as they are able to retire, and the pension they receive serves as a replacement income once they lose their salary. The automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age."

The Court held that that these aims were both necessary and proportionate although it is interesting when you contrast these views against the UK Government's consultation paper.

UK Case Law

In the UK, we have obviously yet to see any cases which deal directly with the new Regulations, however some previous cases on objective justification under the old regime are of assistance. For example, *Seldon v Clarkson, Wright & Jakes 2009 IRLR 267* involved a partner of a law firm who was compulsorily retired at 65 in line with the Partnership Agreement. The retirement required to be objectively justified and this was done successfully. The justifications included: to allow opportunities for the partnership and the planning for that, avoiding the need to expel partners for poor performance and encouraging collegiacy. It is worth noting that the DRA was in force at the time of this decision and was a factor taken into consideration and accordingly, the removal of the DRA will likely have an impact on this authority to some extent. Another caveat regarding this case is that leave to appeal to the Supreme Court has been granted so this is certainly one to watch!

A very high profile case involving age discrimination hit the headlines not so long ago (*O'Reilly v BBC and Bristol Magazines Ltd, Employment Tribunal, Central London, 11th January 2011*). You may recall this case concerning Miriam O'Reilly who was a BBC presenter of the programme Countryfile. At the prime age of 51 she was dropped from the show when it moved from Sunday afternoon to a primetime slot. The BBC attempted to mask the discrimination with a positive discrimination line in which they argued that they thought a younger presenter would attract a younger audience. It was accepted that wishing to appeal to a younger prime time audience was a legitimate aim but the means of achieving the aim were not accepted as being proportionate. It is not surprising that the BBC lost this case especially in light of evidence presented by Miriam O'Reilly which included an offer of a can of spray hair dye, comments such as "its time for botox" and "high definition TV highlights wrinkles"!

The EAT has provided useful guidance on how tribunals should approach justification of direct age discrimination in the cases of *MacCulloch v Imperial Chemical Industries plc* 2008 EAT 0119/08 and *Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd* 2008 EAT 0156/08. In *MacCulloch*, the Tribunal held that a redundancy payment based on a combination of age and length of service was justified. However, the EAT held that, while the Tribunal had identified the legitimate aims of the scheme, it had failed to carry out a proper assessment of whether the discrimination was justified. The Tribunal must assess whether the difference in treatment is reasonably necessary to achieve the scheme's objective. The reasonable needs of the business should be balanced with the discriminatory effect on the claimant.

In *Loxley*, the redundancy payments of the employer, BAE, were based mainly on length of service and employees over 60 years of age were not entitled to them. The rationale, which the Tribunal accepted, was that, until 2006, employees could take their pension at 60 so the exclusion was designed to prevent employees who are made redundant when they are close to retirement from receiving a windfall. Once again, the EAT held that the Tribunal had erred in law. In focusing on related changes to the pension scheme, rather than the redundancy scheme, it had failed to adequately deal with whether this age discriminatory scheme could be objectively justified. However, it was held that an employee's entitlement to pension benefits would be a 'highly relevant factor' in determining their redundancy rights. The fact that the scheme had been agreed in consultation with trade unions would also be relevant. If the collective parties have agreed to a scheme which they consider to be fair, this will be of significant importance.

This was one of the issues considered in the case of *Rolls Royce v Unite the Union* [2009] EWCA Civ 387. The parties had entered into collective agreements which set out the agreed approach to be taken in a redundancy situation. A dispute arose as to whether the use of length of service as a criterion in the redundancy scoring constituted age discrimination. The court held that, while using length of service as a selection criterion was age discriminatory, it could be objectively justified under the Age Regulations. The collective agreements were a compromise between the parties which enabled redundancies to be carried out fairly and 'peaceably'. This was held to be a legitimate aim. The length of service criterion was also said to respect loyalty and experience, whilst also protecting older employees who would be more vulnerable in the labour market.

Another case which, like *Loxley*, concerned the legitimate aim of preventing an employee receiving a windfall was *Woodcock v Cumbria*, where an employee's contract was terminated when a member of HR realised that Mr Woodcock was 13 months shy of his 50th birthday. If he had celebrated this birthday while in employment, the value of his settlement would have increased by £50,000, so his contract was terminated in the face of this looming cost. Mr Woodcock claimed unfair dismissal and age discrimination, both of which were dismissed by the Tribunal. On appeal to the EAT, Mr

Woodcock's Appeal was unsuccessful on the age discrimination claim and, although he had a technical success in the unfair dismissal claim, he received no award of compensation. This Judgment indicates that we have been approaching the question of justification too narrowly. It has always been recognised that cost can play a part in the justification of a discriminatory policy or practice so long as there are other non-economic factors at play. For the first time, however, the EAT suggested that there is no judicial basis for such a narrow view and that, in fact, there may well be cases where cost alone will justify discrimination. .

Action Points

It has become evident that retirement and dismissal of older workers will not be without its problems for employers. In terms of your next steps, we recommend carrying out an assessment of how you wish to approach aging in the workforce, and impact assessment bearing in mind how you wish to proceed. You will need to assess how your business will be affected, whether the new legislation will have a detrimental impact and the extent of that.

As we have now passed the deadline for lawful retirement of employees under the statutory regime, the initial focus should be centred on whether businesses decide to adopt an EJRA. This strategic decision will need careful consideration because, in spite of the possible benefits of having a clear policy based on objective factors put in place, the risks are very clear. The Government appears to be advising against EJRA's unless it is absolutely necessary. However, European case law does go some way to assist employers when arguing their case for an EJRA highlighting that there are advantages of dividing employment between generations, the retired employee will be in receipt of a reasonable pension and the employer would avoid humiliating the employee by way of a capability dismissal.

Any decision employers make must be reinforced with evidence to prove the legitimate aim as to why the employer is introducing a retirement age, and this must be considered carefully. Where no EJRA is adopted in respect of some or all positions within the employer's business, managers should be informed of the possible grounds for dismissing employees who would previously have been retired. As stated previously, the main grounds are misconduct, incapability (by reason of ill-health or by reason of incompetence) and redundancy, managers should be clear about the possibility of age discrimination and perhaps also disability discrimination in addition to unfair dismissal.

You may decide to introduce tests within your business to assist in justifying a dismissal on grounds of incapability. Again, you will need to carefully consider which positions you wish to test (will you test all office staff along with all manual positions?), what testing is required and where you will set your threshold. Setting a threshold which separates those capable of carrying out a function from those who

cannot will be a tricky task. It is important to remember that all of these decisions will require justification and it is advisable that you keep a clear paper trail to demonstrate your thought process in reaching your final approach.

The Agency Worker's Regulations 2010

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These implement the EU Directive 2008/04/EC on Conditions for Temporary (Agency Workers). They follow consultation on the Regulations which ended on 31 July 2009. The Regulations will come into effect on 1 October 2011. The Department for Business and Innovation (BIS) guidance on the regulations is still awaited.

The key points are

- An agency worker protected by the Regulations is an individual who has been supplied by a temporary work agency to work temporarily for and under the supervision and direction of the hirer - unless the individual is genuinely self-employed. In the latter case, the Regulations do not apply to them
- Once the agency worker has worked for the hirer for 12 weeks they are entitled to the same basic employment terms and conditions (the relevant terms and conditions) as a comparator employee
- A clear break of six weeks between one assignment and the next starts the 12 week clock running again. But there are exceptions where the clock is only paused:
 - where the worker is off sick for not more than 28 weeks. The hirer can request a medical certificate
 - where the worker is absent on annual leave
 - where the worker is on public duties
 - where there is a planned shut down of the hirer's business
 - where there is industrial action
- Where the agency worker is absent due to pregnancy, childbirth or maternity leave or adoption leave (up to 26 weeks after the baby is born or when the woman returns to work if earlier) or paternity leave the assignment is deemed to continue for its original intended duration or its likely duration, whichever is longer (Reg.7(6)).

- Where the hirer has structured assignments in a way which indicates that the most likely explanation for doing this is to prevent the worker from acquiring their rights after 12 weeks, the worker is treated as having completed the qualifying period from the time they would have completed it but for the structure of the assignments (Reg.9)
- The 12 weeks means 12 continuous weeks working for the hirer in the same role. However, as an anti-avoidance measure, if the agency worker starts a new job with the hirer during the 12 weeks, whether supplied by the same agency or a different one, this only breaks the continuity of the 12 weeks if the whole or main part of the new role is “substantively different” from the previous one and the agency has told the worker in writing the type of work they will be required to do in the new role (Reg.7)
- A comparable employee is an existing employee who works for and under the supervision of the hirer and who is engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills. The comparable employee must work at the same establishment or, if there is no such comparator, work at a different establishment of the hirer
- The relevant terms and conditions are:
 - pay
 - the duration of working time
 - night work
 - rest periods
 - rest breaks, and
 - annual leave
- The relevant terms and conditions do not include:
 - occupational sick pay
 - pension or other retirement payment or as compensation for loss of office
 - maternity, adoption or paternity pay
 - redundancy pay
 - any payment or reward made pursuant to a financial participation scheme (a distribution of shares or options or a share of profits in cash or shares)
 - “any bonus, incentive payment or reward which is not directly attributable to the amount or quality of the work done by a worker, which is given to a worker for a reason other than the

amount or quality of work done such as to encourage the worker's loyalty or to reward the worker's long-term service" (Reg.6(3)(f))

- any payment for time off for carrying out trade union duties under s.169 of TULR(C)A 1992
- a guarantee payment
- any payment by way of an advance or loan
- any payment in respect of expenses
- "any payment to a worker otherwise than in that person's capacity as a worker" (Reg.6(3)(k)).

- If the agency worker has a permanent contract of employment with an agency providing for "a minimum amount of remuneration" between assignments, the provisions in the Regulations relating to pay do not apply. The minimum amount of remuneration which must be not less than the National Minimum Wage level, is 50% of the worker's pay during "the relevant pay reference period" (the highest level of pay for an assignment within the 12 weeks preceding the previous assignment). (Reg.10).
- From the first day of their assignment agency workers are entitled to be informed by the hirer of relevant vacant posts and given the same opportunity as a comparable permanent employee to apply (Reg.13)
- From the first day of their assignment agency workers are entitled to be treated no less favourably than a comparable worker in relation to collective facilities and amenities such as access to the canteen, childcare facilities or transport services (Reg.12)
- Once the 12 week qualifying period is completed the agency worker can write to the agency asking them for information about their basic working conditions and the identification of the comparator. If the agency does not provide this information within 28 days the worker can ask the hirer to provide it.
- Primary liability for breach of the Regulations lies with the agency except for those relating to collective facilities and amenities which are the sole responsibility of the hirer. However, the agency escapes liability if it has taken reasonable steps to obtain information from the hirer about the basic working and employment conditions and acted on this. "To the extent that the temporary work agency is not liable under this provision, the hirer shall be liable." (Reg.14).

Where a tribunal finds a complaint well-founded it can make a declaration, order the payment of compensation or make recommendations. Compensation is of such amount as the tribunal thinks just and equitable but, other than in exceptional circumstances, must not be less than two week pay. There is no compensation for injury to feelings. Where the tribunal finds that the hirer's structuring of

assignments are a deliberate attempt to avoid the Regulations the tribunal can order an additional award of not more than £5,000 (Reg.18).

Downsizing issues

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Introduction:

The effects of the Global Economic Recession, which started as far back as 2008, continue to reverberate in the UK and abroad. The phrase "tightening our belts" is commonplace both in the home and the workplace.

What does this mean for businesses? The harsh reality of this is that economising usually means "downsizing", to use an Americanism that has crept into our dictionary, which often results in compulsory redundancies. Natural attrition is often no longer sufficient in terms of cutting wage bills to an acceptable level.

This paper will look at some of the questions that we are being asked by clients when a business considers "downsizing".

VERS

The first matter to mention is "VERS" or "VER", or Voluntary Early Release Schemes. We are seeing more and more of these types of schemes in the workplace, particularly in the public sector where institutions often have a commitment to never making an employee *compulsorily* redundant. People need to be seen to be going of their own free will and a VERS scheme is a method of achieving that.

A VERS Scheme is simple. It usually operates on the basis that those who volunteer for early release from their position will receive a severance payment (the amount of which is often based on length of service and will be higher than statutory redundancy payment levels) in return for signing a compromise agreement.

Often an employer will introduce a VERS scheme with a view to minimising later compulsory redundancies. If enough people volunteer then compulsory redundancies will not arise.

There are a number of issues that need to be considered when implementing such a scheme as they can often have an impact on pension rights and we would always suggest taking legal advice before implementing a VERS.

So, in relation to our first question the context is the interaction between VERS and collective consultation. As you will be aware, collective consultation is required where there is a proposal to dismiss as redundant 20 or more employees in one establishment within a 90 day period. Where such a proposal relates to 20 employees or more, the minimum period from starting consultation until the first dismissal takes effect is 30 days. Where the number increases to 100 or more, the statutory consultation period must be a minimum of 90 days.

Q1: Should employees who opt for voluntary release under a VERS (which has been implemented with a view to minimising later compulsory redundancies) be counted in relation to collective consultation triggers? YES OR NO?

A1: Yes

Following the case of *Optare -v- TGWU*, it is likely that individuals who depart under a Voluntary Severance Scheme, will be counted in relation to collective consultation triggers if the Voluntary Severance Scheme is being offered on the basis that it will minimise later compulsory redundancies.

As you are all aware, the penalties for failing to collectively consult can be severe, up to 90 days' pay per employee so do make sure you are totting up your numbers correctly and collectively consulting as appropriate.

Fixed-Term Contracts

Some of the matters that arise regarding fixed-term contracts in a "downsizing" situation. Despite the introduction of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations in 2002, Fixed-Term employees continue to be treated as second class citizens in some restructuring or redundancy situation. Employers must be aware of the risks of doing so.

Q2: In a redundancy situation, is it without risk to dismiss our fixed-term workers first, in preference to our permanent employees? YES OR NO?

A2: Generally No

In a redundancy situation, if you restrict your selection pool to fixed-term workers only, this may amount to direct discrimination under the Fixed-term Employees Regulations 2002 and indirect sex or age discrimination under the Equality Act 2010.

Fixed-term Regulations 2002

The Fixed-term Regulations apply to any fixed-term contract of any duration. A fixed-term employee has the right not to be treated less favourably than a comparable permanent employee.

Equality Act 2010

Selection of fixed-term workers over permanent employees would constitute a provision, criterion or practice. This 'PCP' is likely to put female and/or young staff at a substantial disadvantage compared with the male and/or older staff. An Equality Impact Assessment should be carried out to assess this. Any disparate impact would amount to indirect sex and/or age discrimination.

Objective Justification

Direct discrimination against fixed-term employees and indirect sex or age discrimination is not unlawful if it can be objectively justified if it is a proportionate means of achieving a legitimate aim.

Is protecting the permanent workforce a legitimate aim? Is selecting fixed-term employees first a proportionate approach? We would suggest that this is difficult but not necessarily impossible.

Although the judgment pre-dates the Fixed-Term Regulations, the Court of Appeal in *Whiffen -v- Milham Ford Girl's School* [2001] IRLR 468 have observed:

"It is not immediately clear why it is 'appropriate' to the running of a good school [or business] to ensure

that, in the event of redundancies, even those on fixed-term contracts who have served the school [or business] for upwards of five years should be automatically discharged and not even be allowed to take part in the redundancy selection competition, nor why such a requirement was necessary to achieve the aims of the school [or business]."

Alternative solutions

Alternative solutions might be to breathe new life in to LIFO ("last in, first out") or to allow fixed-term contracts simply to expire at the end of their fixed-term. However, there is a question of age discrimination here...

Q3: Is it unlawful to use length of service as a selection criterion in a redundancy situation? YES OR NO?

A3: No

LIFO is likely to amount to a PCP which puts female and/or young staff at a substantial disadvantage compared with male and/or older staff (and an equality impact assessment should be carried out). However LIFO may be objectively justified, as long as there are other criteria.

The Court of Appeal in *Rolls-Royce PLC -v- Unite the Union* [2009] IRLR 576 discussed this issue.

In this case, the parties had entered into collective agreements which set out the agreed approach to be taken in a redundancy situation. Employees would be assessed against five criteria, with points given for each. Employees would also receive one point per year of continuous service. The employees with the least points overall would be selected for redundancy. A dispute then arose as to whether the length of service criterion constituted age discrimination and RR applied to the High Court to determine whether this was the case. Ironically, it was Rolls Royce that were effectively arguing that the scheme was potentially discriminatory and so wanted to have a new payment scheme instead.

The High Court held that, while using length of service as a selection criterion was age discriminatory, it could be objectively justified under the Age Regulations. The collective agreements were a compromise between the parties which enabled redundancies to be carried out fairly and 'peaceably'. This was held to be a legitimate aim. The length of service criterion was said to respect loyalty and experience, whilst also protecting older employees who would be more vulnerable in the labour market. The Court of Appeal agreed with the decision of the High Court and, by a 2:1 majority, dismissed U's appeal.

Lord Justice Wall giving the leading judgement said that:

"I am, however, quite satisfied that, viewed objectively, the inclusion of the length of service criterion is a proportionate means of achieving a legitimate aim. The legitimate aim is the reward of loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection. The proportionate means is in my judgment amply demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative."

However it should be noted that of the other two judges, Lady Justice Arden gave greater weight to the fact that this approach had been agreed collectively with the unions *"thus removing the scope for disagreement and dissension among the vast majority of its workforce."* The other judge Lord Justice Aikens declined to consider the issue:

"I am not prepared to hold, on an issue of fact, that the length of service criterion is, objectively and in the circumstances that are now to be applied, a proportionate means of achieving a legitimate aim. That needs full investigation by a fact-finding tribunal. In my view it should not be decided in the absence of the parties that it will affect most of all: those who are potential redundancy candidates."

Accordingly, going back to the issue of how to deal with fixed-term employees in a redundancy situation, the solution might be to include both fixed-term workers and permanent staff in the selection pool but to apply LIFO - 'last in, first out' - as one of the selection criteria (but not the sole selection criteria).

This would have the effect of selecting more fixed-term workers but should side step fixed-term worker discrimination as the same length of service criterion will have been applied to both the fixed-term employees and comparable permanent employees.

Another question we get asked about regarding our Fixed-term employees in a redundancy situation....

Q4: In a redundancy situation, should we offer suitable alternative employment to our permanent employees in preference to our fixed-term workers? YES OR NO?

A4: No, not without going through a fair process first!

In a restructuring situation that results in redundancies, the search and offer of suitable alternative employment will be considered in determining the overall fairness of any dismissals. Accordingly, if an employer fails to follow due process when offering suitable alternative employment to displaced employees, this may well render a subsequent dismissal unfair.

In the situation where an employer offers suitable alternative employment only to permanent employees in preference of fixed-term workers as a blanket policy, this is likely to represent discrimination on grounds of fixed-term status. Specifically, the Fixed-term Workers Regulations contain the specific right for fixed-term workers not to be treated any less favourably than comparable permanent employees in relation to the opportunity to secure any permanent position within the establishment.

Instead, the appropriate way to offer suitable alternative employment would be to allow both permanent and fixed-term workers to apply for any suitable alternative role and thereafter to undertake an objective scoring process or competitive interview process in order to select the best candidate for the job, be it an existing permanent employee or one of fixed-term status.

It may be possible to include length of service as one of the selection criteria for selection if it is felt that long serving employees will have a better understanding of the job. This may well result in a permanent employee achieving a higher score than a fixed-term employee as it is more likely that a permanent employee would have been employed by the organisation longer. As long as such a criterion is applied consistently in respect of permanent employees and fixed-term workers and parity in treatment is achieved, it will be difficult to attack such a selection criterion on grounds of discrimination.

Consideration must again be given to what we discussed before - length of service should not be used as a sole criterion in determining matters in a redundancy situation.

So, all this talk about dismissing poor fixed-term employees! What about just allowing fixed-term contracts to expire naturally? This could be used as an alternative solution to making fixed-term employees redundant and may minimise the need to make permanent employees redundant if the fixed-termers are not replaced after their contract has expired.

In addition, this would side step the fixed-term worker discrimination. Allowing a fixed-term contract to expire does not amount to discrimination under the Fixed-term Regulations. In the Court of Appeal in *Department for Work and Pensions -v- Webley* [2005] IRLR 288 again Lord Justice Wall held that

"Once it is accepted, as it must be, that fixed-term contracts are not only lawful, but are recognised in

the Preamble to the Directive as responding, 'in certain circumstances, to the needs of both employers and workers', it seems to me inexorably to follow that the termination of such a contract by the simple effluxion of time cannot, of itself, constitute less favourable treatment by comparison with a permanent employee. It is of the essence of a fixed-term contract that it comes to an end at the expiry of the fixed-term."

However it could still amount to indirect sex discrimination. The Court of Appeal decision in *Whiffen -v- Milham Ford Girl's School* [2001] IRLR 468 concerned a redundancy policy which required the non-renewal of fixed-term contracts first. The council had a policy that in a redundancy situation, temporary workers should be released first and then a redundancy selection procedure should be followed for permanent staff. In this situation, Ms Whiffen was a teacher who had worked at the school for five and a half years on a series of fixed-term contracts. There was a redundancy situation and her contract was not renewed. As she was considered a "temporary worker", the redundancy selection procedure was not followed. She claimed unlawful sex discrimination as all male teachers were permanent employees.

The Employment Tribunal found that there was a smaller proportion of women employed under permanent contracts and therefore that it was only women who did not qualify for the redundancy procedure. However it held that this was justified as it is necessary for employers to have a redundancy policy and the policy in question was gender-neutral.

The Court of Appeal disagreed, stating that, while the policy was prima facie gender-neutral, the Tribunal needed to look at the effect of such a policy in the circumstances and that there was indirect discrimination. The Tribunal had been flawed in its approach. The Tribunal had looked at the need to have a redundancy policy rather than assessing the need for the particular policy that was in place.

However there were a number of special factors in that case which may allow it to be distinguished:-

- the length of the Claimant's service, namely five years
- her replacement with a less qualified teacher
- the explicit terms of the policy
- the employer's failure to lead evidence on the question of justification

- the subsequent influence of the Fixed-term Workers Directive which acknowledged the business need for fixed-term contracts

Accordingly there may be scope for arguing that simply allowing a fixed-term contract to expire at the

end of its fixed-term is distinct from an express policy requirement the selection pool should be restricted to fixed-term workers.

The next question is...

Q5: Do you count the expiry of fixed-term contracts towards the collective consultation triggers? YES OR NO?

A5: Yes (generally)

Employers often do not recognise that, because a failure to renew a fixed-term contract is a dismissal for a reason not related to the individual, it can trigger the collective redundancy consultation requirements in Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. In the recent case of *Lancaster University -v- The University and College Union*, the employer fell into this trap when it did not renew some of its fixed-term contracts due to the withdrawal of third party funding. Although it sent a list of affected employees to the Union, the University failed to provide all the prescribed information or to consult adequately with the representative. The EAT upheld protective awards of 68 days pay.

Remember to count these contract expiries when looking at collective consultation triggers.

Our final fixed-term workers question, and one that baffles many employers...

We all know that the Employment Rights Act lists potentially fair reasons for dismissal: conduct; capability; redundancy; some other substantial reason (SOSR). We know that expiry of a fixed-term contract is a dismissal. Therefore if we let the fixed-term employees go in a time of "downsizing", are they simply leaving for sosr or are they entitled to a redundancy payment? The question is:

Q6: Do all employees that leave on the expiry of a fixed-term contract have a right to a redundancy payment? YES OR NO?

A6: No

There is often significant confusion around the reason why a fixed-term contract is not renewed. Many employers believe that the non-renewal of a fixed-term contract is always a dismissal in respect of some other substantial reason (SOSR) in terms of the Employment Rights Act 1996. However, in many situations, the reason for the non-renewal of a fixed-term contract will actually be by reason of redundancy. For example, where an employee is employed to complete a specific project, the termination of the contract on completion of that project is likely to fall under the definition of a redundancy in terms of Section 139(1)(b) ERA in that the employer's need for employees to carry out work of a particular kind have ceased or diminished.

When the expiry of a fixed-term contract is likely to be by reason of redundancy, consideration should be given as to whether the employee has attained the requisite two year's service, which would make them eligible for a redundancy payment. If an enhanced redundancy payment is paid to permanent employees, fixed-term employees will also be entitled to the enhanced amount as, if a lesser amount is given, this is likely to constitute discrimination in terms of their fixed-term status.

Industrial Action

So with all this talk of redundancies, often this leads to a ballot for strike action.

Q7: In an industrial dispute, if the unions breach balloting technicalities, does that always mean that any resulting strike action is unlawful? YES OR NO?

A7: No

In terms of Section 232B of the Trade Union and Labour Relations Act 1992, accidental failures to comply with certain balloting technicalities are to be disregarded if the failures are unlikely to affect the result of the ballot.

So where does the pendulum sit? At first blush it looks like the pendulum has swung firmly in favour of

the unions with their Section 232B trump card. However the courts have taken an increasingly restrictive interpretation of the balloting technicalities. This approach saw a peak in 2009 in the number of interim injunctions/ interdicts granted to prevent strike action.

The most high profile of these injunctions was of course the High Court injunction granted in favour of BA which prevented UNITE from proceeding with a 12-day cabin crew strike over the Christmas period. The Court found that UNITE did not take reasonable steps to establish the identities of redundant employees who were leaving BA before the strike and prevent them from voting in the strike ballot. Even though support for the strike was overwhelming, and the numbers of leavers wrongly balloted did not remotely affect the outcome, the failure could not be disregarded as it was not "accidental", even though the court accepted it was "unintentional". Looking to the media coverage it looked like the pendulum had swung firmly in favour of the employers.

However, in March of this year the Court of Appeal made robust endeavours to stop that pendulum swinging. In *RMT -v- Serco & Ors* the Court of Appeal discharged two such interim injunctions which had been granted on grounds that there were defects in the balloting and notifications sent to the employers. Lord Justice Elias rejected the contention that the legislation should be strictly construed against trade unions seeking the benefit of the statutory immunities. If one starts from that premise, he says, "*the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was.*" He holds that the Trade Union and Labour Relations (Consolidation) Act should be given, as Lord Bingham put it in an earlier case, "*a likely and workable construction*".

Accordingly, the Court of Appeal overruled previous decisions that in order to be "*accidental*" under s.232B, the errors had to be "*unintentional and unavoidable*". The relevant question, said Lord Justice Elias, is why there was a failure. In this case, the union believed it was balloting the relevant drivers and no one else. "*Because of human errors and failings, it did not achieve that objective but extended the vote to two members not entitled to it. In my judgment s.232B was designed to cater for precisely this kind of case*".

Whether the Court of Appeal have stopped the pendulum swinging remains to be seen, but for the moment at least, technical breaches of the balloting requirements do not necessarily mean that it is the employer who "strikes it lucky".

Conclusion

This paper referred at the start to the American origin of the word "downsizing", some other such euphemisms include: "delayering", "smartsizing" or "workforce optimization"? Some businesses have even gone with "reshaping their cost base in order to implement a career alternative enhancement program"!

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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