Employment Law Breakfast Briefing

28 September 2010

East of England Showground, Peterborough

AGENDA

28 September 2010
Cambridge Suite, East of England Showground, Peterborough

7.30 - 8.00 am
Registration & breakfast

8.00 am - Anne Corder, Anne Corder Recruitment
Introduction

8.05 am - Martin Bloom, Partner, Hegarty LLP Solicitors
The Equality Act 2010

8.25 am - Tim Thompson, Partner, Hegarty LLP Solicitors
Withdrawal of the Default Retirement Age

8.45 am - Martin Bloom, Partner, Hegarty LLP Solicitors
Legislation & Case Law Update

9.05 am
Responding to questions submitted in advance and from the floor

9.20 am
Briefing finishes

Feedback Forms – please leave completed forms on your table or hand in at the registration table.

Hegarty Solicitors

Anne Corder Recruitment

Employment Law at Hegarty LLP

Hegarty LLP Solicitors has a prominent reputation for providing practical first-class employment law advice to its clients in this fast moving area of law. Our Employment lawyers understand the challenges facing human resources professionals, and are proactive in developing close working relationships with clients. The team is well known throughout Peterborough and Stamford. The calibre of our lawyers has meant we have been highly successful at attracting national clients.

Team Profiles

Martin Bloom – Head of Employment, Partner

Martin, who became a Partner at Hegarty LLP in 1983, is Head of the Employment Law department.

Expertise. All aspects of Employment law, from drafting employment contracts and consultancy agreements to representation at Employment Tribunals across the country.

Experience. Martin has over 30 years' employment law experience and is an accomplished presenter undertaking a large number of seminars and courses each year, including national conferences, in-house training and breakfast updates. He holds regular employment law updates with the local CIPD group and has published a book addressing the issue of bullying and stress in the workplace. For a number of days a year Martin sits as a Part Time Employment Tribunal Judge in the East Midlands region. He is a member of the Industrial Law Society and the Employment Lawyers Association.

Clients. Martin advises a very wide range of businesses and individuals on all matters relating to employment law. His clients range from individuals to large multinational organisations and 'high street' names employing thousands of people in the UK and beyond.

Contact details: Tel: 01733 295632 Email: martin.bloom@hegarty.co.uk

Tim Thompson – Partner

Tim became a partner at the firm in 1979. During his career Tim has had experience in a variety of commercial areas and has for the last nine years concentrated on employment law.

Expertise. Tim advises on a wide range of employment matters mainly for employers but does act for some employees and normally carries out his own advocacy at Employment Tribunals.

Experience. Tim provides day-to-day advice to clients on all employment law issues, such as implementing redundancies and business reorganisations, TUPE, managing employment terminations and conducting disciplinary and grievance procedures. He has extensive experience of managing claims within the Employment Tribunal system and negotiating settlements in a practical and, wherever possible, cost effective way.

Clients. Tim acts for a range of SME's and some private individuals. Tim's clients say he provides practical, commercially sound advice putting their minds at ease with his no-nonsense approach.

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Emma Carter – Solicitor

Emma is a new recruit to the firm having joined the Employment Law team in September. Emma's remit is to expand the legal services offered to small local firms by, for example, introducing a fixed fee scale for some employment law services. Emma will also be taking over the writing of the popular employment law news bulletin "E-ssentials"

Expertise. Emma provides advice on all aspects of employment law to employers and employees and is an accomplished trainer of employment law and HR practices to all group sizes, from 1 to 200.

Experience. Emma qualified over 10 years ago, having undertaken her training at a large London firm. Emma's background includes 9 years within an in-house legal team of a major retail supermarket giving her an excellent understanding of the procedures of internal HR departments and obstacles faced therein.

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Anne Corder Recruitment

ACR: Celebrating 15 years at the top

Fifteen years ago Anne Corder had a vision of how a recruitment agency should operate. She felt strongly that attention to detail, a sharp customer focus and a professional – and personal – service was what clients and candidates wanted. Providing these key elements, she felt, would ensure a successful agency built on a solid reputation.

After 18 years working in high profile HR departments and seven years as a founding partner in a recruitment agency, Anne had the business acumen, professional standing and knowledge bank necessary to strike out on her own.

So Anne Corder Recruitment came into being, in an unassuming city centre office with a handful of desks, three hand picked staff and a database of potential customers.

Right from the outset, the agency's ethos was clear. The team would work as an extension of clients' HR departments, handling each job vacancy and each applicant as an in-house team would. There would be no commission and quality would always win out over quantity. In 1995, employment rates were good and agencies were prolific in the high street. The aim was to make ACR the agency of choice, setting itself apart by offering 'added value' long before the phrase came into being.

A number of business initiatives were introduced in the early days and proved so successful they are continuing today. Regular employment law seminars, such as today's, was the first addition to the calendar, then came the annual salary survey. In an effort to be part of the bigger picture in

Peterborough, ACR began a relationship with schools and colleges which has led to sponsorship, award judging and presentation opportunities.

As ACR consolidated its position, the business grew and the team was strengthened. A management team shared out responsibilities. The low staff turnover is testament to the working environment that exists within the business.

The expanding team needed more room and, six years ago, the agency invested in the neighbouring building giving the space it needed to operate more efficiently. Two years ago, a satellite office was opened in Lynch Wood, Peterborough.

Throughout the entire 15 years, the agency has always been forward-looking. The vital role technology would play in the future of recruitment was recognised at an early stage. A major long-term investment programme has seen the agency become virtually paperless. Filing cabinets, photocopies and plastic folders have been replaced with a fully-integrated IT system that has increased the efficiency of the processes and procedures leading to a faster, more effective and more relevant service for clients and candidates. The agency's environmental achievements have been thrown into the international spotlight, securing awards and sparking interest from other companies keen to utilise the ACR blueprint.

With 99 per cent of CVs now arriving at ACR via email – astonishing when it's considered the Internet was in its infancy when the company began 15 years ago – the agency has recognised the part the online world plays in recruitment, and embraced it. Anne is now a regular blogger and the agency tweets several times a day. E-newsletters have replaced paper forms of communication and the ACR website has its own password protected areas for clients and candidates which are consistently under development.

Through all these changes, ACR has remained true to Anne's original vision, demonstrated by its consistent receipt of both ISO accreditation and recognition by industry regulator the Recruitment and Employment Confederation (REC), achievements which the entire team – the majority of whom are here today – are justly proud.

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The Equality Act 2010

Martin Bloom
Partner, Hegarty LLP Solicitors

Introduction

Direct Discrimination

Indirect Discrimination

Dual Discrimination

Harassment

Victimisation

Disability – a new definition

Pre-employment health questionnaires

Burden of Proof

Secrecy Clauses

Genuine Occupational Requirements

Disability Related Discrimination

Powers of Employment Tribunals

Gender Pay Reporting

The Equality Act 2010

1. The majority of the provisions of the Equality Act 2010 come into force on 1 October 2010.

2. The Act covers all forms of discrimination law in the areas of Employment, Services and Public Functions, Premises, Equality of Terms (including Equal Pay) and Education.

3. The Act includes the then Labour Government's desire to include the overall principle of "fairness" into all areas of discrimination.

4. Section 1 of the Act introduces a duty on public authorities in all areas, not just employment, to consider inequalities of outcome in any area that may result from "socio-economic disadvantage" when making any strategy decisions.

5. The overall object of the Act is to ensure that "everyone has the right to be treated fairly and the opportunity to fulfil their potential".

6. All previous Acts dealing with discrimination in the Employment Law field are now brought together under one Act i.e. –

- Equal Pay Act 1970
- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Employment Equality (Religion or Belief) Regulations 2003
- Employment Equality (Sexual Orientation) Regulations 2003
- Employment Equality (Age) Regulations 2006

7. The Act covers all employment in England and Wales and, with some minor exceptions, employment in Scotland. Northern Ireland, for the main part, is excluded from the provisions of the Act.

8. The principle new concept introduced by the Act is that of "protected characteristics" i.e. the grounds on which discrimination will be deemed unlawful. These are:-

   - Sex
   - Sexual Orientation
   - Race (including colour, nationality or ethic origin)
   - Religion or Belief
   - Pregnancy and Maternity
   - Marriage and Civil Partnerships
   - Gender Reassignment
   - Disability
   - Age

9. Sections 5 – 12 of the Act define each characteristic which, on the whole, replicates existing concepts of discrimination e.g. reference to a person who has a particular protected characteristic is a reference to a man or a woman in the field of sex discrimination.

10. The various kinds of discrimination are defined in the Act and widen previous established definitions in some cases.

11. Direct Discrimination

"A person (A) discriminates against another (B) if because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others". Except in the case of either pregnancy or maternity discrimination there will still be a requirement for a real or hypothetical comparator who does not share the relevant protected characteristic.

"Associative discrimination" is prohibited by the Act e.g. (A) is treated less favourably by (B) on the grounds of (C's) disability or age.

12. Indirect Discrimination

The definition of indirect discrimination is widened to encompass all forms. Indirect discrimination occurs when (A) applies a provision, criterion or practice ("PCP") to (B). (A) applies the PCP to persons with whom (B) does not share the relevant protected characteristic. The PCP puts or would put persons with whom (B) shares the characteristic at a particular disadvantage when compared with persons with whom (B) does not share the characteristic. The PCP puts or would put (B) at that disadvantage. The PCP is not a proportionate means of achieving a legitimate aim.

13. Dual Discrimination

The Act permits claims to be brought by combining protected characteristics which permit claims to be brought in relation to a combination of two protected characteristics e.g. age and disability or e.g. religion and sex.

The existing defence of "objective justification" in the field of direct age discrimination and other forms of indirect discrimination remains. The test is whether or not the provision, criterion or practice ("PCP") is a "proportionate means of achieving a legitimate aim".

14. Harassment

Harassment under the new Act extends to all forms of discrimination except harassment in the context of pregnancy and maternity or marriage and civil partnership. Under the old Race Relations Act harassment did not cover harassment on the ground of colour or nationality. That omission is now rectified in the new legislation.

A person (A) harasses another (B) if (A) engages in unwanted conduct related to a relevant protected relevant characteristic which has the purpose of effect of violating (B's) dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for (B). As in the case of direct discrimination harassment based on association and perception of another person is prohibited.

15. Victimisation

A person (A) victimises another person (B) if (A) subjects (B) to a detriment because (B) does a protected act or (A) believes that (B) had done or may do a protected act e.g. bring a grievance.

16. New Definition of Disability

The new definition of disability simplifies the definition previously set out under Section 1 Disability Discrimination Act 1995. The requirement that the physical or mental impairment affects one or more specified capacities including mobility, manual dexterity, physical co-ordination, speech, hearing or eyesight no longer exists. It is enough that the physical or mental impairment has a substantial adverse effect on a person's ability to undertake normal day to day activities (of whatever kind).

17. Pre-Employment Health Enquiries

The Act prohibits to an extent employers asking about a job applicant's health (including any disability) before offering the person work or before including that person in a pool of persons to whom it is intended to offer work in the future. An employer is not committing an act of disability discrimination merely by asking about a person's health but the employer's conduct in reliance on information given in any response may lead to a Tribunal concluding that the employer has committed a discriminatory act. Employers can still ask such questions if they are necessary to establish whether the job applicant will be able to comply with a requirement to undergo an assessment; whether a duty to make reasonable adjustments will arise or whether the job applicant will be able to carry out a function that is intrinsic to the work concerned.

18. Burden of Proof

The two stage burden of proof will now apply in all discrimination cases i.e. has the Claimant provided some evidence upon which an inference of discrimination could result and, if so, can the employer or prospective employer then produce such evidence that would lead to a conclusion that in fact no act of discrimination took place or was due to take place.

19. Secrecy Clauses

Clauses which prohibit employees discussing their pay with colleagues are now unlawful. The situation covers a "relevant pay disclosure" i.e. one which is made for the purpose of finding out whether to what extent there is a connection between pay and a particular protected characteristic e.g. sex or age. There is no general prohibition on clauses that hinder pay discussions only on clauses that hinder pay discussions aimed at establishing the existence of discrimination.

20. Genuine Occupational Requirements

The Act contains a general "occupational requirement" defence for all grounds of discrimination. The occupational requirement must be "a proportionate means of achieving a legitimate aim".

21. The House of Lords' decision in London Borough of Lewisham –v- Malcolm (2008) IRLR 700 is effectively revoked by the Act. The Act introduces the new concept of "discrimination arising from disability" thereby restoring the protection previously available under "disability related discrimination".

22. Enforcement Power of Employment Tribunals

The scope for Tribunals to make recommendations that will benefit the wider workforce and help to prevent discrimination occurring in the future is widened. A Tribunal can now make a recommendation to reduce the adverse effect on not only the individual Claimant but on any other person in respect of any matter to which the proceedings relate.

23. Gender Pay Reporting

The Act introduces the issue of gender pay audits. With effect from 2013 employers with more than 250 staff will have to provide reports on wages and salaries by reference to gender within the workforce. Public Bodies with more than 150 employees will be subject to this requirement by April 2011. There is in place a voluntary scheme whereby the Equality and Human Rights Commission will provide a limited degree of immunity to those organisations that participate voluntarily in providing such information.

Removal of the Default Retirement Age

Tim Thompson
Partner, Hegarty LLP Solicitors

Old Position – pre October 2006

- Unfair Dismissal claims cannot be brought for employees over the age of 65 years
- Redundancy payment ended at 65 years and payments tapered after the age of 64
- Pension age for men 65 years
- Employees "assumed" on pensionable age employment would normally cease

Post October 2006

- Employment Equality (Age) Regulations 2006
- New permissible ground for dismissal – retirement
- Employer serves notice not more than 12 months or less than 6 months on employee
- Default Retirement Age of 65
- Employees' right to request continued working
- Ability to justify earlier retirement age

Current Proposals for Change

- Notice procedure will not apply after the 6th April 2011
- Last retirement by the 1st October 2011 under the Default Retirement Age
- Still “able” to justify retirement on objective grounds
- Consultation ends October 2011
- No longer a Default Retirement Age

Was the retirement process good or bad!

- Perhaps depends on whether you are the employer or the employee

Was the retirement process good or bad!

For the Employer

- Avoids direct criticisms of performance
- A tactful way to “lose” staff who you feel are no longer an asset to your business
- Avoids risk of Tribunal claim
- Enables junior staff to be promoted and progress
- May enable employers to keep good staff but negotiate part-time work

Was the retirement process good or bad!

For the Employee

- Limits working life and ability to earn income in later years
- May make employees feel devalued
- Avoids employer progressing performance management which can be unpleasant

What will it mean?

- A further change in culture in the workplace?
- Potentially retirement will cease except where the employee wishes to stop work
- Few firms will attempt to justify retirement
- Forced dialogue between employer and elderly employees
- Potentially fair grounds for termination under section 98 Employment Rights Act which are:
  - Performance
  - Conduct
  - Redundancy
  - Some other substantial reason

Government's Justification

- Change in demographics
- Improvement in healthcare leading to more active people generally and longer life
- Encourage employees to work longer to contribute to their own finances
- Review of pensionable age to 66
- There are health and social benefits by people continuing to work
- Removing the "administrative burden" of the retirement procedures

Options

1. Stop using retirement after the 6th April 2011, or
2. Continue to use retirement but need to justify

Justification

Discrimination on age grounds can be justified: -

"if objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary" Regulation 3 Age Regulations

What to do?

- Review ageing workforce to see if there are any retirements arising where the notices can be used
- Improve performance management to ensure all staff are monitored adequately on actual performance at work
- Create dialogue to discuss your views and the employees' intentions for their working life
- Consider offering role changes such as reduction in responsibilities or hours worked

Default Retirement Age

The Government have declared that they are proposing to phase out the Default Retirement Age from the statutory retirement procedures that were implemented on the 1st October 2006.

Prior to that date the following factors were relevant: -

1. Unfair Dismissal claims could not be brought by employees over the age of 65 years. This meant that if the employee did not wish to retire themselves at the age of 65 they could be given contractual notice after that date without any recourse on the employer.

2. The Statutory Redundancy Scheme meant that redundancy payments were not applicable after the age of 65 and the payments tapered after the employee became 64. An employer could argue that the employment was being ended on the grounds of “redundancy” to placate an employee, but had no liability to make a redundancy payment if the termination took place after the 65th birthday.

3. The state pensionable age for men was 65 which tied in nicely with the “expectation” that employees would cease work at that stage and then be able to claim their State Pension. Private pensions are likely to be claimable before that date in any event so people who were retiring in the late 1970’s to early 1990’s may well have been financially better off to consider retirement rather than continuing in employment.

4. The general perception within the workforce was that people would work until the age of 65 and then enjoy a retirement funded by their pension. Few employers encouraged employees to remain with them on the basis that there was a supply of good replacement labour available to fill the roles of those retiring.

With effect from the 1st October 2006 the Employment Equality (Age) Regulations became law, which created a new permissible ground for termination of employment, namely retirement. Irrespective of what the employee would allege, providing the employer went through the necessary statutory procedures, if a subsequent application was made to a Tribunal following termination the Tribunal were bound to accept that the termination of employment was on the grounds of retirement and therefore no compensation for Unfair Dismissal would be payable.

The basic procedure was that the employer needed to serve a notice on the employee not more than 12 nor less than 6 months before the employer required the employee to retire. The employer also needed to serve a notice on the employee informing him or her that they had the “right to apply” for extended working. The intention was then that the employer had to consider that request and if appropriate agree terms for continued working. There was complete flexibility whether it was the same role with the same responsibilities or the same remuneration. If any extension was agreed less than 6 months the retirement would take place at the end of that extended period. If the employer agreed any extension beyond 6 months a further statutory notice needed to be served which has led some employers getting into difficulties of extending the employment longer than they originally proposed.

The Government at this stage imposed the Default Retirement Age of 65 so under the statutory procedure retirement would not take place earlier than 65 unless the employer could justify an earlier retirement age. An example of this is Airline Pilots who have an earlier compulsory retirement age and it appears generally few employers have been able to satisfy the justification exemption for imposing an earlier retirement age. It should be remembered of course that these

procedures give the employee the benefit of continuing to work but there is no compulsion on them to do so. It very much depends on their interest in continuing to work whether employees under the current system have applied for extension. That may be dictated by their enjoyment of the work they carry out; the remuneration they receive and their ability to continue doing the same job. In recent years with the poor economic climate many employees' pensions have been adversely affected so some employees have wished to continue to work in the hope that they can earn additional income and defer taking their pensions whilst their pension fund has hopefully had time to increase.

The "duty to consider" the employee's request requires the employer to hold a meeting to discuss the proposals and then give a written decision. If the employee is aggrieved at the outcome of that request he or she can lodge an appeal. The Government's statistics indicate that the majority of requests that were made were accepted by the employer for some period of continued employment, but no details have been given as to whether they were generally short term or whether they are in the same role or some reduced role. There is no obligation on the employer to give reasons for denying the employee's request, which clearly gives the employer the upper hand in those negotiations.

The Government, when the legislation was passed, committed itself to review the Default Retirement Age in 2011, which it has done. It has given an indication that it intends to phase out the Default Retirement Age by the 1st October 2011. The transitional arrangements will commence so that no notice of retirement may be served after the 6th April 2011 and no retirement on the Default Retirement Age can take place after the 1st October 2011.

Employers are still able to justify termination on retirement grounds as long as they are on objective grounds. Consultation ends in October this year and the Government is committed to give a formal response and confirm the legislation by November this year. This will have an impact on an employer as it will no longer be able to lawfully terminate the employment at the age of 65, unless it is on one of the permissible grounds for termination under section 98 of the Employment Rights Act which are: -

1. Capability.

2. Conduct.

3. Redundancy.

4. Illegality; or

5. Some other substantial reason.

Employers are likely to avoid thinking of the redundancy route, as this will involve the payment of a redundancy payment which is a payment of a week or a week and a half's wages capped at £380.00 per week. The current maximum payment is £11,400.00. The alternative is that the employer needs to justify the retirement on objective grounds, which in practical terms is not going to be an easy task.

This may well mean that employers will need to consider the capability and performance of the elderly employee. That potentially will cause some friction. There is then the risk that the employee is aggrieved and may feel that they have been harshly assessed which could lead to an Employment Tribunal, and the possibility of compensation, if the Tribunal considers the employer was not

reasonable in treating their performance as a reason for dismissal. Under normal performance management employees should be given the opportunity of improving, so in general terms a number of weeks or possibly months may be required for the employee to have the opportunity of improving their performance. Whilst that may not be ideal, it does mean that employers should look at the performance leading up to the former Default Retirement Age and perhaps start implementing performance management at an earlier stage. There is no need to wait until the 65th birthday if you consider the staff member is not performing as they should. There could be an argument that if you wait until the 65th birthday the employee may say that the real reason is not their actual performance but it is simply that you want to remove staff over the age of 65, so there may be some advantage in considering it, if the performance is open to fair criticism, as soon as their performance is seen to drop.

The statutory retirement procedures have appeared to be a practical and helpful tool for the employer as they have by the formal procedure been able to give a clear indication to their employees not more than 12 but not less than 6 months prior to the date of their 65th birthday. Having a statutory procedure which the employer has to implement is perhaps less confrontational than attempting to open negotiations with the employee to ascertain their intentions about their future working career. An employee may be very sensitive and protective about their real intentions, as they do not wish to lose their employment. There is always a risk that any of those discussions, however tactfully framed, will be misinterpreted by the employee. The real benefit was that if the procedures were implemented correctly the obligation to consider future work was not a particularly onerous burden and did enable the employer to introduce some variations in the terms and conditions of the employment, such as part-time work or giving up responsibilities. This had the benefit of enabling the more junior staff to be promoted into more senior roles and also enabled the employer to cherry pick at this stage on those employees that were still considered valuable against those that were simply doing the bare minimum to keep their employment.

The statutory retirement procedure was potentially detrimental to the employee as it provided an easy exit route for the employer, except for those employees that it valued and wished to continue. The scheme gave no inducement for staff to remain if they wished to leave and the removal of the scheme next year will not affect that.

The justification route for retirement at 65 or below imposes a substantial burden on the employer. Many legal practitioners will not recommend attempting to use the justification defence. Differences of treatment on the grounds of age will need to be objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives and the means of achieving that aim must be appropriate and necessary. This means that Age Discrimination can be justified if it is a proportionate means of achieving a legitimate aim. Guidance was published by the Equality and Human Rights Commission reflecting the current state of the law on objective justification which states: -

"Proportionate" means: -

- What the employer is doing is actually achieving its aim.
- The discriminatory effect should be significantly outweighed by the importance and benefits of the legitimate aim.

- The employer should have no reasonable alternative to the action they are taking. If a legitimate aim can be achieved by another or less discriminatory means they must opt for that route.

"Legitimate" means: -

- Economic factors such as the needs of and efficiency of running a business;
- The health, welfare and safety of the individual (including protection of young people or older workers);
- The particular training requirements of the job.

A legitimate aim must correspond with the legitimate need of the employer, e.g. economic efficiency may be a real aim but saving money because discrimination is cheaper than non-discrimination is not a legitimate need.

The Government's justification for removal of the Default Retirement Age is based on a change in demographics and a clear improvement of healthcare, which has led to more active people living longer lives. The Government have their own aim for encouraging employees to work longer to contribute to their own finances in later years and also to reduce the burden on the State. The Government are reviewing the pensionable age upwards to 66 and there is some strength to the argument that as long as the employee is capable of still performing their role all parties, the employer, the employee and the Government benefit by continued employment.

One of the justifications of removing the statutory procedure is to reduce the administrative burden on the employers. Compared to many of the administrative burdens which have been imposed in recent years the Statutory Retirement Scheme has probably caused little inconvenience and has easily assisted employers in removing elderly staff without the risk of a challenge and certainly little prospect of them succeeding in a claim for compensation.

The consultation document poses a number of questions and one of the possibilities that may come out following the consultation is that the Government may in due course issue formal guidance on how to discuss retirement in a mutually beneficial way. The other alternative is possibly a statutory Code of Practice including what covers retirement discussions. That, if implemented, would be helpful as it would set out clearly the parameters of the discussions and perhaps reduce the risk of misunderstanding and unfair allegations by the employee. ACAS Codes of Practice have always been helpful and are well publicised. If employees can gain this information of the likely areas of discussion from the various Government websites they may be more willing to participate in a meaningful way, so that both they and the employer can discuss the relevant issues openly.

With the clock now ticking for employers to utilise the retirement process you should look at your ageing workforce and decide whether you wish to serve any notices before April next year where the employee's 65th birthday is prior to the 30th September 2011. Even if the 65th birthday has already passed the retirement process can be utilised by giving the minimum six-month notice period now, so as long as that notice period expires prior to the 30th September 2011, the dismissal will be on the grounds of retirement.

Planning future staffing requirements perhaps ought to be reviewed to decide whether you wish any of your elderly staff to remain in employment after their 65th birthday and if so in what position and for what period. If the employee does not wish to work beyond their 65th birthday you obviously

need to consider succession planning which will create other opportunities perhaps for more junior members of staff.

The Government's intention is that the removal of the Default Retirement Age may induce employers to look differently on their ageing staff and for the staff themselves to come forward with counter-proposals for their future involvement in the business. Some staff may enjoy working and be capable of carrying out the role to an acceptable standard for many years beyond their 65th birthday. Others may wish to have a phased retirement not perhaps starting until they are 65, whereby their responsibilities and/or their working hours are gradually reduced. That could also be of benefit to the employer, as it would enable there to be a phased handover to the successor and also a reduced financial liability if the elderly employee is wishing to work part-time and gradually reduce the days or hours they work each week.

It would also cover the situation where senior employees are encouraged and are happy to take a more junior role in the organisation but still use the skills and experience they have perhaps in training more junior people rather than carrying out the actual work itself. It may be beneficial to the company to re-utilise skills to a different part of the business perhaps at a reduced income. The employees may well be interested in such a proposal as inevitably they may find it difficult to secure employment on the open market at that age and may, after having many years of service with one employer, find the thought of becoming a new employee in a different organisation rather intimidating.

It is clear in the current economic climate that many employees will wish, subject to being able to carry out the work functions to an acceptable standard, to continue working beyond what was the earlier Default Retirement Age.

Legislation & Case Law Update

Martin Bloom
Partner, Hegarty LLP Solicitors

The Bribery Act 2010

Privileged information

Depression – disability?

Financial loss – unfair dismissals

A surprising decision!

Changing terms & conditions

Transfer of Undertakings

Legislation & Case Law Update 2010

1. Bribery Act 2010

   The Bribery Act received Royal Assent in April 2010. It comes into force in April 2011.

   The Act replaces previous provisions including the Prevention of Corruption Acts 1889 – 1916.

   It creates a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf.

   It makes it a criminal offence to give, promise or offer a bribe and to request, agree to receive or accept a bribe either at home or abroad.

   It increases the maximum penalty for bribery from seven years to ten years imprisonment with an unlimited fine.

2. Is advice given to an employer by non-lawyers privileged information and therefore not disclosable to the employee? This issue was determined in the case of *Scotthorne –v- Four Seasons Conservatories (UK) Ltd EAT14/05/2010.* The Employment Appeal Tribunal determined that advice given by both lawyers and non-lawyers is subject to litigation privilege if it is given for the dominate purpose of litigation including how to avoid it and how to be best placed should it occur. It is not therefore limited to any individual proceedings themselves.

3. When does depression constitute a "disability" within the meaning of the Disability Discrimination Act 1995 and now Section 6 Equality Act 2010? The Employment Appeal Tribunal has considered this issue in the case of *J –v- DLA Piper UK LLP*. In this case the Employment Appeal Tribunal determined that not only should the issue of "an impairment" which can include a mental illness be considered but the "adverse effect" of that impairment was an issue equally to be examined before determining whether or not a person fell within the definition of a "disability".

4. An employee who has been unfairly dismissed and who succeeds in pursuing their claim before an Employment Tribunal cannot subsequently bring other civil proceedings alleging breach of contract arising from the employer's failure to correctly follow their disciplinary procedure. Any financial loss which flows from the unfair dismissal forms part of the Compensatory Award at the Employment Tribunal and cannot be pursued as a further or separate claim before the Civil Courts. *Botham –v- Ministry of Defence (2010) EWHC 646.*

5. An employee who was dismissed from his employment as a worker in the Community and Learning and Development wing of a school for watching pornography was unfairly dismissed. The employee concerned was diabetic and alleged that he watched the material concerned as a result of a hypoglycaemic episode. The dismissal was unfair because the employer had failed to investigate or give due weight to his medical condition before deciding to dismiss him. *City of Edinburgh Council –v- Dickson EAT 0038/09.*

6. Provided that an employer's term contained within a Staff Handbook is unambiguous the employer is permitted to introduce contractual changes (in this case a new pay scheme) without the consent of the employees if the employer contractually has the right to vary its terms. *Bateman –v- Asda Stores Ltd EAT 00221/09*.

7. In cases involving transferred employees pursuant to the Transfer of Undertakings Regulations 2006 the new employer is not bound by a clause included in the employee's previous contract of employment linking pay rises to those agreed by a subsequent negotiating authority or Trade Union discussions. *Parkwood Leisure Ltd –v- Alemo-Herron 2010 EWCA24*.

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