Ashfords
Solicitors

Employment Update

August 2010

Employment News

The Equality Act 2010 - Guidance for Employers

You have probably not escaped the fact that The Equality Act 2010, is coming into force in October 2010.

The Equality and Human Rights Commission (EHRC) has now created a series of guidance documents on the new law. To help employers understand the new law and their obligations, there are seven guidance documents specifically aimed at employers, amounting to a total of nearly 700 pages! All documents can be found on line on the EHRC website, http://www.equalityhumanrights.com, but please note that the guidance does not come into force until 1 October 2010.

In preparation for the new legislation, all employers would be well advised to ensure that their HR Policies and Employment Contracts are updated to reflect the new legislative framework. We would be happy to agree a fixed fee for updating your employment documentation. Please contact us to find out more.

"Right to Work" Document Checks and Expired Passports

The UK Border Agency (UKBA) announced on 4 August 2010, that it has revised its policy on whether employers can accept Indefinite Leave to Remain (ILR) in an expired passport as evidence of right to work.

Employers need to ensure that their employees are not working in the UK illegally. As such, they need to carry out "right to work" document checks for all employees.

For further information about employers obligations to prevent illegal working, you can download the summary guidance for employers.

If it finds that an employer employs workers illegally, the UKBA can impose penalties of up to £10,000 per illegal worker. However, provided that the appropriate checks have been carried out and the correct documents have been copied for prospective employees, employers have a statutory excuse against payment of a civil penalty for employing those individuals illegally, even if it turns out that they are in fact working illegally (unless the employer knowingly employs those individuals illegally).

Previously, employers had to see evidence of a prospective employee's leave to remain in a valid passport. However, UKBA has now revised its policy and decided that employers can accept ILR in an expired passport as evidence of right to work.

The legislation itself has not been amended, and provides that in order to have a statutory excuse, employers must see evidence of a prospective employee's "leave to remain" in a valid passport. However, UKBA says that it is now possible to accept ILR in an expired passport as evidence of right to work, and that they are considering an amendment to the legislation in due course to reflect this. They also intend to issue new guidance.

For any type of leave to remain other than ILR, employers must only accept valid passports as part of the right to work document checks.

Retirement Age - is it over the hill?

We briefly reported last month that the Government proposes to remove the default retirement age (DRA) of 65 from October 2011. This month, we look at the issues surrounding this in more depth.

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Currently, an employer who does not wish to retain an employee beyond the age of 65, (provided they follow the set retirement procedure) may dismiss that employee for a fair reason, retirement, on or after their 65th birthday.

The current procedure is a little prescriptive, since it involves providing the employee with six months' advance notice of the date that they are due to retire and giving them the opportunity to request that they continue working. Such requests must then be considered by the employer and the employee must be given the chance to appeal if they dislike the response. However, there is currently no obligation on the employer to permit their employee to continue working past their 65th birthday.

Assuming that the DRA is abolished, employers will then have to rely on their own objectively justified "compulsory retirement age". This is less straight forward as the employer will have to show that they can justify the compulsory age they have selected as a proportionate means of achieving a legitimate aim. This point was considered this month by the Court of Appeal in Seldon v Clarkson, Wright and Jakes and anor (see Case Law section on Page 3) in the context of a partnership. There, the Court held that the compulsory retirement age of 65 was potentially justifiable by reference to the partnership's workforce planning aims. The Court considered that since the policy had an aim that is consistent with the Government's social policy justification for the Age Regulations, then it was justifiable. However, once the DRA has been removed, then it is likely that such an argument will be more difficult to make out.

If an employer seeks to rely on a compulsory retirement age, then it is likely to be critical to identify how the imposition of a retirement age fits with the Government's social aims in order that the employer can justify its actions as proportionate and necessary in achieving one or more of those aims.

In practice, it may be that this exception is likely to have limited application. Performance management and capability are likely to become the key focus. Therefore it is vital that employers are confident that their managers are equipped to deal with performance and capability issues.

Consultation

The announcement that the DRA may be removed was accompanied by a consultation paper inviting comments on issues such as:

- Whether the Government could provide additional support for individuals and employers in managing without the DRA or a statutory retirement procedure;
- Whether further guidance or a more formal code of practice on handling retirement discussions is needed or appropriate; and
- The possible adverse impacts on insured benefits and employee share plans if there is no DRA.

The closing date for responses to the consultation is 21 October 2010 and a copy of the Consultation Paper can be found here: http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation

Case law

Claimants behaving badly: Nicolson Highlandwear Ltd v Nicolson

In *Nicolson Highlandwear Ltd v Nicolson* the Employment Appeal Tribunal (EAT) decided that the Claimant had to pay the Respondent's costs in circumstances where he had won his unfair dismissal claim on procedural grounds, but had acted unreasonably in bringing the claim.

The Facts

The Claimant and the Respondent's Mr Chalmers had a business together, where the Claimant was employed as retail manager. When Mr Chalmers visited the shop in October 2008 he found several matters which lead him to the conclusion that the Claimant had been acting fraudulently. There were cash discrepancies and evidence that the Claimant was running a second, competing shop. He drafted a dismissal letter, which he gave to the Claimant at a meeting the following day.

Decision

The Claimant issued a claim for unfair dismissal to the Employment Tribunal (ET). The ET found that the Claimant's behaviour constituted gross misconduct which directly led to his dismissal. At the time, the statutory dispute resolution procedures applied. Because the Respondent had not followed the standard statutory dismissal procedure, the ET held that the Claimant had been 'automatically' unfairly dismissed, but there was a finding of 100% contributory fault against the Claimant. The ET refused the Respondent's costs application.

The Respondent appealed to the EAT and won. The EAT held that the Claimant acted unreasonably in bringing the

claim. It did not require any understanding and knowledge of law on the part of the Claimant to know that this was the case, but "only a very basic understanding of the need to be honest and not to breach trust, particularly in financial matters". The EAT held that the Respondent was entitled to costs.

Comment

The case shows that it is possible for an employer Respondent to be granted costs even where the Claimant has won his claim. In essence, Claimant will act unreasonably in bringing a claim if simply seeking a declaration of unfair dismissal. Unlike discrimination cases, there is no provision for declaratory relief in unfair dismissal cases.

Employers need only pay holiday pay for the last year of employment

In *Khan v Martin McColl [2010]* an employment tribunal decided that on termination of an employment contract, the employer need only pay the employee for the holiday accrued in the last year of employment.

The Facts

Mr Khan went off sick on 26 May 2008 and remained off work until his employment terminated on 14 August 2009. His employer paid him for the holiday accrued in his last year of employment - 2009.

Inspired by the case of HM Revenue & Customs v Stringer (see the February 2009 Employment Update), Mr Khan brought a claim for unlawful deductions for unpaid holiday pay for years prior to 2009.

Decision

The Employment Tribunal ruled that the unlawful deductions claim was out of time. Had the payment for 2009 not be made, both the 2008 and 2009 holiday pay could have been claimed as a series of linked deductions. However, the payment of the 2009 payment broke the series, leaving claims for 2007 and 2008 holiday pay high and dry.

Comment

This decision is only a tribunal decision. It does have a strong logical basis, but it is possible that it will be overturned by the higher courts.

There is certainly a strong argument that it does not sit comfortably with *Stringer*, or the decision of the European Court of Justice in *Pereda v Madrid Movilidad SA C-277/08*, allowing employees on long term sick leave to carry over untaken leave to the following holiday year.

Whether or not the decision in this case enjoys longevity or not, it is clear that for now employers in these circumstances should pay holiday pay for the last year of employment when employment ends, and this should be done prior to any claim being made. If proceedings have already started, it is likely that any payment of the most recent year's holiday pay will merely be regarded as part-payment of a claim comprising of a series of breaches.

Court of Appeal sanctions partnership compulsory retirement age

In Seldon v Clarkson, Wright and Jakes and anor the Court of Appeal confirmed the EAT's decision that a compulsory retirement age of 65 for law firm Partners was potentially justifiable.

Like many partnerships, Clarkson, Wright and Jakes (CWJ) had a partnership deed containing a compulsory retirement age of 65 for Partners. Mr Seldon was forced to retire at 65 and he brought claims under the Employment Equality (Age) Regulations 2006. One of his claims was that his retirement was direct discrimination under Regulation 17 (which prohibits unjustified age discrimination in partnerships). The Tribunal had to consider whether CWJ had a legitimate aim that it sought to achieve, and whether the compulsory retirement age of 65 was a proportionate means to achieving those aims.

The Tribunal found that CWJ legitimate aims were:

1. Ensuring that the opportunity of partnership is available for senior Solicitors;
2. Facilitating partnership and workforce planning; and
3. Creating a congenial and supportive firm culture by limiting the need to expel partners by way of performance management.

The Tribunal agreed that the retirement age of 65 was a proportionate means of achieving those aims and therefore rejected the direct discrimination claim.

Mr Seldon appealed to the EAT. The EAT agreed that the Tribunal had correctly approved CWJ's legitimate aims. However, they found that the third aim could not justify a retirement age of 65 since it was based on a discriminatory stereotype (that partners' performance tends to drop at 65). The EAT therefore remitted the case to the Tribunal to reconsider the question of justification based on just the first two legitimate aims. Mr Seldon appealed to the Court of Appeal on various grounds.

Mr Seldon argued that the ECJ's decision in the "*Heydey*" case established that legitimate aims must be of a 'social policy or public interest' nature and should not be simply to serve an employer's individual objectives. The Court of Appeal rejected this argument, saying that they considered that the ECJ had held it was the Age Regulations themselves that had to be justified with reference to social policy or public interest, rather than an individual employer's aims.

The Court of Appeal felt it was permissible for a partnership to have "mixed motives" and that if it pursues an aim consistent with the Government's social policy justification for the Age Regulations, then it would be contradictory for the Court to render the partnership's act unlawful. This was provided that the act was a proportionate means of achieving its aim. The Court therefore held that all CWJ's aims were legitimate. In the Court's view, the Default Retirement Age of 65 for employees (contained in Reg 30) supported the choice of 65 "as a fair and proportionate cut-off point" for the partnership.

This decision may be a little surprising following the ECJ's decision (which does appear to suggest that all acts, rather than just the Regulations themselves, should promote a social policy or public interest aim). However, if the Default Retirement Age is removed, then it is questionable whether a similar examination of "legitimate" aims would have the same result. Employers should therefore look very carefully at the reasons for choosing a particular retirement age within their organisation, if they wish to be able to objectively justify it as a legitimate aim.

Legislation

Additional paternity leave?

The Additional Paternity Leave Regulations 2010 came into force shortly before the election. They give fathers of babies due on or after 3 April 2011 the right to take up to six months' paternity leave if the baby's mother has returned to work, and the baby is more than 20 weeks old. This right is in addition to fathers' existing right to take two weeks' paternity leave.
It is now unclear whether fathers will ever benefit from the Regulations, as they may be repealed.

The new Government stated in its coalition agreement that it would "encourage shared parenting from the earliest stages of pregnancy - including the promotion of a system of flexible parental leave".

The Department of Business is currently considering whether the Additional Paternity Leave Regulations are the best way forward to achieve this. The Government will present its proposals later in the year.

The Government has acknowledged that businesses need certainty on timetabling, but the future of the Additional Paternity Leave Regulations is currently uncertain, and the Regulations may be scrapped in favour of something else.

Many employers will have already made changes to their employment policies in preparation for next April. Those policies will now need to be revised again if the Government decides to change or scrap the current Regulations.

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