



→ Employment Law Newsletter

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Economic upheaval - what's next for employers?

Figures for the final quarter of 2009 indicate that the UK economy has finally emerged from recession and brought an end to 6 successive quarters of contraction.

Serious concerns remain over the strength and sustainability of the recovery with many high profile economists at odds over how to best approach reducing the budget deficit. Most recently, for example, the IMF has warned that the fragility of the global economy will require further fiscal support and that 'stimulus' packages should be left in place well into 2010.

No doubt, with the election looming, the ensuing political sparring will continue to dominate the headlines. Discussions over a mandatory retirement age has, in recent weeks, further contributed to the debate with over 60% of over 50s surveyed by the Equality & Human Rights Commission stating they wanted to work beyond 65. Many of those surveyed had to keep working for financial reasons.

We look at the implications for businesses should legislation to extend working be introduced.

In the meantime, businesses have much to contend with. Not least is the introduction of "Fit Notes" and the right to request time off for training, which will require employers to review and if necessary, amend, existing policies and procedures.

We also focus on two recent judgments in cases involving age discrimination, where employers' arguments that a maximum age limit could be legitimately applied were considered.





Finally, we would like to remind you about our forthcoming seminar programme and would welcome the opportunity to discuss current issues with you.

During March and April we will be looking at topical issues including age discrimination, TUPE and agency workers, in addition to recent key cases and a legislation round up.

Email claire.bamford@geldards.com to book your place at either our Derby or Nottingham seminar..



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→ Is A Fixed Retirement Age A Thing Of The Past?

Do the proposals go far enough?

In June 2009, the Government announced it would bring forward to 2010, its planned review of the age employees can be fairly dismissed by reason of retirement to “respond to changing demographic and economic circumstances.”

Furthermore, as we reported in our Autumn Newsletter, although the judgment in the ‘Heyday’ case confirmed the Default Retirement Age (“DRA”) of 65 was legal, Mr Justice Blake made it clear that in his opinion there was a “compelling case” for a change in the law and he further added that “he could not presently see how 65 could remain as a DRA after the Government review”.

Government Consultation

The Government consultation, due for completion by February 2010 before the official review, is casting its net widely and looking for evidence relating to the operation of the DRA in practice and why businesses use mandatory retirement ages.

It will report on the impact of raising or removing the DRA on businesses, individuals and the economy and will be examining the experience of businesses operating without a DRA and the cost implications.

It has been argued by many that as the state pension age is set to rise to 66 in 2024 and 67 a decade later, the

current mandatory retirement age of 65 is outdated and inflexible.

Skills Shortage

Moreover, it was reported in January this year that the survey undertaken by the Equality and Human Rights Commission found that “Britain has experienced a skills exodus during the recession and as the economy recovers we face a very real threat of not having enough workers - a problem that is further exacerbated by the skills lost by many older workers being forced to retire at 65.”

Given the current economic climate, scrapping the DRA altogether would certainly be met with strong resistance. Change in the existing law is however highly likely.

Economic Implications

A recent report published by PWC warns that the condition of public finances in the UK would indicate that plans to raise the retirement age to 68 will not go far enough.

It estimates that pushing the state pension age to 70 would avoid the need for raising more income by taxation and would enable the state to cover the majority of the costs of an index-linked basic pension.





However, if the DRA is simply increased by two or three years, it will be a case of 'as you were' for employers and employees, save for the increased default retirement threshold.

Please note that this is a general update. It will be important to seek specific legal advice as to the impact of this legal development on your particular circumstances.

If you require any further information in respect of this or any other topic please contact any member of the Geldards' Employment Team.





→ Fit To Return To Work?

More red tape or a benefit to all?

Following a groundbreaking report into the health of Britain's ageing population in March 2008 by Dame Carol Black, the National Director for Health and Work, the Government proposed a package of measures designed to help employees stay in work and return to the workplace as soon as possible.

It is estimated that the cost to the British economy of sickness absence is over £100 billion each year.

On 6 April 2010 new medical "fit notes" will replace the current "sick note".

Why Introduce Fit Notes?

The Government hopes that the introduction of the "fit note" will help cut those claiming long-term sickness benefits from 2.5 to 1.6 million.

It is generally accepted that work is good for your health and that, as the Department for Work & Pensions states, "often going back to work can actually aid a person's recovery".

Conversely, staying off work can lead to "loss of confidence, risk of isolation, mental health issues, de-skilling and social exclusion".

How Will It Work?

The fit note will allow doctors to record not only whether a patient is fit or unfit for work but also whether an employee may be capable of carrying out 'some work', even if it is unrelated to their existing duties. The "fit note" will enable employees to get the best possible advice about staying in work. If employees are genuinely unfit, the fit note may assist employers in facilitating a speedier return to work.

The fit note will set out the work employees could perform and how their duties and hours could be temporarily altered to take account of their health. For example, if an employee has a problem with mobility, a fit note might suggest a job where they can work sitting down rather than standing up.

Implications

The new "fit note" system may assist employers' return to work programmes. However, it may have disadvantages, particularly where an employee and GP disagree on what the employee can or cannot do. Currently, if employees are signed off sick by their GP, they cannot be forced to work before they are better.

However, under the new system, a GP may consider an employee capable of light duties, a view that may not be shared by the employee. This may lead to an employee feeling forced to accept an early return to work or an employer having to insist upon a return to work and the





possibility of implementing disciplinary sanctions if the employee resists.

The Employment Lawyers Association (ELA), which drafted a response to the Department of Work and Pensions Reforming Medical Statement paper, said GPs would need to make decisions about partial fitness to return to work without proper knowledge of what an employee's job entails.

The ELA was also concerned about the impact on the costs and resources involved. Whilst some large businesses may have occupational health advisers in-house and be better able to afford the cost of making workplace adjustments for a partially fit employee returning to work, smaller business may not.

Employers will also need to bear in mind their obligations to make reasonable adjustments under the Disability Discrimination Act 1995. Employers may find GPs' recommendations used as evidence of potential reasonable adjustments. They should, therefore, consider such suggestions fully, although they are not bound to implement them if they can show they are unreasonable for genuine business reasons.

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→ Time Off For Training?

Phased introduction from April 2010

2010 is expected to be a relatively quiet year for employment legislation. One change that employers of all sizes should begin to plan for, however, is the new right to request time off for learning.

This new right was included in the Apprenticeships, Skills and Learning Act 2009 which introduces a new section into the Employment Rights Act 1996. It is being introduced on a staggered basis so that from 6 April 2010 it will apply to all employers with 250 or more employees and be fully in force for all employers, no matter how small, with effect from 6 April 2011.

Who Does It Apply To?

Any employee with more than 26 weeks' service will be entitled to make a request for time off to undertake training to improve their effectiveness at work and the performance of their employer's business.

What Is The Procedure?

This mirrors the existing flexible working application procedure, which requires an employee to submit a written request, and provides an opportunity to appeal against any refusal.

Whilst it is open to an employer to refuse a request to work flexibly where it has a specified business reason, it is equally possible to refuse a request for "time to train" for either very similar business reasons or because the employer is not satisfied that the requested training will actually improve the employee's effectiveness at work or the performance of their business.

However, employers need to be aware of the potential for tribunal claims. This could include a claim for failure to follow the request procedure, protection from detriment for making an application and automatically Unfair Dismissal where dismissal is found to have occurred because an application has been made.

Employers should consider all requests seriously and follow an appropriate procedure. They are under no compulsion to actually agree to a request and cannot be forced to do so by a tribunal.

Implications

For employers who encourage employees to undertake professional development courses, the new right is likely to create very few problems. The only area of concern for them will be the need to ensure that their procedures reflect the statutory minimum requirements.

For those without such policies, it may be wise to consider putting one in place.





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→ Good Reason To Discriminate?

Age Discrimination is one of the few areas where both direct and indirect discrimination can be objectively justified.

The European Court of Justice has recently handed down two decisions, which provide useful guidance regarding the use of maximum age limits in continued employment.

What Does The Law Say?

The Equal Framework Treatment Directive contains the relevant provisions in relation to objective justification.

Whilst the Directive prohibits both direct and indirect discrimination on the grounds of age, there are some exceptions:

- Article 4 of the Directive allows a difference in treatment based upon a characteristic related to age where the characteristic is a “genuine and determining occupational requirement”, provided that the objective is legitimate and the requirement is a proportionate means of achieving it;
- Article 6 of the Directive allows member states “to provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim,

including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary”;

- Under Article 2(5) of the Directive, member states are also permitted “measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”.

Wolf v Stadt Frankfurt Am Main

Facts Of The Case

Mr Wolf applied for the role of a firefighter. However, at the time of his application, he was 31 years old, which was over the Frankfurt Fire Brigade’s age limit of 30.

His job application was subsequently rejected and he brought an action in the German courts, claiming that he had been unlawfully discriminated against on the grounds of his age.





Nub Of The Matter

The German courts asked the European Court of Justice (ECJ) if the prescribed age limit was a justified form of discrimination.

The ECJ held that it was justified as the concern to ensure the operational capacity and proper functioning of the professional fire service constituted a legitimate aim. In addition, it found that the need for exceptionally high physical capacities may be regarded as a genuine and determining occupational requirement for performing the occupation of a firefighter.

The Court referred to data provided by the German Government that very few employees over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities.

It accepted that recruitment at an older age may result in a shortfall of firefighters who were readily assignable to the most physically demanding duties of the role.

On this basis, it held that a maximum recruitment age of 30 was a proportionate means of achieving a legitimate aim in the circumstances.

Petersen v Berufungsausschuss Fur Zahnarzte Fur Den Bezirk Westfalen-Lippe

Facts Of The Case

Ms Petersen had been admitted in Germany to provide

dental care as part of a panel with effect from 1974. The Admissions Board for Dentists decided that her licence to practise would expire at the end of June 2007, when she reached the age of 68.

She challenged this decision. The Dortmund court questioned whether the age limit of 68 laid down in German law for dentists providing care under the statutory health insurance scheme was compatible with the Directive.

In Germany, 90% of patients are covered by the statutory health insurance scheme. However, outside the panel system, dentists can practise their profession, whatever their age.

Nub Of The Matter

The ECJ held that a member state may legitimately consider it necessary to set an age limit for the practise of a medical profession such as that of a dentist.

However, the age limit must be set for the right reasons. The Directive precludes a national measure setting a maximum age where the sole aim of that measure is to protect the health of the patients receiving treatment under the statutory scheme against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists. Such a measure lacks consistency and cannot therefore be necessary for the protection of health.

On the other hand, the ECJ held that the Directive allows such an age limit where its aim is to share out





employment opportunities among the generations within the profession of panel dentists, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim.

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Implications

Both cases raise interesting points.

The Wolf case is the first reported ECJ decision to consider Article 4 in a wider context. The judgment gave a very broad interpretation of the genuine occupational defence by finding that a maximum recruitment age in addition to physical fitness was a genuine occupational requirement related to age.

Also, in both cases, the ECJ accepted that age-related decline in performance is capable of justifying directly age discriminatory rules.

In the Wolf case, the German government produced substantial expert evidence to support its case that natural physical decline would be a serious concern for those working in the fire service.

In the Petersen case, the ECJ appeared to accept age-related decline as a valid assumption. However, it eventually rejected it because the age bar did not apply uniformly across the public and private sectors.

To sum up, age limits on occupations may be imposed when there is a genuine occupational requirement to do so.





→ Legislation Round Up

Latest News

A number of changes to employment law has recently come into effect. The main changes are summarised below.

Please get in touch if you would like further information or advice.

Employment Tribunal Compensatory Limits

On 1 February 2010, the Employment Rights (Revision of Limits) Order 2009 came into force, revising the compensatory limits a Tribunal may award.

The most significant change is the reduction in the maximum Compensatory Award for the Unfair Dismissal of an employee under section 124(1) of the Employment Rights Act 1996, from £66,200 to £65,300.

This is the first time ever that the annual review of compensation limits has resulted in a reduction to the maximum compensation award and it reflects the decrease in the Retail Prices Index between September 2008 and September 2009.

Importantly, this decrease will not apply where an employee's effective date of termination falls before 1 February 2010.

Where a claim arises out of a dismissal, which is before such date, the maximum amount of compensation will remain at £66,200.

Other Increases

Other changes as a result of the Order are:

- The maximum guarantee payment to an employee under section 31(1) Employment Rights Act 1996 is reduced from £21.50 per day to £21.20 per day; and
- The minimum amount of compensation where an individual is unlawfully excluded or expelled from a Union (in contravention of section 174 Trade Union and Labour Relations (Consolidation) Act 1992) and not re-admitted by the date the Tribunal application falls, is reduced from £7,300 to £7,200.

NB The amount of a week's pay for calculating Unfair Dismissal Basic Awards and statutory redundancy payments was increased to £380 in October 2009 and has not been changed further.

Maternity, Paternity & Adoption Pay Set To Increase

Employers can also expect changes in April 2010,





following recent Government proposals to increase Statutory Maternity, Paternity and Adoption Pay.

The standard rates for Statutory Maternity Pay, Statutory Paternity Pay and Adoption Pay are currently £123.06 a week, but it is expected this will rise to £124.88 a week in April 2010.

Statutory Sick Pay will remain the same at £79.15 a week, but the weekly earnings threshold for all the above payments is likely to increase from £95.00 to £97.00.

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