

employment update

February 2011

Employers will need to rise to challenge as new rules come into force

With the Government confirming last week that they are to go ahead with plans to abolish the default retirement age (DRA), 2011 is set to be a challenging year of change for employers.

Despite calls for the abolition of the DRA to be delayed to give employers sufficient time to prepare for such a significant change in practice, only those retirements that have been notified before 30 March 2011 and that are due to take effect prior to 1 October 2011 will be able to rely on the statutory retirement procedure to force employees to retire at age 65.

Consequently, the choice for employers is to either (i) stop using retirement as a way to end employment or (ii) continue to use a retirement age (whether 65 or another age) by demonstrating that the age is objectively justified.

On the first option, employers should, in the future, anticipate an increase in performance and sickness absence management and consider whether managers are sufficiently trained to deal with having difficult conversations with employees, who may have many years productive and loyal service up to that point. It also raises various practical issues including how employers choose to deal with insured benefits. The Government has advised that it will introduce an exemption to the principle of equal treatment on grounds of age where an employer provides group risk insured benefits.

On the latter option employers would need to ensure they have sufficient evidence to justify retirement at that age. One example of this could be safety reasons but each situation would need to be viewed on its own merits.

There is already a trend towards an increase in such claims as the latest Tribunal statistics show that in the year to March 2010, age complaints had increased by 37% from the previous year. Miriam O'Reilly's high profile age discrimination case against the BBC is also likely to give employees increased confidence and encourage them to come forward with their own complaints. Following eight years on the show and twenty years with the BBC, Ms O'Reilly, who is 53, lost her presenting role on 'Countryfile' when the programme was moved to a primetime slot. She was replaced by two younger presenters.

Ms O'Reilly was given no reason for her departure other than that the show was being "refreshed". However she gave evidence that during her time with the BBC she was warned by someone working on the show, "You're going to have to be careful about those wrinkles when high-definition television comes in", and was asked, "Is it not time for Botox?" The tribunal found that the selection of the replacement presenters was based on their comparable youth.

The Equality Act 2010, which came in to force towards the end of last year, will continue to create challenges for employers. Amongst other things, the Act consolidates all previous discrimination legislation and in some instances widens the net on who is afforded protection from



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discrimination and in what circumstances. One such example is the new strand of discrimination by association that the Act has introduced. For example an individual who is not disabled but cares for someone who is disabled and is discriminated against because of his caring duties to a disabled person, will be able to claim under the Act for associative disability discrimination.

A further change set to come into force in the spring is in relation to the additional paternity leave rights for fathers. For babies due on or after 3 April 2011, eligible employees will be entitled to take a maximum of 26 weeks additional paternity leave before the child's first birthday. Generally the right will only arise where the child's mother has not taken all of her statutory maternity leave entitlement and has returned to work. Unless the contract provides for enhanced paternity pay, eligible employees will receive statutory paternity pay (which will shortly

increase to £128.73 per week). Accordingly, it is doubtful whether fathers on average or high salaries will make use of this right and may instead opt, as they do just now, to take holidays. Nonetheless the dynamic of families is changing and this may be a change that the next generation will wish to take up in significant numbers.

With the impact of the Bribery Act being felt from April and the introduction of additional protections for agency workers planned for October, there is a lot of new law for employers to embrace this year.

If you would like to discuss any of the issues raised in this update, please contact Kim Pattullo on 0131 222 9556 or email KPattullo@hbj-gw.com