RadcliffesLeBrasseur



# Age Discrimination



**The Employment Equality (Age) Regulations 2006 ("the Regulations") have now been published although still in draft form and subject to consultation until 17th October 2005. They are due come into force on 1 October 2006. The purpose of the Regulations is to make discrimination unlawful on the grounds of age.**

**Sejal Raja and Robert O'Donovan provide a brief overview of what is in store.**

The Regulations follow the language of other discrimination legislation i.e. that of race, sex, disability, religion or belief, and sexual orientation. Accordingly, direct and indirect discrimination are unlawful, as are victimisation and harassment. The Regulations provide that discrimination may be justified if it is a proportionate means of achieving a legitimate aim. This will apply equally to direct and indirect discrimination

This is not the case with other forms of discrimination where justification is only possible in some cases of direct discrimination. The following examples are given.

- The setting of requirements as to age in order to ensure the protection or promote vocational integration of people in a particular age group.
- The fixing of the minimum age to qualify for certain advantages linked to employment and occupation in order to recruit or retain older people.
- The fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period imposed before retirement.

Those protected under the Regulations are not only employees, but self-employed, partners in a partnership, contract workers and office holders and anyone in vocational training.

A retirement age below 65 will, in general, be outlawed unless the employer can justify having a low retirement age for its workforce.

The current upper age limit of 65 for bringing unfair dismissal claims will be removed. There is a provision in the Regulations which provides that it will not be unlawful to dismiss an employee where the reason is retirement. However, in order for such a dismissal to be fair a process of consultation will be required which includes giving the employee not more that one year and not less than 6 months notice of the intention to dismiss on the grounds of retirement.

There will also be no upper age limit for employees claiming redundancy payments. The amount of a statutory redundancy payment will be calculated on a new set formula yet to be published.

Despite fears in the pensions industry, it seems that the intent is to allow UK occupational schemes to continue without any need for change. A number of common features in UK pension schemes are ageist, but are likely to benefit from specific exemptions.

The regulations are still in draft form and are subject to change. If you however, you have any questions then please do not hesitate to contact Sejal Raja on sejal.raja@rlb-law.com or Robert O'Donovan on robert.o'donovan@rlb-law.com.

# When is a Compromise Agreement not a Compromise Agreement?

**Sejal Raja reports on a Court of Appeal Judgment handed down recently which deals with the requirements necessary to achieve a valid Compromise Agreement.**

For Compromise Agreements to be valid they need to comply with Section 203 of the Employment Rights Act 1996 ("ERA") which requires, amongst other things that the Agreement should relate to the particular proceedings that are being compromised.

The case of Hinton –v- University of East London considered whether a Compromise Agreement related to particular proceedings. The facts of the case are that Dr David Hinton raised several grievances against his former employer, the University of East London. These grievances were capable of amounting to public interest disclosures and therefore potentially gave him protection under the whistle-blowing legislation.

## Effect of a general waiver . . .

Dr Hinton subsequently took voluntary redundancy. He then entered into a Compromise Agreement with the University, which was expressed to be "in full and final settlement" of all claims in all jurisdictions (whether arising under statute, common law or otherwise) and listed a number of causes of action which were expressly included. However, this list did not include whistle-blowing or any mention of Section 47B of the ERA, which is the piece of legislation that deals with claims arising from a public interest disclosure.

Dr Hinton subsequently brought a claim in the Employment Tribunal on the grounds that he suffered a detriment as a result of his whistle-blowing. The preliminary question that arose was whether he was barred from bringing such a claim by virtue of having signed the Compromise Agreement.

## . . . not good enough

The Court of Appeal held that a general waiver was insufficient to compromise Dr Hinton's whistle-blowing claim. The Court of Appeal held that to be valid, a Compromise Agreement must satisfy the conditions set out in Section 203 ERA; one of these is that "the Agreement must relate to the particular proceedings". The Court of Appeal held that for this condition to be satisfied, the parties have to expressly identify the particular proceedings to which the Compromise Agreement relates, either by generic subscription, e.g., "breach of the Working Time Regulations 1998" or a reference to the section of the relevant statute, e.g., "Section 98 of the Employment Rights Act 1996" (a general right to complain of unfair dismissal). It was not enough to use a rolled-up expression such as "all statutory rights" or to refer merely to the title of the statute, e.g., "the Employment Rights Act 1996" and assume that such a reference would effectively settle all and any claims under that Act.

## Good practice recommendations

Lord Justice Mummary elaborated further and said that if actual proceedings are compromised, it is good practice for the particulars of the proceedings and of the particular allegations made in them to be inserted in the Compromise Agreement in the form of a brief factual and legal description. If the compromise is of a

particular claim raised which is not yet the subject of proceedings, it is good practice for the particulars of the nature of the allegations and the legal framework under which they are made to be inserted in the Compromise Agreement in the form of a brief factual and legal description. As no particular statutory claim was referred to in Dr Hinton's Compromise Agreement and no particular description of the legal nature or factual basis of any potential whistle-blowing proceedings was stated, the Court unanimously held that the Agreement did not effectively compromise Dr Hinton's whistle-blowing claim.

This decision means that employers will have to be careful when drafting Compromise Agreements, particularly if their practice is to rely on standard company Compromise Agreement templates. The decision makes it clear that the "catch-all" provisions regularly used in Compromise Agreements will no longer be sufficient. In order to be confident that all potential future claims are truly compromised, employers will have to tailor the agreement to the individual whose employment has been terminated, ensuring that any issues, concerns or grievances raised prior to the signing of the agreement, which could give rise to a future claim, are specifically mentioned in the body of the Agreement.

This accords with practice adopted by RadcliffesLeBrasseur some years ago, although we may now recommend that more detail be given.

The need to detail the claims could give an employer a difficult decision. Suppose the employer is aware of a possible claim, say for discrimination, when the main issue is perceived as unfair dismissal. Do you identify the claim and refer to it in the Compromise Agreement? By doing so the compromise will be more effective but you risk the solicitor advising the employee taking advantage of this and seeking to negotiate a higher settlement.

**If you have any questions in relation to this report, then please contact Sejal Raja at sejal.raja@rlb-law.com or on 020 7227 7410.**

**Conditions which must be satisfied for a Compromise Agreement to be binding:**

- it must be in writing;
- it must relate to the particular proceedings;
- the employee or worker must have received advice from a relevant independent adviser as to the terms and effect of the proposed agreement and, in particular, its effect on his/her ability to pursue his rights before an Employment Tribunal;
- there must be in force, when the adviser gives the advice, a contract of insurance covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice;
- the agreement must identify the adviser, and
- the agreement must state that the conditions regulating Compromise Agreements are satisfied.

## Age Discrimination

Banning age discrimination could be the major change in employment law in this decade. We have been asked what we are doing about it. The answer is that we intend to wait until the end of the consultation period, then report in a future "Update". We are also planning a workshop next February.

**Workshop/Seminar News**

**Whistle-blowing : Tuesday 13 September 2005 – sorry fully booked, but places still available on Thursday 8 September at 5.00 pm**

**Annual Update : 17 November 2005 A review of the year including, in particular, the disciplinary and grievance procedures one year on. (Our impression is that their impact has not yet been fully appreciated).**

**2006**
**Workshops planned:-**
**February : Age Discrimination**


# Ask REG

**For those who have not been introduced to REG.**

**Who is REG? REG (otherwise known as RadcliffesLeBrasseur Employment Group) is a friendly, approachable and yet knowledgeable character and appears as a (fairly) regular feature in our Update to answer those employment law questions you were too afraid to ask.**

**Dear REG**

**One of our employees is on long-term sick leave and has exhausted his entitlement to sick pay. He is now claiming his annual holiday leave (and therefore pay!) for four weeks in August. Are we obliged to meet this request?**

Fortunately for you, he is a month or so too late. Until May, the leading case on this point was Kigass v Aero Components Ltd v Brown, where the Employment Appeal Tribunal decided that such an employee was entitled to holiday pay under the Working Time Regulations. The EAT construed the Regulations logically, but absurdly, as laying out that anyone who is a "worker" during the whole or part of the leave year (as your employee is) is permitted to claim annual leave regardless of whether he was capable of work

However, this decision was overruled in May. In Commissioners of Inland Revenue v Ainsworth, the Court of Appeal held that the EAT had erred in Kigass.

The court identified two reasons for its conclusion. Firstly, an employee claiming leave, and therefore pay in respect of the leave, must actually have obligations from which he is to be released during leave. Clearly an employee who has been off work has no such obligations and cannot be entitled to leave.

Secondly, the purpose of the Working Time Directive was to further employees' and safety. Holiday is intended to be a release from the pressures of employment. An employee who does not actually carry out any work would receive no benefit to his health and safety by taking leave and consequently cannot be entitled to holiday pay.

Thus the Court of Appeal has ended the hopes of your employee, and you are under no obligation to meet his demands.

**Dear REG**

**We have now decided to make the employee redundant. Luck is on our side as there are no problems with disability discrimination. However he says he is entitled to statutory notice of 12 weeks and has to be paid for it. Surely this is just as absurd as giving him holiday pay while he is ill?**

This may seem just as absurd as paying the employee holiday pay for not working but it is the law as established by the Employment Rights Act 1996. Under s 86 of ERA 1996, an employee is given a statutory minimum period of notice and is entitled to be paid for that period (ss 88, 89), even when "the employee is incapable of work because of sickness".

If the employee in question were being paid sick pay now you would just have to "top up" to normal pay.

The situation is different, however, if the employee's contractual minimum period of notice is at least one week longer than the relevant statutory minimum period of notice. Here the employer just pays the amount due under the contract which could be nothing.

So, on this point, your employee has the law on his side, strange though it may seem.

**REG invites you to email your questions to reg@rlb-law.com. You can also telephone or email any of us and we will pass your questions on. Look out for REG's answers to your questions in forthcoming issues of the Employment Update.**

---

**If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.**

**robert.o'donovan@rlb-law.com**
**sejal.raja@rlb-law.com**



5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

**info@rlb-law.com**
**www.rlb-law.com**