

Age discrimination

With only a couple of months to go before the Employment Equality (Age) Regulations 2006 come into force in October, the excitement is beginning to mount.

We have now held two workshops, both of which were oversubscribed and we had to relax our normal restrictions on workshop numbers on each occasion.

If you attended our workshops, then we hope you are already working on updating your retirement procedures. If not, then please turn now to page 2 where Sejal Raja will outline the issues you should be looking at.

One of the questions raised at our workshops was whether one can identify general principles in the new regulations given the mass of detailed exceptions. Here is our attempt.

First, the legislation is designed to protect everybody under age 65 from discrimination on the grounds of age. You may have assumed that the regulations are intended to protect those at the older end of the spectrum. This is wrong, you could find yourself discriminating against a younger person on grounds of age just as easily.

What happens at age 65? (Actually protection reduces at age 64½ but most commentators focus on age 65). The underlying principle is that protection continues generally, whatever your age, but there is some reduction at 65. So the over 65 year olds could suffer discrimination in that :

- They can be made to retire against their wishes.
- They can be rejected on a new job application on the basis of age.

However, if the sixty fiver is in employment, then he or she has to be offered the same terms as their younger colleagues even if these cost more (although there may be limits if cost is significant). This creates the occasional inconsistency, for example an internal candidate for a new post could not be rejected on the basis of age yet an external candidate could.

The over 65 year old will now be entitled to redundancy and possible unfair dismissal payments but as long as retirement procedures are correctly followed, these can be avoided. The procedure is tortuous, and will require care to be taken by HR managers.

What do you do if you currently have a retirement age of 60? Can you force people to retire? The answer is “probably not”. If someone is forced to retire at age 61 but not at age 59, there is direct discrimination. Can this be justified? There must be very few (if any) jobs where the difference between age 59 and 61 is vital, or where health is an issue which could not be covered by a medical check. If your organisation has a retirement age of 60, you should be thinking about an increase to age 65.

Do the changes stop anyone retiring earlier and taking their pension earlier? Answer – no, and if you are lucky enough to have a good pension available at an earlier date, then there will be nothing to stop you retiring as you have always planned.

Robert O'Donovan
robert.o'donovan@rlb-law.com

New Retirement Procedures

The major change which will affect every employer in the country is the need to introduce new procedures on retirement. Sejal Raja explains.

The Regulations will not only prevent discrimination occurring in the workplace, but will also make specific changes to the law on unfair dismissal. In summary, the changes are as follows:-

- Allow those over age 65 to claim unfair dismissal;
- Entitle employees over age 65 to redundancy payments;
- Create a new fair reason for dismissal on grounds of retirement - provided procedures are properly followed.

The Regulations set out a specific procedure to be followed to dismiss an employee, even though the retirement date was agreed in the original contract of employment. Provided that this procedure is properly followed, a dismissal on the grounds of retirement will be fair even though the real reason for the dismissal may be on grounds of performance or redundancy. The procedure must be followed if the risk of unfair dismissal or redundancy claims is to be avoided.

The Procedure

Step 1

Between 6 months and 12 months before the intended retirement date, you should write to the employee, informing him that you are intending to retire him on his 65th birthday. In the same letter, you should notify the employee that he can request to work beyond retirement date and that you will consider that request.

Step 2

The employee, if he wishes you to consider a request to work beyond retirement date, should write to you three months prior to the intended date of dismissal, setting out the fact that he would like to work beyond retirement date and whether he would like his employment to continue indefinitely; until a specified date; or for a specified period.

Step 3

If you receive such a request, then you have a duty to have a meeting with the employee to

consider that request. The employee should be allowed to be accompanied by a fellow colleague. You should bear in mind that the right does not include a trade union representative unless the trade union representative is a work colleague.

Step 4

Once you have reached your decision, you need to notify the employee in writing. If your decision is not to agree to the request to work beyond retirement age, then the employee is entitled to appeal that decision. The appeal should be to somebody different from the person who heard the original request.

The consequences of not following the procedure

If you fail to notify the employee within the timescale provided in the Regulations, i.e. between 6 and 12 months prior to the intended retirement date, then you could be liable to pay compensation to the employee of up to 8 weeks' pay which is capped, currently at £290 per week. If, however, you have a retirement policy which sets out the procedure and clearly states employees' right to request to work beyond retirement age, then as an employer you could argue that compensation should be reduced as the employee was aware of his right to request to work beyond the retirement age.

The duty to notify nevertheless continues up until two weeks prior to the intended retirement date. If you fail to notify the employee within this timeframe, i.e. by two weeks before the retirement date, the dismissal will be automatically unfair.

The dismissal will also be automatically unfair if you fail to consider a request made by an employee to work beyond retirement date or if you fail to consider an appeal against a decision.

There are complicated transitional provisions which apply to proposed recruitments between 1 October 2006 and April 2007. You should notify the employee of his or her request to work beyond retirement age as soon as reasonably possible. If you would like further advice on the transitional provisions, then please contact Sejal Raja at sejal.raja@rlb-law.com.



AGE AND REDUNDANCY – AN EXTRA QUESTION FOR REG

Dear REG

I have heard that the enhanced redundancy policy that we have in place for our employees, i.e. that all employees will receive an extra month's pay per year of service on top of the statutory redundancy pay will be unlawful from October 2006. That surely cannot be right as I am being penalised for paying my employees who are redundant more than their statutory entitlement

Answer: The Age Equality Regulations do impact on enhanced redundancy payments and in a most extraordinary way.

Taking your example, does the additional payment constitute age discrimination?

Quite possibly “yes” as it benefits older workers more than younger workers.

Is it a proportionate means of achieving a legitimate aim?

Probably not, given the relatively tight list of legitimate aims identified by the DTI? (But we live in hope the courts may take a wider view in due course).

So is there an exemption? Is the enhancement permissible as a reward for long service?

Answer: “no” – the exemption for long service benefits excludes benefit awarded to a worker by virtue of his ceasing to work for his employer.

Does the enhanced redundancy exemption apply?

The enhanced redundancy exemption works in a curious way. It may be easiest to explain if you think of a redundancy payment in terms of a formula (and to make things easier, I assume everyone is over 22).

The payment is:-

$$1 \times S_1 \times WP + S_2 \times 1\frac{1}{2} \times WP$$

where S_1 and S_2 are service below or above age 41 and WP is a week's pay. The factors of 1 and $1\frac{1}{2}$ weeks' pay are described in legislation as “the appropriate amount”.

Three exemptions allow you to:-

- (i) increase WP to a higher figure; or
- (ii) multiply each appropriate amount (the 1 and $1\frac{1}{2}$ in the formula) by a figure to increase it; or
- (iii) multiply the whole result by a number exceeding one.

If you are mathematically inclined, you will see that all three choices achieve the same end, any enhancement must be proportionate to a redundancy payment with a resultant weighting to those aged over 41.

This leads to the result that there is discrimination in your case because more is being paid to older workers, and you don't fall within the exemption because not enough is being paid to older workers.

Confused? So are we, let us hope the courts are able to apply some commonsense to this. For now, however, keep any enhancements proportionate to the statutory formula.

WHAT NEXT?

After age discrimination, what form of prejudice is next in line for prohibition? There may have been a hint in a Financial Times report on 22 June. A survey of workplace attitudes reported that 1 in 14 workers feel they have been treated unfairly in the last two years. The most common cause was age, the second was long-term sickness, the third was “accent or the way I speak”, which was rated ahead of race, ethnicity, disability and gender. Could “accent or the way I speak” be the next anti-discrimination law?



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

In April, Robert O'Donovan wrote that TUPE was now likely to apply to changes of service provider. Will this be true if the way the service is provided changes?

Answer: Quite possibly "yes". To take an example involving a case a couple of years ago, Swanton provided a computer maintenance service to a client. There were eight employees assigned to the contract. A new maintenance company, Computacentre, was engaged, it used its own employees, none of which spent more than 40% of their time working for that client. Some of Swanton's staff claimed unfair dismissal on the basis that TUPE applied, but failed. The "economic entity" after the transfer was held to be different so, back in 2004, TUPE did not apply to this service contract.

Under new TUPE rules, a change in the way activities are carried on would not prevent there being a transfer and the answer might be different. The approach would be to ask:-

(i) Had activities ceased to be carried out by one person and were now carried out by another?

Answer: yes.

(ii) Was there an organised grouping of employees before the transfer?

Answer: yes

(iii) Did the activities carry on after the transfer?

Answer: yes

The fact the services are now carried on in a different manner would not now prevent there being a transfer. A major change.

Dear REG

I currently ask all my employees who reach age 55 to undergo a health assessment test. Will I be able to do this after 1 October 2006?

Answer : if you proceed with asking all over-55s to undergo a health assessment test, then this will be directly discriminatory unless you can justify that there is a legitimate aim and it is a proportionate way of meeting that legitimate aim. One alternative is to ask all your employees to undergo health assessments.

This may be a costly exercise, particularly if you have 100s of employees. Even if you did do this, you may still be discriminating indirectly.

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

Workshop/Seminar News

Dates for your diary:-

14 September: Avoiding legal pitfalls in recruitment

16 November: Annual Seminar

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

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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

Readers should take professional advice before taking any action based on this bulletin.