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Default retirement age to be abolished

As has been heavily reported in the press this week, the Government has announced its widely expected proposal to remove the default retirement age ("DRA") of 65. The phasing out of the DRA is planned over a 6 month period from April 2011, meaning that it will be abolished by October 2011.

It is proposed that employers will be continue to be able to undertake a DRA retirement dismissal under the procedures contained within the Employment Equality (Age) Regulations 2006 ("the Regulations") providing that notification of this retirement dismissal is given before 6 April 2011 and takes effect before 1 October 2011. After this date, such dismissals will not be valid. Contractual retirement ages will not be enforceable unless it can be objectively justified that they are legitimate means of achieving a proportionate aim - the press release from the Department for Business, Innovation and Skills gives examples of jobs in which this may be demonstrated, namely air traffic controllers and police officers.

A consultation document has been published, with responses sought until 21 October 2010. Views are being sought on a variety of matters, including the acceptability of the proposed timetable; whether further guidance or a code of practice is required; and what support is necessary during the transitional period. The consultation document can be found here:

<http://www.bis.gov.uk/retirement-age>

If the Government's proposals are enacted, it will inevitably fall to the judiciary to decide in which jobs - and at which age - compulsory retirement is justified. It will also be interesting to note whether employers (who previously may have considered keeping employees on after the age of 65, knowing there were procedures to follow under the Regulations to allow compulsory retirement) retire automatically employees who reach 65 before October next year in order to avoid the uncertainty of the new regime.

Government considers abolishing workforce code of practice

It has been reported this week that the Government is considering abolishing the Code of Practice on Workforce Matters in Public Service Contracts. The code is designed to prevent two-tier workforces when services are outsourced from local authorities by providing that individuals employed after the date of the service transfer are on terms that are "no less favourable" than those employees previously in the public sector. Although the code has been in force for several years, there are now plans to review it and a working group to deal with this issue is likely to be set up.

Constructive dismissal as a result of TUPE transfer considered by EAT



In the case of *Nationwide Building Society v Benn and others*, the Employment Appeal Tribunal (“EAT”) considered the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) to claims of constructive dismissal. The claimants had resigned and claimed constructive dismissal following their transfer from Portman Building Society to the respondent. A job mapping exercise had taken place before the transfer (to which the transferring employees were not party), and it was decided that an amended interim bonus scheme was to be implemented.

The claimants resigned and claimed constructive unfair dismissal after the transfer. They claimed that the respondents had fundamentally breached the contracts of employment in a number of ways, including that the changes to the roles as a result of the job mapping had downgraded their positions and the interim bonus scheme resulted in a reduction in earnings capacity. The employment tribunal found that the claimants had, as a result of this, been constructively dismissed. However, it then went on to consider whether the dismissals had been fair. It held that the dismissals were not automatically unfair under TUPE as, although they were connected with the transfer, the dismissal fell into exception of the “*Economic, Technical or Organisational (ETO)*” potentially fair reasons for dismissal. There was an organisational reason entailing changes in the workforce, meaning that the dismissals could be justified by the respondent if it had acted reasonably. Although the tribunal considered the

dismissals were potentially fair, it held they were procedurally unfair due to the failure to consult over the measures the respondent envisaged taking upon the transfer.

Both parties appealed to the EAT. The respondent appealed on the findings of dismissal and procedural unfairness and the claimants appealed in relation to the finding of an ETO reason for dismissal. The EAT upheld the decision that the employees were constructively dismissed. However, it overturned the tribunal’s finding of procedural unfairness due to lack of consultation - no claim for this had been pleaded and it was contrary to natural justice for the tribunal to reach a decision in relation to which the parties had not been given an opportunity to make submissions. Further, the employees had no free-standing right to make the failure to consult claims under the provisions of TUPE, these had to be brought by employee representatives. It was also held by the EAT that an ETO reason does not have to entail changes to the workforce as a whole, rather it was sufficient that the change was to the job functions of a “*body of transferring employees*”. The question of fairness of the dismissals was therefore remitted back to the tribunal.

Court of Appeal holds mandatory retirement at 65 justified



In the same week as the Government announces the proposed removal of the default retirement age of 65, the Court of Appeal (“CoA”) has held that a rule requiring partners in a firm of solicitors to retire at 65 to be a proportionate means of achieving legitimate aims and therefore justifiable. The case, *Seldon v Clarkson Wright & Jakes (a partnership)*,

concerned the applicability of the Employment Equality (Age) Regulations 2006 (“the Regulations”) to partners of a firm - unlike the current exception permitting a retirement age of 65 for employees is not discriminatory, there is no such exception for the retirement of partners of a firm.

The CoA had to consider, then, whether a partnership deed providing that partners had to retire at 65 subjected Mr Seldon to unlawful direct age discrimination. The CoA found that the retirement age was justified and proportionate with the legitimate aims of providing associates with the opportunity for promotion; enabling workforce planning; and supporting “*collegiality*” by limiting expulsion of partners through performance management and so contributing to a congenial and supportive workplace.

Reference was made, though, by the CoA to the retirement age of 65 being regarded as fair and proportionate within the Regulations as this was the default retirement age. This contributed to the CoA’s decision to find the partnership deed’s retirement age of 65 lawful. As the employee default retirement age is now proposed to be abolished, the choice of any compulsory retirement age will inevitably be subject to closer scrutiny in future.

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