

DISCRIMINATION UPDATE

A. LOOKING BACK AT 2005

1 DISABILITY DISCRIMINATION ACT 2005

LEGISLATION 2005

On 5 December 2005 the Disability Discrimination Act 2005 (“the Act”) came into force which amended the Disability Discrimination Act 1995 (“DDA”). The main provisions which affect employers are as follows:

Progressive conditions

Those suffering from cancer, multiple sclerosis or HIV will be “*deemed to have a disability, and hence to be a disabled person*”. This means these individuals are protected from the time of diagnosis and will not have to show that the illness has an impact on their ability to carry out normal day-to-day activities.

Mental Illness

The requirement that a mental impairment should result from a mental illness which is “clinically well recognised” has been removed. This is a significant change as it opens up the possibility for claimants suffering less specific diagnoses such as “stress” or “anxiety” to be covered by the DDA. This means employers will be under the duty to make reasonable adjustments in respect of these employees which will have a significant impact on all employers as the small employer exemption was removed in October 2004 and in addition the failure to make reasonable adjustments can no longer be justified as this defence was also removed in October 2004.

In order to be covered by the DDA a claimant will however, still need to show that the mental impairment is long-term in that it has lasted or is expected to last 12 months and it has a substantial adverse effect on their ability to carry out normal day-to-day activities. In the case of mental illness, particularly depression, which may often be short term and intermittent this is still a significant hurdle to overcome.

Statutory Duty

The Act introduced a positive statutory duty on public authorities when exercising their functions to promote equality of opportunity for disabled people and eliminate unlawful discrimination and harassment of disabled people. This is similar to the statutory duty on public authorities to promote race equality which was introduced in 2000.

This duty also extends to any private company which is exercising a public function. Where a private contractor is effectively “standing in the shoes” of a public authority and carrying out a public function according to the DRC’s Code of Practice the contractor is responsible for meeting this duty. However, in many situations the contractor will not be performing a public function where the duty remains with the public authority that contracts out the function and in this case, the Code suggests that public authorities need to build into the procurement process the relevant disability considerations to ensure it is meeting its disability equality duty.

Discriminatory advertisements

The Act amends the provisions in the DDA concerning discriminatory job advertisements so that they will also now cover a third party who publishes a discriminatory advert (e.g. a newspaper) as well as the person who placed the advertisement.

Private clubs

It is now unlawful for private clubs with a least 25 members to treat disabled people less favourably.

2 **SEX DISCRIMINATION AND EQUAL PAY**

LEGISLATION 2005

On 1 October 2005 the Employment Equality (Sex Discrimination) Regulations 2005 (“the Regulations”) came into force and made a number of changes to the Sex Discrimination Act 1975 (“SDA”) and the Equal Pay Act 1970 (“EPA”).

New definition of Indirect discrimination

The definition of indirect discrimination contained in the SDA has been amended to bring it into line with the Equal Treatment Directive and the definitions in the Race Relations Act, Sexual Orientation Regulations and Religion or Belief Regulations.

The changes mean that “a person discriminates against a woman if he applies a provision, criterion or practice which he applies or would apply equally to a man but:

- which puts or would put women at a particular disadvantage when compared with men
- which puts her at that disadvantage; and
- which he cannot show to be a proportionate means of achieving a legitimate aim.”

This means that a claimant does not need to rely on statistical evidence any more and it should be easier to make out a claim.

The definition of direct discrimination remains the same.

The new definition of indirect discrimination also applies in relation to discriminatory treatment against married people but it does not apply to gender reassignment. Only direct discrimination on the grounds of gender reassignment is unlawful.

New definition of harassment

Prior to October 2005, an individual who wanted to bring a claim based on harassment had to do so on the basis of direct discrimination under the SDA and argue that the harassment amounted to less favourable treatment on the ground of their sex. The Regulations introduce a freestanding right to bring a harassment claim and introduce a statutory definition of sexual harassment. The definition of harassment is in line with that in other discrimination legislation.

The Regulations expressly prohibit harassment (i.e. unwanted conduct):-

- on the ground of sex (this is not necessarily sexual in nature);
- of a sexual nature whether verbal, non-verbal or physical;
- on the ground of gender reassignment; and
- in addition it is unlawful to treat a person less favourably because he or she has either rejected or submitted to harassment.

In order to constitute unwanted conduct on the ground of sex or of a sexual nature, the conduct must have the purpose or effect of *either*:

- violating dignity; *or*

- creating an intimidating, hostile, degrading, humiliating or offensive environment.

The conduct only has the effect of violating dignity or damaging the claimant's workplace environment where "having regard to all the circumstances, including in particular the perception of the claimant, it should reasonably be considered as having that effect". This test is to cover the situation of the over-sensitive claimant who takes offence at a perfectly innocent comment. Again, this brings the legislation into line with other discrimination legislation.

There is no "reasonableness" test where the claim is that the purpose of the conduct was to violate dignity or damage the workplace environment. It will simply be a matter for the tribunal to determine whether the conduct had such a purpose.

- ***Harassment on the ground of sex***

This is similar to the concept covered by the direct discrimination provisions i.e. where an employee is harassed because she is a woman.

- ***Harassment of a "sexual nature"***

There is no definition of what constitutes "conduct of a sexual nature". There are, however, examples of physical, verbal and non-verbal conduct of a sexual nature in the 1993 European Commission guide to implementing the European Commission Code of Practice on sexual harassment:

- physical conduct of a sexual nature – "unwanted physical contact ranging from unnecessary touching, patting, pinching or brushing against another employee's body" to "assault and coercing sexual intercourse"
- verbal conduct of a sexual nature – "unwelcome sexual advances, propositions or pressure for sexual activity; offensive flirtations, suggestive remarks".
- non-verbal conduct of a sexual nature- "display of pornographic or sexually suggestive pictures, whistling or making sexually suggestive gestures".

- ***Gender reassignment***

The SDA has been amended to prohibit harassment due to a person's gender reassignment – whether a man or women intends to undergo, is undergoing or has undergone gender reassignment.

- ***Victimisation***

There is an express prohibition on making a decision which is unfavourable to someone because they have rejected or submitted to sex-based or sexual harassment e.g. turning down someone for promotion because they have refused to sleep with the manager

Pregnancy and Maternity

The Regulations introduced an express prohibition on treating a woman less favourably on the grounds of pregnancy and on treating her less favourably on the ground that she is exercising or seeking to exercise or has sought to exercise or has exercised her statutory right to maternity leave. This sets out the position already established by case law. There is no need for a male comparator in order to succeed in the claim.

The Regulations also clarified that it is not discriminatory to deprive a woman of remuneration while she is on ordinary maternity leave (apart from maternity pay) or of any contractual terms and conditions (apart from certain exceptions) while she is on additional maternity leave. In addition, following the Court of Appeal's judgment in ***Alabaster v Barclays Bank [2005] IRLR 576*** the Equal Pay Act has been amended to reflect the principle that there is no need for a male comparator in equal pay cases where the claim concerns pregnancy or maternity leave.

Geographic limits

The SDA and the EPA expressly gives protection to people working for British organisations outside Great Britain in line with other discrimination legislation.

Protection now applies to those whose employment is at an establishment in Great Britain, which will cover:

- the employee who does his or her work “wholly or partly in Great Britain”; or
- the employee who does his or her work wholly outside Great Britain and the following conditions apply:
 - the employer has a place of business at an establishment in Great Britain;
 - the work is for the purposes of the business carried on at that establishment;
 - the employee is ordinarily resident in Great Britain:
 - (i) at the time when he or she applies for or is offered employment; or
 - (ii) at any time during the course of employment.

Questionnaire

The response to a sex discrimination questionnaire must now be completed within 8 weeks (as opposed to within a reasonable period) bringing this into line with other discrimination legislation.

Miscellaneous

Other changes are:-

- Office holders are now covered by the SDA and EPA apart from elected office holders and political officials e.g. government ministers.
- Ministers of religion are also brought within the scope of the provisions of the SDA, in so far as they are office holders.

CIVIL PARTNERSHIP ACT 2004

The **Civil Partnership Act 2004** (“CPA”) came into force on 5 December 2005. This enabled the first civil partnerships to be formed under the standard procedure on 21 December 2005.

The Act creates a new legal relationship of civil partnership, which two people of the same sex can form by signing a registration document. It also provides same-sex couples who form a civil partnership with parity of treatment in a wide range of legal matters with those opposite-sex couples who enter into a civil marriage and provides them with the same ability to obtain legal recognition for their relationship. Couples who form a civil partnership will have a new legal status – that of “civil partner”. The couple must both be of the same sex, not already be in a civil partnership or marriage, be 16 years of age or older, and not be within the prohibited degrees of relationship (i.e. related). The Government expects between 11,000 and 22,000 people to be in a civil partnership by 2010. The CPA does not create any new rights for unmarried heterosexual couples.

Important rights and responsibilities will flow from forming a civil partnership, helping same-sex couples to organise their lives together. Provisions in the Act include:

- a duty to provide reasonable maintenance for your civil partner and any children of the family;
- civil partners to be assessed in the same way as spouses for child support;
- equitable treatment for the purposes of life assurance;
- employment and pension benefits;
- recognition under intestacy rules;
- access to fatal accidents compensation;
- protection from domestic violence; and
- recognition for immigration and nationality purposes.

Workplace Benefits

The main impact of the CPA in the employment field will be to place civil partners in the same position as married people as regards protection against discrimination on grounds of their status.

Sex Discrimination Act

The SDA has been amended in relation to discrimination on the grounds of marital status. This means that civil partners will have the same status as spouses and may not be discriminated against on grounds of their civil partner status e.g. any benefits provided to employees’ spouses must also be provided to employees’ civil partners.

Sexual Orientation Regulations

The Employment Equality (Sexual Orientation) Regulations 2003 were also amended on 5 December 2005 to make it clear the status of a civil partner is comparable to the status of a spouse. The effect is to enable a civil partner who is treated less favourably than a married person in similar circumstances to bring a claim for sexual orientation discrimination under the Sexual Orientation Regulations. It is no defence to state that being married is a material difference to being a civil partner. The discriminator would have to show that the married person and the civil partner were not in a comparable

position for some other reason, for example, that they were doing different jobs. It follows that a person who is about to become a civil partner, has previously been a civil partner or who associates with a civil partner will be comparable to a person in similar circumstances who is about to get married, was married or who associates with someone who is married.

GOR Defence

An employer will not be able to justify less favourable treatment of a civil partner as compared to a spouse (or of a spouse as compared to a civil partner) in similar circumstances unless he could show that being heterosexual or gay, as the case may be, was a genuine occupational requirement (GOR) of the job within the meaning of reg 7(2). The additional GOR exception in reg 7(3) for employment for purposes of an organised religion permits an employer to apply a requirement "related to sexual orientation" (rather than to be a particular sexual orientation). It may therefore permit a narrow range of employers in relation to a very limited number of posts, to require that an employee be married (rather than a civil partner) but only where such a requirement is necessary to comply with the doctrines of the religion, or because of the nature and context of the job, to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. It is likely that these defences will only be available in a very limited number of circumstances.

Pensions and Benefits

It will be the position that more favourable benefits, such as survivor benefits, can be conferred on civil partners and spouses to the exclusion of others without such a status. The effect is that an individual will not be able to claim that such a practice amounts to unlawful discrimination under the Regulations.

Civil partners will be entitled to future pension rights on the same basis as spouses but not those rights which accrued prior to 5 December 2005. There is an exception in relation to contracted-out rights.

Family Friendly Rights

Civil partners are entitled to paternity and adoption leave and pay as well as the right to request flexible working.

General Impact on Employers

The introduction of the CPA will have an impact on employers. It would be best practice to check that no additional benefits are available to any employees solely because they are married.

The CPA provides a means by which same sex partners can be more open about their relationship. This means that employees may want to be more open at work. The potential increased visibility of lesbian, gay and bisexual staff could lead to an increase in discussion and awareness of same sex partnerships. There is a possibility that this increased visibility could lead to an increase in discrimination or bullying. It is therefore important to ensure that all staff are aware of what constitutes inappropriate behaviour, and how this behaviour could be construed as bullying and harassment.

The civil partnership must be registered and the register **shall be searchable by the public**. (Each jurisdiction within the UK has a system of notification not unlike the bans of marriage before a registrar.) Although this means that information about a person is in the public domain and s/he may be open about their relationship, it does not authorise an institution to discuss an individual's sexual orientation without their consent.

Immigration

There are restrictions where either of the proposed civil partners is subject to UK immigration control. A person will be subject to immigration control if they are not an EEA national and they require permission to enter or remain in the UK. The civil partnership provisions for persons subject to immigration control are exactly the same as those already in place for spouses. People subject to immigration control who wish to give notice of a civil partnership will need to do so at a Register Office designated for that purpose.

What immigration rights will a non-EU citizen partner have if s/he is part of a civil partnership?

Under the CPA, couples who register a civil partnership will have similar immigration rights to married couples. This will mean that the non-EEA civil partner of a British Citizen or person settled here will be able to apply for two years' leave to enter or remain in the UK. If the civil partnership is still subsisting at the end of this period then an application for indefinite leave to remain may be made.

These rights will apply whether they have become civil partners by registering in the UK or by forming one of the recognised overseas relationships. These changes to immigration law will only apply from the time the Act comes into force. Detailed guidance on immigration rights for civil partners will be provided by the Immigration and Nationality Directorate in due course.

What about work permit or student visa holders?

Civil partners of people with temporary leave in the UK, such as students and work permit holders will be free to apply for leave in line with their civil partners. For example where the principal work permit holder has two years leave to remain in the UK their civil partner will also be granted two years leave in line. Should the principal work permit holder apply for indefinite leave to remain it will be open to their civil partner to also apply as a dependant.

B. AGE DISCRIMINATION

1 INTRODUCTION

As a result of the European Framework Directive, the UK must implement legislation prohibiting discrimination on grounds of age by October 2006. The final Regulations have now been passed by Parliament. ACAS has also published guidance on how the Regulations will work in practice.

2 WHO WILL BE PROTECTED?

2.1 New rights

Employees (including those on fixed-term contracts), job applicants, the self-employed, contract workers, paid office holders, partners, applicants for partnerships and those in vocational training, of all ages, will be protected from discrimination based on age from 1 October 2006. All aspects of the employment relationship will be covered and an employer's policies and practices from recruitment, training and promotion, pay and benefits, through to redundancy, retirement and dismissal will be capable of challenge. In common with the other strands of discrimination, employees and workers will not need any qualifying period of employment in order to bring a claim in an Employment Tribunal, provided that in advance of doing so, they have followed the statutory grievance procedure (other than where they are dismissed).

3 WHAT WILL AGE DISCRIMINATION LAWS LOOK LIKE?

In the final Regulations, the concepts of discrimination and their application bear a very close resemblance to the familiar concepts of direct and indirect discrimination, harassment, victimisation and post-termination discrimination found in other discrimination statutes.

4 JUSTIFYING AGE DISCRIMINATION

Unlike the position in other areas of discrimination, in limited areas, it will be possible to justify both direct and indirect age discrimination. In addition to the general "objective justification" defence (for which see further below), the final Regulations also contain certain specific exemptions which may be more or less helpful to employers in practice, depending on the nature and activity of their workforces.

4.1 Genuine Occupational Requirements and Positive Action

As for GORs, an employer will be entitled to use an age requirement where (having regard to the nature of the employment or the context in which it is carried out) possessing a characteristic related to age is a genuine and determining occupational requirement and it is proportionate for the employer to apply the requirement. The only example given by the Government in the consultation paper is the use of age for acting jobs.

Similarly, Regulation 29 dealing with positive action only covers discrimination in two narrowly prescribed situations, namely giving persons of a particular age access to vocational training or encouraging persons of a particular age to use employment opportunities if this is reasonably expected to prevent or compensate for the disadvantages suffered by such a person.

It does not cover what is generally regarded as "positive discrimination" i.e. recruiting someone because, for example, they are in an under-represented age group or refusing

to recruit someone because they are in an over-represented age group. Such positive discrimination could only be justified through the general test of objective justification.

4.2 **National Minimum Wage**

Although the National Minimum Wage legislation contains age bands for younger employees, these will continue to be lawful. The exemption linked to the NMW will allow employers to use exactly the same age bands i.e. 16 – 17, 18 – 21 and 22 and over to pay at or above the NMW provided those in the lower age groups are paid less than the adult minimum wage rate. If an employer pays more than the adult NMW rate to young workers it will need to objectively justify this.

Employers will not be permitted to pay different rates to those in the same age category.

5 **WHAT IS “OBJECTIVE JUSTIFICATION” AND WHEN AND HOW CAN THE DEFENCE BE USED?**

Less favourable treatment on grounds of age and the application of a provision, criterion or practice which disadvantages a particular age group and the individual claimant, may be justified if the treatment or the particular practice is “*a proportionate means of achieving a legitimate aim*”. The first draft of the Regulations gave examples of legitimate aims which could, depending on the circumstances, provide a defence. However, these have been removed from the final Regulations and it is likely that this is an area which will need to be clarified by case law.

In the consultation paper, the Government included a list of legitimate aims which appeared in its previous consultation paper. These were:

- Health, welfare and safety (including protection of younger or older people);
- Facilitation of employment planning;
- Particular training requirements;
- Encouraging and rewarding loyalty;
- The need for a reasonable period of employment before retirement; and
- Recruiting or retaining older people.

It is worth noting that a legitimate aim cannot be related to age discrimination itself. So, for example, the consultation paper stated that it would not be lawful for a retailer of trendy fashion items who wants to employ young shop assistants because it believes this will contribute to its aim of targeting young buyers. Trying to attract a young target group will not be a legitimate aim, because this has an age discriminatory aspect.

In addition, even if the type of treatment or the provision, criterion or practice pursues a legitimate aim, it must still be “proportionate” i.e. the means of pursuing the aim must be “appropriate and necessary”.

6 **WHAT EFFECT WILL THIS HAVE IN PRACTICE?**

6.1 **Recruitment, Training and Promotion**

The Age Discrimination Regulations are likely to have a major impact on policies in these areas as, with the limited exception of “genuine occupational requirements” once the Regulations are in force, employers will not be able to advertise for, employ, train or promote someone on the basis of their age unless that employer has the evidence required to succeed in the defence of objective justification. This is likely to be a difficult

and costly defence to run in this area, as the Government stated in its consultation paper, decisions on recruitment, selection and promotion should not be based on age, but on the **skills** required for the job.

6.2 **Pay, Benefits and Pension**

With the exception of the National Minimum Wage from 1 October 2006, pay and non-pay benefits based on age will not be permitted, unless objectively justified.

In the final Regulations there is an exception for the provision of life assurance cover to retired workers and therefore it will not be unlawful to cease to provide life assurance cover for employees, including those who have retired early on ill health grounds, after they have reached normal retirement age.

6.3 **Service Related Pay and Benefits**

Certain benefits based on length of service are excepted, but where the benefit relates to service exceeding 5 years there are restrictions. In order to be permissible (where service must exceed 5 years) it must *reasonably appear* to the employer that there is a business advantage to applying the requirement in question. For example, if the benefit encourages loyalty or motivation or rewards experience.

6.4 **Occupational Pensions**

The final Regulations make it unlawful for the trustees and managers (but not employers) of an occupational pension scheme to discriminate against, or harass, a member or a prospective member of a scheme. The Regulations also stipulate that every pension scheme has a non discrimination rule and if there is a conflict between the provisions of the scheme and the non discrimination rules, the non discrimination rule prevails.

There are a number of pensions related exceptions set out in the final Regulations where it will not be possible to complain about the non discrimination rule for example, when closing the scheme to new members, providing different pension increases to pensioners over 55 and under 55 and providing "catch up" pension increases..

7 **RETIREMENT AND UNFAIR DISMISSAL**

Two key changes are to be made to the law in these areas which will impact heavily on employers in practice:-

- The Age Regulations will change the unfair dismissal legislation to remove the current statutory age limit (i.e. age 65 or an employer's normal retirement age) for claiming unfair dismissal. As such, from 1 October 2006, all employees in the workplace aged over 65 will be protected against unfair dismissal.
- In addition, the Age Regulations introduce, for the first time, a national default retirement age of 65 to be reviewed by the Government in 2011. Those with a normal retirement age below 65 are in a risky position as they will have to objectively justify the use of that retirement age.

A dismissal by reason of retirement at or above this default retirement age and any objectively justified retirement age below 65 will be regarded as a fair dismissal provided the new "duty to consider" procedure has been followed.

7.1 **The Duty to Consider Procedure**

The Regulations set out a new mandatory "duty to consider" procedure which will be used for any compulsory retirement of employees at any age. It will apply instead of the

statutory disciplinary procedure and is modelled on the existing right to request flexible working.

As with flexible working, the employee does not have the right to continue working past 65 only the right to request to continue working.

7.2 **Employer Notification**

Under the new procedure, an employer must notify an employee of the right to request working after the intended retirement date at least 6 months (but no more than 12 months) before the intended date of retirement and must inform the employee of the date the employee is expected to retire.

If an employer does not comply with these obligations, he has an ongoing duty (until 14 days before the dismissal) to inform the employee of his right to request working longer and of the intended retirement date. The consequences of failing to do this are significant in that any dismissal will be automatically unfair.

7.3 **Employee Request**

An employee has a statutory right to request not to retire on the intended retirement date and can make such a request between six months and three months before the expected date of retirement. In the request the employee must propose that his employment should continue, following the intended date of retirement indefinitely, for a stated period or until a stated date.

If the employer has failed to notify the employee under the duty to consider procedure the employee can make a statutory request at any time within six months prior to the intended retirement date. If such a request is made, an employer is under a duty to consider that request and cannot retire the employee until a meeting has been held with the employee to discuss his request, following which the employer must give its decision as soon as reasonably practicable.

The previous draft Regulations imposed a “duty of good faith” on the employer when considering a request to work beyond retirement but this has been removed from the final Regulations. If the employer decides to reject the request there is no statutory obligation to set out its reasons for doing so or to have any “good” reasons.

The employee can appeal the employer’s decision by giving notice as soon as is reasonably practicable after receiving the employer’s decision. The appeal meeting should take place within a reasonable period after the date of the notice of appeal.

Clearly, the duty to consider procedure will be widely used in practice, particularly as there will be no qualifying period for this new right.

7.4 **Setting a New Retirement Date**

The duty to consider procedure may of course result in a new retirement date being set. If so, as the new retirement date approaches, the duty to consider will apply again in exactly the same way.

7.5 **Transitional provisions**

The Regulations set out transitional provisions in relation to retirements taking place between 1 October 2006 and 31 March 2007. There are different provisions depending on whether the employer gives the employee notice of retirement before or after 1 October 2006 and the intention is that the retirement will take place between 1 October 2006 and 1 April 2007. The provisions enable the employee to make a request to work beyond their retirement date but reduce the notice times.

7.6 Unfair Dismissal

As outlined above, the Age Regulations will remove the current statutory bar on employees aged 65 and over complaining of unfair dismissal.

7.6.1 Reason for dismissal

Dismissal on the grounds of retirement is a potentially fair reason for dismissal. The concept of a “planned retirement” in the earlier draft of the Regulations has been removed and instead the final Regulations distinguish between the circumstances where the employer will be able to rely on retirement as the reason for dismissal, circumstances where it will not and circumstances where it will be for the tribunal to decide what the reason for the dismissal is.

In general, if the retirement takes place at or above the default retirement age of 65, or at an objectively justified retirement age below 65, and the duty to consider procedure is correctly followed the employer will be able to rely on retirement as the reason for the dismissal. If the correct procedures are not followed, the employer will not be able to rely on “retirement” as the reason for the dismissal, which may therefore be unfair.

7.6.2 New fairness test

Where a tribunal considers that the reason for the dismissal is retirement, there is a new test to apply in considering whether the dismissal is fair and is essentially a procedural fairness test concerning compliance with the duty to consider procedure. This test replaces the fairness test which applies to all other dismissals and **only** applies in the context of retirement dismissals.

7.6.3 Automatic unfair dismissal

A dismissal on grounds of retirement will be automatically unfair in the following situations:

- Prior to retiring the employee, the employer has not informed the employee at all of the right to request to continue working or the employer has informed the employee less than 2 weeks before the intended retirement date;
- The dismissal takes effect while a duty to consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision; or
- The employer has failed to consider the employee’s appeal against a decision to retire him/her.

7.6.4 Remedies and Compensation

In common with other claims, claimants must bring their action within three months of the act complained of. Compensation for a successful claimant will be unlimited and injury to feelings awards will be available.

In relation to compensation for any unfair dismissal, the tapering of the basic award at the individual’s 64th birthday will be removed and will match the calculation of statutory redundancy pay (see below).

There is also a new provision for compensation of up to eight weeks’ pay (capped at the statutory maximum) where the employer has not complied with its duties under the duty to consider procedure.

8 REDUNDANCY

The Age Regulations will also have an impact on the availability and amount of statutory redundancy payments. The final Regulations have removed the lower and upper age limits at 18 and 65 respectively and the taper at age 64. The multiplier based on three age bands (currently ½ a week for younger employees to 1½ for older ones) has remained. This is because the government decided that the current scheme best reflects the economic position of all three age bands and the difference in the multiplier can be objectively justified. No doubt this will result in a legal challenge!

The potentially indirectly discriminatory 2 year qualifying length of service for a statutory redundancy payment will, however, be maintained as will the current cap of 20 years on the length of service that can be taken into account for the calculation.

The final Regulations contain a specific exemption for contractual enhanced redundancy schemes which exactly mirror the statutory redundancy payment scheme.

9 LESSONS FROM IRELAND

The Republic of Ireland has had age discrimination laws since 1998 and there have been a number of cases across a range of areas. It is reported that age claims now account for in the region of 20% of all cases in the Republic of Ireland. Here are highlights of the key cases:

- Ryanair advertised for a “young, dynamic, professional”. On being challenged about this they claimed that “young” could be a reference to “young at heart”. However, the evidence showed that none of the 28 candidates who applied for the job was over 40. It was also shown that the interview and selection procedures used by the company were not consistent with their claim to be an equal opportunities employer. Ryanair lost the case.
- Another business advertised for “young, confident and enthusiastic” salesperson. The Equality Officer decided that “young” provided face value evidence that the company intended to discriminate.
- Another airline case involved Aer Lingus. During an interview for cabin crew, an applicant was asked how she would react to younger employees directing her. The Equality Officer decided that the question was discriminatory.
- There have also been cases on the necessary age difference in order to show that there has been age discrimination. In one case, an age difference of three years was held to be not significant enough to give rise to a presumption of age description. The ages here were 31 and 28 years. In another case, an age difference of eight years was sufficient to sustain a case. In this case, the ages were 45 and 37, with the 37 year old being appointed to the post as a promotion. However, and giving a further lesson, the employers won the case because they could demonstrate that they had followed established criteria for interview and had good evidence around the education and qualifications of the successful candidates and how this had been established through the recruitment process.
- A 54 year old was awarded €40,000 in compensation when it was found that he had been discriminated against in two competitions for promotion because he was over 50. He was 54 at the time and was able to produce figures to prove that no candidate over 50 was successful in such competitions between 1999 and 2003.
- An interviewee for a training course successfully claimed age discrimination where in an interview the interviewer had made comments to the effect that older applicants had difficulties with the pressure of attending a course and the demands of technical drawings.

- A worker succeeded in claiming harassment in circumstances where he had not been selected to move to a higher pay scale in a business which was specifically seeking to establish a “young and dynamic” image. At the other end of the scale, a young female worker succeeded in her claim for harassment when she was called “young, foolish girl” by an older male member of staff.

Drawing from these cases and the decisions, the following factors can be identified as leading to an inference of discrimination:

- Discriminatory questions or comments at interview.
- Lack of transparency or unexplained procedures for selection or promotion.
- The mismatch between formal selection criteria and those used in practice.
- A marked statistical difference in success rates for different age groups in apparently similar circumstances.
- Evidence of a policy to prefer a particular age group.
- Incomplete equal opportunities policies (e.g. missing out aspects of discrimination).
- No process to “equality proof” employment advertisements.
- No requirements for interview records or notes on assessing candidates.

10 IS THERE SCOPE FOR AGE RELATED CLAIMS NOW?

Until the age discrimination legislation comes into force, lawyers have sought to make age related claims, by the “back door” through the sex discrimination legislation. In the case of ***Rutherford & Another –v- Secretary of State for Trade and Industry [2004] IRLR 892***, Mr Rutherford and Mr Bentley were over 65 at the time of their dismissal. Under current legislation, individuals have no right to bring a claim for unfair dismissal or a redundancy payment if, at the time they were terminated, they had reached the age of 65 (or later if there was a normal retiring age for that position). It was argued on behalf of Mr Rutherford and Mr Bentley that this legislation was effectively discriminatory on grounds of sex, in that more men than women wanted to continue working after the age of 65.

Mr Rutherford and Mr Bentley were successful in the Employment Tribunal, but this was overturned on appeal. The Appeal Court found that when looking at the working population as a whole, the numbers of those aged over 65 were so small as to be negligible. The claimants appealed. The House of Lords unanimously dismissed the appeal and held that that upper age limit of 65 did not have a disproportionate impact on men as compared to women and therefore did not indirectly discriminate against men.

In another case ***Cross v British Airways plc [2005] IRLR 423*** a slightly different “age related” claim is being made. Here, British Airways cabin crew who were taken on before 1971 were entitled to work until 60, while those taken on after 1971 (when BA changed their policy) have to retire at 55. The argument put forward was that this amounts to sex discrimination as significantly more men are able to comply with the requirement that they started work before 1971 with BA, and can therefore retire at 60. The Court of Appeal upheld the EAT decision that the normal retirement age is not a contractual right that is capable of transferring under TUPE. It must be determined at the time of dismissal.

Although neither case has been successful a decision by the ECJ in relation to a case referred by the German Labour Court ***Mangold v Helm ECJ 2006 IRLR 143*** states that age discrimination is already unlawful. Germany has until December 2006 to implement the Framework Directive’s provisions on age discrimination. However, in a case involving a challenge to existing German legislation on fixed-term work the ECJ stated that national

courts must set aside any provision of national law which conflicts with the Directive even before the period for implementation of the Directive has expired.

This is a reminder that age related discrimination claims may be possible before 2006. Companies need to look at their practices now, and consider carefully why any potentially discriminatory provisions are included and whether these can be justified.

11 PREVENTATIVE ACTION

- 11.1 Age profiling – at all stages of the employment cycle, including during recruitment in order to glean information as to the effectiveness of employment policies in order to identify whether or not you are an employer of choice across all age groups or lose a disproportionate amount of people in one age range or have bunching.
- 11.2 Audit – of all employment policies and benefits in order to “age proof” them and to consider what business case is available to retain current policies if desired.
- 11.3 Cultural awareness training – the existence of age-based stereotypes is well established in many workplace cultures and will need to be eliminated in order to avoid claims. This is particularly true of the recruitment process and will also assist in avoiding claims of harassment. Employees who claim harassment post-October 2006 are likely to be able to refer to workplace culture and comments that were made prior to the introduction of the legislation.
- 11.4 Update Equal Opportunities Policies and training.
- 11.5 Review recruitment processes: from advertising to interviewing and record keeping.
- 11.6 Review criteria for recruitment and promotions and question any age or time related criteria. Consider what qualifications and experience are actually required.

Charles Russell

1 June 2006

This paper is of general application and guidance. It should not be relied upon in relation to any specific set of circumstances without seeking separate legal advice. Neither the authors nor Charles Russell can accept any responsibility for actions taken or omitted to be taken as a result of relying on this talk alone.