

WINTER 2005

# People

## The FFW Employment Review

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## 1

# Introduction and case update

Welcome to the winter issue of *People*, in which we will take our usual look at the recent developments in employment law, including recent changes in the areas of sex discrimination and pensions, recent case law, and also consider changes in prospect.

Thank you to everyone who has participated so far in this year's employment law training programme. This has been a tremendous success, and we are delighted by the positive feedback we have had. If you would like to come to any of our remaining workshops and seminars, please do ask us for a prospectus, or log onto our website at [www.e-employmentlaw.com](http://www.e-employmentlaw.com) where there is a link on the home page to an electronic copy. We are currently planning our prospectus for the financial year 2006 - 2007, which we will send out to you early in the New Year. If you would like particular areas of employment law to be covered, please let us know.

## Case update

### Race discrimination

In *Dresdner Kleinwort Wasserstein Ltd v Adebayo*, Mr Adebayo was a highly successful equity derivatives trader for DKW, and the only trader of non-European origin. In April 2003, his line manager changed, and at the same time, his trading position sharply deteriorated. He was given a formal warning for breach of the trading guidelines, and then summarily dismissed even though DKW had no express policy in this area, and the other traders operated in a similar way to him.

Mr Adebayo brought successful claims for race discrimination, including that his dismissal was discriminatory, wrongful and unfair. DKW appealed unsuccessfully against the findings of race discrimination and unfair dismissal.

The case is legally significant for two reasons – this being one of the first reported cases since the recent change in the burden of proof in discrimination claims. First, it considers what a claimant needs to do to make out a primary case of race discrimination. Secondly, once a primary case has been made out, the burden shifts to the employer which then has to show that no unlawful act has been committed - and the case considers what an employer should (and should not) do to satisfy this requirement.

For the claimant, it will not be enough merely to show a difference of race - for example, that someone of different race was promoted to a post for which he or she had applied. The claimant will also have to show that he or she not only met the stated qualifications for promotion to the post, but that he or she was at least as well-qualified for the post as the successful candidate. This case therefore makes it clear that a thorough

approach must be taken at the first stage to ensure a "like for like" comparison between the complainant and his or her comparator whose circumstances must be the same or not materially different to those of the complainant. At this first stage, the tribunal need only conclude that the facts found **could** lead to the conclusion that there had been unlawful discrimination – and if this conclusion is reached the burden of proof shifts to the employer.

Once the burden of proof has shifted, the employer will have to show, on the balance of probabilities, that it did not commit the act of unlawful discrimination. The shifting of this burden means that employers must call evidence which proves that its explanation for the act complained of was non-discriminatory, and that the employer's explanation was the real reason for what occurred.

An employer may damage its case by giving equivocal or evasive answers to statutory questionnaires, failing to follow recommendations in relevant codes of practice, or failing to call as witnesses those involved in the events and decisions about which the complaint is made.

In *Redfearn v Serco Ltd t/a West Yorkshire Transport*, Mr Redfearn, who was 'a perfectly satisfactory employee', was summarily dismissed for 'health and safety reasons' from his job, following his election as a BNP counsellor, on the grounds that Asian patients and co-employees would be upset and/or hostile. He claimed direct and indirect race discrimination.

He succeeded before the EAT which held that the words 'on racial grounds' in the Race Relations Act 1976 s1 (1) (a) should be construed widely, and are capable of covering any reason for an action based on race, including the race of the person affected by the action or of others.

Note that this case is currently being appealed to the Court of Appeal. Note also the case of *Baggs v Fudge* where Mr Baggs was refused an interview for a job on the grounds that he was a member of the BNP and attempted to argue that he had been discriminated against on the grounds of religion or belief – i.e. that the BNP fell within the definition of religion or belief ("any religion, religious belief, or **similar philosophical belief**"). The tribunal dismissed his claim, adopting a narrow interpretation of "similar philosophical belief" – although query whether the tribunal would have taken such a narrow interpretation had Mr Baggs been



bringing a similar claim as a member of the Green Party.

### Tribunal rules of procedure

In *Richardson v U Mole Ltd*, Mr Richardson was dismissed by U Mole Ltd for gross misconduct. When he complained of unfair dismissal to the employment tribunal, he did not use the new claim form and his claim did not expressly state, as required by the new employment tribunal rules of procedure, that he had been an employee. The tribunal refused to accept his claim, although the form that he used included answers to various questions which clearly indicated that he was an employee, such as "Please say what job you did for your employer" and "Please give the dates of your employment". Mr Richardson was unable to correct the defect within the time limit for presenting the claim.

On appeal, the EAT held that the employment tribunal should not have refused to accept the claimant's claim for unfair dismissal. It recognised that what had happened in this instance, as in several other recent cases, was that the tribunal, as a protest against the new rules of procedure - which many employment tribunals regard as being poorly drafted - followed those rules to the letter, rather than construing them more appropriately. This may well continue to happen until the rules are reviewed once more.

### Statutory dispute resolution procedures

In *Cooke v Secure Move Property Services Limited*, a tribunal held that an employee who resigned in anticipation of his dismissal for gross misconduct who then brought a claim for constructive dismissal did not need to raise a grievance under the statutory grievance procedures. In the alternative, a letter he had written to his employer alleging bias in the conduct of a disciplinary procedure was sufficient to amount to a Step 1 statement of grievance.

*Stewart v Barnett's Motor Group*, a Scottish case, confirmed that a solicitor's letter before action could constitute a Step 1 statement, even though it did not specifically refer to any grievance, or ask for the employer's grievance procedure to be implemented. The same conclusion was reached in *Aspland v Mark Warner*, in which solicitors' correspondence before action was deemed to amount to a written grievance.

In its recent report "A Matter of Confidence: Restoring Faith in Employment Tribunals", the CBI picked up on the problem that employers are having in identifying precisely when the requirement to follow the statutory grievance procedures is triggered. Currently there is no requirement for the employee to state expressly "I am raising a grievance regarding ....." so almost any written expression of dissatisfaction connected with employment could trigger the obligation to go through the statutory procedures. In an email age where employees are constantly sending messages which

could be interpreted as expressing dissatisfaction, employers are caught between ignoring such messages and running the risk of falling foul of the statutory procedures or arranging considerably more grievance meetings than was previously the case. The pragmatic approach at this stage is to address dissatisfaction by asking the employee whether s/he wants the matter addressed formally (i.e. with a procedure that complies with the statutory procedure) or informally and then proceed accordingly.

### Flexible working

Employers should note that an unsuccessful application under the flexible working legislation may well be followed by a complaint of sex discrimination.

By way of background, parents of children younger than 6 or disabled children aged under 18 have, since 6 April 2003, had the right to apply to work flexibly and their employers are obliged consider any such request seriously. Where the request is made in accordance with the procedure set out in the Flexible Working (Procedural Requirements) Regulations 2002, an employer has the right to refuse the request only if one of the following business reasons for the refusal applies:

- burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- planned structural changes;
- detrimental impact on performance; and
- insufficiency of work during the periods the employee proposes to work.

In *Hardys and Hansons plc v Lax*, the facts of which developed before the flexible working legislation came into force, Ms Lax, who worked as a retail recruitment manager, wanted to return from maternity leave on a part-time or job share basis. She was made redundant when her employers decided that no part-time role was available and a job share was not appropriate.

It was held that the post was capable of being split between job sharers, and Ms Lax succeeded in her claims for unfair dismissal and indirect sex discrimination.

In *Starmer v British Airways plc*, BA refused Ms Starmer's application to work 50% of her full-time hours, arguing that, as a pilot, she needed to maintain a minimum number of flying hours. The business reasons given for the refusal of her application included the burden of additional costs, an inability to reorganise work among existing employees, a detrimental effect on



quality and performance and an inability to recruit extra employees. BA instead offered her the option of working 75% of her full-time hours.

However, the EAT held that the requirement to work 75% of her full-time contract amounted to indirect sex discrimination for which BA had not provided adequate justification.

*Clarke v Telewest Communications plc* was another case which started as a request for flexible working, and developed into a claim of sex discrimination. It is also a case which provides an object lesson on how not to handle an application for flexible working!

On return from maternity leave, Ms Clarke asked not to work weekends and late shifts, and to work an hour less each day. Telewest failed to respond promptly or to set up a meeting within the 28-day time limit set out in the flexible working regulations. When a meeting was finally held, Telewest presented three alternative work patterns to that suggested by Ms Clarke, all of which involved her working late shifts and weekends. It then rejected her application.

After the meeting, Ms Clarke wrote asking for written reasons for the refusal but did not receive a response for a month, despite chasing. The response she finally received stated that Telewest required the office to be open seven days a week and that all employees were required to work some weekends and late shifts.

Ms Clarke appealed, suggesting that it would be possible for other employees or agency staff to cover the shifts she was unable to work. She also suggested that, as an alternative, she could work part-time. An appeal hearing was arranged, but Telewest rejected the appeal two days before it took place. Following the meeting, Ms Clarke resigned and brought proceedings claiming constructive unfair dismissal, indirect sex discrimination and breach of the flexible working regulations. She was successful in all three claims.

In relation to the flexible working application, the Tribunal held that Telewest had:

- failed to reply to the request and set up a meeting in a timely manner;
- made the decision to refuse flexible working prior to the first meeting and without proper consideration of the merits of the application. Importantly, it concluded that the fact that the employer came to the meeting with three alternative work patterns, none of which fitted in with the hours requested, indicated that the request had already been rejected;
- failed to give written reasons for its decision within the time limit required (14 days), and only did so after repeated chasing;

- failed to state on which of the prescribed grounds it had made its decision and to explain why those grounds applied; and
- dealt with the appeal unfairly in that a decision was made prior to the hearing and by the same person who had rejected the original application.

## Stop press!

### Restrictive covenants

The EAT has just handed down an important decision on restrictive covenants.

In *Windsor Recruitment v Silverwood*, the employer had had both its staff and business 'poached' by competitors several times, and wanted to take action to protect its position. It therefore asked its employees to accept new restrictive covenants. Some employees refused to do so, and they were dismissed. They claimed unfair dismissal.

The employment tribunal held that the covenants were unreasonably wide and consequently unenforceable. Therefore, the employer could not show that the dismissals were for 'some other substantial reason', and as a result, they were unfair.

The EAT overturned this decision. It held that it is not appropriate for an employment tribunal to decide the validity of a proposed covenant and that

"It cannot be the proper approach that an employer with a genuine need for protection, which seeks, acting on legal advice and adopting a fair... procedure, to introduce a covenant, which, after exact analysis, turns out to have been, perhaps marginally, too wide, is liable 'automatically' for unfair dismissal".

The reasonableness of such covenants should be considered by a tribunal when looking at the fairness of the dismissal. The approach to take is:

- is the proposed covenant plainly unreasonable and not severable? If so, this may lead a tribunal to a conclusion of unfairness;
- if it is arguably unenforceable, then the tribunal should consider the approach of the employer, for example, the time allowed for the employees to consider the proposals and any opportunity, if appropriate, for legal advice;
- if the covenant is plainly reasonable then, whilst consideration of the employer's approach is still necessary, it will be easier for a tribunal to conclude the dismissal is fair.

(Note: the unfairness of the dismissal was actually upheld on separate, procedural grounds).



## 2 Recent changes to sex discrimination law

The Employment Equality (Sex Discrimination) Regulations 2005 (the regulations) came into force on 1 October 2005. These regulations amend the Sex Discrimination Act 1975 (SDA), in relation to employment, recruitment and vocational training.

Note that, of course, the SDA applies equally to men and women. In general therefore, protections against sex discrimination are provided to both sexes equally, although typically the wording of the statute anticipates that the discriminator will be male, and the person suffering the discrimination female.

### Summary of key amendments

These are:

- a new definition of indirect sex discrimination;
- statutory definitions and express prohibition of harassment and sexual harassment;
- the codification of the rule established by case law that less favourable treatment of women on grounds of pregnancy or maternity leave is unlawful sex discrimination;
- an extension of protection for overseas workers of companies in the UK;
- a change to the 'general occupational requirement' rule to provide protection to someone considering, undergoing or following gender reassignment; and
- the introduction of an 8-week time limit within which an employer must reply to a sex discrimination questionnaire, in order to avoid the drawing of adverse inferences by an employment tribunal.

In this article, we will concentrate on the changes to indirect discrimination, harassment and maternity discrimination.

### Indirect discrimination

The definition of indirect discrimination in the SDA, as amended, states that a person indirectly discriminates against a woman in employment or vocational training if "... he applies to her 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."

Therefore, indirect sex discrimination occurs when an

apparently neutral provision, criterion or practice (which can, of course, include a policy) applies to all workers or applicants but causes particular disadvantage to members of one gender. It is open to an employer to defend a claim of indirect sex discrimination if it can objectively justify such a provision, criterion or practice by showing both that it meets a legitimate business aim, and is a proportionate means of meeting that aim.

This brings the definition of indirect sex discrimination into line with other statutory definitions of indirect discrimination on grounds, for example, of race, religion or belief and sexual orientation. The way that the new statutory test is worded means that, when an employment tribunal considers whether a provision, criterion or practice causes a particular disadvantage to members of one gender in comparison to members of the other gender who are in the same, or not materially different circumstances, claimants need not always provide statistical evidence.

It remains the case that, even though indirect sex discrimination is often inadvertent, lack of intention is not a defence. For example, the following actions by the employer could have an unintended indirect discriminatory effect:

- a change of location or working hours;
- a requirement to work overtime or a shift pattern
- a long hours culture;
- a refusal to allow employees to work from home.

### Harassment

Until recently, the SDA did not specifically outlaw harassment, although claims for compensation for harassment suffered could be successfully pursued as a form of direct discrimination.

The amendments to the SDA now explicitly prohibit both harassment on the ground of gender, and sexual harassment itself.

The SDA now states that a person subjects a woman to harassment if :

- on the ground of her sex, he engages in unwanted conduct that has the purpose or effect



- of violating her dignity, or
- of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,

or

- he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect
- of violating her dignity, or
- of creating an intimidating, hostile, degrading, humiliating or offensive environment for her

or

- on the ground of her rejection of or submission to such unwanted conduct he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

This definition breaks down into four prohibitions:

- **Harassment** - this is gender-based harassment, which is unwanted treatment on the ground of the victim's sex, but is not of a sexual nature. The Women and Equality Unit gives the example of putting crucial equipment on a high shelf which can only be reached by tall people, in other words, mainly men. This will of course only amount to harassment if it has the purpose or effect of violating the victim's dignity, etc.
- **Sexual harassment** – this occurs where the unwanted conduct *is* sexual – such as a person making unwelcome and sexually explicit comments to a colleague of either sex - so this type of unwanted conduct need not be related to a person's gender.
- **Victimisation** - victimisation is unfavourable behaviour meted out to someone because they have rejected *or* submitted to harassment - for instance, someone's job application is turned down because he or she rejected particular unwanted conduct, or he or she is refused promotion because they *did* submit to it.
- **Gender reassignment** - harassment on the ground of gender reassignment, as well as gender, is prohibited.

As with indirect discrimination, even if the conduct is unintended, it can be unlawful if it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. However, conduct will only be taken to have the effect of violating a person's dignity or creating such an environment if, having regard to all the circumstances, including in particular the perception of

the complainant, it is reasonably considered as having that effect. Either a serious "one-off" occurrence or an accumulation of occurrences can amount to harassment.

## Pregnancy and maternity leave

Until now, case law has established that unfavourable treatment on grounds of pregnancy or taking maternity leave is unlawful discrimination. The regulations have codified this rule so that the SDA and the Equal Pay Act 1970 now expressly prohibit it.

This protection covers not only employees, but also job applicants and vocational training. Women are explicitly protected from discrimination when exercising their right to both ordinary and additional maternity leave.

## Conclusion

The SDA has been amended primarily to comply with European equal treatment legislation, and to a large extent, the amendments to the SDA merely codify the legal position in this country as developed by case law – in relation to pregnant women, or the ability to claim sexual harassment as a type of discrimination, for instance. To this extent, the amended legislation is unlikely to create great waves, as employers will already have policies in place that outlaw such discrimination. The Department of Trade and Industry acknowledges this, in its regulatory impact assessment:

“The changes... to the SDA and [Equal Pay Act] do not alter fundamentally the way the law works in practice. The number of changes... is relatively small. Where the purpose of these changes is to clarify existing case law and what already happens in Employment Tribunals, the new information that employees and individuals need to know about is modest.”

So how will the changes affect employers? First, the change in the definition of indirect discrimination is likely to affect preparation for the tribunal hearing in some cases, as the emphasis has moved away – slightly - from the need to compile statistical evidence to show the disproportionate effect of an employer's provision, criterion or practice, although this might of course lead to some confusion regarding when such evidence would, in fact, be required. Further, now that harassment has a statutory definition, there may well be cases on the interpretation of that part of the statute, and policies should be frequently reviewed to ensure both that they cover every angle of the definition and that they are in step with the evolving law.



# 3

## The Civil Partnership Act 2004

On 5 December 2005, the Civil Partnership Act 2004 (CPA) comes into force. It is a wide-ranging act, which will take strides in providing rights to same sex couples who choose to formalise their relationships. It covers registering and dissolving civil partnerships, financial and property rights, children of one or both partners, immigration and employment.

The Department of Trade and Industry has stated that

“as well as giving formal legal recognition, civil partnership brings... rights and responsibilities between the partners themselves and third parties, including the state and employers. This will include ensuring that access to employment and vocational training and related benefits will achieve, as far as is possible, equality of treatment between spouses and civil partners”.

The most striking impact of the CPA will be the new equality between civil partners and married people in the eyes of the law. The most obvious implications for the employer will be on employment and pensions benefits. For instance, a surviving civil partner will be entitled to similar pension benefits to those of a surviving spouse, (and, incidentally, will be able to claim a state pension on the basis of their deceased partner's national insurance contributions).

Discrimination legislation will also be affected, and employers will need, as a consequence, to carry out a review of internal policies.

First, there will be an amendment to the Sex Discrimination Act 1975 section 3. As currently drafted, this section outlaws discrimination on the grounds that an individual is married, but does not protect single people (and therefore gay people in stable relationships), from discrimination. This will be extended by the CPA to protect civil partners from discrimination in the same way that married people are protected.

Discrimination in favour of married employees is not outlawed by the Sex Discrimination Act as it stands. Furthermore, European law has consistently taken the line that married people are not comparable to those in other relationships. Therefore, currently, where a benefit is awarded to those who are married, unmarried employees cannot complain of sex discrimination. This means that, until now, people in same sex relationships have not been able to achieve parity with married people, as an employer has been entitled to defend itself against claims by arguing that no comparison may be carried out with married employees.

Because of this, the Employment Equality (Sexual Orientation) Regulations 2003 are being amended to

make it clear that for the purposes of these regulations, a civil partner has the same status as a spouse. The effect of this will be 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, and an employer will not be able to defeat the comparison by saying, by way of defence, that being married is a material difference. The amended regulations will also come into force on 5 December 2005.

In more recent legislation, and particularly that commonly known as ‘family-friendly’, same sex partnerships are often already taken into account. The CPA extends the ambit of such rights by amending the Employment Rights Act 1996 to allow employees to take time off work to deal with an emergency that concerns their civil partner.

In order to prepare for these changes, employers should review their internal policies, such as equal opportunities and anti-harassment policies, to ensure that civil partners are accorded the same status and rights as married people. They should amend forms such as equal opportunities monitoring forms, which ask about marital status in order to make ‘civil partnership’ a possible answer.

Employers should also ensure that any employee benefits such as extra leave when an employee gets married, or benefits available to an employee's spouse, such as health insurance or free travel, should also be made available to civil partners, and where employee benefit schemes are provided by a third party, employers should check that they do not discriminate.



# 4

## Age equality - the draft regulations

The long-heralded age equality regulations were finally published in draft this summer, and consultation closed on 17 October. The legislation is scheduled to come into force in October 2006.

This article will outline the main provisions of the draft regulations, and in particular look at the issue of retirement, which is attracting attention as a potentially controversial area under the regulations. Of course since the regulations are not officially in final form, they could, in theory, change – but it is likely that they will only be tweaked, and definitions and underlying concepts will probably remain the same.

### Application

In the employment field, the regulations will cover workers of all ages, not just older people, or employees. Once in force, they will outlaw discrimination in recruitment, employment, including training and promotion, and dismissal.

There will be four types of discrimination: direct and indirect discrimination, harassment and victimisation.

- Direct discrimination will occur where a person discriminates against another on the grounds of their age.
- Indirect discrimination will occur where a person applies an apparently neutral provision, criterion or practice to a second person, which he or she would apply to others of a different age group, but which
  - puts people in the second person's age group at a particular disadvantage compared with others, and
  - which actually puts the second person at that disadvantage.

One of the headline aspects of these regulations is that unlike other anti-discrimination legislation, both direct and indirect age discrimination may be justified under the regulations if the discriminator is able to show that the treatment suffered is a proportionate means of achieving a legitimate aim. The government stresses in its consultation paper that the defence of objective justification will only succeed exceptionally and for good reason, and assertions of justification must be backed up by evidence. This last point is very relevant in practice: we have seen reports of several recent cases in other areas of discrimination law where employers have lost because such assertions were made baldly, without the necessary proof.

- Victimisation will occur where a person suffers less favourable treatment as a result of taking action under the regulations.
- Harassment will occur where a worker can show that his or her dignity has been violated, or that he or she has been subjected to an intimidating, hostile, degrading or offensive environment.

Where an individual believes that he or she has been discriminated against on the basis of age, a claim may be made to tribunal within three months of the act perceived as discriminatory. For successful claims, there is no upper limit on compensation.

### Service-related pay, benefits and incentives

Whatever their advantages may be, service-related benefits are by their nature indirectly discriminatory, as the longer you are in a post, the older you are likely to be, and if your terms and conditions become more and more favourable over that time, they are bound to be better than those of your colleagues who have less service and therefore tend to be younger.

It was expected that the regulations would outlaw such benefits, at least to some extent. In the event, however, there are a number of substantial "carve outs" allowing such benefits, in general, to remain lawful, without having to satisfy the objective justification test. So there are exemptions where:

- providing a benefit is an incentive or a reward for employee experience or loyalty, and the employer has reasonably concluded it will be advantageous to the business to provide such an incentive or reward, and applies a length of service criterion similarly to all its staff; or
- the qualification for a benefit is no more than five years' service, and the employer applies the length of service criterion similarly to all its staff; or
- the benefit provided is an enhanced replacement of a statutory benefit, and the employer applies a length of service criterion similarly to all its staff.

Exemptions will also exist where employers are obliged to discriminate in order to comply with a statutory



provision, or where employees are paid at national minimum wage levels (which already vary by reference to age).

## Termination of employment

An area on which the regulations are likely to have a big impact is on termination of employment. Once in force, employees over 65 will, for the first time, be entitled, like their younger colleagues, to make a complaint of unfair dismissal, and to statutory redundancy payments. The method of calculating both redundancy payments and basic awards for unfair dismissal will change, although it is currently unclear exactly how.

Employees who are forcibly retired by their employer before reaching their 65th birthday will succeed in a claim for unlawful age discrimination, unless their employer is able to show objective justification for having a retirement age below 65.

So what happens when employees reach 65, the traditional (although not mandatory) age for retirement in this country? Well, somewhat surprisingly for anti-discrimination legislation, the regulations include a default retirement age of 65. Although not obligatory, the default retirement age will create an exception to the principle that compulsory retirement is unlawful age discrimination. It will be lawful, therefore, if the employee is aged 65 or above, retirement is the genuine reason for termination of employment, and the employer has carried out a "planned retirement".

A planned retirement is a genuine retirement which occurs on or after the employee's 65th birthday, of which the employee has received at least six months' notice.

Many employees want to work beyond their retirement age, and it is likely that numbers wishing to do so will increase, particularly as the so-called pensions crisis deepens. Where an employee asks to carry on working, the regulations will impose a "duty to consider" the request on the employer. The procedure that the employer should go through is as follows:

- the employer should notify the employee in writing of their retirement date (as above), and of their right to ask to work beyond it, no more than 12 months, and no less than six months in advance;
- the employee's request to carry on should be made no more than 12 months, and no less than six weeks before retirement is due;
- the employer then has to go through certain prescribed stages, including meeting with the employee, to consider this request seriously, and will either give written confirmation of the original retirement date, or agree the request; and

- the employer should give the employee a right of appeal.

Employers are strongly recommended to go through the procedure. This is because where the procedure is adhered to, the onus is on any employee who asserts that the termination was for a reason other than retirement to show that other reason. Where this process is not used, the onus will be on the employer to show that the reason for termination was genuinely retirement.

Because the draft regulations deal with retirement in this way, it may be that the position of older workers wishing to work beyond the age of 65, will not be protected as much as they had hoped. First, there is a default retirement age, a concept which is inherently discriminatory. Second, workers older than 65 merely have the right to ask for their contract to continue, and have no real power to insist.

Third, although the legislation sets out the duty to consider, it does not set out the basis upon which an employer may reject the request, having considered it, nor a duty to provide reasons for having done so. Whilst it may be that tribunals take the view that an employer cannot show that the duty has been properly complied with if no reasons are provided, the draft legislation is silent on this issue.

Further, the "duty to consider" procedure may well put the employer who is quite happy to allow some people, but not others, to continue working beyond the default retirement age, in a difficult position. Inevitably employees will consider why their request has been rejected whilst others have been agreed. It is hard to think of a sifting process that does not complicate the retirement issue. For example, "we kept him, but don't want to keep you because you're not as good" is a performance-related reason rather than retirement, and needs to be dealt with through the statutory dispute resolution procedures. If it is not, an employee will succeed in a claim for unfair dismissal. "We could still use her, but don't need you" could be a redundancy, and needs dealing with accordingly. Where discretion is exercised there is also always the fear of claims for discrimination on the grounds of sex, race, disability, religion or sexual orientation depending upon the characteristics of those allowed to continue working and those refused. Employers may think that it is more straightforward, simply to enforce blanket retirement at 65 – surely not a result that the legislation intended.



# 5

## When good employees turn bad: damage limitation

It is a sad but inevitable fact of life that not all employment relationships end happily ever after. Even when a departure appears entirely amicable, an employer can find itself reeling from the subsequent conduct of a once-trusted employee. Where employees leave on less-than-friendly terms, the likelihood of post-employment problems only increase.

### Return of company property

Often employees hold valuable company property. This should be recovered from them as close to the dismissal decision as possible, as it gets progressively harder to do so. Where an employee refuses to return laptops, mobile phones and company cars, for example, the employer can either turn to the police (although they are ordinarily reluctant to help with what they perceive as a private matter) or start long drawn out and expensive proceedings for delivery up of company property. In the meantime, there is no guarantee that an employee will take adequate care of the property. The most nightmarish scenario is that the company laptop and mobile phone hold extremely valuable, highly confidential company information, of which the employer has lost control. Downloading or copying customer contact lists, databases, price lists or business development plans could all be dynamite in the wrong hands.

### Restrictive covenants

Whilst it is tempting to believe that mutual trust will continue - at least to some degree - post-employment, the importance of reminding departing employees of any restrictive covenants in their employment contracts should not be underestimated.

In summary, restrictive covenants are clauses in a contract of employment which limit an employee's ability to, for example, work for a competitor, contact former customers, use business information, or work in a certain location for a certain period after the contract ends. Legally, such covenants are in restraint of trade and therefore void unless the employer seeking to enforce the covenant can show that

- it is reasonable and fair to do so, and
- it is necessary to protect the company's legitimate business interests.

A restrictive covenant should only provide adequate, and not excessive, protection for the employer's business. If an employer feels its business is being damaged by the employee's breach of a restrictive covenant, the immediate (but expensive) solution is to apply for an injunction preventing the activity from continuing.

An injunction is by no means guaranteed and the court

will need to be satisfied on a number of grounds. For instance, the employer will have to give an undertaking to compensate the erstwhile employee if the injunction is subsequently found to have been incorrectly sought. On the other hand, where an injunction is granted but disregarded, the employee risks imprisonment.

For example, in *LTE Scientific v Thomas* [2005], Mr Thomas sold his business to LTE on terms which included restrictive covenants but then (according to LTE) went to work for a competitor in breach of those covenants. LTE successfully applied for an interim injunction to enforce the covenants together with orders requiring Mr Thomas to disclose information about his new business. Mr Thomas avoided receiving these orders and failed to comply with their terms. The court agreed that he was in criminal contempt and sentenced Mr Thomas to a short term of imprisonment.

This is, of course, a relatively rare situation. Usually when considering the enforcement of restrictive covenants, which may well impact on people's ability to work, a court will take a very restrictive approach, as shown in the cases below.

### Time is of the essence

Employers must be quick about it if they do want to take action. In *Corporate Express v Day* [2004], the court agreed that an ex-employee had breached valid restrictive covenants in her contract, which prevented her from working for named competitors for six months or soliciting former customers. However, since the employer had not taken action promptly, time remaining in respect of the six-month non-competition clause was very short. This, together with evidence given by the ex-employee that she would lose her job if she could not work for the remainder of the six-month term, made the court decide not to enforce the covenant. Had the employer acted faster, the result might well have been different.

### Injunctions will not be lightly granted

Courts are, of course, concerned that applications for injunctions are not brought lightly. In *Townends Group Plc v Cobb* [2004] (unreported), the claimant applied for an injunction to enforce various restrictive covenants. The court held that the claims were weak and an injunction not justified. Likewise, in *Countrywide Assured*



*Financial Services Limited v Smart and Pollard* [2004] (unreported), the court refused to grant an injunction on the basis that goodwill of a company was not a legitimate interest capable of protection.

### Confidential information

In *Raks Holdings AF v TTP Com Ltd* [2004] (not an employment case, but indicative of the approach a court will take), the court reiterated the need for confidential information to be just that, i.e. information and/or trade secrets not for disclosure to third parties. Merely stating that a document was confidential did not make it so. In this case, again, the delay in applying for the injunction led to the conclusion that the claimant clearly did not believe there would be a serious breach or leakage of confidential information and this was fatal to its claim.

What happens where there are no restrictive covenants in the contract to protect confidential information? In this case, no such term will be implied into a contract other than that following termination of employment, an employee will not use or disclose any information learned during employment that is so highly confidentiality that it amounts to a trade secret or equivalent – see *Fibrexit Storage Limited v Davis and Lapis Solutions Limited* [2004].

### Harassment

At the most extreme end of the scale some former employees use threatening and/or violent behaviour

against their employer or those who continue to work for them. This trend appears to be increasing. In such a case, it is the employer's duty to protect its employees' safety. An employer can apply for an injunction against such behaviour under the Protection from Harassment Act 1997. If granted, the injunction will usually prevent the former employee from entering an "exclusion zone" (for example, within 200 metres of the office or within a specified distance of an individual). If the injunction is breached, the individual in question can be committed for contempt of court and imprisoned.

### Preserving the employer's position

It is vital for employers to note that the manner in which a dismissal is carried out, typically where no or insufficient notice is given to the employee, can deprive the employer of any right to enforce otherwise reasonable restrictive covenants. It is therefore again vital that advice is taken prior to dismissing any employee where enforcement of restrictive covenants may be necessary.

### Conclusion

Disgruntled ex-employees have a range of potentially damaging weapons at their disposal. Where an employee has been dismissed an employer should be aware that it might need to start taking damage limitation measures without delay. The alternatives can often be costly and provide only a partial victory for the employer.

## 6 Pensions update

### Draft age discrimination regulations – effect on pension schemes

The draft regulations imply a rule into occupational pension schemes that trustees or managers of such schemes refrain from doing any act which is unlawful discrimination. All other provisions of the scheme are to have effect subject to this non-discrimination rule.

However, removing age discrimination in pension schemes is very difficult. This is because the essence of a pension scheme is that it is age-based, with employees (and their employers) paying contributions while they are young enough to work, so that they have an income after they retire.

The draft regulations provide, however, that a long list of current practices in pension provision will not be unlawful discrimination. Exceptions include:

- setting minimum ages for entry to a scheme;

- setting minimum ages for benefits;
- providing for different contribution rates to be payable at different ages for membership of the same scheme; and
- the use of age criteria in actuarial calculations for contributions and benefits.

In fact, the draft regulations provide so many protections to pension schemes that there is a concern that the UK could be accused of not implementing the age discrimination directive adequately. We await the final version of the regulations to see whether this approach survives.

### Civil partnerships and pensions

The Civil Partnership Act 2004 provides for registration of same sex relationships and equality of treatment with married couples in discrimination legislation. Registered



civil partners will become entitled to the same state pension rights as married couples, but only from 2010 (the date when state pension ages begin the process of equalisation between men and women). When a civil partnership is dissolved, courts will have powers to order the division of the partners' pensions or to earmark them for future payment in the same way as they currently have the power when dealing with a divorce. Where occupational pension schemes provide pensions to a spouse following a member's death, these provisions will be extended to include a surviving civil partner. However, schemes can restrict the pension payable to a civil partner to those rights which have built up in the scheme on or after 5 December 2005 - in other words, from when the 2004 Act comes into effect.

Where death benefits payable to spouses are insured, employers and/or scheme trustees need to confirm with their insurers that the benefits will now also be payable in respect of civil partners.

## Other pensions news

### Debts caused by corporate restructure

On 2 September 2005, the government implemented an important change to the employer debt rules which apply when an employer leaves an occupational pension scheme. The change greatly increases the debt which is due from the departing employer to the scheme where the scheme carries on without winding up. The employer leaves because it no longer has employees in the scheme – this could be because it has stopped employing anyone at all, or because it has stopped offering the scheme as an employee benefit. The scheme carries on because it has other sponsoring employers.

Until now, these very high-debt calculation rules only applied where the scheme winding up was triggered. This is an important change as it may catch very basic corporate restructures, such as liquidation of a subsidiary, sale of a subsidiary, reorganisation of employees into or out of a service company and conversion of a partnership to a limited liability partnership. Where such changes are made within an employer group which sponsors a final salary pension scheme (including a scheme which has closed and is no longer used for current employees), specific pensions legal and actuarial advice should be sought.

## Contacts

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## Notifiable events

The Pensions Regulator, in conjunction with the Department for Work and Pensions, has finalised the list of "notifiable events". These events must be notified by employers who sponsor salary-related schemes to the Regulator under the Pensions Act 2004 and include:

- any proposal by an employer to cease operations in the UK;
- any breach by an employer of a banking covenant, unless the bank agrees not to enforce the covenant;
- any down-grading in the employer's credit rating (if the scheme is in deficit);
- a decision by a parent company to relinquish control of an employer; and
- two or more changes within 12 months in the holders of key employer posts (which means the Chief Executive and Chief Financial Officer/Finance Director).

Scheme Trustees also have to notify the Regulator where they grant benefits or transfer out benefits which involve either more than 5% of scheme assets, or more than £1.5m.

## Money purchase or salary-related?

The Court of Appeal has given guidance on how to determine whether a scheme is a money purchase scheme or a salary-related scheme in a case involving the occupational pension scheme for employees of accountancy firm KPMG. This is of particular importance as schemes which are salary-related must pay the Pensions Protection Levy (introduced in April 2005 to pay for the new Pension Protection Fund), must have annual actuarial reviews and every three years must have a full actuarial report. Such schemes carry large financial risks for the sponsoring employers, whereas in a money purchase scheme the employers' only financial commitments are to pay fixed-rate contributions. In this case, the court stated that wherever a scheme's assets can rise above or fall below its liabilities, then it cannot be treated as a money purchase scheme and must be treated as salary-related, even if the benefits are, strictly speaking, described by any formula, not just those directly related to salary.

