

SPRING 2005

# People

## The FFW Employment Review

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# 1 Summary

Welcome to our first newsletter of 2005. In this edition we look at the government's plans to protect the aging population of this country against discrimination, and at the Pensions Act 2004. The Information Commissioner has published the fourth and final part of the Employment Practices Data Protection Code, which we review.

First, let's look at some recent cases with practical implications for HR managers.

Hot off the press is a case successfully brought under the Employment Equality (Religion or Belief) Regulations 2003. Mr Khan wanted to make a pilgrimage to Mecca. He asked his employers if he could take six weeks off work (five weeks' annual leave, and one week's unpaid leave) in order to do so. When he did not receive an answer from his employer, on the advice of his union he submitted a further, written request. When he still received no reply, his manager told him that he could assume that the leave had been granted.

On his return to work, Mr Khan was suspended without pay pending an investigation into unauthorised absence and subsequently sacked for gross misconduct. His claims to tribunal for unfair dismissal and discrimination on the basis of religion or belief were successful.

Discrimination on the grounds of religion or belief can be direct or indirect. Direct discrimination is where, on the grounds of religion or belief, one person treats another less favourably than he or she treats, or would treat others.

Indirect discrimination occurs, between employer and employee, where the employer applies a provision, criterion or practice to the employee which it would apply equally to others who do not share the employee's religion or belief, but which puts people of the employee's religion or belief at a disadvantage, and does in fact disadvantage the employee. The tribunal found that Mr Khan had suffered indirect discrimination, as his employer was not prepared to give him 6 weeks' leave, which he needed in order to go on the pilgrimage to Mecca.

Whilst we understand that the employer, now in administration, did not appear, this is being reported as a 'landmark' case which may pave the way for many more applications on the basis of religious discrimination. Not only may Muslims wishing to take a large amount of annual leave to go on a Haj have the right to do so, but it follows that, if this case has been correctly decided, people of all denominations may have a right to take annual leave over their religious holidays.

A wider point arises from this case. This is whether non-Christians are indirectly discriminated against if obliged

to take annual leave over Christmas. Mr Khan's lawyer certainly made this point, and there may well be claims by non-Christians in this position.

As noted, Mr Khan's claim was unopposed. This possibly means that this point was not as tested as it might have been had there been a respondent employer represented, defending itself and prepared to appeal. For example, an employer may assert that the treatment, which the claimant asserts amounts to indirect discrimination, is a proportionate means of achieving a legitimate aim. If it does so successfully, this provides the employer with a defence.

Incidentally, this case has been reported widely. We have seen newspaper reports throughout Britain and in both India and Saudi Arabia. This case will at least raise an expectation and the possibility of employment tribunal claims even if they are ultimately unsuccessful.

In *Webley v Department for Work and Pensions*, Ms Webley was employed on a series of short fixed-term contracts. When her contract expired (and was not renewed) after 51 weeks, she argued that she had been treated less favourably than comparable permanent employees, whose contracts had not been terminated after 51 weeks, and therefore had suffered discrimination on the basis of her fixed-term status.

Although she was successful before the EAT, the Court of Appeal decided that she had not been discriminated against. It held that it is the essence of a fixed-term contract that it expires. If Ms Webley was right that she had been discriminated against, the only way of eliminating that discrimination would be to remove the time limit term of her contract – effectively removing the distinction between fixed-term and permanent work, which could not be right.

There have been several cases in the last few years concerning rolled-up holiday pay under the Working Time Regulations 1998. An employer 'rolls up' holiday pay where it pays holiday pay as an addition to a worker's normal salary throughout the period of employment, rather than when holiday is actually taken. For example, if a worker is on a 3-month contract, an employer may either pay him or her the contractual rate of pay for 3 months, and then make an additional payment for accrued holiday, or may pay that amount



across the 3 months in addition to the contractual pay.

In *Smith v Morrisroes and others*, the EAT redrafted the guidelines for employment tribunals dealing with the issue of rolled-up holiday pay. The guidelines state that there must be mutual agreement for the genuine payment of holidays which represents a true addition to the contractual rate of pay for the time worked. The best way of evidencing this, according to the EAT, is for a provision for rolled-up holiday pay to be clearly incorporated into the contract of employment; the percentage or amount so allocated (or enough detail to calculate it) to be identified in the contract and (preferably) also in the payslip; and records to be kept of holiday taken and for reasonably practicable steps to be taken to ensure that workers take their holidays within the relevant holiday year.

The EAT also stated that where there is a variation of an existing contract where holiday was previously unpaid, to include provision for rolled-up holiday pay, it will be particularly necessary for the employer to show that there is a genuine addition to the contractual rate of pay, to cover holidays.

### Recent developments

The statutory disciplinary procedures have now been in place for several months – we would be very interested hearing what effect they have had on your business (and working lives). Please do e-mail your comments to [erica.neustadt@ffw.com](mailto:erica.neustadt@ffw.com).

As noted, the final part of the Employment Practices Data Protection Code was published late last year. We take a look at it below.

In conjunction with ACAS, the Employment Appeals Tribunal is running a four-month conciliation pilot scheme from 1 January 2005. Under this scheme, the

EAT may refer claims to ACAS for conciliation, specifically where they concern allegations of bias, where there is a monetary award only, or where a successful appeal is highly likely to result in remission to an employment tribunal for a re-hearing.

### Changes in view

In April 2005 the Information and Consultation of Employees Regulations 2004 will come into effect. These regulations have now been published in final form on the HMSO website - <http://www.legislation.hmso.gov.uk>. The Department of Trade and Industry has published guidance to the new regulations on its site – see <http://www.dti.gov.uk/er/>.

Various financial limits are going up. The annual increases in tribunal limits are effective from 1 February 2005; the limit on a week's pay for various calculations is increased from £270 to £280 and the maximum compensatory award from £55,000 to £56,800. For a full list of increases, see the Employment Rights (Increase of Limits) Order 2004 (again, on the HMSO website - see statutory instrument 2004 No. 2989). See also the enclosed employment rights checklist. If you would like further copies for colleagues, please e-mail [erica.neustadt@ffw.com](mailto:erica.neustadt@ffw.com).

Statutory maternity, adoption and paternity pay will be increased to £106 from April 2005, and the earnings threshold will increase from £79 to £82 per week.

We have been expecting new draft TUPE regulations for several years now. Latest reports suggest that they should hit the statute book in autumn 2005, which usually means 1 October. However, as you will see from our pensions article, the Pensions Act 2005, coming into force on 5 April this year, has a big impact on the treatment of pensions in TUPE transfers, even where transfers take place within a group.

## 2 Dates for your diary

Field Fisher Waterhouse's employment department is pleased to announce its seminar programme for 2005.

### Morning seminars

17 May 2005

#### Managing sickness - including recent changes in the Disability Discrimination Act and Data Protection Code of Practice

If your workforce is plagued by frequent short-term sick leave absences, this might indicate individual underlying

problems such as disability, depression or family concerns. Alternatively it may be symptomatic of an unhappy or stressed workforce, or mere work shyness.

Have you got any employees on long-term sick leave? Do you know how long they might be away, and have you a plan for phasing them back into work if and when they recover? Are there any disability concerns?



How can these issues be handled, or even better, remedied? This seminar will address these issues and discuss how to ensure, as far as possible, that sickness absences are genuine.

### 13 October 2005

#### **Employment law crammer - a summary of all recent and forthcoming changes**

This seminar will provide revision of the major areas of employment law, such as TUPE, discrimination, internal procedures and working time, and will ensure that you are well-prepared to meet changes in prospect.

#### **Early bird workshops**

These workshops will last about 2 hours, and will take place in small groups. They are intended to address

everyday issues with which HR managers deal, providing an update on the law and a practical discussion forum. They will include consideration of the following topics:

- harassment and bullying
- discipline, grievance and unfair dismissal
- surviving Employment Tribunal claims
- redundancy and consultation

We will send you a prospectus shortly, and hope to see you there!

# 3

## Data protection and sickness records

In December 2004, the Information Commissioner's Office published the long-awaited fourth and final part of the Employment Practices Data Protection Code (the "Code"), entitled "Information about Workers' Health". Part 4 of the Code addresses the collection and subsequent use of information about a worker's physical and mental health or condition.

Like its counterparts, Part 4 of the Code sets out the Information Commissioner's recommendations as to how the legal requirements in the Data Protection Act 1998 can be met. It does not, however, impose any new legal obligations.

However, whilst an employer who does not follow Part 4 of the Code will not necessarily be in breach of the Act, it will run the risk of the Information Commissioner taking the view that it is in breach of the Act and bringing an enforcement action. Also, although not legally binding in itself, the courts will accept it as best practice and will look askance at any departure from its guidance.

### **Sensitive personal data**

Under the Act, sensitive personal data essentially means data about a person's private life, particularly concerning race, politics, religion, membership of a trade union, health, sex life and criminal convictions. Clearly, information about an individual's physical or mental health or condition is sensitive personal data. An employer may process such information fairly and lawfully provided it satisfies one of the sensitive personal data conditions set out in the Act.

There are various conditions set out in the Act. However the conditions which are most likely to be relevant in the employment context are:

- the processing is necessary to enable the employer to meet its legal obligations, for example;
  - to ensure the health and safety at work of its workers;
  - to comply with the requirements not to discriminate on the grounds of disability and to consider reasonable adjustments to the workplace to accommodate workers with disabilities; or
  - to comply with statutory and contractual obligations in relation to sick pay.
- the processing is necessary for the purposes of, or in connection with, actual or prospective legal proceedings
- the worker has given consent to the processing. Such consent must be explicit and must be freely given



## Impact assessments

Before collecting information about workers' health, Part 4 of the Code suggests that employers should carry out an "impact assessment" to decide how and whether to collect such information.

An impact assessment involves:

- identifying clearly the purpose(s) for which the information is to be collected and held and the benefits it is likely to deliver (for example, an employer may require information regarding a worker's health to make a proper assessment of the worker's future employability)
- identifying any likely adverse impact of collecting and holding the information (such as the potential intrusion into a worker's privacy)
- considering alternatives to collecting and holding such information
- taking into account the obligations that arise from collecting and holding health information (such as keeping the information secure and not retaining it for longer than is necessary – note statutory sick pay rules require retention of relevant data for three years after the end of the tax year to which they relate.)
- judging whether collecting and holding health information is justified when weighing the benefits against any adverse impact

## General considerations

The Code sets out general considerations which employers should take into account when collecting and using any information about workers' health.

These include:

- identifying who within the organisation can, on the employer's behalf, authorise or carry out the collection of information about workers' health and ensuring that they are aware of the organisation's responsibilities under the Act
- if health information is to be collected, ensuring that a sensitive personal data condition is satisfied (see above)
- ensuring that the collection of information about workers' health can be justified by carrying out impact assessments
- protecting information about workers' health with appropriate security measures and ensuring, wherever practicable, that only suitably qualified health professionals have access to medical details

- not collecting more information about workers' health than is necessary for the purpose(s) behind its collection

## Sickness and injury records

The Code defines a sickness record as one which contains details of the illness or condition responsible for a worker's absence. Similarly, an injury record is a record which contains the details of the injury suffered.

In respect of such records, the Code recommends that employers:

- where possible, keep sickness and injury records separate from absence and accident records (the Health and Safety Executive has previously produced a model Accident Book to comply with the Act)
- ensure that the holding and use of sickness and injury records satisfies a sensitive personal data condition (see above)
- only disclose information from sickness or injury records about a worker's illness, medical condition or injury where there is a legal obligation to do so, where it is necessary for legal proceedings or where the worker has given explicit consent to the disclosure
- do not make the sickness, injury or absence records of individual workers available to other workers unless it is necessary for them to do their jobs. The principle of "need to know" access should be strictly applied

## Occupational health schemes

As regards information collected in connection with occupational health schemes, the Code recommends that employers ensure that workers are aware of how information about their health will be used and who will have access to it. The Code also states that employers should not compromise any confidentiality of communications between workers and health professionals in an occupational health service. It is important therefore that any monitoring of e-mails, telephone calls, internet usage or similar activities by employers is designed not to compromise any confidential communications between workers and health professionals.

## Information from medical examinations and testing

On the subject of medical examinations and testing, which are often carried out at the recruitment stage, the Code recommends the following:



- where information obtained from medical testing is used to enforce the organisation's rules and standards, the employer should make sure that its rules and standards are clearly set out in a policy, of which workers are aware
- only obtain information through medical examinations or testing of potential recruits at an appropriate point in the recruitment process, where there is a likelihood of appointing them
- only obtain information through a medical examination or medical testing of current workers if the testing is part of a legitimate occupational health and safety programme
- do not obtain a sample covertly or use an existing sample, test result, or other information obtained through a medical examination for a purpose other than that for which it was originally obtained
- permanently delete information obtained in the course of any medical examination or testing that is not relevant for the purpose(s) for which the examination or testing is undertaken

### Information from drug and alcohol testing

With respect to information from drug and alcohol testing, the Code recommends that employers should:

- ensure that the business benefits justify any adverse impact before obtaining such information
- minimise the amount of personal information obtained
- ensure the criteria used for selecting workers for testing are justified, properly documented, adhered to and communicated to workers
- confine obtaining information through random testing to those workers who are employed to work in safety critical activities
- gather information through testing designed to ensure safety at work rather than to reveal illegal drug use in a worker's private life

- ensure that workers are fully aware that drug and alcohol testing is taking place, and of the possible consequences of being tested
- ensure that such testing is done with rigorous integrity and with quality control procedures in place, and conducted under the direction of, and positive test results interpreted by, a person who is suitably qualified and competent in the field of drug testing

### Information from genetic testing

Genetic testing is rarely used in the employment context. However, if genetic testing is used by an employer, the Code recommends that employers:

- do not use genetic testing in an effort to obtain information that extrapolates a worker's future general health
- do not insist that a worker discloses the results of a previous genetic test
- only use genetic testing to obtain information where it is clear that a worker with a particular, detectable genetic condition is likely to pose a serious safety risk to others or where it is known that a specific working environment or practice might pose specific risks to workers with particular genetic variations
- ensure that information obtained from a genetic test is valid and is subject to assured levels of accuracy and reliability

### Comment

Employers should ensure that their data protection and sickness policies deal and conform with the terms of part 4 of the Code, and that they are either circulated or made readily available to all workers. Training should be given to managers about the terms of all parts of the Code and what falls within the definition of sensitive personal data. An impact assessment should be carried out before information about workers' health is gathered, and employers should consider how often a fresh impact assessment should be made.



# 4 Pension obligations on TUPE transfers and internal restructuring

In previous editions of this newsletter, we have referred to ongoing - and laborious - government consultations on amendments to TUPE. In particular, the government has been promising for several years to increase the scope of protection to employees' pension rights. Now, in the Pensions Act 2004, that intention has found its way into law. The proposed detail of that protection (to be published in regulations) could affect all TUPE transfers including internal restructures, and may even cause parties to a transaction to abort.

Accordingly, companies may want to complete commercial transactions and such restructurings before 6 April 2005 to avoid the additional obligations under the Act.

So what is changing?

## Current position

It is well known that a TUPE transfer is one where a business or economic entity is transferred from one employer (the transferor) to another (the transferee). It is sometimes overlooked that this includes internal restructures (e.g. between group companies) as well as commercial transactions.

On a TUPE transfer, the rights and obligations of the transferor as employer become the rights and obligations of the transferee, subject to one exception. Whilst personal pension obligations transfer from the transferor to the transferee, including group personal pensions and stakeholder plans, obligations in relation to employers' pension schemes under which pensions are payable at normal retirement date do not transfer.

## From 6 April 2005

The Act sets out new pension obligations on transferees in all TUPE transfers which take place on and after 6 April 2005. From then on, every employee who is in, or entitled to join an occupational pension scheme sponsored by the transferor will have enforceable pension rights immediately after the transfer, against the transferee.

This includes waiting period entitlements – if a transferring employee was entitled to join the transferor's scheme after, say, 12 months' service, once that period of service is completed the transferee must honour that entitlement and allow the employee to build up pension. As with other continuous service issues, continuity is not broken by the transfer.

Employees who are not entitled to join a scheme sponsored by their employer obviously do not gain from

these changes. This includes employees who can join a stakeholder plan to which their employer does not contribute.

Pension schemes vary a great deal in the types of benefits which they provide, and there can be a myriad of differences even between members of the same scheme. In formulating the protection of pension schemes in TUPE transfers, the government had to choose between making a few broad rules apply across the board, or making a tailored and intricate web of rules to fit all different pension schemes and benefit systems. From the draft regulations that the government has published under the Act, it would appear that it has chosen the general principles approach set out below.

## General principles

- There will be a basic scheme minimum for each main type of pension scheme rather than a more tailored approach.
- The transferee's scheme does not have to match the transferor's scheme – for instance a final salary scheme can be replaced by a money purchase scheme.

## Specific standards

- If the transferee supplies a final salary scheme, the test of whether it is acceptable is that which is used for National Insurance contracting out (or a scheme which matches the transferor's scheme if it was below the contracting out test).
- If the transferee supplies a money purchase scheme, a single minimum standard will apply to employer schemes, group personal pensions and stakeholder schemes. This minimum standard will be that the transferee must match employee contributions up to 6% of basic salary.

These standards are quite practical, bearing in mind that it is almost impossible to replicate individual benefits under pension schemes. This approach does create its



own problems, however, as in some cases the obligation on the transferee will be greater than that which existed before the transfer. Take for example where the transferor promised to match its employees' money purchase contributions to its scheme to up to 4% of pay. After a TUPE transfer, that automatically becomes a duty on the transferee to match contributions up to 6% of pay.

Of course, employees in some transfers would be worse off if the transferor's contributions were above 6%.

A further hurdle is that, after a TUPE transfer, a transferee may have to make better pensions provision for transferring staff than for its existing staff. This may cause assimilation problems – remember that other benefits for the transferred employees cannot be reduced if the reduction is connected with the transfer.

Where a transferee provides a money purchase scheme after transfer, it will normally make sense to place a restriction on the employees' power to vary their contributions levels, as the employer will need to re-programme payroll data each time. A restriction to one or two variations per year is not unusual.

### Internal restructures

It is vital that employers who are part of a corporate group take these changes into account when restructuring. Often when corporate divisions undergo a

re-organisation, no real attention is paid to the fact that this involves a TUPE transfer, as all that changes is the name of the employer. From 6 April 2005, the obligation to match higher pension contributions could be created by such transfers.

### Contractual effect

Importantly, on transfer, the transferee's pensions duty becomes a condition of each transferring employee's contract of employment. However, unlike the rights currently protected by TUPE, the pension rights protected by the Act are not set in stone, but may be varied at any time by agreement between the employee and the transferee.

### Non-compliance

Since the Act makes it clear that the pension rights of the transferred employees are contractual rights, any failure by the transferee to comply with its pension obligations under the Act would amount to a breach of contract and an employee could claim for any loss following such a breach. Where the breach is fundamental, an employee could resign and bring a claim for wrongful and unfair dismissal.

There is no regulatory enforcement of these new rights under the Act against a transferee who fails to discharge the obligation to provide pensions after a transfer.

## 5 Other Pensions Act changes

TUPE transfers are not the only employment issues affected by the Act. It has introduced a number of other significant changes:

### Adoption and paternity leave

From 6 April 2005, time off work for the purposes of paid adoption and paid paternity leave will be treated in the same way under employer pension schemes as ordinary maternity leave.

For final salary schemes, this means that the period of leave must be treated as full pensionable service for the purposes of calculating the employee's benefits. For money purchase schemes, the employer must pay employer contributions based on notional full pay, as if the adoption or paternity leave had been normal employment. But for both types of scheme, the employees are only required to contribute at the normal percentage contribution rate applied to their **actual** pay for the period.

### Corporate transactions

Where a company has sponsored a final salary pension scheme, even if it is an old scheme, a closed scheme or a frozen scheme, corporate transactions are already affected by the Act. This is because the new Pensions Regulator will have power to issue a contribution notice in respect of any transaction. Alarming, this power has retrospective effect and a notice may be issued in respect of any transaction **since** 27 April 2004.

### What is a contribution notice?

A contribution notice is an order from the Pensions Regulator requiring the person named in it to pay for any pension scheme deficit. Where there is a merger, sale or acquisition of, or by a company which has sponsored



a final salary scheme, there is a risk that parties to the transaction and persons connected with them, such as directors and shareholders, could be served with a contribution notice. It cannot be overstated that due diligence, always an important part of a deal, is now vital.

From April 2005, a clearance notice procedure will be available for the parties to any transaction who want comfort that a contribution notice will not be issued. We recommend that this is used in any case where a final salary scheme is involved.

### Corporate groups

In a corporate group which includes a company with a final salary scheme, after 6 April 2005 each group company is at risk of being ordered to help finance or underwrite the scheme. This effective and ongoing cross-subsidy can be ordered by the Regulator if it issues a financial support direction. These directions may be issued where the Regulator is of the view that the scheme is under-funded and the sponsoring employer is "insufficiently resourced" to support the scheme. It is not yet clear what "insufficiently resourced" means.

### Notifiable events

When a company sponsors a final salary scheme it will be obliged to notify the Pensions Regulator of various corporate governance events which the Regulator considers may threaten the scheme's stability or funding. The duty to report such "notifiable events" is expected to come into force in May 2005.

A draft list of notifiable events has been issued for consultation. Consultation on the draft list will run until 1 March 2005. Examples of notifiable events, from the draft list, include: where the Finance Director is promoted to replace a retiring Chief Executive; breach by the employer of a banking covenant; a change in the employer's credit rating; or a decision of a parent company to put the employer up for sale.

It is our opinion that, following consultation, the draft list will be overhauled, because, as it stands, it appears so wide as to be unworkable.

In the final list, some of the listed events will be designated as serious notifiable events and reporting will be mandatory whenever such events occur. An event not designated as serious will be reportable if the scheme funding level is below a certain (as yet undefined) level. Where the scheme is well funded (presumably above that same level), then even if a reportable event occurs, it will not need to be reported.

Failure to report an event leaves an employer or the

scheme trustees at risk of a fine. The fine can be as high as £50,000 for corporate bodies. Transactions cannot be reversed simply because there was a failure to report them.

### "Whistleblowing"

Professional advisers to employers and trustees will be obliged to report their clients to the Pensions Regulator if they are aware of any breach of pensions law which might concern the Regulator. This will include any failure by an employer or trustee to notify the Regulator of a notifiable event.

Until now a professional adviser's duty to "blow the whistle" on its own clients has been confined to areas of national importance, such as money laundering and terrorism, or to specialist advisers (for example pension scheme actuaries currently have a duty to report pension law breaches to the current regulatory authority). Clearly this duty is being significantly widened.

### Informing and consulting

From April 2006, employers will be obliged to inform and consult their workers when they propose changes to pension provision. This is separate to the statutory duties on large employers concerning informing and consulting employees about major changes to their organisation and employment contracts. That general employment legislation comes into force in April 2005 and where there is an information and consultation agreement, significant changes to the way in which pension benefits are offered are likely to be covered.

The Pensions Act duty will cover a greater range of proposed changes, will apply to employers of all sizes and will apply whether or not there is a pre-existing information and consultation agreement. However, at this stage we do not have the exact detail of what proposed changes trigger the duty and what process will be sufficient to comply with the duty. Where the changes are to an employer's own scheme, the trustees of the scheme will be forbidden from implementing the change if the prescribed consultation process has not been followed. We will report further when more detail is available.

### Further information

Our Pensions Group has produced detailed briefing notes on this area covering:

- the corporate transaction and notifiable events changes; and
- the specialist pension changes taking effect in April 2005 under the Act, which will be of particular interest to pensions managers.



Further briefings will soon be available on the TUPE and notifiable events changes (once they are finalised) and, in due course, on the technical pension changes due to take effect on September 2005 and April 2006. Please

contact any member of the Group (contact details on the last page of this newsletter) if you would like a copy of any of these briefing notes.

## 6 When I'm sixty-five...

On 14 December 2004, the government announced plans for a default retirement age of 65 to be introduced as a part of regulations outlawing age discrimination.

The age discrimination strand of the European Employment Directive is due to come into force on 1 October 2006. From then on, direct and indirect discrimination, harassment and victimisation on the ground of age will be unlawful. Since it is anticipated that by 2010 almost 40% of the workforce in Britain will be aged 45 or over, the protection offered by these regulations is, perhaps, a necessary addition to our discrimination laws, although please note that the legislation is aimed at all age-based discrimination, not merely that suffered above a certain age.

Currently there is no national retirement age, allowing employers to set their own conditions and ages of retirement in line, for example, with the terms of a company occupational pension scheme, or the age at which the state pension becomes payable. Once the government's proposals are implemented, an employer will not be able to set a mandatory retirement age lower than 65 unless it can show that it is objectively justified. Of course, employees can choose to 'retire' before their 65th birthday, even if their pension may only be drawn later.

Significantly, the introduction of a default age will be accompanied by a right for employees who want to continue to work beyond this age or, if earlier, their employer's own justified retirement age, to have a request to do so considered seriously by their employer. This right will be modelled on the right which parents of young children have, to request flexible working.

In the 1980s and 1990s there was a marked shift towards early retirement, which if continued would limit the effect of the new law. This trend is slowly changing for two reasons: first, employers have realised that it is expensive to fund early retirement and are therefore changing their policy in this respect; and secondly, it is becoming more common that pensions saving fails to provide sufficient income for retirement. This, together with longer life expectancy, means that more people will need to work for longer because of financial pressures rather than personal choice.

### Impact

Employers can rest a little easier in the knowledge that a default age of 65 will be legislated for, in preference to the government's initial proposals of abolition of mandatory retirement ages, or a default retirement age of 70. In spite of this, a number of concerns regarding the impact of this change to the current regime have been raised including:

- Employee relations – it has been argued that some employees' skills might decline with age. If and where this is so, there may be an increase in performance-related dismissals of long-serving employees using disciplinary procedures. Employers who dismiss older employees may also open themselves to claims for unfair dismissal. Although currently, employees typically lose the right to claim unfair dismissal or a redundancy payment on their 65<sup>th</sup> birthday, proposals are afoot to amend provisions relating to unfair dismissal so that employees can seek redress at any age (subject to any justified mandatory retirement age). To avoid the risk of a tribunal claim, employers may have to retain some employees who are, they feel, no longer "up to the job" but are not performing sufficiently badly to warrant dismissal.
- Manpower planning – since under these regulations an employer must seriously consider any request to continue employment beyond default and mandatory ages of retirement, it may have difficulty projecting when staff might leave and what the future needs of the business in terms of manpower might be. Businesses may also become 'top heavy' with older people retaining top positions, with a resultant reduction in career development possibilities for more junior employees. This in turn may lead to a high turnover of younger staff.
- Managing pension schemes - all pension schemes will be affected. Particular problems are caused for **final salary** pension schemes. Their funding



projections and benefit rules are based around each employee having a fixed retirement age. If an employee can in fact work beyond that age, the employer will need to decide whether the employee can start drawing his or her pension while still working, continue to build up a bigger pension than may have been budgeted for, or freeze his or her rights at retirement age. The last option will only be available if the regulations, once in final form, specifically permit it.

- For **money purchase** schemes, problems can arise with so-called “lifestyle” investment options. These options gradually change the asset mix of pension investments as the member approaches his or her assumed retirement age. If that assumed retirement age is wrong the investment mix is less likely to be suitable. Also, the position on age-related contribution levels is not yet clear.
- Insurance premiums – certain types of employment-related insurance premiums might significantly increase with an employee’s age, or may become impossible to obtain for older employees. Such

issues may amount to justification of a mandatory retirement age below the age of 65.

Other possible justifications of a mandatory retirement age below the age of 65 may concern the type of work carried out by the employee, for instance, where employment requires a high level of physical fitness and/or strength or where a maximum age limit must be set on grounds of health and safety.

### Looking forward

This year will see further consultation on the regulations, which are expected to be published in draft in May 2005. This will allow the government to fine-tune its proposals on the retirement age and other aspects of the legislation which will ban unjustified age discrimination in recruitment, promotion and other employment terms, as well as in vocational training. Employers will need to start preparing for the regulations this year by reviewing their contractual terms, benefits packages, pension scheme rules and any policies which may have an age component.

## 7 Constructive dismissal – the last straw?

**As a general rule, to bring a successful constructive dismissal claim, an employee must have resigned in response to a fundamental breach of contract by the employer.**

However, there are some cases where the courts have recognised that there may be a series of acts by the employer which, although not particularly serious individually, amount collectively to a fundamental breach and give rise to a claim of constructive dismissal. In these circumstances the single act following which the employee resigns may, although trivial, represent the “last straw” that finally destroys the employment relationship.

In *London Borough of Waltham Forest v Omilaju*, in an analysis which appears to go further than before, the Court of Appeal has recently considered whether even a reasonable or justifiable act by an employer may in some cases constitute such a last straw.

The Court of Appeal set out the accepted position that, in order to be relied upon by the employee as a basis for a constructive dismissal claim, the last straw should be the final act in a series whose cumulative effect amounts to a breach, by the employer, of the duty of trust and

confidence, implicit in every employment relationship. It went on to state, however, that the last straw act does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. It must, however, contribute in some way to the breach of the implied term of trust and confidence.

It is expected that in practice, for the last straw test to apply, there must at least be some kind of unfair or malicious final action on the part of the employer, even if the act in question was relatively trivial. This might include a nasty remark to the employee or applying a contractual discretion unfavourably as regards a benefit (even though strictly speaking the employer has acted perfectly reasonably and within the terms of the contract). The implications of the Court’s decision appear to be that it will be highly unusual for an employer’s conduct, where reasonable and justifiable, to satisfy the last straw test.



# 8 Contacts

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