Magrath LLP
solicitors

employment

Phasing Out the Default Retirement Age

Draft Regulations have now been published to implement the phasing out of the default retirement age ("DRA").

The draft Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 ("the Draft Regulations") were published on 16 February 2011 and are set to come into force on 6 April 2011.

Prior to the publication of the Draft Regulations, it was understood that employers would not be able to give notice of retirement to individuals under the Employment Equality (Age) Regulations 2006 ("the Regulations") after 5 April 2011, with retirement taking effect by 1 October 2011. However, transitional provisions will apply which will enable employers to extend the notice of intended retirement by up to 12 months (instead of six months) in the following circumstances:

- The individual concerned has reached 65 (or normal retirement age for the company if this is higher), by 30 September 2011;
- The retirement date would fall before 5 April 2012; and
- The employer has complied with its duties under the Regulations, to consider a request to work beyond age 65.

This means that in the circumstances highlighted above, a retirement dismissal under the Regulations could take effect after

1 October 2011 provided it is notified before 5 April 2011 and termination of employment is before 5 April 2012.

So what will the abolition of the DRA and the Regulations mean for organisations? Supporters of the DRA and the Regulations have commented that they provided a dignified exit route for older workers and allowed employers to plan for succession and continuity within the business, which will now be removed. It will however remain possible for individual employers to operate a compulsory retirement age provided this can be objectively justified.

Employers seeking to dismiss older employees, after 5 April 2011 will need to consider their policies and procedures to ensure that a fair and reasonable process is adopted. Performance management processes and capability procedures will have increasing relevance for effecting the fair dismissal of an older worker.

continued on page 6

Spring 2011

New Additional Paternity Leave Rights

The Additional Paternity Leave Regulations ("the Regulations") introduced in April 2010 mean a greater choice and flexibility for parents in the use of maternity and paternity leave rights.

Fathers of babies born on or after 3 April 2011 will be able to take advantage of new rights of additional leave of up to 26 weeks, where such leave it taken for the purpose of caring for a child. Such leave must commence within 12 months of the child's birth and may be paid at the set statutory rate (Additional Statutory Paternity Pay) if taken during the mother or partner's Statutory Maternity Pay period or Maternity Allowance period. Similar rights will apply in adoption and civil partnership cases.

Under the Regulations, mothers will be able to choose between taking their full maternity leave allowance or returning to work early and allowing their partner to take leave instead. This will increase opportunities for both parents to share childcare responsibilities and is compatible with the Government's desire to achieve ever greater flexibility in the workplace.

To be eligible for Additional Paternity Leave ("APL") an individual must have been continuously employed for 26 weeks before the 'relevant week'. The relevant week is the week immediately before the 14th week before the baby is due.

Eligible employees will be automatically entitled to APL. However, APL can only be taken once the mother of the child or the individual's partner, as the case may be, has returned to work. Parents will therefore not be able to take concurrent periods of leave and APL can only begin once the child is 20 weeks old or in the case of an adoptive parent, once the child has been placed with the parents for 20 weeks, meaning that the initial care period will still be predominantly undertaken by the child's mother (or principle adopter).

A "light-touch" approach has been adopted by the Government in relation to administering APL, meaning that the process will rely heavily on self-certification by both the individual employee seeking to take the leave and their partner or the child's mother (as the case may be). Individuals will be required to give at least eight weeks' notice of their intention to take leave, which must be taken as complete weeks and over one continuous period.

The self-certification requirements will place a considerable burden on employers who will need to put in place appropriate notification procedures and policies.

Many employers pay employees at their normal rate of pay during the current two week period of Ordinary Paternity Leave. Enhanced APL rights will mean that employers should review existing arrangements and consider appropriate payment rates for a period that could last for up to 26 weeks.

Organisations would be well advised to consider the implications of the Regulations carefully and put appropriate procedures in place for employees who wish to take advantage of the new rights. Employers that currently provide enhanced contractual maternity leave benefits will need to consider whether such benefits should be extended to APL. Given the low statutory rate of APL pay, if an enhanced maternity pay scheme is in place for more than 20 weeks in the mother's workplace, switching to APL may be too financially burdensome.

New maximum compensatory award for unfair dismissal from 1st February 2011

The maximum compensatory award for unfair dismissal increased to £68,400. The maximum for a week's pay increased to £400.

Therefore the maximum unfair dismissal award (basic plus compensatory) is now £80,400.

New rates for statutory sick pay and statutory maternity, paternity and adoption pay from 11 April 2011

The rates for Statutory Sick Pay will increase from £79.15 to £81.60.

The rates for Statutory Maternity/Paternity/Adoption Pay will increase from £124.88 to £128.73.

Data Watchdog Starts to Bite

In April 2010, the Information Commissioner's Office (ICO) was given the power to issue fines of up to £500,000.

Prior to that, Britain's data regulator reported 720 breaches of the Data Protection Act 1998 (DPA) by businesses, government bodies and charities. However warnings and enforcement notices were the strongest measures at the regulators disposal.

- In November 2010, the ICO fined Hertfordshire County Council £100,000;
- In the same month a private employment services company was fined £60,000;
- In February 2011, Ealing Council and Hounslow Council were fined £80,000 and £70,000 respectively.

Many "data breaches" resulting in fines have been the result of accidents or errors. However it is clear that paying lip service to data protection is not sufficient. Rigorous measures need to be in place to ensure compliance and protect employers from significant fines.

November 2010

Hertfordshire County Council was hit with the highest fine ordered by the ICO to date of £100,000. In this case, the highly sensitive nature of the personal information disclosed, was seen to justify the hefty fine. Two incidents occurred; a fax containing details of care proceedings of three children was sent to the incorrect recipient 13 days after another fax concerning a child sexual abuse case had been sent to a member of the public in error.

The £60,000 fine ordered against employment services company A4e, was seen as appropriate given the potential distress that may have been caused by the theft of a laptop containing personal data. It was argued that A4e, did not take reasonable steps to avoid the loss of data, primarily because they had issued the employee in question with an unencrypted laptop, despite knowing the amount and type of personal data that would be processed on it. Records including names, addresses, dates of birth, employment status and income levels of 24,000 people who had used community legal advice centres in Hull and Leicester were stored on the laptop.

February 2011

Two councils found themselves fined for the theft of laptops which were stolen from an employee's home. Ealing Council is responsible for providing out of hours service on behalf of itself and Hounslow Council. To provide this service, employees work from home and record individuals' personal information on laptops. The stolen laptops were password protected, but the sensitive data was not encrypted. The failure to encrypt the laptops was a breach of both councils' own policies.

Ealing Council was fined £80,000 as a result of the sensitive personal data which was released to an employee on an unencrypted laptop and Hounslow Council was fined £70,000 for insufficiently supervising Ealing Council's use of the sensitive data in question.

The DPA provides that where personal data is shared with a third party, in this case one council sharing individuals' personal data with another council, there must be a written contract in place between the parties. The personal data provider (Hounslow Council) had a duty to make sure there was a written contract monitoring the use of the data by the third party (Ealing Council), and to ensure satisfactory procedures were in place to protect the data.

Conclusion

Arguably all of these events should have been foreseeable. The failure to recognise the importance and sensitivity of the data retained and the lack of satisfactory measures in place to protect the data were the overriding reasons for the fines.

In other cases the ICO has made it clear that "where a data breach is a result of a malicious cyberattack, this is not an adequate defence and serves as no excuse".

All of these cases demonstrate that it is vital to ensure that data processing, storage and transfer is undertaken in a manner consistent with the DPA by having up-to date IT policies and processes to avoid risking a potential PR nightmare and ultimately a significant fine.

Reforming the Employment Tribunal System

In January 2011 the Government announced its proposal to reform the Employment Tribunal system.

The consultation document, "Resolving Workplace Disputes", has been published with the laudable aspiration of "removing barriers to recruitment so that businesses have the incentive and ability to expand, ensure they provide maximum flexibility and promote competition without compromising fairness." Quite what this means in practice remains to be seen!

The Government is seeking views on measures to:

- Achieve more early resolution of workplace disputes so that parties can resolve their own problems, in a way that is fair and equitable for both sides, without having to go to an Employment Tribunal;
- Ensure that, where parties do need to come to an Employment Tribunal, the process is as swift, user friendly and effective as possible; and
- Help businesses feel more confident about hiring people.

The Consultation, which closes on 20 April 2011, could be seen as a knee jerk reaction to some recent statistics which, on the face of it, make alarming reading - the number of Employment Tribunal claims rose by 56%, from 151,000 in 2008 – 2009 to 236,100 in 2009 - 2010[1], which is a record number. However, closer inspection of these figures reveals that the large increase is in part due to a number of 'multiple claims' made by large groups of employees against a single employer, and the inevitable 'spike' in claims caused by redundancy exercises due to the economic climate.

However, it also follows numerous concerns expressed by business representative bodies.

- The British Chambers of Commerce stated that it is "too easy for employees to make unmeritous claims and that cases are too costly and take too much time to be heard"[2] .
- The Institute of Directors blamed the large number of weak claims being made by employees on the fact that there is no incentive for employees and their lawyers not to bring weak cases to the Tribunals[3].
- The Forum of Private Business' Employment Law Panel reported that it had raised numerous concerns, including that the balance of employer and employee rights is in favour of employees; that action is needed to deter and deal with weak and vexatious claims; and that dealing with Employment Tribunal claims increases the stress and cost to small businesses[4].

The Government considers that the following measures will help to create the right conditions for future economic prosperity, including the need to remove barriers to growth and job creation.

1. Extending the qualifying period for unfair dismissal claims to two years.

Perhaps the most politically sensitive of the Government's proposals; the aim being to encourage "growth through giving businesses more confidence when they consider taking on people". However, the Government estimates that this change will, in fact, have a relatively modest direct impact, with a reduction in claims of between 3,700 and 4,700 a year. That said it seems the Government hopes that the indirect impact of this measure will be an enhanced confidence amongst business. Apparently it is not a charter for businesses to sack people unfairly, and there remain questions about how effective this proposal will be in stimulating job growth. The majority of employers are able to assess the quality of an employee within the first 12 months, and extending the qualifying period to 2 years is likely to make little difference to their desire to increase headcount.

Having canvassed opinion amongst clients it seems that, in practice, the increased qualifying period for unfair dismissal will have very little impact upon whether new staff are recruited. The Government's ambition to stimulate growth through reduced regulation therefore seems a little misplaced.

2. Financial penalties for employers found to have breached employment rights.

It is intended that financial penalties, payable to the Exchequer, in addition to compensation payable to the Claimant, will contribute to the financial impact of an employer failing to comply with its obligations. The financial penalty will be automatic and calculated as 50% of the total amount awarded to the Claimant – the penalty will be reduced by 50% if payment is made within 21 days.

Continued on page 5

Reforming the Employment Tribunal System

continued from page 4

3. Greater powers for Tribunals to strike out claims, increased use of deposit orders and an enhanced costs regime.

Weak and spurious claims brought by disgruntled employees, rather than those with genuine grounds for complaint, are an issue for many employers. In particular, small and medium sized businesses suffer at the hands of vexatious litigants, both in relation to legal costs and management time.

The Government proposes to extend the power to strike out claims (in whole or part) at any time rather than exclusively at pre-hearing reviews, and, without the need to hear from the parties.

It is also proposed to reformulate the rules concerning deposit orders, enabling Judges to make such deposit orders at any point in proceedings.

Probably the most welcome piece of news for employers is the proposal to increase the current cap of £10,000 on cost awards. However, unless Tribunals exercise their powers more frequently, the increase will be as good as meaningless.

4. Encouraging early conciliation of claims.

In order to encourage early settlement, Claimants will be required to submit an abbreviated version of the ET1 to Acas prior to submitting the full claim to the Tribunal. This will then be followed by a statutory conciliation period (proposed to be 1 month), for Acas to encourage the parties to resolve the dispute. Apparently, whilst it will not be mandatory for parties to enter into pre claim conciliation, the increased involvement of Acas during a statutory conciliation period will ensure parties make a more informed decision about going forward.

Several clients have indicated that they welcome this aspect of the Government's proposals. Too often Claimant's leave it until the last minute to enter into settlement negotiations, at which point legal costs have already been incurred and management time has already been wasted. Encouraging Claimants to conciliate at an early stage may be the most positive of the proposed reform.

5. Introducing fees for bringing a claim.

For businesses, the most eagerly anticipated proposal now seems to be something of a damp squib, and will be subject to further consultation later this year. The suggestion that a fee should be levied on all claims was one that was lobbied but rejected when the revised 2004 Employment Tribunal Rules were introduced. Whether it will fare better this time remains to be seen.

The disappointing lack of a concrete proposal in relation to the introduction of a fee for bringing a claim has caused much frustration amongst many clients, both small and large. The general feeling is that the Government must act to weed out spurious claims, and that this would be the most effective way of doing it.

Conclusion

The Government's proposed reforms have been broadly welcomed by businesses, particularly small and medium sized businesses who often suffer the worst at the hands of spurious claims, both financially and in terms of management time.

Whether the reforms have the impact businesses desire remains subject to the willingness of the Government to take a robust approach to implementing the proposals once the consultation closes.

John Cridland, CBI Director-General Designate, said:

"It is in everyone's interests that disputes are resolved swiftly and fairly. Introducing an element of charging would help weed out weak and vexatious claims, clearing the way for more deserving cases to be heard."

"Extending the qualifying period for unfair dismissal is a positive move that will give employers, especially smaller ones, the flexibility and confidence they need to hire."

The Government believes that if an employer has reasonable procedures in place, and these are followed, there is every chance that fewer disputes will arise in the first place, and therefore fewer employees will reach the point where they contemplate embarking on a Tribunal claim. However, it fails to recognise that unless there are significant financial implications for the Claimant, many employees will still issue claims, if only to hold a gun to their employer's head when pushing for settlement.

[1]http://www.justice.gov.uk/publications/docs/tribs-et-eat-annual-stats-april09-march10.pdf

[2]http://www.britishchambers.org.uk/publications_4

[3]https://www.iod.com/MainWebSite/Resources/Document/business_manifesto_2010.pdf

[4]www.fpb.org/page/608/Research.htm; www.fpb.org/page/608/Research.htm

Phasing Out the Default Retirement Age

continued from page 1

The abolition of the DRA is part of a series of changes the Government is implementing to encourage people to work for longer, against the backdrop of demographic change and the current budget deficit. Also relevant is the push to increase the state pension age to 66, sooner than currently scheduled.

There have been calls for abolition of the DRA to be delayed, in view of the current economic circumstances. However, the Government has confirmed that it will press ahead with implementing the previously announced plans. Minister of State for Pensions Steve Webb said that the Government "will work with employers to ensure that the transition is fair and well understood."

Many organisations may have already updated their policies in line with the originally publicised timetables. However, further amendments may be necessary to implement the Government's final proposals once the Draft Regulations are finalised. Organisations yet to finalise or implement changes to their policies will need to do so sooner rather than later in order to ensure compliance with the brave new, or rather, old world.

Compromise Agreements – New Era of Uncertainty?

Many employers rely on Compromise Agreements to agree severance terms with an employee who might otherwise pursue claims against them. Provided all the components of a binding Compromise Agreement are in place, the employee will be unable to pursue any claim arising from their employment or its termination in the Employment Tribunals and/or Courts. Unfortunately, the Equality Act 2010 has thrown a spanner in the works.

One of the components required for a valid Compromise Agreement is that the employee must take advice from an independent advisor (usually a solicitor) before signing the Agreement. However, the Equality Act states that a relevant independent advisor cannot be an independent advisor if they are either a party to the contract or the complaint (obviously!) or if they are 'acting' for a person who is a party to the contract or complaint.

It is generally understood that this new drafting was meant to cover situations where an advisor may be acting, not only for the employer but someone else involved with the claim e.g. perhaps a Second Respondent. However, that is not what the Equality Act says. By virtue of the wording used, arguably, all independent advisors that provide advice to an employee in connection with a dispute cannot then sign off on the Compromise Agreement issued to resolve it – a ludicrous situation indeed!

There has been much debate and gnashing of teeth at the highest level amongst employment lawyers. However, perhaps as one may expect, opinions are divided; one QC has said that whilst there is need for formal interpretation, he observes that the advisor acting for "another party" clearly cannot refer to an advisor acting for the employee. Others, however, have suggested this is exactly what the drafting means. Therefore until such a time as the courts interpret this section or it is re-drafted, the effectiveness of Compromise Agreements hangs in the balance.

Practical solutions to the current problem include the addition of a repayment or liquidated damages clause within the Agreement which requires the ex employee to repay the compensation payment if they pursue a claim. Alternatively, one could use a COT3 settlement arrangement via ACAS or make payment by instalments i.e. after time limits to bring a claim have expired. None of these are entirely satisfactory, adding as they do, another layer of complexity.

Certainly, the practical view is that Tribunals are likely to take a very dim view indeed of an individual who has received payment under a Compromise Agreement and then seeks to take advantage of this loophole and pursues a claim. The likelihood is that Tribunals would be unwilling to order additional compensation, given their power to make awards that are 'just and equitable'! Rumour has it that a test case is currently in the pipeline, brought by a sympathetic Trade Union and employer in order to resolve the uncertainty. We will keep you posted!

magrath LLP solicitors 66/67 Newman Street London W1T 3EQ

tel 020 7495 3003 fax 020 7317 6766 www.magrath.co.uk

This newsletter is for information purposes only. The information and opinions expressed in this document do not constitute legal advice and should not be regarded as a substitute for legal advice. For further information on our legal services please see above.

© Magrath LLP Solicitors 2010