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HEYDAY CAUSES RETIREMENT AGE CONCERN

In probably the most eagerly awaited decision of the year, *R (on the application of Age UK) -v- Secretary of State for Business Innovation and Skills and others* (High Court, 2009), or the Heyday Challenge as it is more commonly known, the High Court ruled that the UK's default retirement age of 65 (DRA) is lawful. However, the judgment indicated that this may not be the case for much longer.

The essence of the judgment was that the DRA of 65 achieved a *legitimate social aim* and was also *proportionate* when it came into law - but only just.

Legitimate aim

The High Court was satisfied that the DRA was a legitimate social policy aim, namely avoiding an adverse impact on the provision of occupational pensions and other work related benefits and workforce planning. Mr Justice Blake described it as "maintaining confidence in the labour market". He also noted that the DRA was not designed to restrict flexibility, but was intended to give certainty to employers and employees for the purpose of workforce planning.

Was it proportionate?

The Court considered whether the choice of 65 was itself proportionate in the circumstances. It could not see how any age

less than 65 could conceivably have been adopted as the DRA for the purpose of the Employment Equality (Age) Regulations 2006. However, it said that there were "powerful reasons" why a DRA higher than 65 could have been adopted by the Government. Mr Justice Blake recognised, however, that the majority of consultees at the time supported a DRA of 65 and "no one was making a case for age 68 or so and age 70 commanded little support in the consultations."

On balance, the Court concluded that adopting a DRA of 65 was within the competence of the Government in implementing the Directive. Mr Justice Blake went on to comment, that if the Age Regulations had been implemented today (in the current economic climate), or if the Government had not announced that it was bringing forward its review of the Age Regulations to 2010, then he would have concluded that a DRA of 65 was not proportionate.

The future

For the time being, employers can continue to retire employees at the age of 65 without risk of age discrimination or unfair dismissal claims (so long as they comply with the correct procedures).

However, it is highly likely that the DRA will be increased (possibly to 67 or 68) whatever the outcome of the next general election. Employers should therefore begin to prepare for the almost inevitable changes now by starting to think about how they will manage their older employees if forced retirement at 65 is no longer an option in the future.

Employers should consider:

- Reviewing capability and performance procedures to ensure they are clear and robust. It is now even more important that employers deal with any issues of performance as and when they occur irrespective of the age of an employee.
- Offering flexibility about how and when an individual leaves the business. For example, employers could think about flexible retirement options being incorporated into the work/life balance options already offered to employees.
- Ensuring managers are well trained. Even if policies and procedures are in place, it is important that line managers are sufficiently trained on their contents to be confident in effectively implementing them.

For details of the Government's review of the Default Retirement Age please see page 8.



CONSULTATION ON ADDITIONAL PATERNITY LEAVE AND PAY

Currently, mothers are entitled to statutory maternity leave of 52 weeks made up of 26 weeks' ordinary maternity leave and 26 weeks' additional maternity leave, whereas fathers (or adopters) are only entitled to up to two weeks' paid paternity leave on the birth, or placement for adoption, of a child.

However, in a radical change in the law, from 2011, mothers will be able to choose whether to take their full maternity leave period of 52 weeks or, alternatively, to return to work early and transfer up to 26 weeks' maternity leave to the father. This will give fathers the right to up to six months' Additional Paternity Leave (APL). The father will receive Additional Paternity Pay (APP) if he takes the leave whilst the mother is still eligible for statutory maternity pay.

Although we use the term "father" throughout this article, APL and APP will apply equally to partners and civil partners of mothers and to adopters who are entitled to statutory adoption leave and pay (in the case of couple, this will be the person who chooses not to receive statutory adoption pay).

The Government has recently consulted on draft Additional Paternity Leave Regulations and draft Additional Statutory Paternity Pay Regulations which would implement these changes.

Who will be eligible for APL?

A father who has been continuously

employed by the same employer for at least 26 weeks ending with the 15th week before the baby is due (which essentially means that the father must have already been employed by the employer when the mother fell pregnant). He must remain in the same employment from the 15th week until he commences APL. The father must have responsibility for the upbringing of the child and be taking leave for the purpose of caring for that child.

Who will be eligible for APP?

A father who has average earnings at least equal to the lower earnings limit (which is currently £95 per week) during the eight week period ending with the 15th week before the baby is due.

Notification

A father must give his employer eight weeks' written notice of his intention to take leave and specify when he wishes it to begin; the expected week of the child's birth; the date of the child's birth; and when he intends to return to work. Employers will be required to confirm these start and end dates to the employee within 28 days of receiving the written notification.

When can leave be taken?

The earliest that a father can start APL is 20 weeks after the child's birth or placement for adoption, and he will need to have completed the leave by the child's first birthday or one year after placement for adoption.



The leave can only be taken once the mother has returned to work, although there is no requirement that the father's leave begin immediately after the mother returns to work.

The minimum duration of APL is two consecutive weeks. The leave will need to be taken in periods of complete weeks and as one continuous period.

When can a father receive APP and at what rate?

The period of APL may be paid if the leave is taken whilst the mother is still eligible for statutory maternity pay (i.e. in the first 39 weeks of her maternity pay period) or she is still entitled to maternity allowance or statutory adoption pay. Leave taken after this period has ended would be unpaid. APP will be paid at the lesser of the standard SMP rate, currently £123.06 per week or 90% of the father's average earnings.

During leave

During his leave period, the father will be entitled to all terms and conditions of employment which would have applied if he had not been absent. He will also be entitled to work or train for up to 10 days without loss of APP and without bringing his leave period to an end.

Return to work

An employee returning from a single period of APL lasting 26 weeks or less will be entitled to return to the same job on the same terms, unless there is a redundancy situation (see below). Where the father takes subsequent, consecutive periods of statutory leave (such as parental leave), he would be entitled to return to the same job and terms unless there is some reason why this is not

reasonably practicable. In this case, he would be entitled to return to a suitable alternative job.

Redundancy

Fathers taking APL will be protected from being singled out for redundancy and will be entitled to be offered suitable alternative vacancies in the same way as mothers on maternity or adoption leave.

Administration of scheme

Parents will be required to self-certify their entitlement to APL and APP by providing the employer with specified information with a signed declaration that the information they have provided is correct. This information will allow the employer to check the employee's eligibility for APL and APP and to calculate any payment due. In addition, the information will be used by HM Revenue and Customs to check that the claim was paid correctly and that the mother was entitled to maternity or adoption pay.

There is no requirement for the father's employer to check the mother's eligibility or that she has returned to work. However, the father must provide details of the mother's employer, if requested, so that his employer can make the checks if it so chooses.

What should you do now?

The consultation closed on 20 November 2009. The Government expects the changes to be introduced by April 2010 with the law applying to parents of children due on or after 3 April 2011 or, in the case of adopted children, children matched with a person after this date.

Employers will need to consider amending maternity and paternity leave policies and ensure that they have a system in place for monitoring employee eligibility once the Regulations have been finalised.



TUPE - APPEAL TRIBUNAL CLARIFIES INTERPRETATION OF **MOBILITY CLAUSES**

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 an employee can treat his employment as terminated where the transfer of employment involves a substantial change in working conditions to the employee's material detriment.

The Employment Appeal Tribunal has, in *Tapere -v- South London and Maudsley NHS Trust*, given guidance on the correct test when assessing whether proposed changes in working conditions are to the employee's material detriment and on the enforceability of mobility clauses in transferring employees' contracts of employment.

Background

Ms Tapere worked for Lewisham Primary Care Trust, London (the PCT). Her contract stated that her place of work was Camberwell but it included a mobility clause which provided that she could be required to perform her duties at other locations within the PCT.

Her employment was transferred to the Respondent, South London & Maudsley NHS Trust (the Trust). Whilst her terms and conditions of employment were to remain the same, her place of work changed from Camberwell to Beckenham (which was outside the area of the PCT).

Ms Tapere objected to the change in her place of work, particularly because it would increase her journey by 10 miles and cause

disruption to her childcare arrangements. She lodged a grievance to this effect but, upon returning from holiday, discovered that her colleagues had moved without her to the new premises in Beckenham. Upset by this development, Ms Tapere went off sick before lodging a further grievance and eventually resigning claiming constructive dismissal.

The Decisions

The Employment Tribunal dismissed Ms Tapere's claim, finding that a mobility clause in her contract should, following the transfer, be read as meaning the Trust's geographical locations. Therefore, South London & Maudsley NHS Trust was entitled to require Ms Tapere to work from the Beckenham site.

The Tribunal also found in Ms Tapere's case that the journey time was not materially different and, viewed *objectively*, there was no substantial change to Ms Tapere's detriment.

The EAT overturned the Tribunal's decision. It held that the transfer did not change the scope of Ms Tapere's mobility clause and it was therefore restricted to the geographical location of the employer at the time the contract was entered into. The transferee was therefore not entitled under the terms of Ms Tapere's contract to require her to move to Beckenham.

Whether there has been a change in working conditions is a question of fact. Whether it is *substantial* is also a question of fact, and the Tribunal must consider both the nature and the degree of the change. The change in working conditions must be to the material detriment of the employee, but this must be tested *subjectively*. The Tribunal had erred in not considering the impact of the proposed change from Ms Tapere's viewpoint.

Comment

This case will be particularly important to purchasers of businesses and transferees in outsourcing situations where transferring employees are required to move locations after the transfer takes place.

Employers should only rely on mobility clauses following a transfer where they clearly cover the intended relocation. If the mobility clause does not cover the intended move, or if the employees raise valid arguments that relocation will be to their material detriment, the transferee needs to consider whether the employees in question are in fact redundant and undertake appropriate consultation as necessary.

Clearly, it is also best practice to ensure that the transferring employees are consulted as fully as possible prior to the transfer to ensure the transfer operates smoothly.



TEMPORARY AGENCY WORKERS REGULATIONS PUBLISHED

The Government has recently published the long-awaited draft Agency Workers Regulations. The Regulations will implement the Temporary Agency Workers Directive and give temporary agency workers, after a 12-week qualifying period, the same basic working and employment conditions as would apply to a permanent employee fulfilling the same role. Consultation on the draft Regulations closed on 11 December 2009.

There are few significant changes since the Government's consultation earlier in the year which we reported on in our May bulletin [click here for details](#). However, the new consultation provides clarification on a number of issues which were unclear at the previous consultation stage.

Implementation

Perhaps the most significant change is that implementation of the Directive will now be delayed until 1 October 2011 (shortly before the deadline for implementation of 5 December 2011). This is to give agencies and hirers sufficient time to adjust to the changes, particularly in view of the current economic climate.

Terms and conditions

The "basic working and employment conditions" to which equal treatment will apply are those relating to pay, annual leave, working time, length of night work, rest periods and rest breaks that are ordinarily

incorporated into contracts of the hirer whether by collective agreement or otherwise.

The definition of pay remains broadly the same as at the previous consultation stage and includes basic pay plus other contractual payments such as commission, bonuses and holiday pay. The draft Regulations specifically exclude a number of payments and rewards, for example maternity and paternity pay, payments relating to redundancy and occupational sick pay.

In the context of bonuses, the Government is proposing some refinement to its original approach. Bonus payments will not be subject to the equal treatment entitlement if

they are awarded in the context of performance appraisal systems aimed at the long-term management, motivation and retention of staff; relate purely or partly to company performance; or would not be due to the agency worker during his time with the hirer had he been recruited directly.

Qualifying period

The draft Regulations provide some explanation as to how the 12-week qualification period will work in practice. This will be 12 calendar weeks and it will not matter whether the individual works full-time or part-time.



The Government is proposing a minimum break of six weeks between assignments, before continuity will be broken and the qualifying period can restart. This is intended to prevent employers avoiding the rules through a series of repeat contracts.

A new qualifying period will start if a worker takes on a new role with the same employer. However, there will be safeguards built in to prevent avoidance of the rules. The worker will need to start a new, separate assignment and this new assignment must be “substantively different”. So, slightly varying the duties or job specification of an agency worker will not be sufficient to restart the qualifying period. The meaning of “substantive” in this context will be set out in guidance.

Certain legitimate absences will not count towards a break period either before or after the 12 week period has elapsed. For example, approved annual leave and certified sick leave will “pause” the clock on the qualifying period. In the case of maternity-related absence, such as on health and safety grounds, the clock will continue to tick.

Equal treatment

A question that arose at the previous consultation stage was what would happen if there was no comparable employee with which to compare the agency worker.

The current consultation sheds some light on the approach to be taken.

The basic rule for assessing equal treatment set out in the Regulations is that the worker should be treated as if he had been recruited directly by the hirer to do the same job. The Regulations expressly provide that terms and conditions consistent with those given to a comparable employee will be deemed to

mean compliance with the Regulations. A comparable employee is someone doing broadly similar work in the same establishment. However, this is not the only way a worker can demonstrate equal treatment.

Draft guidance indicates that it will usually be a matter of common sense what amounts to equal treatment. Whilst acknowledging that the simplest approach will often be comparison with a permanent employee, the draft guidance also suggests alternative ways equal treatment might be established. For example, in organisations with clear pay scales it should be obvious what level of pay the person would have received had he been recruited directly, taking into account skills, experience and qualifications; in certain organisations there may be a going rate for a given job and in many cases certain rights, such as annual leave, will be clearly set out or understood.

What should you be doing?

Although October 2011 might seem a long time off, employers would be wise to start preparing now. This should involve a thorough review of contracts, policies and procedures to ensure “equal treatment”. Employers will also need to put procedures in place to ensure that they are able to provide relevant information to agencies. Employers may be liable to the extent that they are responsible for any infringement of the Regulations, for example, through failing to provide the necessary information on pay.

Employers may also want to reconsider their employment strategies between now and 2011. A primary reason for employers opting for temporary agency workers is that it offers flexibility. This will be reduced with the implementation of the Regulations. Therefore, employers may wish to consider whether use of temporary agency workers will remain the more convenient and financially beneficial option.





EMPLOYEE, WORKER OR SUB-CONTRACTOR?

The Court of Appeal has handed down a judgment in *Autoclenz Ltd -v- Belcher and others* which primarily concerns the vexed question of employee worker status.

Valeters working for Autoclenz Ltd asserted that they were employees of the company with the protection that employment status confers, despite the fact that their contracts described them as sub-contractors. The valeters succeeded in their claims at Tribunal but the Employment Appeal Tribunal held that they were not employees but workers within the meaning of section 230(3) of the Employment Rights Act 1996. The case went to the Court of Appeal.

The Court of Appeal accepted that the appeal raised a difficult point in employment law. Parliament has given various forms of statutory protection to people who contract to work for others and their entitlement depends on their legal status. Essentially, there are three possibilities: self-employed, a worker, or an employee. An individual who is not a worker is probably a self-employed contractor. If he is a worker, the next question is whether he is an employee.

The Court determined that the fact that the parties to a contract described their contractual arrangements in a particular way was not conclusive of the actual effect of the arrangements. Where contractual terms were in writing, they would usually be taken as representing the agreement between the parties. However, if one party to the agreement claimed that the written terms did

not represent the true agreement, the court would have to decide what the true agreement was.

In this case, Autoclenz contended that the terms set out in the documents properly reflected the nature of the contractual relationship. The valeters contended that they did not. The Court of Appeal had to decide whether the employment judge had been correct to infer from evidence that the written contract did not genuinely reflect the rights and obligations of the valeters.

The Court of Appeal held that the employment judge was entitled to do this. Although the judge had observed more than once that the valeters knew when they were taken on that Autoclenz regarded them as self-employed contractors, the judge had rightly considered that what Autoclenz wished to create was not material; what mattered was what Autoclenz did in fact create, both by the drafting of its documents and by the requirements it imposed on the valeters.

Autoclenz controlled the manner in which the claimants did their work, the rates at which they were paid and the materials they were required to use. The valeters had no say in the hours they worked and no say in the terms upon which they performed the work because the contracts were not negotiated. The claimants were fully integrated into Autoclenz's business and had no real other source of work, although occasionally they may work elsewhere when Autoclenz had no work for them. These factors amongst others made the relationship one of employment, despite contrary assertions in written documents.

The case is one of a line of cases dealing with employment status in the context of so-called "sham" contracts and serves as a reminder to employers that, as far as possible, they should ensure their relationship with self-employed contractors reflects the contractual position.



NEWS IN BRIEF

Climate change and philosophical belief

The Employment Appeal Tribunal has held in *Grainger plc and others -v- Nicholson* that a belief in man-made climate change is capable of being a "philosophical belief" for the purpose of the Employment Equality (Religion or Belief) Regulations 2003.

In doing so, the EAT set out guidelines for determining what is a "philosophical belief" for the purposes of the Regulations. The belief must be genuinely held; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must have sufficient cogency, seriousness, cohesion and importance; and it must be worthy of respect in a civilised society.

Failure to redeploy was age discrimination

In *Tower Hamlets LBC -v- Wooster* the EAT upheld the Tribunal's decision that an employee suffered unlawful age discrimination when he was made redundant six and half months short of his 50th birthday. Under the terms of his pension scheme, he would have been entitled to an early retirement pension had he remained in the Council's employment until his 50th birthday.

When Mr Wooster's secondment to a social landlord came to an end, his employment was terminated as no suitable alternative position could be found. In the lead-up to Mr Wooster's redundancy, the Council had refused an offer by the social landlord to extend his secondment until he became entitled to his pension, stating: "if he goes now we do save the pension". The decision serves as a warning of the risk of dismissing an employee to prevent entitlement to an age-related benefit.

Government review of Default Retirement Age - we would like your views

In our last Employment Brief we reported on the Government's plans to bring forward to 2010 a review of the default retirement age of 65. As part of the review process, the Government has commissioned research into employers' policies, practices and preferences relating to age and in particular the use of the default retirement age.

As this is a significant issue for all employers with wide-ranging consequences, we are planning to submit a response on our clients' behalf and we would be grateful for your views.

For more information, and to complete our online survey, please [click here](#).

Time off for training to be phased in

The Government has announced that the right to request time off for training for employees with 26 weeks' service will be introduced in two phases in view of the current economic situation. Time to train will be introduced in April 2010 for businesses with 250 employees or more and extended to employees in all businesses in April 2011 or later.

The articles in this brief contain summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on particular problems and we will be happy to assist.

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