

## NeTWork

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### Default Retirement Age set to be axed

The Government has proposed that with effect from 1 October 2011 the default retirement age of 65 will be abolished. This will mean that after 6 April 2011 employers will no longer be able to issue any notifications for compulsory retirement using the default retirement age. [Read more...](#)

Employers will only be able to compulsorily retire employees if they notify staff before 6 April 2011 and set a retirement date before 1 October 2011. For example, if an employee is 65 on 30 September 2011, they would have to be notified before 6 April 2011. If employers wish to retire an employee after 1 October 2011, they will have to demonstrate that they are "objectively justified" in doing so.

The Department for Business estimates that £45 million will be saved by employers in the first year alone, rising to £71 million per year in a decade as the "right to request" procedure becomes obsolete

Whilst the Government estimates that there will be between 200 and 400 fewer tribunal cases per year, there may be an increase in claims relating to older employees who have been dismissed rather than being allowed to retire with dignity.

Businesses need to be prepared to take an 'outside the box' approach to succession planning, as the abolition of the DRA will make bringing junior staff up through the ranks more difficult. As a result, employers will have to have more rigorous performance management of staff and should be more willing to reallocate older members of staff to more suitable roles. The Government has also left very little time for businesses to prepare for this change given that the current six month notice procedure will become ineffective from 6 April 2011.

Consultation on the above proposal will close on 21 October 2010.

## Compulsory retirement and direct discrimination

*Seldon v Clarkson, Wright and Jakes and anor* (July 2010)

The Court of Appeal (CA) has upheld the Employment Appeal Tribunal's (EAT) decision that law firms may be able to justify the compulsory retirement of partners at 65. [Read More...](#)

CWJ, a law firm, arranged for the compulsory retirement of partners who attained the age of 65. Subsequently, S, an equity partner at the firm, was retired against his will on turning 65. S then lodged a claim for direct age discrimination under the Employment Equality (Age) Regulations 2006.

The first instance employment tribunal accepted that S's retirement was an example of direct discrimination on the basis of age. However, it held that CWJ could rely on the defence of objective justification. The tribunal found that CWJ's aims of allowing senior solicitors the opportunity of partnership, facilitating workforce planning and creating a supportive culture by limiting the need to expel partners based on performance were legitimate.

On appeal the EAT upheld the tribunal's decision. It agreed that CWJ's first two aims were justified, however, it stated that the third aim, maintaining a congenial and supportive culture within the firm, was based on a discriminatory stereotype that a partner's performance tails off at 65.

Unhappy with the first instance tribunal and EAT's rulings, S appealed to the CA. S held that in accordance with the European Court of Justice's decision in *Age Concern v Secretary of State for Business, Enterprise and Regulatory Reform* the firm's aims must be of a social policy or public interest nature in order to be legitimate. The CA disagreed, stating that these requirements did not apply to the individual aims of employers and partnerships. The CA also dismissed S's claim that CWJ's aims should have been specified when the compulsory retirement clause was introduced, applying the indirect discrimination case *Crossley v British Airways*.

Finally the CA stated that the fact the firm could have chosen a different retirement age did not mean it was unjustified. The question at hand was whether the clause was legitimate and proportionate, and in this case the CA held that 65 was a fair and proportionate cut off point.

## Claimant ordered to pay Respondent's costs

*Nicolson Highlandwear Ltd v Gordon Nicolson*

The Employment Appeal Tribunal (EAT) in Edinburgh has held that a Claimant may be ordered to pay the Respondent's costs where the Claimant was found to have "defrauded" the Respondent. Read more...

The Claimant and Mr C of the Respondent went into business together in 2002. The Claimant was the director of the Respondent company until August 2008, when Mr C demoted him to retail manager following concerns about the financial performance of the business. Mr C subsequently discovered that the lease of the premises was not held in joint names, as he believed, but was in the sole name of the Claimant. Mr C also discovered a dual invoicing system, invoices to customers not on the system and evidence that the Claimant was running his own business and passing it off as the Respondent. Mr C concluded that the Claimant had been acting fraudulently and dismissed him on 27 October 2009.

The Claimant brought a claim for unfair dismissal in the Employment Tribunal. The Tribunal upheld his claim, as the statutory procedures had not been complied with, but did not award him any compensation on the grounds that his own misconduct had directly led to his dismissal. In addition, he had made open admissions of fraud in his evidence to the Tribunal.

The Respondent applied for costs which was refused on the grounds, amongst others, that the Claimant had not lied to the Tribunal (although Mr C was found to have lied to the Tribunal), the Claimant had not built his case on a collection of lies, the Claimant had succeeded in his claim for unfair dismissal and Mr C had completely ignored the statutory provisions applicable in this case. The Respondent appealed.

The EAT held that the Tribunal had made findings of fact that the Claimant's conduct was deliberate, that he was aware that he was dishonestly diverting orders away from the Respondent, that his actions were blatant and that he was "unrepentant" regarding them. He had continued with a claim for unfair dismissal whilst knowing that the grounds for his dismissal were well-founded. The Tribunal should have found that the Claimant acted unreasonably in bringing and persisting with the claim and should have awarded costs to the Respondent. The EAT therefore allowed the appeal and the Respondent was entitled to an award of costs.

*If you would like to discuss any of these topics further please contact **Heather Cowley** (Partner & Head of Employment Law) on 01582 731161. Alternatively she can be contacted via email at [heather.cowley@taylorwalton.co.uk](mailto:heather.cowley@taylorwalton.co.uk)*