Issue: September 2011

Employment News

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Retirement Planning

Most employers will be aware of the recent changes to the retirement regime. Since the start of April 2011, it has not been possible to issue notices to compulsorily retire employees, although where notice was issued before April, it will still be legitimate for these to take effect. Has your organisation reviewed its practice with regard to retirement? What about performance management of a potentially aging workforce? And have you reviewed your recruitment procedures to ensure that job opportunities are available to all? There are important issues for every employer to consider and address. Failure to consider these issues carefully can be costly given the claims that can arise.

Employees can no longer be forced to retire at any particular age, unless the employer can objectively justify having that retirement age. The great unknown is how the courts will approach the issue of justifying a mandatory retirement age for employees. Will it be only in very unusual circumstances that an employer can justify forced retirement, or will it be relatively easy to do? What sort of issues will be relevant to the question of justification? ACAS suggests that the test will not be an easy one to satisfy, but a number of European cases have suggested that the hurdle may be far from insurmountable.

Relevant justifications could potentially include:

- Encouraging young people to seek employment by holding out good promotion prospects
- "Sharing employment between the generations"
- Facilitating the employer's succession planning
- Providing stability and certainty in the workplace
- Creating a "happy workforce" allowing individuals to retire with dignity, rather than being forced out due to poor performance

It remains to be seen how the case law will develop, but all employers should now be deciding whether or not to retain a fixed retirement age. Do remember that no two cases are the same, and different considerations will apply for different employers. We would be delighted to discuss with you the issues in your organisation and provide some guidance in this thorny area. Failure to prepare is preparing to fail.

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Case Update

Be careful with ex gratia payments!

The Employment Appeal Tribunal (EAT) recently considered the case of an employer who made a particular employee redundant. The employee was contractually due 3 months' notice. The employer paid a redundancy payment and also paid "an ex gratia payment equivalent to 3 months' salary". The employee claimed breach of contract, arguing that she had not received any notice pay and therefore her dismissal was wrongful. At the tribunal hearing, the employer argued that the "ex gratia" payment of 3 months' salary was in fact notice pay, therefore nothing else was due. The tribunal disagreed – to say that a payment is ex gratia must mean that it is something voluntary, over and above what the employer is obliged to pay. Consequently, there had been no notice pay paid, and the employee was awarded £20,000 for breach of contract/notice pay. The EAT upheld the decision.

On a strict legal analysis, this decision must be right, but this is a cautionary tale for any employers who issue termination letters without proper thought, or who wish to appear generous by making "ex gratia" payments, when they are simply paying the employee their legal entitlement...

Dismissing for refusal to agree pay cut

In the current economic climate, many employers may be asking employees to consider taking a pay cut, but what if employees refuse to agree? If they are dismissed, would that be fair? The EAT recently considered one employee who was dismissed for refusing a 10% pay cut – he was the only one of 77 employees to refuse. The employer argued that there was *"some other substantial reason"* for dismissing the employee. The employment tribunal had found in favour of the employee and held that the dismissal was unfair, since it had been reasonable for the employee to reject a pay cut, and because the employer could not show that its survival depended on making the pay cut across the board. The employer's appeal to the EAT succeeded – the tribunal had erred in its application of the law.

The tribunal's task is not to consider whether it was reasonable for the employee to refuse the pay cut, rather the question is whether it was reasonable for the employer to dismiss an employee who refused to agree the pay cut. The tribunal's requirement that the employer show that the survival of the business was at stake was also far too strict a test. It is for the employer to show that there were sound business reasons for the pay cut, but it need not show that the business would close if the changes were not made. Employers must remember, however, that pay cuts cannot be imposed unilaterally. The recommended approach is to seek employees' agreement, and if that is not forthcoming then it may be necessary to dismiss. Dismissal should always be a last resort having exhausted all avenues.

When is a contract not a contract?

The Supreme Court recently considered the circumstances in which the terms of a written contract between two parties can be disregarded. The case concerned car valeters who had entered into contracts with a company stating that they were self-employed, that they could send along a substitute to do the work instead of attending themselves, and that they had no requirement in any case to turn up and do any work. The company was, of course, seeking to avoid these individuals acquiring employment status and having rights such as the right not to be unfairly dismissed.

Normally, if a worker was not obliged to carry out work, and could send a substitute, these would be strong indications that the worker was not an employee. The company here argued that as the contract contained these provisions, the workers could not be employees. The Supreme Court held that where the contract does not reflect the reality of what the parties actually intended their relationship to be, these clauses can be ignored. The reality was that the workers were expected to attend work full time and could not in fact send a substitute.

The court is entitled to look behind the terms of the written contract and ask *"what is, in reality, the bargain between the parties?"* This is a warning for any organisation that might try to defeat employment status by inserting "self employment" clauses in a contract. Our advice has always been that the contract must be reflected by the reality of the parties' relationship, and that clauses in the contract which do not reflect that reality will not assist. In each case, consideration needs to be given to how the arrangement will work in practice with the documentation reflecting this.

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Update

Agency Workers Regulations

A reminder about the important new regime for agency workers coming into force on 1 October 2011:

Anyone who hires agency staff will need to be aware of and to comply with these. Hirers have obligations in respect of agency staff from the first day of hire, such as giving access to "facilities".

After 12 weeks the temporary worker is entitled to the same pay and "basic working conditions" as equivalent staff who are directly employed.

Please contact us for further details, or you may be interested in our employment law seminar programme which includes a session dedicated to these important new Regulations. To view **bto**'s forthcoming seminars, visit the Seminars section of our website at: **www.bto.co.uk**

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