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October 2005

NEWS

Age laws "weak and cautious"

The Trades Union Congress (TUC) has voiced its disappointment with Government proposals for protecting UK workers from discrimination on grounds of age.

The flagship plans, which represent the final stage of the UK's implementation of the European Employment Directive, were set out for consultation in July by the Department of Trade and Industry (DTI).

Under the proposed new laws contained in *Equality and Diversity: Coming of Age: Consultation on the Draft Employment Equality (Age) Regulations 2006*, it would be unlawful for UK firms to discriminate on the basis of age in recruitment, promotion and training or to impose a retirement age of less than 65 unless such a measure could be objectively justified. In addition, the laws would remove the current upper age limit for unfair dismissal and redundancy rights and introduce a duty on employers to consider requests from employees that they be permitted to continue working beyond the stipulated retirement age.

Launching the consultation process, Secretary of State for Trade and Industry, Alan Johnson said that the measures "were not about forcing people to work longer", but "about freedom to choose".

"To thrive in a competitive market British business increasingly bases its employment and training decisions on talent not age," Mr Johnson said. "Employers know that they cannot afford to ignore the skills of any worker - young or old."

However, the Government's proposals were described as "a missed opportunity" by TUC general secretary Brendan Barber.

"These regulations are clearly an advance for older workers, but they could have gone much further by ending arbitrary age-based retirement," Mr Barber said. "We are also concerned that the right to request to work beyond employer-set retirement ages is too weakly drawn, and will monitor its implementation carefully."

"While we welcome any advance in employee rights, this extremely cautious response to the European Directive is a missed opportunity to really extend choice by giving people far more control over not just when they finally give up work but to establish new routes to retirement."

A more encouraging response to the DTI's proposals was submitted by the Confederation of

British Industry (CBI).

CBI deputy director-general John Cridland said that the Government had taken a "workable and common-sense" approach to the issue.

In particular, the CBI welcomed the introduction of a "clear process" for employers to retire workers over 65 "without fear of redundancy or unfair dismissal claims". This measure was included in the proposals following heavy lobbying by the CBI; without it, the CBI argued, the measures would have had "the perverse effect of discouraging firms from keeping staff on".

"In a tight labour market, employers want to retain skilled and experienced older staff who are keen to carry on working," Mr Cridland said. "The latest drafting of this landmark legislation for employees will reassure businesses, because it takes account of their need to plan and operate effectively. One of the vital factors behind the UK economy's success is its flexible labour market. These regulations recognise the importance of retaining that flexibility, which can only be good news for both businesses and their staff."

The CBI did, however, raise concerns regarding the DTI's decision to include length-of-service benefits in the draft regulations. "Companies that currently reward long-serving employees through enhanced sick pay and holiday allowances could risk age discrimination claims from younger employees who have been with the firm for less time," Mr Cridland warned. Parliamentary approval of the proposed reforms will, the DTI hopes, be followed by full implementation on October 1 2006.

Despite the looming implementation of the proposals, an October survey by the law firm Eversheds found that a quarter of employers believe that workers over 50 are too old for their jobs. More worrying was a lack of preparation by employers for the forthcoming laws. Just 20 per cent of firms had undertaken any preparation at all, whilst 20 per cent felt that their board members or senior managers were not committed to tackling ageism in the workplace.

Further information

www.dti.gov.uk/er/equality/age.htm

In this issue

2 Part-time work

EOC warns over 'brain drain'

3 Parental leave

Government to announce deal for new fathers

4 Q&As

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EOC issues warning over 'brain drain'

Around 80 per cent of the UK's part-time workers are employed in jobs that do not make the most of their potential, according to research published in October by the Equal Opportunities Commission (EOC).

At present, there are around 7 million part-time workers in the UK; the EOC's findings suggest that, of these, around 3.5 million have used more advanced qualifications or skills in previous jobs and around 2 million believe that they could "easily work at a higher level".

In a report, *'Britain's Hidden Brain Drain'*, the EOC asserted that existing flexible and part-time working arrangements were "failing to meet the needs of working women and men".

The EOC's research indicates that women working part-time in 2003-04 earned, on average, 27 per cent less than women working full-time; while around 25 per cent of the 44 per cent of UK women who were employed part-time worked as shop

assistants, care assistants or cleaners; just 4 per cent worked as managers or senior officials.

Many respondents to the EOC's survey said that they were doing lower-skilled work because it was less demanding and stressful than the higher-skilled work for which they were qualified.

The EOC argued that, if flexible working were made more widely available at a higher level, such an approach would seldom be necessary.

"Flexibility is Britain's future," said acting EOC chairman Jenny Watson. "Increasingly, people want to work flexibly at different points in their lives, whether as a student, a parent, a carer, or as we near retirement.

"Yet many employers who routinely update equipment and plug into the latest management thinking are still stuck in the past in how they think about work, confining flexibility to a 'working-time ghetto' of low pay and low prospects.

"With these out-dated attitudes, it's no surprise that the part-time pay gap is stuck at a shocking 40 per cent – a figure that hasn't shifted for 30 years.

"The best employers are leading the way, moving away from 'presenteeism' to giving people choice in how they work simply because they recognise it's good for business, fitting the demands of a 24/7 world and improving staff morale.

"But the pace of change is still slow. It's time for a transformation in Britain's workplaces, time for flexibility to become the norm at all levels of employment."

In response to the findings, the EOC is to launch an investigation into the "imaginative and practical ways in which the workplace can be transformed to meet the changing demands of the 21st century".

Further information

Britain's Hidden Brain Drain can be found at: www.eoc.org.uk/flexwork.

Sex discrimination

The EC Directive on equal treatment in employment was implemented through legislation that was published on September 16, 2005 and came into force on October 1, 2005.

The Employment Equality (Sex Discrimination) Regulations 2005 (SI 2005 2467) amend the Sex Discrimination Act 1975 and the Equal Pay Act 1970 in order to implement and fulfil the Government's obligations under European Parliament and Council Directive 2002/73 on the implementation of the principle of equal treatment.

Specific provisions featured in the Regulations include Reg. 3, which sets out a revised definition of indirect discrimination, Reg. 4, which sets out a definition of discrimination on the grounds of pregnancy and maternity leave, and Reg. 5, which sets out a definition of harassment due to a person's sex or on the grounds of gender reassignment.

The regulations were subject to a consultation earlier this year, to which the Government responded on September 5, stating that the draft regulations would remain relatively unchanged.

The response confirmed that the

following would be retained:

- **the new formulation of indirect discrimination;**
- **the new definition of harassment, which covers both harassment on the grounds of a person's sex and harassment that is sexual in nature;**
- **the new provisions in the 1975 Act to make it clear that less favourable treatment on the grounds of pregnancy or maternity leave constitutes sex discrimination;**
- **the extension of protection for people who work for UK companies overseas;**
- **an eight-week time limit for responding to questionnaires in cases of discrimination and harassment.**

The Government did amend provisions to more accurately reflect the Court of Appeal's judgment in *Alabaster v Barclays Bank Plc*, which made it clear that there is no need for a male comparator in equal-pay cases concerned with pregnancy and maternity leave.

Further information

Copies of the regulations are available and can be downloaded in full from: www.opsi.gov.uk.

'Super Saturday': regulatory change and new NMW

On October 1, 2005 'Super Saturday' saw an increase to the minimum wage, stricter sex discrimination laws and amendments to the Employment Relations Act to place new duties on employers over ballots for union recognition or de-recognition for collective bargaining purposes.

As the National Minimum Wage (NMW) increased by 4.1 per cent to £5.05 for adults and to £4.25 an hour for workers aged 18-21, business leaders warned that further rises could be disastrous for firms.

The British Chamber of Commerce (BCC) expressed concern over the recent trend to increase the NMW well above general wage inflation, which puts pressure on all firms to keep wage differentials maintained. David Frost, the BCC's director general, said that business could "just about" cope with the latest increase, but said that "the planned rise for next year to £5.35 is too risky".

John Cridland, the deputy director-general of the Confederation of British Industry (CBI), warned that the UK was near the top of the minimum-wage league in Europe. He said: "It is time for a pause, otherwise jobs could be at risk." The Federation of Small Businesses said the latest increases could have "devastating" long-term consequences for the small-business sector.

Government to announce deal for new fathers

In the week beginning October 10 the Government is to announce that new fathers should have the right to six months' unpaid paternity leave, on the condition that the mother agrees to forego an equivalent amount of her maternity leave.

At present, new fathers are only legally allowed two weeks' leave. They are entitled to £106 a week in paternity pay from the Government, although about half of companies offer new fathers two weeks' paid leave.

The change in leave for fathers will be allied to an extension in maternity rights: new mothers will be entitled to nine months' paid maternity leave from April 2007, and an additional three months' unpaid leave.

Responding to the reports, the Chartered Institute of Personnel and Development (CIPD) said that if the Government wants to improve paternity leave take-up, it should provide more financial support, rather than extend unpaid paternity leave.

Many fathers say that they cannot afford to spend time with their newborn children because of the current statutory entitlement. Less than half of the fathers questioned by the CIPD (46 per cent) said that they would take paternity leave at the current rate of pay if they had another child.

However, at 90 per cent of full pay, the number of fathers who said that they would take paternity leave increased to

four out of five and at full pay the figure rises to nearly nine out of ten (87 per cent).

"We would have expected the rate of paternity pay to be one of the factors in the decision to take paternity leave," said Rebecca Clarke, resourcing adviser at the CIPD. "But with less than half of fathers willing to consider taking leave at the current GBP 106 a week, and four out of five wanting to take up the opportunity at 90 per cent of full pay, the implications for any further family friendly legislation are clear."

Further information

CIPD research is available from www.cipd.co.uk/subjects/worktime/flexwking/paternityflexwork.htm

Business welcomes Directive delay

European Commission proposals designed to bolster the rights of EU temporary workers are likely to be revised as part of a wider programme of deregulation.

The proposed Temporary Workers Directive would have given temporary workers within the European Union the same pay, conditions and holiday entitlement as full-time staff after six weeks at a company.

The Commission published details of its plans to scrap and review different legislative proposals on September 27.

The Recruitment and Employment Confederation clarified the Commission's position to its members on September 29. It said that, contrary to some press

reports, the Temporary Workers Directive was not on the Commission's 'scrap' list.

However, the Commission did say that it "reserves the right to reconsider the proposal in light of future discussions on other proposals".

The British Chambers of Commerce (BCC) welcomed the EC's decision to reconsider the reforms.

"If [Europe] wants to be shown to be an economy that's going to compete in the modern world, the decision to hold this proposal back has got to be right," said BCC director general David Frost.

The Commission's decision to shelve the draft directive was described as a "major setback" for temporary workers

by the Trades Union Congress (TUC).

TUC general secretary Brendan Barber said: "Today's announcement is a major setback for temps across Europe.

"For four years the agency workers directive has been blocked by various governments including our own and now it is destined to sit on a Brussels shelf for many more years to come.

"Agency workers deserve a better deal. Today's announcement gives a green light to those unscrupulous employers who will continue to exploit agency workers."

Further information

www.dti.gov.uk/er/agency/directive.htm

ECJ dismisses workers claims

Sick-pay schemes that treat pregnancy-related conditions in the same way as other illnesses do not breach discrimination legislation, EU judges have ruled.

Irish worker Margaret McKenna suffered a pregnancy-related illness that resulted in her taking extended sick leave.

In line with her employer's sick-leave scheme, Ms McKenna remained on full pay for 183 days and was then entitled to half pay for the remainder of her time off.

She returned to full pay for the

duration of her maternity leave, but when that finished her pay was halved once again as she remained on sick leave for the same condition. She took her employers to court, arguing that the reduction in pay breached EU discrimination rules as her time off was caused by a condition that could not be suffered by men.

However, the case was thrown out after judges ruled that pregnancy-related illness could be treated as other conditions "provided that the reduction in pay is not so much as to undermine the protection of pregnant workers". In

other court developments, a Christain worker who claimed that he was sacked for refusing to work on Sundays has lost his challenge in the Court of Appeal.

Lord Justice Mummery said that although the issue of holy days was controversial, Stephen Copley's employers had "compelling economic reasons" for insisting he work Sundays, adding, "Its resolution requires a political solution following full consultation."

Further information

<http://www.curia.eu.int/>

Q We allow staff to use company mobile and landline calls for personal use. However, people are not always paying their accounts – usually for very small sums of money.

We would like to get the money back by making a deduction from pay. Do we need to give staff notice that we are going to start to do this and, if so, how much notice should we give?

A If an employer wants to make changes to an employee's contractual terms and conditions of employment, and there is no provision in the contract for them to do so, then it is essential to get the consent of the employee to the changes. If the employee does not consent, and the changes are material, then they may resign and claim constructive dismissal, or make a claim for an unlawful deduction from wages if the changes affect their take-home pay.

The provision of fringe benefits is usually regarded as arising from the contract and therefore, if the employer wants to remove those benefits, they will be in breach of contract unless the rules of the phone policy allow them to do so. Even where the rules do permit changes or cessation, the employer should, as far as possible, consult employees.

If the employer effects a variation to the contract without the right to do so or the consent of the employee, the employee may have a case for breach of contract or constructive dismissal.

The amount of notice should ideally be at least four weeks, giving time for queries to be dealt with, unless there is a flexibility clause within the contract that requires a longer period, such as statutory notice.

Q I had a call today from a manager who wanted to make a complaint against the director of his division. He has accused the director of bullying and said that he is willing to submit a formal grievance.

Our policy is that grievances go to the next person in line of management;

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as there is no-one else, this means that his grievance will go to the managing director and there will be no-one above him to hear any appeal.

Would it be correct to use a non-involved third party to hear the first part of the grievance, leaving the managing director free in case of an appeal, or should it be the other way around?

A This scenario seems to be becoming increasingly common, as numerous small companies only have one senior manager to manage the grievance, disciplinary and appeal procedures. The employer has to show that they have dealt with the issues fairly and reasonably and without bias, thereby reducing any potential claims. If you are able to involve a third party to facilitate the process fairly then either suggestion would be possible.

It would seem more logical to involve the third party in the next stage, leaving the managing director to manage the appeal if it should go that far. The reasons for doing this should be explained to the employee in case he has any objections.

Q If an employee works beyond the statutory retirement age (65) for over a year or more, how do we legally dismiss them? Do we just offer a date with notice on the basis of retirement? Would such an employee have any grounds for an unfair dismissal claim?

A An employee who has reached normal retirement age is not normally eligible to bring a claim for unfair dismissal or for a redundancy payment. Statute sets a default age of 65 for bringing such claims, which will apply unless the normal retirement age is lower or higher.

There are, however, exceptions and, in

future, the law on the age-65 cut-off for bringing claims may change. This is currently under consultation for the new age-discrimination legislation expected to come into force on October 1, 2006.

It is important to remember that the upper age limit is either the normal retirement age for the position held or in any other case 65; you need to be mindful, however, of custom and practice and possible inconsistencies leading to claims, such as discrimination, that are not age-barred.

It would be advisable, as a best practice point, to at least follow the statutory procedures.

Q Some of our employees have objected to having work materials (details of work courses they are attending, changes in T&Cs, etc. – nothing that could be considered a flyer) sent to their home addresses. Are we in breach of the Data Protection Act, and can they prevent us from sending the materials?

A Sending out work-related information to a home address from HR is very different to them being on a general mailing list and receiving junk mail through the post. Presumably you have not given these details to a third party; that could potentially be unlawful disclosure. Have you consulted these individuals to find out why they have such objections?

It is unlikely that the individuals could challenge your practice unless they could show they are suffering damage or distress. Even then, any awards are likely to be minimal.

At this stage, you should simply say to the individuals that you believe it to be necessary for you to send the information by post in the pursuance of their contracts, i.e. for the employment relationship, and that it is one of the safest ways to communicate.

However, should they wish to appeal against this decision, give them access to the grievance procedure and consider each case on its merits.