



## Proposal to phase out the Default Retirement Age

Retirement is a potentially fair reason for dismissal. Provided an employer follows the required notice procedure an employee can be dismissed by reason of retirement upon reaching 65, the current default retirement age. The Government has announced plans for legislation to remove the default retirement age altogether.

The following timetable has been outlined in the proposals:-

- From 6 April 2011 employers will no longer be able to issue any notices of retirement under the default retirement age procedure.
- Between 6 April and 1 October 2011, only people who have been notified before the 6 April 2011, and whose retirement date is before 1 October 2011, can be compulsorily retired using the default retirement age procedure.
- After 1 October 2011, an employer will not be able to use the default retirement age procedure to retire employees. If the employer does wish to set a normal retirement age this will have to be objectively justified.

The Department for Business, Innovation and Skills have launched a consultation - *Phasing out the default retirement age* - which sets out further information and detail. This can be found at - <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/10-1047-default-retirement-age-consultation.pdf>

The consultation remains open until 21 October 2010. A response to the consultations is planned for November 2010.

## Compulsory retirement of partners at a set age can be justified

The Court of Appeal has reached a decision in the case of *Seldon v (1) Clarkson, Wright and Jakes and (2) SoS for Business, Innovation and Skills (intervening)*. The case involved the compulsory retirement of a partner from a firm of solicitors on reaching the age of 65. Partners are not treated in the same way as employees, and in particular the default retirement age procedures do not apply to them. This means that they cannot rely on the procedures available to employers to retire employees at that age. It is however unlawful for a partnership to discriminate against a partner on the grounds of age.

Mr Seldon's dismissal was found to be direct age discrimination but the Employment Tribunal which heard his claim found that the discrimination was justified in furthering a number of legitimate aims. This position has been confirmed by the Court of Appeal with reference particularly to the equality of bargaining power among the partners in originally deciding on the retirement age and the assistance for career progression and planning that fixed retirement ages can give to all involved.

This case may well turn out to be one that will offer some initial guidance to employers seeking to set a normal retirement age when the default retirement age has been phased out.



## CASE STUDY - *Willoughby v CF Capital Plc*

### Background

The Claimant, Miss Willoughby, had been in discussions with her employer about a possible change of her employment status to that of self employment as a way of avoiding redundancy. The discussions had not concluded but her employer wrote to her terminating her employment and indicating that she had agreed to the change. Miss Willoughby then contacted her employer after having taken legal advice, to say that she did not agree to becoming self employed but did accept that she had been dismissed. The employer tried to retract the dismissal on the basis that there had been a misunderstanding. Miss Willoughby did not accept these attempts and brought a claim for wrongful and unfair dismissal.

### Decision

The Employment Tribunal found that while the letter sent to the Claimant did on its face end her employment there were special circumstances which meant that it should not be treated as having done so. They found that a reasonable person would have concluded that there had been a mistake and that the Employer had sought to correct the position within a reasonable period.

Miss Willoughby appealed against this decision on the grounds that the special circumstances exception was designed to cover circumstances where the person had not intended to resign or dismiss, such as heat of the moment cases.

The Employment Tribunal overturned the tribunal's decision and held that the dismissal had been effective. The fact that an employer or employee may have been mistaken in some way was not a special circumstance and employers and employees are usually taken to mean what they say. The employer's letter was clear and unambiguous and a reasonable person, who knew that Miss Willoughby had not agreed to self employment, could conclude that the employer was "bent on riding roughshod over her rights".

The EAT also referred to the Court of Appeal's decision in the case of *Buckland v Bournemouth Higher Education Corp [2010]* for confirmation that an employer who has breached a contract of employment cannot unilaterally cure that breach. They also considered that the employer's attempt to retract the dismissal had not been swift enough.

### Comment

This case confirms that special circumstances which would allow an employer or employee to withdraw a resignation or dismissal are very limited. They are most likely to occur where one of the parties is acting irrationally in the heat of the moment or when under extreme pressure.

## EMPLOYMENT TRIBUNAL STATISTICS FOR 2009-10

The Tribunals Service has published its statistics for the period of 1<sup>st</sup> April 2009 to 31<sup>st</sup> March 2010. The figures show that the number of Employment Tribunal claims submitted has increased by 56% from the previous year. The biggest increase was in multiple claims (where two or more people bring cases, involving one or more jurisdiction(s) usually against a single employer) which rose by 90%. Single claims were also up by 14%.

The most common claims accepted by the tribunal were unfair dismissal claims (up 8% on last year) followed by unauthorised deduction from wages claims (up 54% on last year).

The disposal rate for claims by the tribunal was up 22% but this has not kept pace with the increase in submissions and this has inevitably led to a backlog of cases and delays. Of claims that were disposed 32% were withdrawn, 31% settled with ACAS's assistance and 13% were successful at tribunal.

The report did not publish information about levels of awards and costs.

*DISCLAIMER - The content of this publication is for general information purposes only. It does not constitute professional advice (legal or otherwise) nor should it be used as such. We cannot accept responsibility for actions based on the material contained herein.*