

LEONARD GRAY LLP

Employment Law Department

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These notes are intended to be a general overview of the law in relation to the subject detailed above.

Legal advice on the issues and the application to a particular case should still be obtained.

This constitutes our understanding of the law as at January 2011.

THIS SECTION

- ❑ The compulsory retirement age
 - ❑ Retirement policy changes
-

Compulsory retirement – forthcoming changes to the law and the consequences of policy change

On 1 October 2011, the current statutory default retirement age of 65 years will be abolished. As a result, employers will no longer be able to legitimately force retirement on employees approaching that age by giving the usual six months' notice. A victory for senior workers, we hear you say?

What will be the main effects of the forthcoming change in the law?

Employers *will* still be entitled to maintain a compulsory retirement age as a standard policy. However, any such policy will have to be justified since, at first blush, it will automatically discriminate against older workers and therefore give rise to claims for age discrimination and/or unfair dismissal.

What are the relevant criteria for ensuring a policy is safe? Unfortunately, no one can be certain, since there are no clear legal guidelines as yet. These will no doubt become apparent once a sufficient number of cases regarding the issue come before the courts/Employment Tribunals. It has already been determined, however, that a compulsory retirement policy which is aimed at enabling effective

succession planning and avoiding the need to manage under-performing older workers(!) is capable, in principle, of being upheld in law.

In the light of the above, the savvy, risk-averse employer will probably either suspend any existing compulsory retirement policies or avoid introducing any new ones until the above issues become clearer. Those that do not risk claims for unfair dismissal being brought against them by affected employees. However, for employers that feel it is in their interests to maintain such a policy, they should gather as much data and reasoning as possible that will help them justify such a move. This process will probably need to entail, in part, meeting and consulting with staff on a formal basis. Please contact us for specialist legal advice on the subject.

The current procedure

It should be noted that the *current* procedure for compulsorily retiring employees (which can still be exercised up to and including 5 April 2011) remains fraught with potential difficulties and pitfalls. For detailed guidance on both this and the proposed changes in the law referred to above, please contact our Employment Law team.

THIS SECTION

- ❑ Updates to discrimination law
 - ❑ Disability discrimination
 - ❑ Discrimination by association
-

The Equality Act 2010 – changes to discrimination law and examples of their practical effect

A useful reminder regarding the Equality Act 2010 – from 1 October 2010, the following changes were made to the law regarding disability discrimination:

Meaning of disability

This is now somewhat wider and less complex. Certain illnesses (e.g. cancer) are now automatically regarded as disabilities (the full list, for those that wish to read it, can be found lurking within Schedule 1 to the 2010 Act – see <http://www.legislation.gov.uk/ukpga/2010/15/schedule/1/part/1>).

Discrimination 'by association'

Quite crucially, it is now possible for a non-disabled employee to make a claim against an employer who treats the employee unfavourably because of the disability of another person (e.g. a spouse, child, etc.).

The 'treatment test'

Under the old law, an employee had to show that the employer was treating him/her less favourably than a hypothetical, non-disabled colleague (i.e. a 'comparator'). This is no longer necessary. It is an important change because...

Case study

... take the case of an employee who is repeatedly absent from work over a period of, say, six months, due to a disability. The employer dismisses him. Under the pre-October 2010 rules, the employee would have to show that he had been treated less favourably than a non-disabled colleague (albeit a hypothetical one). This led to the employer being able to avoid a claim simply by arguing that the non-disabled person who also took extended absences would also be dismissed (i.e. there would be no discrimination). Now, however, the employee would simply have to show that he was treated *unfavourably* (probably quite an easy test) and the employer must then be able to *justify* the decision to dismiss.

Though it may not seem all that obvious at first, the above rule change has led to a significant moving of the goalposts.

Guidance

The recruitment and future treatment of disabled employees remains, as ever, an area that employers need to give careful and considered attention. Most people nowadays accept that there is no room in the workplace for discrimination of any kind, not to mention against disabled individuals. Our Employment Law specialists are always available to help guide both employers and employees alike through the key legal requirements in this area.

THIS SECTION

- Dismissal dates
- Recent case law

The effective date of dismissal/termination

It is important for an employer and employee to be clear as to the exact date on which an employment contract comes to an end, as it can effect the employee's deadlines for submitting claims to the Employment Tribunals.

Gisda Cyf -v- Barratt (2010)

The above case was recently heard at the Supreme Court (the UK's highest Court, formerly the House of Lords). The facts were as follows: an employee was dismissed by a letter, sent to her home on 29 November. She did not actually open the letter until 4 December, having been away in the meantime staying with her sister. She eventually decided to submit an unfair dismissal claim to the Employment Tribunal on 2 March. Her deadline for doing so was (the usual) three months from the date her employment terminated. Did the Court allow the claim?

The answer is yes, even though the claim was submitted more than three months after 29 November. Why? Because the Court decided that the employee did not have a "reasonable opportunity" to read the letter until her return from her break (i.e. 4 December, not 29 November when the letter was actually posted).

Where does this leave, then, the situation for employers confirming dismissals in writing? It depends on circumstances, but certainly the overwhelming implication is that informing an employee of his/her dismissal on a face-to-face basis removes any room for doubt. Care, however, must of course be taken by employers in terms of the *procedure* adopted when dismissing, as this can also be subject to scrutiny. Please contact our Employment Law team for assistance and further guidance.
