



Spotlight

Employment Winter 2010 Issue

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Out with the old, in with the new...

Well not quite. [Jennifer Dolan](#) considers the recent High Court decision upholding the UK's current Default Retirement Age of 65 years and the practical implications for employers.

The High Court has recently upheld the UK's current Default Retirement Age (DRA) of 65 years. The existence of the DRA effectively allows employers to compel their employees to retire at this age provided that a retirement procedure set by law is followed. The decision brings the long-running challenge (known as the 'Heyday' litigation) to a number of provisions of the Employment Equality (Age) Regulations 2006, launched by the charity Age Concern, to an end. However, employers should not get too comfortable as the Government's review of the DRA set for 2010 is likely to result in the DRA being raised or even abolished.

In the Heyday case, older workers, supported by the charity, challenged the DRA of 65 years in Regulation 30 of the Employment Equality (Age) Regulations 2006 on the basis that its inclusion served no consistent social policy aim. Further, it was argued that the choice of 65 years was not proportionate in all the circumstances. An earlier decision of the European Court of Justice (ECJ) had found that a DRA set by the Government was *capable* of justification. The issue for the High Court was whether the DRA was in fact justified.

Mr Justice Blake rejected both arguments. He found that a DRA served legitimate social policy aims and that, for the time being at least, the choice of 65 years was a proportionate one.

Whilst the decision will no doubt come as a welcome relief to employers, the political context in which the decision was handed down is worthy of a cautionary note. The litigation, which first came before the High Court in 2006, has long fuelled a heated media debate and has divided opinion between employer, employees and trade unions.



The Government's underlying policy in this area is to encourage a greater number of older people into the workplace. Significantly, just two days before the case returned to the High Court, the Government announced its review of the DRA in 2010 (the review is in fact now underway with employers being asked to provide preliminary statistical information). Mr Justice Blake was keen to pay lip service to this fact, commenting that he could not see how the DRA could remain at 65 years after the review. One may speculate that the decision may well have been a very different one without the comfort of a Government review freshly announced in the prelude.

Being able to objectively justify direct age discrimination is one of the marked features of age discrimination when compared to the other grounds of inequality, such as race, sex etc. The flexibility to retire employees is welcomed by many employers, particularly in the current economic climate. If an employer was forced to make redundancies as opposed to retirements, the costs of redundancy payments for employees over 65 years can be very high.

For now at least, employers have the comfort of acting in the knowledge that provided the correct retirement procedure is followed they can compel older employees to retire at 65. In very general terms, the employer is required to: give the employee 6 - 12 months written notice of their right to make a formal request not to be retired; arrange a meeting with the employee to duly consider any such request; and give the employee the opportunity to appeal against its decision.

The upholding of the DRA will also facilitate proper succession planning – enabling the exit of older and perhaps key employees to be carefully managed. In turn, this means that career development programmes for younger employees can be rolled out. Of course, in many industries, employers will not want to lose its more experienced employees, with invaluable skills and knowledge acquired over the years. Such employers will be glad to hear that the flexibility to permit consenting employees to work past the DRA is unaffected by the decision. This, coupled with effective use of flexible working arrangements, may facilitate retaining older employees to the benefit of both the employer and employee.

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Foreign tummy bug...

Neil Dite explores two recent decisions which mean that:- (1) employees continue to accrue statutory annual leave whilst absent from work through illness and (2) that employees who fall ill during a period of scheduled annual leave have the right to take the lost annual leave at a different time. The focus is on the practical implications for employees and tactics for reducing risk.

The House of Lord's decision in the conjoined cases of *Stringer v HMRC* and *Schult-Hoff v Deutsche Rentenversicherung Bund* ("Stringer") earlier this year confirmed that a claim for unpaid annual leave can be pursued as an unauthorised deduction for wages claim, as well as a claim under the Working Time Regulations 1998 (WTR). This means that a worker can take advantage of the more generous time limits that apply to unauthorised deduction from wages claims – such claims can be brought within 3 months of the last of a series of deductions. This potentially will allow a worker to bring a claim in respect of a series of deductions going back more than 3 months, even over a number of years. Contrast the position under the WTR where a claim must be brought within 3 months of each deduction.

The previous ruling of the European Court of Justice (ECJ) in *Stringer*, was for employers, perhaps even more worrying. The ECJ found that annual leave entitlement under the WTR (or more commonly referred to as statutory annual leave – currently 28 days per annum inclusive of bank holidays for a full-time worker) continues to accrue during long-term sickness absence and that workers can opt to take paid statutory annual leave even when absent from work through illness (for example, when statutory sick pay entitlement has been exhausted).

A further recent decision of the ECJ, in the case of *Pereda v Madrid Movilidad*, has added to the controversy. Mr Pereda was required by his employer to take annual leave from 16 July – 14 August, however, as a result of an injury suffered at work, he was declared as unfit to work until 13 August, i.e. this overlapped almost all of the designated holiday period. He requested his employer to treat his period of absence as sickness absence rather than annual leave and for his employer to allow him to take a 'new' period of holiday upon his return. His employer refused.



The case progressed to the ECJ which found in favour of Mr Pereda. The decision means that 'a worker who is on sick leave during a period of previously scheduled annual leave has the right, on his request and in order that he may actually use his annual leave, to take that leave during a period which does not coincide with the period of sick leave'. Where a worker does not wish to take annual leave during a period of sick leave, annual leave must be granted to him for a different period (even if this is outside the holiday year in question).

What does this all mean for employers?

- An employer must allow statutory annual leave entitlement to accrue during a period of an employee's sickness absence.
- An employee is entitled to a payment in lieu of any accrued but untaken annual leave entitlement on termination of their employment.
- Employees on long-term sick leave are able to take paid annual leave whilst off sick (presumably when any sick pay entitlement has been exhausted).
- If an employee is unable through sickness absence to use up his/her statutory annual leave entitlement then it appears that he is able to carry over the used entitlement to the next holiday year.
- Only the statutory holiday entitlement under the WTR is affected by these decisions. For additional contractual holiday entitlement, an employer is able to require employees to take that holiday leave even if they would have been otherwise absent from work through sickness.

Both decisions are likely to cause a considerable amount of concern to employers. Employers would be well advised to reduce the risk of potential issues arising so far as possible by:-

- Reviewing/amending their policies and procedures dealing with sickness absence to ensure that it is being managed as robustly as possible. Improved policies and better management should help to avoid employees remaining on long-term sickness absence accruing large amounts of statutory holiday entitlement;
- Reviewing/amending their policies to ensure that it is made clear that no holiday entitlement over and above the minimum statutory entitlement under the WTR may be carried over to the next holiday year;
- Even if the employee is on sick leave before or during a period of holiday leave, an employer may still treat that period as being holiday leave, **unless** the employee requests that it is treated as sickness absence instead. The ECJ's decision in Pereda *implies* that unless and until the employee makes such a request then the period of absence can be treated as holiday leave. However, that position is not wholly clear.

Reality check and looking forward

A good deal of private sector employers will already operate schemes whereby they agree to reinstate some or all of a period of holiday leave disrupted by sickness. Regrettably the two decisions did not offer any guidance as to what evidence of sickness may be required in such circumstances; however, one would suggest that this would reflect the employer's normal notification of sickness requirements.

Looking forward, the current UK law on carry-over of statutory annual leave entitlement is, at least on the face of it, inconsistent with the decision in Pereda. It will be interesting to see whether the Government elects to amend the WTR and/or whether further test cases will come through in light of the decision.

The Dolmans Employment Team will be focusing on these two important decisions and the issues arising out of sickness absence in forthcoming breakfast seminars.

Neil Dite

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The new Vetting and Barring Scheme

The new Vetting and Barring Scheme, established following the enquiry into the Soham murders of Holly Wells and Jessica Chapman, was launched on 12 October 2009. A new non-departmental public body, the Independent Safeguarding Authority (ISA) is responsible for administering the scheme.

The purpose of the scheme is to provide a greater level of regulation for all those who work with children and vulnerable adults directly or indirectly. Indirect contact covers those who have access to sensitive records and or information concerning children or vulnerable adults. All persons who work, or potentially will work, with such groups must be registered on a centrally held database held by the Criminal Records Bureau (CRB). The new scheme applies to voluntary as well as paid work.

The new scheme will operate alongside the current system of standard or enhanced CRB checks. However, whereas the CRB lists only contain information as to past criminal convictions, the new database will include reference to a wider range of information, including 'soft intelligence' – general police information, concerns reported to local authorities, professional bodies etc.

The scheme is compulsory for all those working or volunteering in a 'Regulated Activity' either 'frequently' (once a month or more) or 'intensively' (three or more days in any 30 month period) or overnight between 2.00am and 6.00am. Regulated Activity is widely defined to include anybody working in a 'Specified Activity' (e.g. teaching, care, supervision or the provision of medical treatment) or at a 'Specified Place' (e.g. schools, care homes, children's centres, nurseries).

The scheme further provides for vetting of those involved in 'Controlled Activities'. This is more limited in scope and will cover those whose work may provide for the opportunity of contact with children or vulnerable adults which is ancillary to their primary role. In England, persons who are barred under the register may still be able to undertake Controlled Activities provided adequate safeguards are in place. In Wales, however, no distinction is made between Controlled and Regulated Activities – it will be illegal for an employer to engage a barred individual in either.

The scheme places obligations on employers which carry serious sanctions for non-compliance, including a potential prison sentence and fine. Employers will need to ensure that all employees working with children or vulnerable adults are appropriately registered with the scheme and checked. Employers are also under an obligation to refer appropriate information to the ISA, e.g. any conduct by an employee which harms or puts at risk a child or vulnerable adult. The scheme will have a phased introduction with the duty upon employers to carry out registration for all new employees commencing in November 2010.

Transferable Maternity Leave

The Department for Business, Innovation and Skills has published draft Regulations to introduce a new scheme allowing for maternity leave and pay to be transferable between parents.

Under the proposed Additional Paternity Leave Regulations 2010, new mothers who have returned to work without exhausting their full entitlement to maternity leave will be able to transfer any or all of the second 6 month period of statutory maternity leave to the father, together with up to 3 months statutory maternity pay.

The Government aims to have the new legislation in place by April 2010, to come into force for parents of babies born on or after April 2011.

Tips and the minimum wage

From 1 October 2009 it is illegal to use tips to top up workers' wages up to the level of the national minimum wage (NMW). Previously, service charges, tips and gratuities processed through an employer's pay-roll could count towards an employee's salary for NMW purposes.

The new position is that, although such payments may be passed on to employees, they will not count towards NMW. However, there remains no obligation upon employers to pass tips and the like on to employees.

The Department for Business, Innovation and Skills has published a voluntary Code of Best Practice aimed at the hospitality and service sector.

From 1 October 2009, the NMW was increased to the following rates:

Employees aged 16 – 17 years	£3.57/hour
Employees aged 18 – 21 years	£4.83/hour
Employees aged 22 and over	£5.80/hour

It's getting hot in here...

In an interesting decision, the Employment Appeal Tribunal has ruled that a genuinely held belief in climate change could constitute a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (Grainger Plc and others v Nicholson).

Mr Nicholson claimed he had been unfairly dismissed by his employer because of the beliefs he held about climate change. His employers challenged the Tribunal's preliminary decision that this could constitute a philosophical belief; however, the Employment Appeal Tribunal dismissed the appeal finding that such a belief, *if genuinely held*, could satisfy the requirements under the Regulations. It would be a matter of fact in each case whether such a belief was so genuinely held.



Volunteers not covered by Discrimination Act

A decision of the Employment Appeal Tribunal (EAT) has confirmed that volunteers who give their time unpaid to charities are not covered by domestic or European equal treatment legislation.

The decision concerned a claim made by a volunteer to the Citizens Advice Bureau who claimed she had received less favourable treatment under the Disability Discrimination Act 2005 (DDA). The EAT struck out the claim on the basis that the DDA only protects employees and not volunteers.

Employment law is changing...

... all the time. The Dolmans Employment Team is able to offer cost effective, bespoke training packages to ensure that you are able to keep up with the latest developments in the law and to manage your employees effectively. Our courses are interactive and practical, aimed at getting the key points across without getting "too bogged down" in unnecessary detail.

The Dolmans Employment Team is able to offer training courses in the following areas:

- Dispute Resolution and Grievances in the workplace
- Absence Management
- Equality and Diversity (including all aspects of discrimination)
- Redundancy planning and procedure
- Restructuring programmes
- 'Family Friendly Rights' (including dealing with flexible working requests)
- Stress and Bullying in the workplace
- TUPE Transfers

Our courses can be tailored to suit your individual business needs. We are able to provide training at your premises or elsewhere over a single morning/afternoon/evening or over a number of days. We are mindful that disruption to your business needs must be kept to a minimum.

For further information on training courses available, please do not hesitate to contact Jennifer Dolan jenniferd@dolmans.co.uk.



Dolmans in the Community

The Dolmans Employment Team is proud to participate in the Cardiff Law Centre Pro Bono Employment Law Evening Clinic. This is an initiative aimed at providing employment law advice to those primarily living and working in the Cardiff area with little or no income, no legal expenses insurance, and no realistic way of seeking private legal advice. It is an entirely pro-bono and non-profit making organisation run in association with the Employment Lawyers Association.

Watch this space - Breakfast seminars ahead

The Dolmans Employment Team is pleased to confirm that its previously well received breakfast seminars will continue. The seminars will aim to focus on the issues covered in **Spotlight** and expand upon the key points in discussion.

Details are being finalised and will be published in the next few weeks. In the meantime, if you would like further information and wish to register your interest or suggest topics for discussion, please contact Rahel Chinnock rahelc@dolmans.co.uk.

What we do - Employment Law Services

Dolmans is a dynamic law firm achieving outstanding results for its clients. We have gained a reputation for our expertise and professionalism. Our integrity is an essential element of the way in which we work and we are highly skilled in the delivery of our services.

The Employment Team is the chosen representative of many companies, public authorities and senior executives in employment litigation, dispute resolution and the provision of non-contentious advice.

However, we can offer more than that. The Dolmans Employment Team advises its clients proactively – reducing the risks of problems arising in the first place and dealing with any that have arisen promptly before they get any worse.

We are able to provide the following services to our clients:-

- **Employment Litigation.** Dealing with claims in the regional Employment tribunals throughout the UK and the Employment Appeal Tribunal.
- **Contracts and Policy Documentation.** We are able to review your existing contracts of employment and policy documents to ensure full compliance with the legislation in place today. Alternatively, we are able to provide fresh documents individually tailored to meet your business objectives.
- **Business Restructuring and Termination.** We can advise you on a step-by-step basis through a restructuring or redundancy programme or the exit strategy of a senior employee.
- **Helpline Consultancy.** Urgent problems demand urgent answers. Dependant upon your specific requirements, we are able to provide a one-stop point of contact for urgent employment law and HR advice for an agreed fixed monthly retainer.
- **Employment Training Services.** We are able to offer interactive training seminars to you and your staff covering all employment law issues. The focus of our training is to provide clear and concise practical advice, telling you what you need to know.

Dolmans is able to provide fully-integrated commercial legal services to our clients, including Commercial Dispute Resolution and Litigation, Mergers and Acquisitions, Debt Recovery and Commercial Property services.

For full details of the commercial services Dolmans is able to offer, please contact Alison Henders-Green, Partner alisonhg@dolmans.co.uk.



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Dolmans is a fully integrated commercial law firm. To find out more about us go to www.dolmans.co.uk.

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