

Pensions and Employment: Employment/Employee Benefits Bulletin

Legal and regulatory developments in Employment/Employee Benefits

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This week's contents include:

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For details of our work in the pensions and employment field [click here](#).

For more information, or if you have a query in relation to any of the above items, please contact the person with whom you normally deal at Slaughter and May or [Rebecca Hardy](#).
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Client seminars

Equality Act 2010

Our firmwide programme of client seminars for September to December, 2010 is attached. In particular the programme includes a session on 17th November, 2010 on the Equality Act 2010 and an Employment Update, to be given by Roland Doughty and Sandeep Maudgil, partners in our Pensions and Employment Group. If you would like to attend, please contact Angela Bustard in our training department (angela.bustard@slaughterandmay.com).

Pensions Update

Also attached are details of our next Pensions Update client seminar, on 16th November, 2010 from 9.30am to 1pm.

New law

Phasing out the default retirement age: consultation paper published

On 29th July, 2010, BIS and the DWP jointly published a consultation paper on the Government's proposals to phase out (i) the default retirement age ("DRA") of 65, and (ii) the statutory retirement procedures, including

the duty on employers to give a minimum 6 months' notice of retirement to employees, and the right for employees to request to work beyond retirement age.

The Government proposes to abolish the DRA on 1st October, 2011, with transitional arrangements beginning on 6th April, 2011. Where an employer has given notice of retirement under the DRA using the statutory retirement procedures **before 6th April, 2011**:

- the DRA will continue to apply, so long as the employer continues to follow the statutory retirement procedures, but
- where the intended date of retirement is after 1st October, 2011, it is proposed that the DRA will no longer apply. The employer will need to be able objectively to justify any retirement taking effect after 1st October, 2011.

If an employer gives notice of retirement after 6th April, 2011, the employer will no longer be able to rely on the DRA, because the minimum 6 months' notice will expire after 1st October, 2011 and the existing provisions allowing less than 6 months' notice will have been repealed.

Employers giving notice after 6th April, 2011 will still be able to operate their own compulsory retirement age provided that this can objectively be justified as a proportionate means of achieving a legitimate aim.

The consultation paper seeks views on 2 potentially negative consequences of removing the DRA, namely:

- the extent to which removal will impact negatively on the current and future provision of **group insured benefits**, such as life insurance, medical cover, income protection schemes and critical illness cover, and
- **employee share schemes**, where it is common for retiring employees to be classified as "good leavers" and employees who resign to be classified as "bad leavers", where removal of the DRA may create difficulties.

After 6th April, 2011, employers currently using retirement ages under the DRA process will have 2 choices:

- they can stop using retirement ages, although they can complete any retirements where the employee has been notified before 6th April, 2011 and where the retirement will be complete before 1st October, 2011. The Government says it will provide guidance on managing without retirement ages, or
- they can choose to continue using a retirement age. However, they will be open to challenge in the courts to show that their retirement

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age is objectively justified. The consultation paper states *"It is not easy to demonstrate that a retirement age is objectively justified, so the employer should be confident that it can be objectively justified before deciding to use any retirement age"*.

The consultation paper, on which comments are invited by 21st October, 2010, is available from the [BIS website](#).

Equality Act 2010: EHRC guidance

In July 2010, the Equality and Human Rights Commission published extensive guidance on the Equality Act 2010, expected to take effect in October, 2010. There is separate guidance for employers, employees, providers of goods and services, and recipients of goods and services.

The guidance for employers is in 7 (lengthy) parts dealing with: recruitment; working hours, flexible working and time off; pay and benefits; training, development, promotion and transfer; managing workers; dismissal, redundancy, retirement and after a worker has left; and equality policies, equality training and monitoring.

The guidance, available at www.equalityhumanrights.com, explains the relevant provisions of the Act and

provides practical examples to illustrate the changes it will introduce.

Bribery Act 2010: implementation

On 20th July, 2010, the Ministry of Justice issued a press release announcing that:

- a consultation on the proposed guidance on "adequate procedures" that commercial organisations may put in place as a defence to a charge of failure to prevent bribery will be published in September, 2010, and
- the Bribery Act 2010 will be commenced in April, 2011. The Act was expected to come into force in October, 2010.

Consultation on right to request time off to train

On 11th August, 2010, BIS launched a consultation on the future of the right to request time off to train, in particular, whether the right should be repealed, retained for large organisations, or extended to small and medium sized organisation.

The Apprenticeships, Skills, Children and Learning Act 2009 introduced the right to request time to train for employees in large organisations with effect from April, 2010. The legislation extends the right to

employees in small or medium sized organisations from April, 2012.

Responses to the consultation, which is available from the [BIS website](#), are requested by 15th September, 2010.

Consultation on revision of FSA Remuneration Code

On 29th July, 2010, the FSA published consultation paper CP10/19 on revising the FSA's remuneration code.

The main change proposed is a major expansion of the firms subject to the Code, so that from 1st January, 2011, it will apply to "all banks and building societies, asset managers, hedge fund managers, UCITS, and investment firms as well as some firms in corporate finance, venture capital, the provision of financial advice and stockbrokers". Other changes proposed are:

- **bonus deferral:** at least 40% of any variable remuneration of staff subject to the Code must be deferred for at least 3 years, rising to 60% for variable remuneration of more than £500,000,
- **limit on cash bonuses:** at least 50% of variable remuneration of staff subject to the Code must be delivered in the form of "shares, share linked

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instruments or other equivalent non-cash instruments of the firm”, subject to a minimum retention policy,

- **guaranteed bonuses** may only be offered in exceptional circumstances to new hires for the first year of service and the period of the guarantee cannot exceed one year,
- **total variable remuneration** must not limit a firm’s ability to strengthen its capital base if necessary and must be significantly reduced if there is subdued or negative financial performance,
- **severance pay** will be subject to new restrictions to prevent reward for failure, and
- **pensions:** discretionary enhancements to pension funding will be required to take the form of shares or share-like instruments that must be held for at least 5 years.

The consultation paper, on which comments are invited by 8th October, 2010, is available from the [FSA website](#).

Cases round-up

Age discrimination: objective justification for compulsory retirement age

On 28th July, 2010, the Court of Appeal upheld the Employment Tribunal’s decision that a rule requiring partners in a solicitors’ firm to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities.

The exemption in Regulation 30 of the Employment Equality (Age) Regulations 2006 (the “**Age Regulations**”) for the default retirement age of 65 does not apply to partners. A requirement that partners retire at a certain age is therefore discriminatory in the absence of objective justification.

S, a former partner in 10-partner Kent law firm Clarkson, Wright and Jacques, was required by his firm’s partnership deed to retire at 65. He claimed that this was an act of direct age discrimination contrary to the Age Regulations. His firm accepted that his compulsory retirement amounted to less favourable treatment on the grounds of age and so would be unlawful unless objectively justified.

In attempting to establish objective justification, the legitimate aims the firm relied on were:

- ensuring that associates were given the opportunity of partnership after a reasonable period,
- facilitating partnership and workforce planning with realistic expectations as to future vacancies, and
- contributing to a congenial and supportive workplace culture by limiting expulsion of partners through performance management.

The Employment Tribunal accepted that these aims were legitimate. The EAT overturned the Employment Tribunal’s decision on one aspect, namely that there was no evidence that performance would decline at around age 65, so that the third aim relied on was not legitimate.

The Court of Appeal has now dismissed S’s appeal.

S had argued that the ECJ’s decision in **Heyday** on the legality of the default retirement age established that legitimate aims must be of a “social policy or public interest” nature, rather than serving an employer’s individual objectives. In the view of the Court of Appeal, the ECJ had held that it was the Age Regulations themselves which had to be justified by reference to social and employment policy objectives, not the aims of employers or partnerships. While a partnership may have “mixed motives” behind

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its aim, where it pursues an aim that is consistent with the Government's social policy justification for the Age Regulations, it would be contradictory to render the partnership's act unlawful, provided it was a proportionate means of achieving its aim. The firm's aims, according to the Court of Appeal, were all legitimate.

The Court also dismissed S's claim that the firm's aims needed to be consciously recognised at the time the compulsory retirement clause was introduced into the partnership deed. Cases concerning indirect discrimination show that a discriminatory measure can be justified by a legitimate aim which was not specified at the time the measure was introduced. There was no need to distinguish the position for direct discrimination.

Finally, the Court decided that the mere fact that the firm could have chosen a different retirement age to provide partnership opportunities for senior solicitors and enable effective workforce planning did not automatically lead to the conclusion that the rule to retire partners at age 65 was not justified. The question was whether the clause was a proportionate means of achieving a legitimate aim. If it was proportionate to choose 65, the fact that it would be less discriminatory to some to have chosen 66 could not render the clause unlawful. In the Court's view, the DRA of 65 for employees in Regulation 30

supported the choice of 65 "*as a fair and proportionate cut-off point*".

Comment: If the proposals to phase out normal retirement age are implemented then this case will provide useful guidance on the concept of objectively justifying a retirement age.

TUPE (1): ETO reason affecting part of the workforce

In August, 2007, employees of the Portman Building Society ("**Portman**") transferred to the Nationwide Building Society ("**Nationwide**") under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**"). Prior to the transfer, a job mapping process concluded that some roles within Portman would be changed to roles within the existing Nationwide structure which had been assessed as being comparable with them.

A number of employees resigned after the transfer and claimed that they had been constructively unfairly dismissed by Nationwide for reasons connected to the transfer. They claimed that the terms of their employment were altered to their detriment by Nationwide in the following ways: (i) their job role and responsibilities were downgraded when they were assimilated into Nationwide roles; (ii) the process of assimilation was such as to be a breach of trust and confidence; and (iii) the Nationwide bonus scheme which was to or did replace their Portman bonus

scheme was substantially less beneficial to them (a reduction of £4,000 per month for one employee). These acts constituted fundamental breaches to their contracts of employment entitling them to resign.

The Employment Tribunal held that the employees had been constructively dismissed. In the alternative, the tribunal held that the employees were dismissed by virtue of regulation 4(9) of TUPE on the basis that the transfer involved a substantial change to their working conditions to their material detriment. However, the tribunal held that the dismissals were not automatically unfair as they were for an economic, technical or organisational reason (an "**ETO reason**"). The principal reason for the change to the employees' roles was Nationwide's narrower product range. The narrower product range amounted to an organisational reason and it entailed changes in the workforce by virtue of the job functions of the transferring employees. The change to the bonus scheme was similarly made for an ETO reason because it was connected with the employees' job functions and driven by Nationwide's narrower product range. However, the Employment Tribunal concluded that the dismissals were procedurally unfair.

The Employment Appeal Tribunal allowed Nationwide's appeal against the finding that the dismissal was procedurally unfair. This finding had been based on a failure to consult collectively which

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had not been pleaded and the EAT held it was against the principles of natural justice for the Employment Tribunal to reach a decision in relation to a matter on which neither party had been invited to make submissions. In addition, the employees would have had no standing to bring a claim for a failure to consult collectively. However, the EAT acknowledged that generally the tribunal can consider the extent and nature of any consultation (collective or individual) in deciding the fairness of any dismissals.

The EAT agreed that the harmonisation of roles and functions and remuneration amounted to an organisational reason. It also held that the organisational reason did not need to entail changes in the entirety of the workforce: it is sufficient that the organisational change affected a body of transferring employees. This meant the dismissal, while it was connected with the transfer, was not automatically unfair; therefore the case was remitted to the Employment Tribunal for it to reconsider whether the dismissal was unfair in accordance with the normal principles.

TUPE (2): collective agreements

In **Worrall and Others v. Wilmott Dickson Partnership Limited and Others**, the Employment Appeal Tribunal (the “EAT”) considered whether a change in legislation could affect the terms of a

collective agreement which had been transferred under TUPE.

Mr Worrall commenced employment with Birmingham City Council (the “Council”) in 1971. In 1993, the Council and its recognised trade unions entered into a collective agreement relating to redeployment and redundancy. Clause 3.2 (which was also in the Council’s personnel handbook) provided that in respect of employees who were made voluntarily redundant, the City Council would, in exercising its discretion in accordance with the Local Government Pension Scheme regulations, award at least 5 added years.

After a series of TUPE transfers, the first being in April, 2001, Mr Worrall’s employment was finally transferred under TUPE to Wilmott Dickson Partnership Limited (“Wilmott”). Mr Worrall volunteered for redundancy and was made redundant in April, 2008. In the period between 2001 and 2008, the relevant legislation was amended and the ability to award a period of added years was replaced by a power to award a lump sum of up to 104 weeks’ pay.

On Mr Worrall’s redundancy, Wilmott did not award the added years, as it claimed that the discretion under clause 3.2 to award the added years had been removed by the change in legislation. Mr Worrall claimed that Wilmott had breached his contract by

failing to give him credit for those additional 5 years’ service.

The EAT held that clause 3.2 of the collective agreement was not incorporated into Mr Worrall’s contract as:

- (i) there was no evidence that Mr Worrall had received a copy of the Personnel Handbook, and just because that handbook was available to him, it did not mean that he had notice of it and was bound by it;
- (ii) the letter which mentioned the collective agreement and was sent to all employees that transferred contained a list of over 100 different agreements and policies without giving any details of their contents. Therefore it was impossible to conclude that Mr Worrall was aware of clause 3.2 or that he had agreed to it; and
- (iii) the absence of protest from Mr Worrall in relation to the benefits under clause 3.2 does not in itself show that clause 3.2 was incorporated into his contract of employment.

If, however, clause 3.2 had been incorporated, then the issue was the date at which his rights under clause 3.2 failed to be determined. Mr Worrall submitted that **Parkwood Leisure v. Alemo-Herron** and the European Court of Justice case of **Werhof v. Freeway**

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Traffic Systems GmbH & Co suggested that the critical date for establishing the nature of his rights was April, 2001 (the date of the first TUPE transfer), and so any subsequent changes in law must be ignored.

The EAT distinguished **Parkwood Leisure** and **Werhof** on the basis that those cases go “no further than preventing parties from being bound by future changes to collective agreements, which are very different from statutory prohibitions on making payments.” The EAT thus held that “there is no reason of principle why an employer who is a transferee under TUPE is outside the scope of statutory provisions and immune from such provisions”. The principle of static interpretation of Regulation 5 of TUPE is only in relation to changes to the collective agreement itself, and does not extend to legislative changes. Thus, where valid provisions of a collective agreement become unlawful at a later date due to changes in legislation, the transferee would no longer be bound by them.

Comparators in disability-related and direct discrimination claims

On 29th July, 2010, the Court of Appeal, in **Aylott v. Stockton on Tees Borough Council**, upheld the EAT’s decision that, in line with other decisions, the comparator test laid down by the House of Lords in the housing case of **London Borough of Lewisham v.**

Malcolm applies to disability-related discrimination in the employment field, until such time as the Equality Act 2010 changes the position.

A person discriminates against a disabled person if, among other things:

“(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified.”

The Court of Appeal in the 1998 employment case of **Clark v. Novacold**¹ (“**Clark**”) held that this meant that the appropriate comparator in disability-related discrimination cases should be someone for whom “that reason” (which is related to the disability) does not apply. For example if someone was refused a promotion for the reason that he has poor writing skills (and this was caused by his dyslexia) the comparator would be someone who does not have poor writing skills i.e. someone to whom that reason does not apply. As a result, it was relatively easy for a claimant to show that he had been treated less

favourably than his comparator, meaning that the focus shifted to the question of justification.

However, on 25th June, 2008, the House of Lords overruled the **Clark** test in the case of **Mayor and Burgesses of the London Borough of Lewisham v. Malcolm**² (“**Malcolm**”). The judgment highlighted the ineffectiveness of the comparison under **Clark** and decided that the correct comparator should be an able-bodied person in the same material circumstances as the claimant. The **Malcolm** case was concerned with disability discrimination in relation to housing; however, it has subsequently been followed in employment cases.

The Court of Appeal in this case also considered the appropriate hypothetical comparator when considering a claim of **direct** disability discrimination and concluded that this need not be the same as for disability-related discrimination.

Comment: This is not the first employment decision to follow **Malcolm**. However, as the Court noted, the situation will be changed by Section 15 of the Equality Act 2010, which will, in effect, re-establish the comparator test set out in **Clark v. Novacold** for disability-related discrimination claims.

¹ [1998] IRLR 318, CA.

² [2008] UKHL 43.

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Equal pay (1): TUPE

In **Buchanan and anor v. Skills Development Scotland Co Ltd**, the Scottish Employment Tribunal considered the extent to which TUPE can be a genuine material factor defence to an equal pay claim.

Two female employees (the “**Claimants**”) and Mr Sweeney (the “**Comparator**”) were transferred to Scottish Enterprise in 2002 from 3 different former employers under TUPE 1981. The Claimants’ salaries were approximately £8,000 less than the Comparator’s at the date of the transfer. The Comparator’s contract provided for 3 specific wage increases over 2002 and 2003, and then stated that his “salary will be reviewed on an annual basis as per normal arrangements applying from April, 2004”.

In 2004 Scottish Enterprise introduced a Performance Related Pay Scheme (“**PRP**”) which allowed it to red-circle overpaid employees. This freeze was not imposed on the Comparator despite the fact that he was overpaid for his grade. Both the Claimants and the Comparator received across the board pay increases most years.

In 2008, they transferred under TUPE 2006 to Skills Development Scotland Co Limited (“**Skills Development**”) who decided to undertake a job evaluation. By October, 2008 the disparity in pay between the Claimants and the Comparator was approximately £12,000.

The Claimants made a claim for equal pay. Skills Development claimed that the difference in pay was due to its obligations under TUPE. It was not in dispute that the Claimants and the Comparator did work of equal value, and therefore the issue before the Tribunal was whether the difference in pay was due to a genuine material factor that was not the difference in sex (as otherwise the Claimants are entitled to benefit from the equality clause in the Equal Pay Act 1970 to increase their pay to that of the Comparator).

The Tribunal referred to the EAT decision in **Coventry City Council v. Nicholls**, which held that for a genuine material factor defence to be successful it must be: (i) a genuine reason, and not a sham or a pretence, which existed and was known to the employer at the relevant date and continued to the hearing; (ii) the less favourable treatment is due to this reason and the factor is material and causative and not just justificatory; (iii) the reason must not be the difference in sex; (iv) the factor is a significant and relevant difference between the woman’s and man’s case; and (v) if the factor is indirectly discriminatory on the grounds of sex, that reliance upon it is justified.

The Tribunal accepted that TUPE was a genuine material factor which justified continuing increases in the pay of a transferring employee to reflect pre-existing contractual obligations. However, although TUPE can be a historical reason for differentials in

pay (**Kings College London v. Clark**), the Tribunal was not satisfied that Scottish Enterprise had been obliged to continue increasing the Comparator’s pay after 2003, nor that it gave any meaningful thought as to whether it was either contractually obliged, or obliged under TUPE, to do so. As a result, from 2004 onwards, TUPE was no longer a genuine material factor and therefore the equality clause operated to substitute the Comparator’s more favourable pay into the Claimants’ contracts. When they transferred under TUPE in 2008, the Claimants transferred with the modified contracts: the TUPE transfer in 2008 was not a new intervening genuine material factor, nor was Scottish Development entitled to suspend the modified terms pending the completion of the job evaluation exercise. Accordingly the Claimants were entitled to equal pay with the competitor.

Equal pay (2): Unsociable hours

In **Brownbill and others v. St Helens & Knowsley Hospital NHS Trust**, female health care assistants and receptionists who were working in the NHS and paid time and one third for Saturday and time and two thirds for Sunday claimed equal pay with male drivers/porters/parking assistants who were paid time and a half and double time for the same periods. The Employment Appeal Tribunal held that it was wrong to amalgamate unsocial hours supplements with basic pay to find the average hourly rate, and instead

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each term should be considered individually (as stated in **Hayward v. Cammell Laird Shipbuilders Limited (No. 2)**).

This decision followed the ECJ case of **Jämställdhetsombudsmannen v. Orebro Läns** (which did not amalgamate unsocial hours supplements with basic pay and upheld the term by term approach) and distinguished the Court of Appeal case of **Degnan v. Redcar & Cleveland Borough Council**, where basic pay was aggregated with attendance allowances and fixed bonuses forming remuneration for normal working hours. In this case the supplements for unsocial hours were distinct from normal working hours, whereas in **Degnan** they were held to be all part of a single term governing the same subject being remuneration of normal working hours.

And finally . . . Britain's Got Talent

Simon Cowell and Britain's Got Talent's production company, FremantleMedia have had proceedings brought against them for disability discrimination by a contestant, Ms Emma Amelia Pearl Czikai, who appeared on the show in May, 2009.

Ms Czikai claims that the show had not made reasonable adjustments for her disability (fibromyalgia) during the audition process, such as not lowering the level of backing music and microphone levels, which resulted in poor performance and subsequent "humiliation" by the judges. Ms Czikai said:

"This programme makes a select number of rich people very, very rich on the backs of the ordinary man and

woman in the street through exploitation, humiliation, degradation and a re-emergence of modern-day barbarism with all its inherent cruelty."

Ms Czikai complained to Ofcom in January but her complaint was rejected, and she then lodged her complaint at the tribunal. She is claiming £300,000 for injury to her feelings, £1.25 million for loss of earnings and additional compensation of £1 million. The co-respondents have opposed the claim from getting a full hearing on the basis that Britain's Got Talent is not an employer, and the crew were not aware that she was suffering from fibromyalgia. The pre-tribunal review, to decide if the case can be brought before a full tribunal, was concluded on 22nd July, 2010.

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