Vol TWO // Spring 2011

upfront

the employment edition

CONFUSION OVER ABOLITION OF DEFAULT RETIREMENT AGE

In the last edition of Upfront we reported that the Coalition Government was proposing to scrap the default retirement age of 65. These changes are due to come into force from 6th April 2011.

The Draft Regulations that were initially laid before parliament caused widespread concern and confusion due to what we can only assume was an error in the way they were worded.

The Department for Business Innovation and Skills has finally resolved this mess with a second draft version of the regulations on 1st March 2011.

So what will this all mean?

- You can retire any employee who is already 65 or will turn 65 before 30th September 2011
- The last day for giving compulsory notice of retirement to employees is 5th April 2011 and 6 to 12 months notice must be given

If notice is given by the employer before 5th April 2011, the employee can then request to work beyond the proposed retirement date. If this is agreed by the employer then up to 6 months extension for working past the retirement date can be granted without having to issue a fresh notice of retirement, which cannot be done after 5th April.

The last possible day for retirement is also the subject of much legal debate; it would be safest to assume that this would be 3rd October 2012. This would cover an employee who is given 12 months notice of retirement on the last possible day (5th April 2011) which would take them to 4th April 2012 and then is given the maximum six month agreed extension to 3rd October 2012.

Once the retirement age is abolished, employers will have to justify a compulsory retirement age as a 'proportionate means of achieving a legitimate aim'. The issue of whether a compulsory retirement age can be justified will have to be considered very carefully and may leave employers open to claims of age discrimination and/or unfair dismissal. Damages in discrimination cases are potentially unlimited and so employers should act carefully.

If there is no justification for a compulsory retirement age, employers will either have to wait for the employee to retire of their own accord or rely on one of the other potentially fair reasons for dismissal, such as capability. Employers must however, ensure that they follow a proper and fair procedure for this.

Employers will need to ensure that they are ready for this change and act very quickly if they intend on issuing any compulsory notices of retirement. Given the complexities it is important that employers seek legal advice in respect of any proposed retirements.

> You can retire any employee who is already 65 or will turn 65 before 30th September 2011

For further information please contact Amy Crabtree on 01254 54374 or email amy.crabtree@forbessolicitors.co.uk

RESOLVE TO AVOID TRIBUNALS

Now; let me be honest with you from the start.

Short of standing at the door of the Tribunal with a big wieldy stick, there is nothing anyone can ultimately do to stop an employee issuing a Tribunal Claim (even if you did that they could still issue via email). It is becoming increasingly easy for employees to issue Tribunal claims – it is little more than a matter of form filling. Tribunal claims are costly to defend and in the vast majority of cases, employers cannot recover their legal costs incurred in defending the claim. It is not only the cost of legal fees that employers should bear in mind but also the increase in management time and resources that are involved in defending a Tribunal claim.

It is therefore important that any employer, however big or small, takes all steps they can possibly do to avoid Tribunals. Whenever any employee raises an issue, however small, employers should ensure that this is dealt with properly. The fundamental key is to deal with matters fairly and reasonably, and not to make any pre-judged assessment of any complaints or issues. All employers should have in place a robust Grievance Policy that managers are trained on; and if matters do need to escalate to a Disciplinary Policy then that should also be robust and followed in all cases. It is vitally important to keep records of any and every issue.

Tribunals, in my experience, are much more readily persuaded to accept the case of the employer who has kept diligent and full written records rather than the employer who is relying on memory alone. The vast majority of cases come down to simple factual disputes at the end of the day and if there are contemporaneous documents supporting the employers position then that will always stand them in good stead.

Finally, if the worst does happen and it does appear that a Tribunal is inevitable remember all is not lost: if you have kept the records and followed the procedures listed above, you have much better prospects of defending any claims that are brought against you.

Here at Forbes we regularly assist in drafting Policies and Procedures, providing in-house bespoke training to members of management on dealing with workplace disputes, and defending Tribunals. In the last annual report from the Employment Tribunals, there was a 56% increase in the number of claims accepted by the Employment Tribunals, which were at the highest ever level. This is therefore an issue that every employer needs to have at the forefront of their people management strategy.

From an HR practitioners point of view:

Encourage your management to document what goes on when they are going down a disciplinary or grievance route. Also remind them that should a matter go to an Employment Tribunal, as well as the HR person providing a statement and reading that statement under Oath, they too could be involved in reading from their statements. Statements are so much easier to write if you can refer back to documented records, stating dates, who was involved etc. You need a paper trail to provide the evidence to an Employment Tribunal that you have done everything possible and in line with your own Policies and Procedures.

From a HR practical point of view, if you require any assistance, please contact Joanne Pickering on 01254 580000

For your assistance in dealing with any Employment Law related issue, please contact Jonathan Holden on 01254 54374 or email jonathan.holden@forbessolicitors.co.uk

EVENTS

Equality Act Update

17 May 2011, Stanley House Hotel, Mellor, Blackburn

We will be holding a mock tribunal looking at the implications of the Equality Act.

The programme for this seminar is yet to be finalised but to register your interest please email bethany.jones@forbessolicitors.co.uk

Annual Employment Law Updates

6 October, Stanley House Hotel, Mellor, Blackburn

18 October, Deepdale, PNE FC, Preston

9am - 1.30pm

The experienced team will be covering all the latest UK and European employment law developments and the implications for your organisation.

A full programme is yet to be finalised but to register your interest early, please email catherine.butler@forbessolicitors.co.uk

HR BUSINESS SUPPORT -TEAM EXPANDS

Due to the growth of the HR Business Support service, I am pleased to announce Emma Fitzsimmons has joined Joanne Pickering in the HR Business Support Team. Emma has been with Forbes for four years and has over nine years experience in HR. She is a Chartered Member of the CIPD (Chartered Institute of Personnel & Development) and works closely with Joanne in looking after Forbes' 365 + staff.

I would also like to congratulate Joanne Pickering on gaining her Chartered Fellow status with the CIPD. This is the highest grading with the CIPD and recognises Joanne's many years of experience working at a senior level in the HR field. Joanne has been with Forbes for eleven years and heads up the HR, Training and Quality team.

Joanne and Emma provide a practical HR Service from undertaking investigations, holding disciplinary or grievance hearings or hearing Appeals either disciplinary or grievance. When the management in smaller companies has heard the disciplinary/grievance, but due to their size/structure, do not have a suitable person in house to hear the Appeal, Joanne or Emma can assist. Also, many firms who do not have their own dedicated HR practitioners in house are making the most of this service. Joanne is also an experienced trainer and can deliver sessions on carrying out investigations, disciplinary or grievance hearings.

Peter Byrne, Head of Employment,
01254 54374 or
email peter.byrne@forbessolicitors.co.uk

WHO'LL BE LEFT **HOLDING THE BABY?**

From April this year, new legislation will be brought into force entitling fathers to take up to six months' paternity leave.

This will be available to those fathers where the mother returns to work early and in those circumstances it is open to the father to use up the balance.

That will inevitably cause problems for employers, not least because of the fact that many couples will not necessarily work in the same establishment.

Many smaller employers, and indeed employers as a whole, cite maternity/paternity leave as being a potentially difficult issue for them to deal with insofar as keeping jobs available for the parent to return to, following the period of leave.

Under new proposals announced, the Government intends to consult on proposed changes to allow fathers and mothers to take up to ten months between them. Under current law, the mother has the entitlement to take up to twelve months parental leave. The proposals, if accepted, will mean that fathers can take up to ten months statutory paternity leave, in circumstances where the partner/mother returns to work and the balance of the leave is taken up by the father.

The new proposals come as no surprise to those who keep a close eye on employment legislation. This was suggested in the European Parliament not too long ago. It remains to be seen how either the changes in April, or the subsequent extension proposed by Mr Clegg, will be brought into force and how it will be applied practically.

There are clearly potential administrative issues. Employers do need to plan for this and ensure that they have appropriate policies and procedures in place.

That said, it has to be borne in mind that the level of statutory pay – whether for paternity or maternity leave – remains low. One potential issue is going to be who will be entitled to enhanced maternity pay under the new rules in circumstances where the employer provides for enhanced maternity pay currently. It could be argued that failure to do so, following April, could amount to sex discrimination since the woman could be entitled to the enhanced maternity pay but the employer may deny to fathers.

This is obviously going to be a difficult area which will create problems for employers going forward. It is therefore important that any employer should seek specialist advice at an early stage, to ensure as smooth a transition as possible.

For assistance in dealing with this, or any employment law-related issue please contact Emma Newbould on 01254 222352 or email emma.newbould@forbessolicitors.co.uk

forbessolicitors.
with you every step of the way

For legal advice that is straight to the point:

Blackburn Office t: 01254 54374
Preston Office t: 01772 220022
www.forbessolicitors.co.uk

DO YOU TAKE THEE .... DAY OFF?

As people in all corners of the world will by now know, Kate Middleton and Prince William are due to marry on Friday the 29th April 2011. Prime Minister, Mr David Cameron has announced that this will be a bank holiday to allow for a national celebration.

The Queen is entitled to appoint by proclamation a 'special day' as an additional bank holiday in accordance with the Banking and Financial Dealings Act 1971. As the grandmother to the bridegroom it is no wonder the Queen deemed his wedding a 'special day'.

The news appeared to be welcomed by employees as an extra day off. For many employees, it will represent an extra paid day off and for employers an additional cost at a time when costs savings are imperative.

There may be some light at the end of the tunnel though for employers who would be advised to check their employees' contract of employment. Whether or not employees are entitled to an additional paid day's leave will depend upon the wording of the contract. Employees are not automatically entitled to the extra day off. In some types of industry employees will simply not be able to take the time off. It is likely that the Royal Wedding may result in a boost to the profits of the hospitality industry for pubs, restaurants and hotels showing the footage and will open the doors for those who wish to join in the celebrations.

If the contract permits employees to take paid bank holidays off, to have a replacement holiday at another time or they have in fact done so on a regular basis, then it is likely they will be entitled to paid time off. For those employees whose contracts give a holiday entitlement with additional bank holidays then the employer will be obliged to give their employees the additional day.

In the event employees have the current statutory entitlement of 5.6 weeks (28 days for a full time employee) which includes bank holidays, there is an arguable case that they do not have to be paid for the time off and they would have to use time from their existing holiday entitlement. When the legislation was drafted the 5.6 weeks took into account the normal 8 bank holidays. In this case employees will have 9 bank holidays which will be deducted from the 28 days entitlement.

This will also apply to part time staff whose entitlement will be pro-rated in the same way as their normal holiday entitlements.

Some employers may decide to grant an additional day off or an additional day's pay as a gesture of good will and to boost morale for their employees. Whatever employers decide, it is worth remembering that there will also be an additional days' bank holiday next year for the Queen's Jubilee.

If you need further advice or assistance please contact Ruth Rule-Mullen on 01254 222302 or at ruth.rule-mullen@forbessolicitors.co.uk