Parker & Co

Employment Update

March 2011

Welcome to the latest edition of Parker & Co's Employment Update. We focus on the abolition of the default retirement age and review recent authority on territorial jurisdiction and TUPE consultation. We also consider an EAT decision on redundancy pools and a Court of Appeal case dealing with disciplinary investigations.

Abolition Of Default Retirement Age

Employers will soon be required to objectively justify a compulsory retirement age.

The Government has confirmed that the Default Retirement Age (DRA) of 65 will be phased out this year. The phasing out will begin on 6 April 2011 and be completed in early October 2011.

From 6 April 2011, employers will no longer be able to issue compulsory retirement notifications using the DRA procedure set out in the Employment Equality (Age) Regulations 2006.

Once the DRA is removed, employers will only be able to operate a compulsory retirement age if it can be objectively justified.

Transitional Arrangements

Under the transitional provisions, only employees notified before 6 April and who turn 65 or over before 1 October 2011 can be compulsorily retired using the DRA and the procedure set out in the 2006 Regulations.

Under the 2006 Regulations, employers have an obligation to give between 6 and 12 months' notice of compulsory retirement. However, short notice of at least two weeks is allowed under the 2006 Regulations, but an employee may be able to claim compensation of up to 8 weeks' pay if the full notice is not given.

In addition, giving short notice may leave an employer open to an argument that retirement is not the sole reason for dismissal pursuant to the Employment Rights Act 1996.

Abolition of Default Retirement Age .....continued

The Default Retirement Age of 65 will be phased out over the coming months.

Objective justification

In order to maintain a compulsory retirement age for employees, employers will need to demonstrate that they are pursuing a legitimate aim in a proportionate manner.

In *Seldon v Clarkson Wright & Jakes*, the CA held that compulsory retirement of a partner in a law firm at age 65 was justified. However, the Supreme Court will hear an appeal later this year and it is likely to provide authoritative guidance on objectively justifying a compulsory retirement age. We will update you once the decision is published.

However, in the meantime employers will need to consider whether to maintain existing compulsory retirement ages or abandon them. If compulsory retirement will be used, employers must analyse their reasons why and carefully review why they are not using an alternative to enforced retirement. This process should begin now – it will not be sufficient to undertake the exercise only after ET proceedings are issued!

Insurance related benefits

Employers will be able to stop offering employees insured benefits, such as life assurance and private medical cover, beyond their normal retirement ages.

Reviewing existing policies

It is advisable to review your retirement policy and other policies related to performance management ahead of these changes. For example, it is essential that you have policies in place which allow you to properly manage retirement issues. Such policies make managing the expectations and aspirations of your employees, together with ensuring you meet the needs of your business, fairer and easier.

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Territorial Jurisdiction

The EAT and Court of Appeal have recently considered three cases concerning the ET's territorial jurisdiction.

In *Pervez v Macquarie Bank Ltd (London Branch)*, the Claimant was employed by a company incorporated and based in Hong Kong. This Company did not reside or carry on business in England or Wales. The Claimant moved to London on an international assignment to a UK-based associated company and acquired rights under the Employment Rights Act 1996. The EAT held that a company can "carry on business" in England and Wales by seconding an employee to work at an establishment, even if the supply of workers to third parties is not part of its ordinary business.

In *British Airways plc v Mak and ors,* the CA upheld the ET's decision that it had jurisdiction to hear the race and age discrimination claims of cabin crew employed on flights between Hong Kong and London. The crew were recruited, ordinarily resident and based in Hong Kong, but spent around 5% of their working time in Great Britain. The ET held this was not "trivial or trifling" and the role could not be done without it.

Finally, in *Ministry of Defence v Wallis and anor*, the CA upheld the ET's decision to accept the unfair dismissal and sex discrimination claims of two British employees who worked at NATO's overseas headquarters. The CA held that the necessary connection to hear the unfair dismissal claims had been established and the principle in *Bleuse v MBT Transport Ltd* (relating to the need for ETs to provide an effective domestic remedy to enforce an EU right) conferred jurisdiction for the sex discrimination claim.

As the new Equality Act, which re-enacts the old discrimination legislation, is silent in relation to territorial scope, it is likely that there will be further case law in this area. In addition, the Supreme Court will consider *Bleuse v MBT Transport Ltd*. We will report any further developments.

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TUPE Consultation

Employers should carefully consider their information and consultation obligations under TUPE, even where measures may seem minor or not detrimental.

In *Todd v Strain*, a care home was TUPE transferred. The owner of the home called a meeting to inform staff that an offer had been made to purchase the home, but that jobs were safe. There was no specific information provided and many of the staff were not actually present at the meeting. No further consultation took place, save for some minor communications with one employee. 32 employees subsequently alleged that the seller and buyer of the care home had failed to inform and consult them in accordance with the requirements of TUPE.

The ET agreed and identified measures envisaged which were not communicated relating to the way in which the seller would make payments for work done up to the date of transfer, including a change to the usual payment date. The ET awarded each employee the maximum compensation of 13 weeks' pay.

The EAT upheld the ET's finding, holding that the payment arrangements constituted measures for TUPE purposes. Although the arrangements were administrative, they were not an inevitable consequence of the transfer (which would not trigger the information and consultation duty).

The EAT stated that the purpose of TUPE consultation was partly to enable any transitional arrangements to be explained and to reassure employees that they would not be prejudiced in any way. In addition, TUPE does not require that a measure's effect must be disadvantageous before the requirement to consult is engaged. The EAT reduced the award to 7 weeks' pay to reflect the fact that some information had been given and that the measures were not of any great significance.

Given the potential liability that can arise, employers are best advised to conduct a TUPE compliant information and consultation exercise even where the only measures envisaged are administrative and to address all TUPE liability issues in sale or transfer documentation.

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Redundancies And The Pool Of One

EAT considers pooling and the scope of consultation in a standalone redundancy situation.

In *Fulcrum Pharma (Europe) Ltd v Bonassera*, the Claimant was employed as HR Manager following the Respondent's acquisition of another company, having previously been HR executive/office manager. Following a period of sick leave, recovering from heart surgery, the Claimant was informed that she was at risk of redundancy.

During her sick leave another employee, Mrs Carter, had taken on some of the Claimant's duties. The Claimant suggested that the two roles be combined and that Mrs Carter be made redundant.

The Respondent had privately anticipated questions about the redundancy pool and had prepared answers. The matter was not discussed with the Claimant and the suggestion was rejected. The Claimant argued that she had been unfairly dismissed.

The ET agreed and considered that the Respondent had identified the Claimant's position as being redundant and had automatically concluded that she would be made redundant. The ET considered that any reasonable employer would have included both employees in a pool and carried out the appropriate selection process.

The EAT directed that the ET should revisit its decision that a reasonable employer would have included both employees in the pool as it had not taken into account relevant factors such as seniority in reaching this decision.

However, this decision does make clear that simply considering the possibility of a wider redundancy pool and providing evidence of the same is not sufficient. An employer must consult with the employee about its reasoning.

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Unfair Dismissal

The Court of Appeal considers the scope of an employer's knowledge for unfair dismissal purposes.

The Court of Appeal in Orr v Milton Keynes Council considered whether knowledge held by one manager could be imputed to another, resulting in the assumption that an employer knows everything known to its employees.

The Claimant, a black youth worker of Jamaican origin was dismissed for discussing a sexual assault with some young people in breach of a direct instruction from his manager, Mr Madden, and for being rude to him during a discussion about working hours several days later. Group Manager, Mr Cove, was responsible for conducting the Claimant's disciplinary proceedings and he concluded that both incidents amounted to gross misconduct. The Claimant was dismissed.

An ET held that the argument at the centre of the second incident had been caused by Mr Madden's underhand attempt to change the Claimant's working hours and commenting to the Claimant that he could not "understand a word [his] lot [were] saying". Mr Cove was not aware of this.

The CA held that for the purpose of considering whether a dismissal is unfair, it is the person charged with carrying out the employer's functions whose knowledge counts as the employer's knowledge. Reasonableness must therefore be considered in light of his investigation and knowledge. The CA considered that to impute Mr Cove with knowledge he could not reasonably acquire through the appropriate disciplinary procedure would impose too onerous a duty.

The CA considered that an investigation which is as thorough as could be reasonably expected will support a reasonable belief in the findings, whether or not some information had been missed. Therefore Mr Cove's decision to dismiss was considered fair. However, in most situations we would expect such information to come to light during a reasonable investigation.

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News in brief & what's coming up

February changes: A reminder that the following changes became effective from 1 February:-

→ The limit on a week's pay for the purposes of calculating statutory redundancy payments and the basic award for unfair dismissal increased from £380 to £400.

→ The compensatory award for unfair dismissal increased from £65,300 to £68,400.

Statutory pay rates: In April, Statutory Maternity, Paternity and Adoption Pay will increase to £128.73, while Statutory Sick Pay will increase to £81.60.

Time off for training: Implementation of the right to request time off for training to those employed by small and medium-sized employers, due to take effect in April, has been postponed.

Flexible working and shared parenting: The right to request flexible working will be extended to parents of children under 18 years old in April. In addition, for parents of children due on or after 3 April it will be possible in some case for fathers to take additional parental leave if the mother returns to work early.

Collective redundancy consultation: In *United States of America v Nolan*, the Court of Appeal has asked the ECJ to clarify when the consultation obligation in collective redundancies arises, as it considered previous ECJ case law is unclear. We will update you once the ECJ's decision is available.

Maternity Pay: The EU has rejected a proposal to increase paid maternity leave to 20 weeks full pay.

Discrimination: religion or belief: The EAT has confirmed in *Power v Greater Manchester Police*, that an employer may discipline its employees for inappropriately manifesting their protected beliefs in the workplace. The Claimant's belief in the psychic and paranormal was protected by the Employment Equality (Religion or Belief) Regulations 2003. However, the Claimant was not dismissed "on the grounds of" those beliefs. Although the Claimant was dismissed primarily on the grounds of conduct, during an investigation it came to light that he had brought spiritualist DVDs and posters into the workplace. This was considered inappropriate and was a second reason for his dismissal. There is an important distinction between treatment on the ground of a person's beliefs and treatment based on the manifestation of those beliefs.

Discrimination: disability: The Court of Appeal held in *X v Mid Sussex Citizens Advice Bureau* that an unpaid volunteer was not covered by the Disability Discrimination Act 1995. The Claimant provided services under an agreement which stated that the arrangement was "binding in honour only and not a contract of employment or legally binding". The CA considered the arrangement more akin to a work placement. This will apply equally under the Equality Act 2010.

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Contact us

If you have any questions arising from the articles or on other areas of employment law, please call or email us and we will be happy to discuss them with you.

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