Definitely, maybe - the year ahead in employment law

23 FEBRUARY 2012

CATEGORY:
ARTICLE

Last year saw a huge number or proposals issued by a range of Government departments that will or may have an impact on employment law and HR practice. Over the coming months some of these are going to start coming into effect and others will be further consulted upon.

Increase in the unfair dismissal qualifying period

The Government will increase the qualifying period for bringing an unfair dismissal claim in April. The transitional provisions make it clear that only people recruited after 6 April 2012 will be affected by the revised rule.

For 'recruited', read, 'commenced employment'. That will often mean the date on the employment contract, but not necessarily. For example, employees who join you after 6 April, but have continuous employment with another employer, eg because of a TUPE transfer, will continue to benefit from the one year rule.

Employees whose contracts state a date after 6 April, but who in fact started working for you before that date will also benefit from the old law. The date of commencement of employment is what it says – the date they start working, not the date on the contract.

The extension to two years will also apply to the right to request written reasons for dismissal.

Changes in tribunal rules

It is too early to say how some of the changes that have been announced will affect employers from a practical perspective – particularly the issue of fees. This is still under consultation, although under current proposals the kinds of cases that are most likely to be affected are discrimination claims by employees still in employment. Under the draft proposals many unfairly dismissed employees who have not yet found work will be exempt from fees.

However two changes that are worth noting are the increase in the amount that a claimant can be ordered to pay by way of deposit as a condition of continuing with a weak case (going up from £500 to £1000), and the increase in the amount of costs that a tribunal can award against an unsuccessful party (going up from £10,000 to £20,000). Tribunal judges sometimes say that the ability to order a deposit is not used as much as it could be and that employers should consider more often asking tribunals to exercise this power. A requirement to pay £1000 before the claim can carry on might be enough to put off a claimant who has a weak case.

As for costs, it will be interesting to see if the power to award costs will be given a jump start by the increase in the limit. Historically reluctant to order costs, tribunals may start to do so more frequently, particularly in larger cases. However that may also mean that more costs awards are appealed, meaning….more costs!

Pensions auto-enrolment

This is being introduced on a staged basis and the government has recently announced that the timetable has been pushed back for medium sized and small employers. Medium-sized employers (under 3000 employees) will be re-allocated auto-enrolment dates between 1 April 2014 and 1 April 2015, a delay for some employers of up to nine months. Small employers will be allocated auto-enrolment dates between 1 June 2015 and 1 April 2017.

The largest employers (with 3000 or more employees) will be unaffected by the amended timetable and they will affected in batches according to size from 1 October 2012, starting with those with 120,000 employees. The staging will come into effect month by month between October 2012 and July 2013:

No. of employees	**Date**
120,000 or more	1 October 2012
50,000 – 119,999	1 November 2012
30,000 – 49,999	1 January 2013
20,000 – 29,999	1 February 2013
10,000 – 19,999	1 March 2013
6,000 – 9,999	1 April 2013
4,100 – 5,999	1 May 2013
4,000 – 4,099	1 June 2013

3,000 – 3,999 1 July 2013
Click here for further information.

The amount of money that employers will have to contribute will also be phased in over a period:

Year	Employer contribution	Employee contribution (including tax relief)
One to four (first transitional period)	1 %	1%
Five (second transitional period)	2%	3%
Six onwards (steady state period)	3%	5%

The new rules on matters such as eligibility (temporary agency workers are eligible to enrolled in a scheme for example), whether you existing scheme will meet the new requirements, opting out and automatic re-enrolment are complex. So even if your implementation date is some way off, 2012 is a good time to get to grips with what the new law will eventually require you to do.

The Regulator will write to all employers around 12 months before their staging date so that they know when to automatically enrol their eligible jobholders. Three months before the employer's staging date the Regulator will write again to remind them of the new duties and the need to register.

Older workers

The default retirement age is a thing of the past, but the need to manage older workers is here to stay.

Two cases will be decided this year which could have an impact on how you go about doing this. The first (consisting of the two joined cases, **Seldon** and **Homer**, currently being decided by the Supreme Court) will, we hope, give employers some guidance on the much debated issue of when you can objectively justify retiring an individual who has reached a certain age. The second, Woodcock, being decided by the Court of Appeal, will consider another hotly debated topic, namely whether in a situation involving indirect discrimination an employer can look to cost alone to justify its discriminatory practice.

It will be some months before we can expect any answers on these two issues. Meanwhile you should continue to use the **ACAS guidance for employers on working without the default retirement age**, not only when issues arise with older workers, but any time you have a discussion with an employee about their future plans. And in considering whether you have a business case for adopting a practice which could have an indirect discriminatory effect on some of your employees, you still, at least for now, need to be able to point to something more than cost to justify what the organisation is doing.