In the news...

Workplace Law

Welcome to our re-vamped newsletter. In future, we will be sending this out once a month. We hope that the new format and the greater frequency with which you will hear from us will ensure that you are kept up to date with important developments in employment law, as well as our individual take on what is going on.

Each month, a different member of the team will provide you with their thoughts on the topical issues of the day. This month's new style offering has been prepared by me, James Willis.

The Beecroft Report – is this where employment law is going?

There has been a lot of talk of late about changes to employment laws. Most recently, Adrian Beecroft set the cat amongst the pigeons with his report on legislative changes aimed at giving the economy a helping hand.

For those of you who do not know, Mr Beecroft is a venture capitalist whom the Conservative party have tasked with the job of looking at employment laws in the UK and considering how they might be improved. The central aims of any changes are to increase economic growth and create jobs. We have already seen the increase in the qualifying period for continuous service for making unfair dismissal claims rise to 2 years for all new employment starting on or after 1 April 2012. This is intended to achieve the same objectives. The problem is that the vast majority of the clients and contacts that we have spoken to have been highly sceptical about its chances of success. So do Mr Beecroft's proposals stand a better chance?

The sections of the report that have attracted the most publicity relate to so-called *"no-fault dismissals"* and the prospect of small businesses (those with fewer than 10 employees) being allowed to opt out of certain employment rights, including unfair dismissal. It is fair to say that both suggestions are likely to prove very controversial, should the Tories seek to introduce them. After all, even the Lib Dems do not agree with these parts of the report, to say nothing of the likely reaction from the Labour party.

My own thoughts, which I have recently set out in a blog piece for the Guardian, relate to the extent to which such changes would have the effect of creating a two-tier workforce. After all, those employed within the smallest businesses would be in a considerably weaker position than everyone else. This causes something of a problem. Mr Beecroft seems to feel that by freeing up employment laws, poor performing employees could be more easily dismissed. In turn, they would make way for more able workers. But why would these higher achieving individuals want to work for an employer who can fire them at will? Surely they are much more likely to want to

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work for a larger employer, where they will enjoy much greater rights. By giving the employees of the smallest business fewer employment rights, it makes it more difficult for these businesses to attract good quality candidates; in effect, working for smaller businesses becomes much less attractive. Surely that is not the sort of message that the Government wants to be sending out whilst trying to stimulate growth and reduce unemployment.

On a more general note, attempts to 'simplify' employment laws have a rather unpleasant habit of making life even more complicated. For this reason, if no other, I suspect that the best thing that this Government could do to employment laws, in order to foster positive economic growth is absolutely nothing at all. Let people catch up with where we are with laws that we have right now. If employers act appropriately, there is still room for manoeuvre when it comes to hiring and firing, particularly with the longer qualifying period for unfair dismissal that is already in force.

Lap dancers - Employees or self-employed?

This was at the heart of a recent case brought against Stringfellows nightclub. The story appeared in a number of the national newspapers and raises some interesting points.

Nadine Quashie worked for Stringfellows as a dancer. After Stringfellows terminated its arrangement with her, she brought a claim against the club for unfair dismissal. Her unfair dismissal claim relied upon Ms Quashie successfully arguing that she was an employee. But the arrangements under which she worked for Stringfellows were rather unusual. She did not have set hours of work and was under very limited obligations to work at all. Furthermore, the club did not pay her a wage as such; instead, her income depended entirely upon how many dances she provided to the club's clientele and how much those customers agreed to pay her. For these reasons (amongst others), Stringfellows denied that Ms Quashie was their employee, instead alleging that she was self-employed.

Initially, an Employment Tribunal found that she was not an employee and dismissed her claim. But Ms Quashie successfully appealed to the Employment Appeal Tribunal (EAT). Taking account of, amongst other things, the way in which the rota worked, the control that Stringfellows exercised over her and her obligation to dance for free at certain times, the EAT Judge said that there was sufficient evidence to prove that Ms Quashie was an employee.

The facts in this case are quite specific and so it would be difficult to draw any broad conclusions from a single decision of this nature. But it is a gentle reminder of the importance of classifying your workers correctly. The risks associated with getting it wrong can be very high indeed. Not only could you be hit with an unfair dismissal claim that you did not see coming, but there could also be tax consequences, if you have failed to make PAYE deductions in relation to someone who turns out to be an employee.

If you have got anyone who is regularly undertaking work for your business, but who is not treated as an employee (whether for tax or any other purposes), then it is certainly worth reviewing their status regularly, in order to ensure that you are not caught out.

Retirement and age discrimination

The Supreme Court in the case of *Seldon v Clarkson Wright & Jakes* has now ruled on whether a retirement age of 65 is legally sustainable. It could be, but.....

.....and it's a big 'but' too! The full answer is a little more complicated.

You will probably be aware of the basic facts of this case. Mr Seldon was a partner in a law firm called Clarkson Wright & Jakes (CWJ) in one of the North Kent boroughs. He was compulsorily retired at 65 years of age, in accordance with the terms of the partnership deed. He was one of a number of self-employed partners who signed up to the compulsory retirement agreement in the partnership deed. He was retired and whilst this happened before the default retirement age was completely scrapped, he brought claims against CWJ, arguing that his retirement was an act of unlawful direct age discrimination.

This case has worked its way up to the Supreme Court and wrestles with the incredibly important question of whether mandatory retirement ages can ever be justified, in spite of their age discriminatory effect. Since the scrapping of the default retirement age, most employers have concluded that they can no longer compulsorily retire employees at 65 (or any other age for that matter). But if the courts confirmed that, in certain circumstances, a mandatory retirement age could be justified, then current practice might start to change again.

In Mr Seldon's case, the Supreme Court found that CWJ could potentially justify its retirement age on the basis that the firm was pursuing the following aims:

- 'inter-generational fairness' (balancing the interests of workers of different ages, whilst allowing businesses to retain staff and undertake workforce planning); and
- 'dignity' (limiting the need to expel partners who have begun to under-perform).

This might all sound rather encouraging, but it is not all good news. The Supreme Court accepted that CWJ might have a legitimate reason for enforcing a retirement age. But the question of whether *this* retirement age of 65 is lawful (as a proportionate means of achieving a legitimate aim) is now due to be considered by an Employment Tribunal. So whilst this decision leaves the door open to the possibility of employers reintroducing a retirement age for their staff, I ought to strike a note of caution here. The Supreme Court ruled that when justifying direct age discrimination, an employer cannot simply rely upon company-centred justification, such as cost or competitiveness. Instead, any justification must touch upon a broader public interest. Whilst they accepted that '*inter-generational fairness*' and '*dignity*' as legitimate aims were sufficient to trigger a wider public interest, whether these will be applicable in very many businesses is rather

questionable. Employers will still need to think very carefully before dismissing employees at a specific age or indeed engaging any other form of direct age discrimination.

If you would like to discuss the issues covered in this edition of Workplace Law in more detail, please contact me by telephone on 01322 422540 or by email at **james.willis@ts-p.co.uk** or please contact any member of our team on 01892 510000.

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