Presentation - Default Retirement Age and Agency Workers – A legal update.

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Jane Byford

Jane introduced her presentation by giving a brief overview of the subjects and dealt firstly with **Agency Workers' Rights.** The Agency Workers Regulations 2010 implement the European Temporary Agency Workers Directive and give temporary agency workers after a 12-week qualifying period, the same employment conditions as would apply to a permanent employee fulfilling the same role. There are
also a number of rights which agency workers are entitled to from day one of their placement.
The government has issued guidance to assist with interpretation of the Regulations and this can be found at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/a/11-949-agency-workers-regulations-guidance .

Jane went on to say that the Regulations apply to people seeking temporary work through an "employment business", which introduces workers to hirers for temporary work (more commonly known as temping agencies). They do not apply to people seeking permanent employment through "employment agencies". The self-employed, those working through their own limited company managed service contracts (e.g. whereby a company provides a specific service to a company such as catering) are excluded from the ambit of the Regulations.

Dealing with the definition of Equal Treatment, Jane said the Directive described it as "at least the basic working and employment conditions that would apply to the workers concerned if they had been recruited directly by that undertaking to occupy the same job". This does not entitle agency workers, she added, to full equality and does not create a contract of employment. The equal treatment is limited to defined basic terms
and conditions of work, covering: -

- duration of working time
- breaks
- night work
- pay
- overtime
- rest periods
- holidays; and

The definition of pay includes basic pay plus other contractual payments linked to work undertaken by the agency worker whilst on assignment such as commission, shift allowances, bonuses and holiday pay. Bonuses linked to individual performance (e.g. piece-work linked to output or a bonus based on performance appraisal arrangements) are included. However, a bonus (for example, profit share or share participation, which reflect long reward loyalty) is excluded. The Regulations specifically exclude a number of payments and rewards, for example, occupational pensions and occupational sick pay. The Regulations do not cover such rights as contractual notice pay, contractual redundancy pay and benefits in kind, such as company car allowances of health insurance.

Hirers and agencies will also need to make sure that agency workers who are entitled to equal treatment are on the same working hours, rest periods and break provisions as employees carrying out comparable work. This may require an adjustment to current working practices.

In relation to holiday, agency workers are entitled to the statutory minimum holiday entitlement from their first day of engagement pursuant to the Working Time Regulations 1998. However, additional contractual holiday entitlement will now also accrue after the **12 week qualifying period,** although the guidance suggests that a possible way of simplifying administration may be to deal with any additional entitlement (over and above the statutory minimum) as a one-off payment at the end of the assignment or as part of the agency worker's hourly or daily rate.

Regarding the 12 Week Qualifying Period, the right to equal treatment does not apply until an agency worker has undertaken the same role, whether on one or more assignments, with the same hirer for 12 continuous calendar weeks. Any week in which a worker is engaged to any extent is counted as a calendar week – this could be a half-day, or perhaps only an hour, as the Regulations do not stipulate a minimum period of work. A break of at least six calendar weeks, either during or between assignments, is needed before it is necessary to restart the time that counts towards the qualifying period. This intended to prevent employers avoiding the rules though a series of repeat contracts. A new qualifying period will start if a worker takes on a new role with the same employer.

However, there are safeguards built in to prevent hirers from pursuing policies such as rotating agency staff between different roles to ensure that they never accrue the requisite 12 qualifying period. If there is a suspension in the employment and the worker is subsequently reengaged, the worker will need to start a new, separate assignment and this new assignment must be "substantively different". So, slightly varying the duties or job specification agency worker will not be sufficient to restart the
qualifying period.

Certain legitimate absences will not count towards a break period either before or after the 12 week period has elapsed. For example, certified sick leave of up to 28 weeks and annual leave will pause the clock on the qualifying period. In the case of maternity related absence, such as on health and safety grounds, or statutory or contractual maternity, paternity or adoption leave, the clock will continue to tick. However, any pay in respect of maternity is specifically excluded from the definition of pay. So,
even though an agency worker might meet the 12 three weeks before going on maternity leave, she would not be entitled to maternity pay.

Jane continued by referring to a specific **Anti-avoidance Provision**, which gives an agency worker the right to be treated as if he was entitled to equal treatment if a structure of assignments develops, within the hirer or between that hirer and connected businesses that is intended to prevent the worker from acquiring equal rights. This provision only applies when the worker has completed at least two assignments with the hirer or any connected company. The Regulations set out a non-exhaustive list of factors that can be taken into account in deciding whether there has been such a structure of assignments, such as the length of the assignments and the number of assignments with the hirer and, where applicable, hirers connected to that hirer.
There is a significant deterrent from such evasive action by employers because tribunals have the power to make an additional award of up to £5,000 where a hirer and/or agency breached this provision.

In order to establish a claim for equal treatment, Jane added, the agency worker will have to use a **Comparator** to show

- that it is sufficiently apparent what terms would have ordinarily been offered had the worker been recruited directly as an employee to do the same job; or
- there is a comparison with a permanent employee doing broadly similar work in the same organisation having regard, where relevant, to whether he has a similar level of qualification and skills.

Agency workers who believe they are not receiving equal treatment have a right to ask the agency for written details of any matter relating to their equal treatment rights. There are time limits, which need to be adhered to in relation to the requests. If agency worker's terms and conditions are consistent with those that would be given to a comparable employee then there will be deemed compliance with the Regulations. An actual comparator who receives the same basic employment rights for doing broadly similar work will provide a complete defence for the hirer. It will usually be a matter of common sense what amounts to equal treatment. For example, in organisations with clear pay scales it should be obvious what level of pay the person would have received had he been recruited directly, taking into account skills, experience and qualifications; in certain organisations there may be a going rate for a given job and in many cases certain rights, such as annual leave, will be clearly set out or understood.

Jane continued by saying that the use of Collective Facilities was one area where Health and Safety professionals might need to give consideration to agency workers. Collective facilities may include: -

- canteens
- workplace crèches
- toilets and shower facilities
- waiting rooms
- mother and baby rooms
- food and drinks machines
- transport services (e.g. local pick up or drop off but not company cars or season ticket loans).
- staff common rooms
- prayer rooms
- and car parking

From the start of an assignment agency workers have the same access to certain facilities provided by the hirer as those employed directly. There is no need for the worker to satisfy the 12-week threshold. This does not mean that agency workers will be given enhanced access rights, e.g. where access to a crèche involves joining a waiting list, the agency workers would also need to join the list and would not be given an automatic right to have a crèche place. Nor does the right include access to off-site facilities and amenities that are not provided by the hirer, such as subsidised access to an off-site gym as part of a benefit package to reward long-term service or loyalty. The Directive does allow for "less favourable" treatment in this context as long as it can be justified on objective grounds. Liability for failure to provide access rests with the hirer.

Another significant area for Health and Safety covered by the Regulations, Jane added, were the safeguards for **Pregnant Women and New Mothers**. The Regulations extend certain health and safety rights of expectant, new and nursing mothers, from which agency workers do not currently benefit. After completing a 12-week qualifying period, a pregnant agency worker will be allowed paid time off to attend antenatal medical appointments and antenatal classes when on assignment. She can bring a tribunal claim if she is unreasonably refused time off or is not paid during her absence. Subject to a 12-week qualifying period, hirers will need to make adjustments to protect an agency worker from identified risks if they are pregnant, having recently given birth or are breastfeeding.

If the nature of the assignment is such that a risk to health and safety is likely, the agency will need to ask the hirer to undertake a workplace risk assessment and, if necessary and possible, to make any reasonable adjustments for the agency worker. Where this is not reasonable, or will not remove the risks, it will fall to the agency to find alternative work on terms (including pay), which are not substantially less favourable than the original assignment. If this is not possible, the agency should pay the agency worker for any period she cannot work due to a health and safety risk, but only for the duration of the original assignment. In addition, the protection from discrimination arising from less favourable treatment on grounds of pregnancy or

maternity under the Equality Act 2010 should not be overlooked. For example, the Guidance on the Regulations refers to the fact that it would be discrimination if a placement were terminated because of an agency worker's pregnancy, or if a worker was subjected to a detriment because of her pregnancy.

Agency workers also have the right to be informed of Permanent employment Vacancies at a hirer. Again, this right will apply from day one of the Assignment.

In dealing with Enforcement and remedies, Jane said an agency worker may bring a number of claims in the employment tribunal for breach of the Regulations. These include claims that: -

- equal treatment rights have been infringed;
- rights of access to employment or facilities have been breached
- the agency or hirer has unreasonably refused a woman paid time off for ante-natal care and
- the agency or hirer has failed to pay the agency worker remuneration where the supply of her work to a hirer is ended on maternity grounds.

The time limit for presenting claims to a tribunal will usually be three months from the date of the infringement or detriment subject to a tribunal's ability to accept a claim out of time where it is "just and equitable" to do so. A tribunal will be able to make a declaration, order payment of compensation and make recommendations for action to be taken. Compensation payable by an agency or hirer will be a "just and equitable" amount having regard to the extent of account the nature of the breach, any financial loss suffered by the worker and any expenses he has reasonably incurred as a result.

Jane than changed hats and addressed the subject of the **Abolition of the Default Retirement Age**. Until last year, compulsory retirement was a relatively low risk and straightforward mechanism for managing staffing levels, costs and career progression. Staff aged over 65 could still be compulsorily retired and no reason had to be given for refusing an employee's request to remain in employment. However, on 6th April 2011 the Default Retirement Age was completely removed and unjustified, fixed retirement ages are now unlawful. This means that employers can no longer compulsorily retire employees when they reach the age of 65, or indeed any other age, without objectively justifying the decision to do so. Of course, some employees may choose to retire when they reach 65, but if an employee wishes to remain in employment an employer who compulsorily retires him could be faced with an age discrimination claim and potentially an unfair dismissal claim as well.

There are potential disadvantages to its removal. Having an older workforce may block promotions and work opportunities for younger members of staff. It is already extremely difficult for young people to enter employment at the moment and matters may be compounded if staff over 65 hold onto positions for several more years.

Staff in the middle of their career may also become frustrated if their progress is slowed down by older staff staying on. In addition, an ageing workforce may give rise to concerns about a deterioration in the quality of work. In certain working environments, poorer performance resulting from age could also have an impact of safety in the workplace, for example, in a factory context where an employee is required to use potentially dangerous machinery. Jane added that she would look briefly at the previous legal position in respect of retirement; summarise the changes; and consider what the impact may be on health and safety.

By way of background, prior to 2006 there was no specific legal protection for older (or younger) employees in the workforce. Attempts to introduce protection against age discrimination through case law were unsuccessful. However, the EU Equal Treatment Framework Directive 2000 required the UK to introduce legislation prohibiting age discrimination in employment and it did so. The resulting Employment Equality (Age) Regulations 2006 made it unlawful to discriminate on grounds of age from 1st
October 2006, unless an employer could objectively justify such treatment. These provisions are now contained in the **Equality Act 2010**.

There was, however, a significant exception for retirement in the Regulations/Act, because it was recognised as a legitimate social policy. This exception enabled employers to dismiss employees without contravening the Regulations/Act if they were over 65 and the reason for dismissal was retirement. There was a right for an employee to request to work beyond retirement, to which the employer was required to give due consideration, but it was entitled to reject this request without giving reasons.

In summary, as long as an employee was over 65 and the employer followed the correct procedure in relation to notice and the right to request to continue working, then a dismissal for retirement would have been automatically fair. But everything changed on 6th April 2011, with the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, which provide that the retirement exemption for age discrimination and retirement as a fair reason for dismissal is abolished. This effectively removes the right for employers to compulsorily retire employees without any justification and they may be subject to claims if they continue so to do.
This change does not make it unlawful to compulsorily retire employees. The courts seem likely to continue to recognise that legitimate aims are pursued by retirement, but they will need to be satisfied that the particular age chosen is appropriate and necessary (i.e. proportionate).

Dismissal on the basis of retirement will now come under the umbrella concept of some other substantial reason for the dismissal, which can be used by the employer to establish that a dismissal is fair and will therefore be subject to objective justification by an employer. There will no longer be a “safe” age at which to retire employees – whatever age is chosen will require objective justification.

When it comes to terminating employment of older employees, Jane went on, there are now a number of options available to employers: -

- retirements by mutual agreement
- compulsory retirements that are objectively justified, either by a fixed retirement age or on a case-by-case basis;
- dismissals of employees only on the basis of the (remaining) fair reasons for dismissal, either for their capability or qualifications, conduct, redundancy, illegality, or some other substantial reason.

It is a policy decision for the employer as to which of these options, or what mix of them depending on the circumstances, it decides to use.

Dealing now with **Voluntary Retirement**, Jane said it will involve allowing employees to work for as long as they want and decide when to retire and so is likely to be a less attractive option for employers in some circumstances. However, it is the safest option in relation to any retirement, post 5th April 2011. In order to manage it well and assist with workforce planning, employers should develop a policy (and possibly include provision for it in employment contracts) including, for example, notice periods of intended voluntary retirements and the process for a voluntary retirement being agreed.
Employers may also wish to offer flexibility about how and when an individual retires. There are a whole range of flexible retirement options that may suit both the employer and the employee. For example, will the employee consider flexible working, part time work or a job share, if he does not want to leave employment altogether or wants to phase out slowly? These options could keep the knowledge of the older employee and also provide they promote current staff to fill the gap left by the employee. ACAS's guidance on working without the DRA suggests that discussions about retirement should be built into annual appraisals. It suggests using open for the short, medium and long term but that no pressure should be put on employees to retire rather than face an undignified sacking.

On the more sensitive issue of **Compulsory Retirement**, Jane went on to say that an employer would still be able to retire employees compulsorily if it can objectively justify the retirement under the Equality Act. It is highly likely that the courts will continue to recognise that retirement is often in pursuance of a legitimate aim but they will need to be convinced that the particular age that is chosen is appropriate and necessary. To objectively justify the retirement an employer will need to show not only that a legitimate aim is being pursued but also that retirement is a proportionate way of pursuing it. Irrespective of whether employers have a fixed retirement age or retire employees on a case will need to objectively justify each decision to retire. It should be noted that there is still an element of risk in the approach of adopting a policy of compulsorily retiring staff because it will take litigation and court decisions before it is clearly determined exactly what can and cannot be objectively justified by an employer.

An employer has a choice regarding how it goes about seeking to objectively justify compulsory requirements:

- adopt an employer justified retirement age for all staff;
- adopt different employer justified retirement ages for different categories of staff/employees in particular positions; or
- justify any retirements on a case-by-case basis (which would be a risky and potentially costly strategy to adopt).

There are some key retirement cases which give some guidance on how the issue of objective justification will be approached, but in brief the UK courts have taken a more rigorous approach in protecting employees from age discrimination, whereas, in general, the ECJ has been far more liberal and allowed retirement to be justified.

In ***Martin and Others v Professional Game Match Officials, March 2010****,* a football referee was forcibly retired at the age of 48 in accordance with a retirement policy. The tribunal found that the policy was discriminatory and could not be objectively justified.
The tribunal identified several ways in which Professional Game could have achieved its aims in a less discriminatory way, including fitness and competence tests that had no regard to age, meaning that the retirement approach had not been proportionate. The tribunal further commented that even if it had been satisfied that a retirement policy was appropriate, Professional Game had done nothing to satisfy the tribunal that the appropriate retirement age was 48. The employer was required to show why that age was reasonable.

In ***Seldon v Clarkson Wright and Jakes and the Secretary of State for Business Innovation and Skills 2010***, a partner at a law firm was retired at the age of 65 and it was argued this was a proportionate means of achieving a legitimate aim of workforce planning and providing associates with promotion opportunities.

The Court of Appeal found that the employer was justified in retiring Mr Seldon at 65 conclusion was reached, at least in part, in reliance on the DRA (which the government announced the abolition of on the same day the Court of Appeal handed down its judgment). An important distinguishing point in this case is that the claimant was a partner in a law firm who had, with equal bargaining power, agreed to the rule of retiring partners at 65. Employees are not in the same bargaining position as partners in a law firm and so it is arguable this case will not apply to employment retirements.
An appeal in *Seldon* has been heard by the Supreme Court and we are still awaiting judgment, so it will be instructive to see whether or not that decision is overturned.

In a 2011 judgement, ***Prigge and others v Deutsche Lufthansa AG***, The ECJ took a more restrictive approach than it has done in the past. The claimants were employed by Lufthansa as pilots. In accordance with a collective agreement, their contracts of employment were terminated when they reached the age of 60. However, under

international and German law, although pilots aged 65 and over are not permitted to fly a commercial aircraft, those aged between 60 and 64 are permitted provided they do so as part of a multi-pilot crew within which no other pilot has attained the age of 60. The ECJ held that, given that German and international law fixes the age limit for airline pilots at 65, the compulsory retirement age of 60 was not "necessary" for the protection of public health within the meaning of the Equal Treatment Framework Directive. Nor, in this context, could the requirement for pilots to be under 60 amount to a genuine occupational requirement.

Considering **Dismissal for Fair Reason,** in light of the removal of the DRA, there are other options for an employer to consider in managing the dismissal of older employees. Employers can rely to a greater extent on the other fair reasons for dismissal (set out in section 98 of the Employment rights Act 1996) in order to terminate employment contracts of older staff. In the future, if an employer wants an older employee to retire then the employer can rely on capability, conduct, redundancy illegality, or some other substantial reason as a reason for dismissal. An employer should consider specifically how it will manage older employees and what standards/capabilities are required – these criteria and standards should be applied to all staff. This will enable the employer to manage and assess older staff in a measured and transparent way and still enable it to control their exit from its employment when their performance or capability drops below what is required of them in order to carry out their job. The key action points that an employer should consider are: -

(i) Reviewing capability/performance

It will be even more important that employers deal with any issues of underperformance as and when they occur irrespective of the age of an employee. Appropriate assessments, warnings and assistance should be provided to any employees that require them so that if standards do not improve the employer is in a strong position to dismiss fairly. Regular appraisals and/or reviews should also be scheduled with all employees, without exception. The employer should ensure it is specific regarding the competencies required for the particular role so that there are clear criteria by which staff can be assessed. Also, the employer should consider how any decline in performance of these competencies could be identified/assessed. Work objectives and expectations should be clearly set through the appraisal process so that employees' performance can be measured against them. These do not need to be identical for all employees, but they should not be different for reasons of age unless this can be objectively justified. This process also has to be well managed throughout and standards should be applied to all staff. This will enable procedures to ensure they are clear and robust

(ii) Workplace discussions

Following the abolition of the DRA it is arguable there will no longer be a clear legitimate point at which to have discussions with workers about their future plans and when they may wish to retire. It will probably take this issue being referred to

the courts in order for it to be established what the best approach is. The safest approach in the meantime is to develop a policy whereby these sorts of discussions are held regularly with all staff, perhaps once a year in their appraisals.

(iii) Ensure managers are well trained

Even if the policies and procedures are in place, it is important that line managers are sufficiently trained on the contents of the employer's policies and procedures to be confident in effectively implementing them. Employers should consider whether, for example, managers need training on how to communicate and manage performance issues better. This is often an area that many managers shy away from due to the unappealing nature of critiquing an employee while he is present. If the manager does not communicate effectively with the employee about his capability or performance then it can make dismissing an employee on the grounds of performance at a later date more difficult. Managers should also be informed and trained regarding any changes that are made to the employer's policies in response to the changes in law.

(iv) Follow correct procedure

As with all dismissals, the correct procedure should be rigorously followed so as to minimise the potential for any claims of unfair dismissal. Therefore, an employer should ensure that: -

- one of the fair reasons for dismissal applies to the employee (capability, conduct, redundancy, illegality, or some other substantial reason);
- it acted reasonably in dismissing the employee for that reason; and
- a fair procedure was followed.

What does this mean from a health and safety point of view?

The removal of the DRA is likely to result in an older workforce as many employees choose to stay on at work longer. On the positive side, this will result in greater knowledge and experience being retained. However, on the negative side, this could result in a deterioration of performance by older employees who work for longer than they would have done under the previous legal position. The effect that any poorer performance of older employees could have on health and safety in the workplace will depend to a large extent of the nature of the workplace. For example, in an office environment, the risk of danger to health of the employee concerned and other employees may be minimal. Compare this to the potential risks in a factory setting or on a building site, for example, where any failure could potentially have catastrophic consequences.

What, therefore, should employers and health and safety executives do? Employers should consider, as a first step, carrying out risk assessments on an ongoing basis with all staff, to highlight any increased risks resulting from older employees wishing to continue work. Whether this is appropriate will depend on the nature of the work involved. This may highlight adjustments that could be made to reduce any risk. Targeting only older employees to undergo additional risk assessments will be age

discrimination if there is no objective justification for this. It is therefore wise to assess any risks to health and safety as part of a regular process applied to all staff.

But what if an employee's performance is so poor that he is creating a real risk to health and safety? Although there would be no obligation to re-deploy employees to less demanding roles, this is something that employers may wish to consider, depending on the circumstances. At the other end of the spectrum, dismissal may the best (and only) option. In these circumstances, as I have highlighted above, this would have to be done either by agreeing voluntary retirement, by justifiable compulsory retirement or by dismissal for one of the other fair reasons such as capability.