

Employment Law Newsletter

Default retirement age and age discrimination

65 is the default retirement age subject to the right of employees to make a request to their employer to work beyond retirement.

The ECJ ruled in *Heyday* that the default retirement age is

compatible with the Employment Equality (Age) Regulations 2006 as it can be objectively justified.

A higher default retirement age (of perhaps 68 or 70) has now been suggested for

review by the Government in 2010 and with the possibility of further reviews thereafter.

The Government has commissioned a research project called the Survey of

Employers' Policies, Practices and Preferences relating to age (SEPPP) to collect views and information on employers' age based practices. The Survey is open until 1 February 2010.

Stringer and Pereda Judgments

The House of Lords in *Stringer and others v HM Revenue & Customs [2009]* stated that (1) statutory holiday entitlement under the Working Time Regulations 1998 (WTR) accrues during periods

of sick leave, (2) payments in lieu of untaken statutory holiday on termination are unaffected by sickness absence, and (3) the WTR should be interpreted as allowing workers to take paid statutory holiday during periods of sick leave.

However, in relation to

point (3) in *Stringer*, the European Court of Justice (ECJ) in *Pereda v Madrid Movilidad* stated that workers cannot be required to take annual leave when they are sick. Instead the ECJ stated that where a worker's pre-arranged annual leave coincides with a period of sickness incapacity,

the worker must have the option to designate an alternative period as annual leave, even if this falls after the end of the relevant leave year.

Other than in the public sector the *Pereda* judgment does not necessarily apply in the UK yet, but it may be the shape of things to come.

Seminars

If you were unable to make our recent seminar on Absence Management and would like to arrange a meeting to go through the notes please contact Andrew Rowell (contact details overleaf).

Redundancy

The Court of Appeal in *Rolls-Royce PLC v Unite PLC the Union [2009]* held that using length of service as a criterion in a redundancy selection matrix was lawful and objectively justified on

the basis that it was a proportionate means of achieving a legitimate aim on the following basis: (1) the maintenance of a stable workforce during a redundancy exercise,

and (2) rewarding loyalty.

However, length of service should not be used as the only criterion in a redundancy matrix.

Sick Notes

The Government has proposed that, in light of the health of the working population and the economic loss suffered as a result of sickness absence, sick notes should be replaced by electronic "fit notes" which puts the emphasis on what the employee can do rather than what they cannot do.

Belief in climate change can constitute a "philosophical belief"

The EAT has upheld the ET finding in *Nicholson v Grainger* that a belief in climate change can constitute a philosophical belief for the purposes of being discriminated against under the Employment

Equality (Religion or Belief) Regulations 2003. However, Mr Grainger still has to prove that his redundancy was actually discriminatory i.e. he was treated less favourably by reason of his belief.

The Disability Discrimination Act (DDA) covers associative discrimination

The EAT upheld the Employment Tribunal finding in *EBR Attridge LLP and another v Coleman* that the DDA prohibits associative discrimination.

This means that an employee (Mrs Coleman in this case) can be discriminated against in employment on the basis of their association with a

disabled person (her son), even if that employee does not actually have a disability of their own.

Prior to the *Coleman* ruling, the DDA only prohibited discrimination in employment "against a disabled person."

Inflationary increase to the Vento guidelines confirmed

Injury to feeling awards are sometimes made in discrimination cases where the ET finds that the employee has been discriminated against. In 2002, *Vento v Chief Constable of West Yorkshire Police*, the Court of Appeal set out three bands of award which reflect the seriousness of the discrimination, which have become known as the *Vento* guidelines.

The EAT has now confirmed in a very recent case,

Da'Bell v NSPCC, that the *Vento* guidelines should be increased in line with inflation as follows:-

1. Lower band: up to £6,000 (formerly £5,000).
2. Middle band: £6,000 to £18,000 (formerly up to £15,000).
3. Higher band: £18,000 to £30,000 (formerly up to £25,000).

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