

# Spearing | Waite

Employment Law

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## Newsletter

News update for  
HR Specialists



**Kim Abbott**

### Employment Equality (Age) Regulations 2006

It is now just over 12 months since the Employment Equality (Age) Regulations 2006, (the "Regulations,") came into force. Heyday, a membership organisation backed by Age Concern has mounted a judicial challenge against the legality of the national default retirement age of 65. The High Court has referred the case to the European Court of Justice, ("ECJ") which will consider whether the equal treatment framework directive allows European Union member states to introduce national rules permitting employers to dismiss workers aged 65 or over by reason of retirement. It is understood that the case will not be heard until 2008. However, a very recent Spanish case, *Palacios de la Villa v Cortifiel Servicios SA*, on this same topic has held that member states enjoy a broad discretion as to the balance of different interests and the measures adopted, provided they are not "inappropriate and unnecessary." In this particular case, the ECJ held that national laws on retirement are justified to that extent.

So far, Tribunals seem to be taking a hard line on the new age discrimination rules. In *Martin v SS Photay and Associates*, Mrs Martin was dismissed from her cleaning job two days after her 70th birthday. Her dismissal letter specifically referred to her "age and health problems." The employer had no medical evidence to support this

view, nor had there been any prior discussions with Mrs Martin about her health or performance. The Tribunal decided that Mrs Martin had been treated less favourably than other employees because of her age and that the treatment was not justified.

Mr Holmes in *Holmes v Active Sensors Ltd* had his claim struck out by the Tribunal. He had requested to work beyond the age of 65, but his written request did not specifically state that it was made under paragraph 5, schedule 6 of the Regulations, so the statutory requirement had not been met. According to the Tribunal, the law was clear on this point.

It will interesting to see whether, in the future, the EAT takes a different view on these topics.

### Industrial action

Industrial action seems to be on the increase. In recent times, we have seen the Prison Officers on strike, London Underground workers and now Post Office workers.

In this country, there is no positive 'right to strike' as there is in other countries with written constitutions. Employees taking any form of industrial action will almost always be in breach of their contract of employment.

As a general rule, employees taking part in unofficial industrial action cannot claim unfair

dismissal unless the reason for dismissal is any of the automatically unfair reasons, e.g. pregnancy, making a protected disclosure etc, contained within the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA.")

An employee taking part in official industrial action can only complain of unfair dismissal if there has been selective dismissal of employees taking part in the action, or there have been selective offers of re-engagement to employees taking part in the action. If the employer dismisses all employees taking part in the action, they cannot claim unfair dismissal.

However, an employer cannot dismiss employees engaged in official industrial action during an initial protected period. The protected period is usually 12 weeks from the date when the industrial action started. This period is extended if the employer is stonewalling and not taking reasonable steps to resolve the dispute. Dismissal of employees during the protected period is automatically unfair.

'Protected industrial action' is essentially industrial action induced by acts which carry immunity from action in tort thanks to a section in TULRCA. For practical purposes, these are official strikes called after a proper balloting of members process has been carried out. The ballot must conform to strict conditions, including that the employer is given seven days' advance notice of the ballot. A ballot which approves industrial action is valid to cover action started during the next four weeks, with possible extension up to eight weeks if the union and employer agree.

Certain acts are specifically not 'protected,' and include secondary industrial action, (other than lawful picketing.)

### **Commission for Equality and Human Rights**

1st October saw the Commission for Equality and Human Rights (CEHR) come into being, which replaced the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The CEHR also takes on responsibility for the 'new' areas of

discrimination law: religion or belief, sexual orientation and age.

### **Forthcoming legislation**

The Queen's speech to Parliament is rumoured to include reference to the Employment Simplification Bill. The main feature of the Bill is the repeal of the statutory dispute resolution procedures, which have not had the desired effect of reducing the burden on Employment Tribunals. It should also lay the legislative groundwork for whatever is eventually to replace the much maligned procedures.

We are also keeping an eye on the progress of the long debated Single Equality Bill, by which it is proposed to consolidate all the existing discrimination legislation into one Act. A Single Equality Act would underpin the approach of the newly created CEHR.

There are also rumblings afoot with regard to the protection of vulnerable and low paid workers. The Government has undertaken consultations this year on proposals to improve the enforcement regime for the National Minimum Wage Act 1998, by increasing the fines imposed on employers who pay below the minimum rates, and to tighten up the regulation of employment agencies, by, among other things, outlawing the practice of making agency workers pay for things like accommodation and transport.

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