

e-post

Updating you on employment issues

Welcome to the 50th issue of *e-Post*, which covers July and August combined. We are marking this milestone by refreshing the layout to incorporate our new branding.

For advice about any of the topics covered please contact [Martin Brewer](#), [David Mills](#), [Gillie Scoular](#) or your usual Mills & Reeve contact.

In this issue:

- [Default retirement age to go by October 2011](#)
- [October start date for Equality Act confirmed](#)
- [Latest figures reveal ET system under strain](#)
- [Public sector pay-offs: a return to the status quo?](#)

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Default retirement age to go by October 2011

The Government launched a [consultation document](#) last week setting out its plans to abolish the default retirement age, which currently allows employers to retire staff compulsorily at 65 without facing age discrimination claims. The change would take effect from 1 April 2011, with transitional protection for retirements notified before that date and taking effect before October. These plans reflect previously announced Coalition Government policies, though some may have been surprised by the limited time businesses will have to prepare for the new regime.

It will still be possible to retain a compulsory retirement age, but only if it can be objectively justified. How can this be done? This is just the question the Court of Appeal has addressed in a [decision](#) also announced last week, when it rejected an appeal by a former partner in a law firm challenging his forced retirement at the age of 65.

This case could be seen as a trial run for employers who wish to retain a compulsory retirement age after April next year. Superficially the signs are encouraging, because the partnership was able to rely on what was termed the "collegiality" principle, based on the idea (criticised in some quarters as being inherently discriminatory) that older workers should be able to retire with dignity without their performance being challenged. It was also able to rely on succession planning as a legitimate aim.

However, the decision is less helpful about what age to pick, because the employment tribunal has still to decide whether the means chosen by the partnership adopted were a proportionate way of achieving the aims which the Court of Appeal has now pronounced legitimate. In other words, was 65 the right age at which to impose compulsory retirement? Without deciding the point the Court of Appeal seems to be suggesting that the age of 65 might be acceptable because that was the age at which employees could be made to retire. However, once the default retirement age goes that reference point will be lost.



A more detailed briefing on the implications of the consultation paper for employers is available [here](#).

October start date for Equality Act confirmed

The Government Equalities Office has confirmed its intention to go ahead with the implementation of the Equality Act 2010 from 1 October 2010. The Act aims to harmonise and strengthen existing equality legislation. In order to assist organisations and individuals to prepare, the government has published a number of "quick start" guides including one prepared by ACAS for employers. This focuses on the areas in which the key changes will take place and it is available on the [ACAS website](#). The associated codes of practice, currently available in draft [here](#), are expected to be finalised shortly.

Although many provisions of the Act will come into force in October there are notable exceptions including the new single public sector duty. The Coalition Government is still considering whether to adopt Labour's timetable, which envisaged that the new duty would be introduced in April 2011.



Latest figures reveal ET system under strain

The [tribunal service statistics](#) for 2009/2010 show that over 230,000 claims were lodged in the employment tribunal last year - the highest ever figure. The bulk of the increase is attributable to multiple claims, though individual claims have also risen, particularly in recession-sensitive jurisdictions like unfair dismissal and redundancy.

The system is struggling to cope with the increased workload. Despite a rise in the number of sitting days and disposals, there are now over 400,000 unresolved claims in the system, over 90 per cent of which are multiple claims. There was also a significant fall in the percentage of claims being heard within six months of being lodged, down from 74 per cent to 65 per cent. The figures are likely to increase pressure on the Government to devise a more efficient system of handling multiple claims, though to be fair some of the delays are more likely to be attributable to the complexities of equal pay law than inefficiency on the part of the tribunal service.



Public sector pay-offs: a return to the status quo?

The [Court of Appeal](#) has overturned last year's High Court decision which blocked a substantial termination payment that a NHS trust had agreed to make to its outgoing chief executive. In doing so it has reiterated the limited grounds on which the courts are prepared to strike down financial decisions of public bodies if they act within their ostensible powers. The extent of such powers depends on the legislation establishing and regulating the public body concerned: NHS trusts enjoy a fair degree of independence when making decisions about the remuneration of their staff.

Rose Gibb had agreed a settlement package so that she was out of the way before the publication of a report which highlighted the poor levels of hygiene at the hospitals she managed. However, the Department of Health subsequently blocked most of the payment, saying that it was a reward for failure and that the trust had no power to enter into the compromise agreement which provided for its payment. While there had been public criticism of the level of the award, the court was at pains to point out that it was not its role to second-guess decisions of public authorities unless they were plainly irrational. This ruling will not avoid the need for public bodies to think carefully about the level of termination packages, but it does make them hard to challenge once a contractual agreement has been reached with the outgoing employee.



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