

October 2007

# Law at work



## STOP PRESS

*Peter Bloxham v Freshfields Bruckhaus Deringer*

The Employment Tribunal has unanimously dismissed Mr Bloxham's £4.5 million age discrimination claim against City law firm Freshfields Bruckhaus Deringer. It is anticipated that the former partner (who claims that he was effectively forced to retire at age 54 because of reforms made to the firm's pension scheme) will appeal against the decision.

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# Features

## Flexible retirement and pension provision

The DWP has published a consultation paper which seeks views on the application of the Employment Equality (Age) Regulations "the Regulations" to flexible retirement and pension provision.

Since 1 December 2006 it has been unlawful for a pension scheme to discriminate against its members on the grounds of age. This has been achieved through the application of a non-discrimination rule which is implied into all pension scheme rules.

## Why consider flexible retirement?

Flexible retirement, which was introduced by the Finance Act 2004, offers members of pension schemes the possibility of taking all or part of their pension and pension commencement lump sum while continuing to work (on either a full-time or part-time basis).

The benefits of flexible retirement are clear. With life expectancy increasing, allowing employees to work past normal retirement age can bolster the decreasing work force while also giving individuals the opportunity to save for longer for a more financially secure retirement. From an employer's point of view it will also prevent unnecessary loss of skills and know-how, allowing a company to retain experienced workers for longer. However, employers do not need to offer flexible retirement and will not be discriminating on grounds of age by not doing so.

## Why is the DWP consulting?

The DWP states that its consultation paper is to address concerns over whether amending scheme rules to allow for flexible could constitute discrimination on grounds of age.

The DWP's main areas of concern are:

- the interaction between the Age Regulations and the increasing desire to allow older workers flexibility in how they work; and
- the provision of death benefits beyond a scheme's Normal Pension Age.

The DWP has requested views on, and examples of, a number of issues raised in the paper. These include:

- what may constitute direct or indirect discrimination,
- what practices should be exempt or could be justified,
- whether refusing to allow members to draw benefits and continue to work would constitute discriminatory practice,
- which specific scheme rules create problems in this area,
- how the accrual of benefits are dealt with for members who have reached their maximum number of years service.

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### Discrimination?

While Schedule 2 of the Regulations contains exemptions in relation to pension schemes, there is no specific exemption relating to offering flexible retirement. Any potentially direct or indirect discriminatory practice will therefore only be deemed lawful if it can be objectively justified i.e. if an employer can show that he was pursuing a legitimate aim and doing so by appropriate and necessary means. Increased administration costs or the time required to amend a scheme's rules will not be deemed sufficient for the purposes of such justification.

Providing flexible working and retirement options only to employees over a specific age may amount to direct discrimination. Nevertheless, it seems that such discrimination could arguably be objectively justified as both satisfying a business need for employers (i.e. to maintain an experienced and knowledgeable workforce) and equally pursuing a government endorsed aim of encouraging employees to work for longer.

In our experience employers are not deterred from introducing flexible retirement by fears that it is discriminatory but rather by the minefield of administrative and legal issues it represents, particularly in relation to defined benefit schemes.

Many employers may prefer to wait until some of the potential administrative problems have been ironed out before introducing a system of flexible retirement for their employees.

[Click here for the full consultation paper.](#)

*By Amy Patterson*

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# Features

## Employee conduct: From virtual relationships on Facebook to physical relationships in the workplace – How to protect the employer

### Social networking sites

In last month's Law at Work Camilla Marriott looked at the implications for employers of using Facebook and similar sites for recruitment purposes. It is not just employers who are making use of Facebook in the workplace and below we consider the implications for employers of accessing the site during working hours and/or whilst holding themselves out as an employee of the business they work for.

The information that employees put on the site might not be protected by security settings and could be accessible to anyone browsing the site, including clients, competitors, other employees or potential employees of an employer. Even if the information is protected it will still be accessible to employees' friends who could include clients and competitors, particularly as the distinction between our personal and professional lives becomes more blurred than ever before.

Employees' activities on Facebook can have a damaging impact on productivity and on an employer's reputation, and may lead to the disclosure of confidential information as well as exposing employers to legal claims.

### Negative impact

#### Disclosure of confidential information:

- Employees may discuss company business on notice boards (including key resignations and appointments) and the identity of clients may be revealed.

#### Reputation:

- Employees' comments about their place of work can reflect negatively on an employer, particularly if that employer is identified or if the employee has joined an employee network.
- The information employees post about themselves may also indirectly damage an employer's reputation, particularly if it contradicts the ethics or philosophy of the organisation.

### Legal exposure

#### Discrimination

Employers are vicariously liable for unlawful acts committed by employees in the course of their employment whether or not these acts are done with the employer's knowledge or approval.

The message, opinions or views posted by employees on notice boards within the context of an employer network on Facebook are likely to constitute acts done in the course of employment and the employer may be liable if they amount to discrimination or harassment. In the same way that 'round robin' emails are now widely accepted to be a potential cause of offence, information posted on an employer network in the spirit of a joke may be discriminatory and offence to other employees viewing the network. Information posted on Facebook may also be a source of evidence used by employees to support general allegations of a discriminatory or harassing work environment.

#### Defamation

A defamation claim may be established when information has been published about an organisation or an individual which is untrue and which lowers the organisation/individual in the estimation of right thinking members of society. Information posted on notice boards by employees may be deemed to be expressed by the employer exposing them to a claim.

### Should access be banned in the workplace?

In light of the risks to employers of employees' use of Facebook, many have taken the decision to ban access to employees' during working hours altogether. Whether or not this is appropriate will depend on the nature of the employer's business and the way in which such a move is likely to be perceived by employees. Media and technology based companies may actively encourage employees to be involved in sites such as Facebook, and for these organisations banning access is clearly inappropriate. Employers should also consider whether the culture of the business is one which relies on employees' voluntary compliance with guidelines or whether a greater level of control over employees' activities is appropriate.

Whether access from the employers' computers is banned completely or restricted to outside of working hours, employers should still issue guidelines on appropriate use, as restricted access will generally reduce time wasting but will not address the other issues.

### The positives

As well as protecting the business from the negative effects of social networking sites, some employers are looking to reap the benefits of this social phenomenon instead. Deloitte is one such organisation to benefit – in support of its award as one of the top 50 places for women to work in the UK, excelling against the 'connectivity' criterion, it was said in The Times newspaper on 3 October 2007 that "half [of] Deloitte's employees use Facebook in innovative ways to connect with each other". The delicate aim for some employers is to balance the risks of Facebook whilst still harnessing the potential benefits.

#### Protecting the employer – Practical steps

- Consider whether to ban or restrict employees' access to Facebook and similar sites.
- Whether access is available in the work place or not, issue guidelines to employees about acceptable use and content.
- Give examples of breaches of confidentiality and damage to the employer's reputation.
- Amend confidentiality and internet policies to expressly refer to on-line media including Facebook access and use.
- Warn employees that disciplinary action will be taken against those who breach the policies and/or guidelines.

### Relationships in the workplace

Physical relationships as well as virtual relationships can become a problem for employers. Whilst colleagues in relationships can happily work alongside each other, employers should be aware of the practical and legal issues that can arise before taking action to deal with a problem relationship.

#### Practical issues

- Disruption to the business. There is more likely to be disruption where managers and subordinates, or employees who work closely together, are in a romantic relationship. The relationship may negatively affect the dynamics of a team, decision-making and performance appraisal. Complaints and dissatisfaction from other employees may also be an issue.
- Breaches of confidentiality. A manager in a relationship with his or her subordinate may be tempted to disclose confidential information about the business.
- Harassment/bullying at the end of a relationship. When a relationship turns sour it can be difficult or impossible for employees to work together, possibly resulting in harassment and bullying behaviour.

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### Legal issues

Employers who are considering taking action against employees need to consider whether this action constitutes discrimination or could be grounds for unfair or constructive dismissal.

#### ■ Discrimination

Most employers do not treat employees in a relationship differently directly according to whether the individual is a man or a woman and their approach is therefore unlikely to constitute direct sex discrimination. However, where action is taken to manage the effects of a relationship this may be indirect sex discrimination. In the case of *Chief Constable for the Bedfordshire Constabulary v Graham* [2002] IRLR 239 a female policewoman was refused employment in a position that reported to her husband because of concerns about the negative effect this arrangement would have on other officers in the team and on the spouse's ability to be competent witnesses for or against each other in criminal proceedings.

The Employment Tribunal and the Employment Appeal Tribunal agreed that if a man had applied for a position that reported to this wife he would have been treated in the same way so there was no direct sex discrimination, but the policewoman's complaints of indirect discrimination were upheld. This was because a larger proportion of the police force's female officers were in relationships with male officers than the proportion of male officers who were in relationships with female police officers. The policy that spouses should not work together therefore had a greater impact on women, who were more likely to have a spouse in the police force than men.

Similarly, employers who consistently take action against the junior employee in a relationship may be at risk of indirect discrimination claims if there are more women than men employed in junior positions in the business. To limit the impact of discrimination employers should consider what action is appropriate in each case, rather than taking a blanket approach.

#### ■ Unfair dismissal/constructive dismissal

In principle, a work place relationship may be a fair reason for dismissal on the grounds of "some other substantial reason" and it is legitimate for employers to consider it. However, the existence of a relationship itself cannot be a reason for dismissal. Employers must be able to show why dismissal is a reasonable response to the effects of a workplace relationship.

Taking action without any evidence of the negative effects of a relationship could also lead to resignation by the employee and a constructive dismissal claim on the grounds that the employer has no trust and confidence in the employee to carry out their role whilst they are in a relationship with a colleague.

#### **Before taking action – Checklist for employers**

- Identify the negative effect of the relationship and the basis for action.
- Don't make assumptions about the possible effect of the relationship, collect evidence to back up the basis for action.
- If appropriate, speak to the employees informally to try to resolve the issue.
- Consider alternatives to dismissal including relocation and role changes.
- Follow the statutory procedures if dismissal or action short of dismissal (including relocation or a change in role) is contemplated.
- Consider whether the action proposed constitutes discrimination.

*By Gemma Parker*

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# Case law update

## Knowledge acquired by an employer after grievance letter sent not relevant

### *Dick Lovett Ltd (t/a Porsche Centre Swindon) v Evans UKEAT/0211/07/JOJ*

#### Why care?

In claims for unlawful discrimination an employee is usually required to raise a grievance prior to being able to submit a Tribunal claim. This case reviews what amounts to a valid grievance and whether information an employer acquired after the complaint was submitted could be relied upon by the employee to put the original grievance in context.

#### The case

On 10 April 2006 Ms Evans was told by her employer that she would not be receiving a pay rise, either because of or for reasons connected with her pregnancy. She went home from the meeting in distress and was off work for a week. On her return she completed an absence report form on 18 April that said "Following on from meeting with Richard and Mark, went home very upset. Didn't sleep and suffered numerous nosebleeds". This document was relied on by Ms Evans as a grievance. The timing of the form was important because under s32 (3) Employment Act 2002 an employee is not allowed to present a complaint to an Employment Tribunal unless 28 days have passed since the date on which a grievance was made. Some days later two meetings took place between the employer and Ms Evans, the notes from which suggested that she explained that she had been upset that her lack of pay rise was in some way connected with her pregnancy. Ms Evans brought Tribunal claims for sex discrimination and equal pay. The Employment Tribunal accepted that the notes of the meeting could not amount to a grievance as they had to be set out in writing by the employee. However, the Tribunal then relied on the case of Canary Wharf Management Ltd v Edebi [2006] IRLR 416 to decide that the "context" in terms of what happened at the meeting, read with the earlier sickness report form, satisfied the requirements of a grievance.

The Employment Appeal Tribunal reviewed its decision in Canary Wharf in which it said that a Tribunal must look at how a reasonable employer would assess its knowledge at the time it received the grievance. The EAT held that it was not right to look forward and take notice of events which occurred after the document came into existence (i.e. the meetings) and use those as a context to interpret the document. In any case the document itself has to give an indication of a grievance so Ms Evans could not bring her claim, as a grievance had not been submitted.

#### What to take away

Any statement made by an employee must be expressed in such a way as to make it clear to an employer that a grievance is being raised at the time. An employer is not required to look forward and take notice of events which occurred after the document came into existence. The EAT did hint that it may be permissible to look back to events which took place before the document came into existence. Had Ms Evans mentioned that she was unhappy with her lack of pay rise at the first meeting on 10 April 2006 then, in that context, the completed absence report form might have constituted a grievance.

Also note the recent EAT decision of ADM Milling Ltd v CL Hodgson UKEAT/0051/07/JOJ on a different but related point concerning grievances. The employee claimed that her dismissal was unlawful sex discrimination. The employer argued that the Employment Tribunal had no jurisdiction to hear the claim because she had not used the statutory grievance procedure prior to making a claim. The EAT, following the earlier case of Lawrence v Prison Service UKEAT/0630/06, confirmed that her case fell within regulation 6(5) Employment Act (Dispute Resolution) Regulations 2004. This states that the grievance procedure does not apply where the grievance is that the employer has dismissed or is contemplating dismissing the employee.

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## Hot topics

### Age discrimination law – one year on

It is now 12 months since the Employment Equality (Age) Regulations 2006 ("Regulations") came into force. At the end of last month the [Department for Work and Pensions](#) ("DWP") published a report "Employer responses to an ageing workforce: a qualitative study". Employers were asked by independent researchers how they were responding to an ageing workforce, particularly in the light of the Regulations. The report covered recruitment and also the difficulty of finding appropriately skilled people. This appears to be encouraging employers to adopt more age-friendly HR practices, especially around retention and flexible working.

The [Employers Forum on Age](#) ("EFA") has also published research on the Regulations. The survey found that 86% people asked knew that it is now illegal to discriminate on the grounds of age, compared with 51% a year ago. However, the research also found that the percentage of workers claiming to have witnessed ageist behaviour in the workplace during the last 12 months was static – at around 60% of those surveyed.

### HM Revenue & Customs announcement on timing of introduction of 52 weeks paid statutory maternity pay

Although the Government had not decided an implementation date for the extension of Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay from 39 weeks to 52 weeks and the introduction of Additional Paternity Leave and Pay, it has confirmed that it will not be implemented in April 2009.

On 11 October the HMRC issued a statement that it had been planning on an implementation date of April 2009 but that it will now start planning implementation for babies due on or after April 2010. HMRC states that this is a pragmatic approach rather than implying any timing decisions have been taken. Their press release can be found [here](#).

### New code of practice on dyslexia in the workplace and recent case law

The [British Dyslexia Association](#) has published a code of practice for employers dealing with dyslexia in the workplace. The code provides practical advice for employers and guidelines to assist businesses to adopt policies and procedures in compliance with the Disability Discrimination Act 1995, under which dyslexia is a recognised disability. A recent court decision which exemplified this was that of *Paterson v The Commissioner of Police of the Metropolis* UKEAT/0635/06/LA in which the EAT held that an employee's dyslexia had an adverse effect on his normal day-to-day activities which in this case included examinations and other professional assessments in his capacity as a police officer.

## Hot topics

### **Flexible working – redefining references to adoption and foster carers**

Under the Work and Families Act 2006 the right to request flexible working was extended to carers of adults from 6 April 2007. The ambit of the right to request a variation to an employment contract in order to care for a child has now been extended by the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2007. These regulations came into force on 1 October 2007 and redefine "adopter" to include those who are adopting a child, whether in the UK or from abroad, where the child has not been placed with those adopters by a UK adoption agency. Other amendments include defining "adoption agency", "private foster carer" (carers who foster children privately rather than through a fostering service) and "residence order". More information can be found on the Department for Business, Enterprise and Regulatory Reform's website [Department for Business, Enterprise and Regulatory Reform](#).

### **Racial and Religious Hatred Act 2006**

This Act, which came into force on 1 October 2007, creates a new offence of stirring up hatred against individuals on religious grounds. This could include religious discrimination in the workplace for which individuals and corporate bodies may be found liable. The Act supplements existing offences under the Public Order Act 1986.

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# Contacts

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