Equality Commission FOR NORTHERN IRELAND

EMPLOYMENT EQUALITY LAW UPDATE

Labour Relations AGENCY

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Keeping you up to date with developments in employment and equality law

Welcome to the first edition of this joint Newsletter between the Equality Commission for Northern Ireland and the Labour Relations Agency. We plan piloting the Newsletter over two editions to determine the demand for such a publication amongst you, our stakeholders, and will be actively seeking your views on its value.

The Newsletter has been developed because of what both organisations see as a growing need amongst stakeholders for clear and practical information on those areas of employment and equality law which are covered by the remits of both organisations. This need has become more apparent through the joint training which is now delivered on themes such as migrant workers, harassment and bullying, age and flexible working.

Our first edition examines a number of very pertinent issues, i.e. the government's removal of the default retirement age, legislative changes relating to agency workers and changes to the Dispute Resolution Regulations.

We hope that you find this edition useful and are very keen to receive your feedback. If you need more information or advice on any of the issues covered here, please contact us. Please email the individuals named in the Contact Section on the back page of the Newsletter.

Inside this Edition

Dealing with Change

It can be difficult for anyone involved in employment and equality law to keep abreast of changes and developments whether these arise from the introduction of new legislation or developments in case law. In many cases someone can find out about these changes by accident or via a colleague. Whatever the source of the information there are normally some key questions that everyone involved asks:

1. What is the nature of the change?
2. When does it come into operation?
3. What do we need to do?

Sometimes the changes mean that a policy document needs to be amended slightly or that a new procedure needs to be negotiated, agreed and implemented or in some cases it means starting with a blank page and devising something new. There are basic questions to ask about how changes can be brought into effect in the employment relationship, including:

1. What internal document(s) does the change in law affect?
2. Are there equality aspects to the changes required?
3. Is the matter being addressed in the employment contract, statement of written particulars, employee handbook, collective agreement etc?
4. Does the change need to be individually negotiated with each employee?
5. Are the changes in context?

It is our intention that this Newsletter will provide answers to these questions in respect of key changes that emerge in the areas of equality and employment law.

The Employment Act (Northern Ireland) 2011

The Employment Act (Northern Ireland) 2011 came into operation on 3rd April 2011 and makes changes to some of the processes and procedures associated with individual dispute resolution both in terms of internal processes with the employer and external processes with the Industrial and Fair Employment Tribunals. From a dispute resolution point of view the main issues addressed in this Act are as follows:

1. The removal of the statutory grievance procedure and the introduction of the new Labour Relations Agency Code of Practice on Grievance, Discipline and Dismissal.

2. The increased use of the Labour Relations Agency Pre-Claim Conciliation Service and the removal of fixed periods of Conciliation prior to an Industrial or Fair Employment Tribunal.

3. Situations where the Industrial Tribunal may be able to determine proceedings without a hearing and the recovery of sums payable under compromises involving the Labour Relations Agency.

The vast majority of employers in Northern Ireland, regardless of size, will have some form of grievance, discipline and dismissal procedure. In April 2005 all employers and employees became obliged to follow the minimum grievance, discipline and dismissal procedure or face financial penalties if the case went to an Industrial Tribunal.

Six years on and the law has now changed in terms of its impact in that the minimum requirements regarding grievances (Discipline and Dismissal remain the same) are no longer a legal requirement under statute but are now part of the Labour Relations Agency's new Code of Practice on Grievance, Discipline and Dismissal. Employers and employees alike need to follow the requirements of the new Code of Practice in order to avoid a potential financial penalty being imposed by the Industrial Tribunal.

The requirements of the new Code of Practice on Grievance, Discipline and Dismissal

Labour Relations Agency's new Code of Practice on Grievance, Discipline and Dismissal

Labour Relations Agency staff at the launch of the Agency's new Code of Practice on Grievance, Discipline and Dismissal

If your organisation has, since 2005, been following the simple principles (known as the 1,2,3) of the existing legal requirements:

1. Put the Grievance in writing;
2. Employer holds a meeting to discuss and gives a decision;
3. The employer offers the right of appeal if the employee is dissatisfied with the outcome;

- then this process should continue in order for the employer and employee to be compliant with the new Labour Relations Agency Code of Practice (which is available from the following webpage): www.tinyurl.com/new-lra-code

Removal of Statutory Grievance Procedure

There are several technical impacts as a result of the changes and although many organisations may carry on as normal, because what was compliant under the existing law basically remains compliant under the new Code, it will be important to pay attention to the following:

1. Informal dispute resolution - Ask - What does our organisation do in terms of informal dispute resolution before things are committed to writing and a formal process?

2. Transitional arrangements - Ask - What does our organisation know about the rules regarding grievances that could go before an Industrial Tribunal and which are commenced before the 3rd April 2011 but run beyond that date?

3. The impact of the return to the 3 month "window" for lodging a claim to the Industrial Tribunal - Has provision been made for target internal timescales for processing internal grievances as the automatic 3 month extension for making a claim to tribunal no longer applies?

4. Simultaneous lodging of grievance and Industrial Tribunal claim - This may happen and it may create tension. From the employees' and trade unions' points of view, even though there may be understandable reasons for doing so, the possibility of an informal or alternative dispute resolution can be undermined if, even before the issue is discussed, a claim is lodged to the Industrial Tribunal.

Pre-Claim Conciliation

The Labour Relations Agency can offer dispute resolution services at any stage during an individual dispute and there are several factors which will determine which type of assistance can be offered, for example: timing, what stage the dispute is at, whether the dispute is eligible to go before an Industrial Tribunal and so on.

If a formal grievance is lodged with the employer, but before a claim is made to an Industrial Tribunal, there may well be an opportunity for the employer and employee to avail of the Labour Relations Agency's Pre-Claim Conciliation service.

The Key criteria for accessing the Pre-Claim Conciliation service are:

- that the employee is eligible to make a claim to the Industrial Tribunal;
- there is nothing to prevent the conciliation from succeeding;
- the parties have already made reasonable efforts to address the matter;
- and the employee is likely to make a claim if LRA assistance is not provided.

Conciliation

If a claim is lodged to an Industrial Tribunal the Labour Relations Agency has a duty to conciliate the case in order to promote a settlement between the parties. The position under the 2005 statute was that the duty to conciliate was to be conducted within a timeframe of 7, or in some cases 13, weeks. The position from 3rd April 2011, is that there is no longer a 7 or 13 week limited timeframe within which the Labour Relations Agency can conciliate in an individual dispute.

The "Default Retirement Age" Has Been Retired

As employers, you will know that it is unlawful for you to commit age discrimination without lawful justification. This has been the general rule since October 2006, when the Employment Equality (Age) Regulations (NI) 2006 (the "Age Regulations") came into force.

One of the most controversial aspects of the Age Regulations was the provisions that created a **Default Retirement Age** ("DRA"). The main legal effect of the DRA was that it protected employers from claims of age discrimination and unfair dismissal by aggrieved individuals who were forcibly dismissed after they had reached the age of 65, so long as the employer properly followed a prescribed statutory retirement procedure (i.e. "the duty to consider working beyond retirement" procedure).

Repeal of the DRA

All this has changed as a result of new legislation which came into force on 6 April 2011; namely the **Employment Equality (Repeal of Retirement Age Provisions) Regulations (NI) 2011** (the "Repeal Regulations").

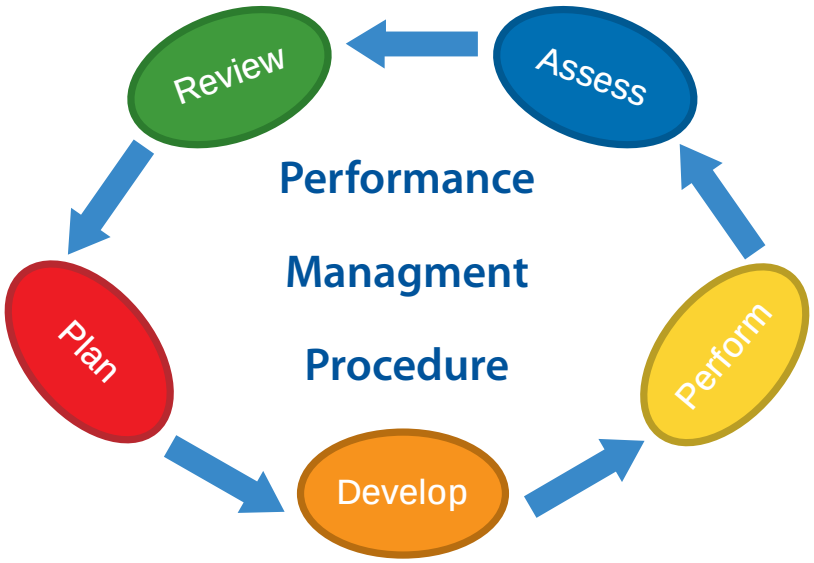
To borrow the well-known phrase, the Repeal Regulations do "exactly what it says on the tin": i.e. they repeal the DRA provisions of the Age Regulations. They also repeal associated provisions of the **Employment Rights (NI) Order 1996**, thus extending the right of older ex-employees to complain of unfair dismissal.

Since 6 April, employers no longer have the right to rely on the DRA, and its associated retirement procedure, to avoid having to go before industrial tribunals to justify the decisions they might make to forcibly dismiss employees who are aged 65+ years. [As a partial exception, some employers may lawfully continue to use the DRA procedures during a short transitional period, so long as these were commenced before 5 April; see below for further information.]

The likely implications of this are -

a. you will allow your employees to continue to work beyond the age of 65 until such time as:
   - they choose to voluntarily resign, or they die in service; or
   - you are compelled to dismiss them on grounds of incapacity, misconduct, or redundancy [i.e. the usual kinds of grounds that might justify the dismissal of any employee regardless of their age], or;

b. you will retain a compulsory retirement age for all of your employees, or for a class of your employees. If so, you will be required to objectively justify this.



Employers who do not operate a compulsory retirement age

Research shows that concerns about the health and productivity of older workers were prominent amongst the reasons why some employers previously operated compulsory retirement ages. Accordingly, the repeal of the DRA may see employers increasingly use performance management procedures.

It is good practice to use such procedures. A good system will assist employers to address their legitimate concerns about the productivity and health of their employees whilst at the same time helping to ensure that all employees are treated fairly and without unlawful discrimination.

They will provide a solid foundation for defending any complaints of discrimination (on grounds of age or disability) or unfair dismissal that employers may face. Such procedures should be applied fairly and consistently to all employees, and not merely to those aged 65+.

There are several sources of guidance about establishing and operating such procedures, such as the Labour Relation Agency's **Advice on Managing Poor Performance** and the Equality Commission's **Disability Code of Practice – Employment and Occupation.**

In addition, you should also review how you communicate with your employees. Are you interested in their personal aims, plans and aspirations? Taking an interest in this could be a valuable source of information that may help you to plan and reach your business objectives to everyone's mutual satisfaction. Such information should be sought from all employees, not merely those aged 65+, and discussions should be handled sensitively. An excellent source of guidance about this is a publication by ACAS entitled: **Working Without the Default Retirement Age.** ACAS is the GB based sister organisation of the LRA.

You should also consider how your working arrangements may affect older workers. In particular you should develop a flexible working policy or if you already have one, then you should review it. Again, there are several sources of guidance on this subject, such as the Equality Commission's and Labour Relations Agency's joint publication **Flexible Working: The Law and Good Practice.**

Finally, if you are compelled to consider dismissing an employee on grounds of incapacity, misconduct or redundancy you must follow the statutory dismissal and disciplinary procedures laid down by the **Employment (NI) Order 2003.** The best source of guidance about this is the Labour Relations Agency's new **Code of Practice on Grievance, Discipline and Dismissal** (as described earlier in this newsletter).

Employer Justified Retirement Ages

The Age Regulations, as now amended, permit you to retain a compulsory retirement age where you can objectively justify it. This is called an **Employer Justified Retirement Age** ("EJRA").

An EJRA does not necessarily have to be set at 65 years: employers may set lower or higher ages. However, in all cases the EJRA must be objectively justified or it will be unlawful.

The general rules for successfully establishing an EJRA are the same as those which apply to the other equality laws when establishing objective justification for acts of discrimination where this is allowed (i.e. usually in cases of indirect discrimination). The only difference here is that an EJRA is a justification for acts of direct age discrimination.

So, the familiar formula applies. An EJRA will be lawful where it is shown to be a proportionate means of achieving a legitimate aim. A balance must be struck between the business needs which might compel you to set a compulsory retirement age and the discriminatory impact this will have on the employees affected by it.

There has already been some case law addressing these matters, both from the European Court of Justice ("ECJ") and from the employment tribunals in England. For example, cases have concerned compulsory retirement ages of 48 years (for professional football referees) and 65 years (for part-time judges, solicitors in a law firm and office cleaners) and 68 years (for dentists in the German public health service).

Legitimate aims:

It is not legitimate to compulsorily retire an employee merely because he or she has reached a particular age. There must be some other purpose to the action – some other aim that is intended to benefit your business.

The ECJ and the employment tribunals have accepted the following as being legitimate aims for the purpose of justifying compulsory retirement ages: (a) ensuring that employees are physically or intellectually competent to perform their duties; (b) to safeguard against declining performance; (c) to protect the health and safety of service users; (d) to improve the employment opportunities of other groups (i.e. younger people or unemployed people) or to share job opportunities fairly amongst the generations (i.e. avoiding "job blocking"); (e) to control public finances in the health service; (f) to avoid violating the dignity of, or causing humiliation to, older workers by avoiding the need to dismiss them on grounds of capability.

With regards to (f) above, it is noted that the law will, later this year, consider this matter in a case entitled **Seldon .v. Clarkson Wright & Jakes**.

Proportionate means:

It will not be enough for you to show that you have a legitimate aim, or aims, for setting an EJRA. You must also show that setting it is reasonably necessary to achieve those aims. You must also show that there are no non-discriminatory, or less discriminatory, alternative courses of action open to you.

The case law on the topic of *proportionate means* is very fact specific. What is deemed to be lawful for one employer will not necessarily be lawful for another. Also, what may be lawful for one employer in relation to a particular job/occupation may not necessarily be lawful when applied to other jobs/occupations in the same workplace.

One important thing is clear; the employment tribunals in the UK tend to place justification arguments under intense scrutiny. This means that you should not expect tribunals to readily accept the assumptions or data on which you have based your decisions. Tribunals are likely to require detailed evidence and logical arguments that are specific to your particular circumstances and which hold up under cross-examination.

For example, the UK Government has expressly denied that older people *"block jobs"* for younger people and, furthermore, asserts that the repeal of the DRA is likely to increase economic activity in the economy as a whole. So, if you try to rely on the aim of *"avoiding job blocking"* you will need to refute the Government's opinion. It is likely that you will need some very specific arguments and evidence relating to your particular organisation or industry to support a claim that *"job blocking"* exists there and is a problem for you.

Finally, it is important to remember that for employers in Northern Ireland some statutory procedures still remain despite the repeal of the DRA and the *"the duty to consider working beyond retirement"* procedure. If you intend to dismiss an employee on grounds of an EJRA, you must still follow the statutory dismissal and disciplinary procedures laid down by the **Employment (NI) Order 2003**. To fail to do this will leave you open to a claim of automatic unfair dismissal. The best source of guidance about this is the Labour Relation Agency's new **Code of Practice on Grievance, Discipline and Dismissal.**

The Transitional Arrangements

It may be possible for some employers to continue to lawfully use the DRA provisions, and associated retirement procedure, for a short transitional period. However, these transitional arrangements may only be applied where the following conditions are met-

- the employee concerned is 65 now, or will reach 65 before 1 **October 2011**,
- the employer issued the statutory notice of retirement to the employee before **6 April 2011** (note: the employer must have given between 6 and 12 months notice).

Now that 6 April is past, you are no longer permitted to issue fresh statutory notices of retirement under the old or transitional DRA procedures to employees who did not receive any before that date.

If you acted in time and are able to rely on the transitional arrangements, you must also comply with "the duty to consider working beyond retirement" procedure. You will, therefore, have to consider any requests that you receive under the procedure; **although no requests may be made on or after 5 January 2012**. You may also agree to give an extension and still rely on the DRA transitional arrangements to enforce the retirement, providing that the extension is for no more than six months.

The Agency Workers Regulations

The Agency Workers Regulations (Northern Ireland) 2011 are due to come into operation in early December 2011 and provide for improved rights for temporary agency workers in relation to basic working and employment conditions. The basic principle behind the Regulations is that, subject to certain qualifying criteria, for the duration of their assignment with a hirer the agency worker should be given certain protections and rights that would apply as if they had been directly recruited by that hirer to occupy the same job.

The Regulations are complex and, although the basic principles seem straightforward, assumptions should not be made and exceptions to rules should be examined. If the final Regulations come into operation as drafted in the consultation material then an agency worker who does the work personally (not using a substitute) and is employed by, or who has a contract for services with, an employment business, and who works on assignment with a third party hirer, will be covered and protected under the Regulations.

The basic equal treatment rights

Some of the rights afforded to agency workers are from day one of the assignment and include:

- **Access to employment:**
  for example: being informed about vacancy lists in order to have an opportunity to find permanent employment

- **Collective facilities:**
  for example: being given access to canteens, child care facilities and provision of transport services

Other rights afforded to agency workers only apply after a **12 week qualifying period** and include:

Pay (as defined)	Holidays	Working Time
Overtime	Breaks / Rest periods	Night work

An agency worker will normally be required to raise the fact that they are not being treated equally as compared to an actual employee of the hirer with the employment business and, from here, the employment business can seek the necessary information from the hirer in order to address the issue and get it resolved.

Key questions to ask

If your organisation uses, or intends to use, the services of an employment business and temporarily assign agency workers, there may be some key questions to ask including:

1. How many staff in our organisation, as of today, come from an employment agency and how many come from an employment business?
2. How do we ensure temporary agency workers have immediate access to their "Day One" rights? How long are their assignments due to last?
3. How do we ensure that we supply all the foreseeable information requirements to an employment business that is attempting to resolve an equal treatment complaint for one of its workers on temporary assignment with us?
4. What is the nature of the work undertaken by temporary agency workers in the context of the various types of work undertaken in our organisation?
5. What will our role, if any, be in the resolution of disputes on equal treatment between a temporary agency worker and the employment business?

Employers can contact the Equality Commission and Labour Relations Agency for general or specific advice on:

Equality Commission FOR NORTHERN IRELAND

Equality Commission - 028 90 890 890

Labour Relations AGENCY

Labour Relations Agency - 028 90 321 442

Conclusion

What next?

The three key areas of law development detailed in this document can be viewed in a variety of ways depending on how directly they impact on the organisation, for example, if you follow the basic requirements of the 1,2,3 for grievances as part of your procedure, you have abolished your retirement age completely and do not use temporary agency workers then there is little to concern you with these changes.

However, there may be a requirement for the organisation to ensure that policies are amended, in accordance with the proper protocols, to reflect the requirements of the new laws. All parties to the employment relationship should be clear about how changes brought about by new laws come into operation within the organisation in terms of:

1. Informing employees; or their unions or representatives.
2. Consulting employees;
3. And, if appropriate, negotiating and agreeing with employees, or their unions or representatives.

It is now time for everyone who is likely to be affected by changes in employment law to look at their own situation and answer the key questions posed throughout this booklet in relation to their own context. There are no real “one size fits all” answers, but there are ways of making decisions which are fully informed and which apply to individual circumstances allowing for a smoother transition towards change.

The Labour Relations Agency and Equality Commission are here to help employers, employees, trade union representatives, Human Resource managers and anyone else involved in the employment relationship to find answers to key questions and ensure that we assist with informing any decision making process via information, advice and guidance.

Assistance with keeping up to date with employment and equality law

The Labour Relations Agency and Equality Commission will continue to work together to make stakeholders aware of changes in the areas of employment and equality law. One way in which we seek to do this is through the provision of training. You can find details of the joint training we provide on the websites of both organisations.

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