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Retirement Age Of 65 To Stay.... For Now

The High Court has recently ruled on the validity of a compulsory retirement age of 65 under UK age discrimination legislation

The Employment Equality (Age) Regulations 2006 ("The Age Regulations") came into force on 1 October 2006. They were introduced to further implement the EU Equal Treatment Directive which prohibits discrimination on the grounds of sex, race, age, disability, sexual orientation, religion or belief.

The Age Regulations give employers the right to compel staff to retire at 65, provided that a designated procedure is followed. The Heyday Group (now part of Age UK) submitted a claim for judicial review to challenge this aspect of the Age Regulations on the basis that it amounted to age discrimination which could not be justified.

The High Court Judge (Mr Justice Blake) dismissed Heyday's claim and stated that a compulsory retirement age was permitted by the Equal Treatment Directive and that it was not a disproportionate means of the government seeking to achieve its social policy aims of labour market confidence and workforce planning.

However, it is clear from the judge's comments in this case that he found some of the submissions made by Heyday for a retirement age of more than 65 to be adopted persuasive, in part due to the change in culture in recent years arising from people working for longer as a result of an ageing population. It appears that a deciding factor for the court was that a review of the compulsory retirement age is due to take place in 2010.

At the moment, employers can in most cases therefore lawfully terminate employees who reach the age of 65. However, in order to avoid a finding of unfair dismissal or age discrimination, employers must follow the correct procedure. This would include ensuring that they notify employees at least 6 months (but no more than 12 months) before they reach their intended retirement date of their right to request to continuing working beyond that date.

Clearly this is an issue which will continue to be the subject of much debate and, given the government review due to take place in 2010, a retirement age of 70 could be looming over the horizon.

If you would like any further advice on these matters or to discuss how The Age Regulations could affect your policies, procedures and practice in the workplace, please contact **Fudia Smartt** on 020 8394 6525 or email her at fudia.smartt@russell-cooke.co.uk

Unfair Terms In Consumer Contracts

Recently both the UK banking industry as a whole and Foxtons estate agents have been subject to court proceedings brought by the Office of Fair Trading ("OFT") under the Unfair Terms in Consumer Contract Regulations ("the Regulations"). Any business which deals with consumers should be aware of the Regulations. When do the Regulations apply, what do they say, and what should businesses be doing?

When do the Regulations apply?

- Broadly, the Regulations apply where any business is dealing with consumers on standard terms of business.

- The Regulations will not apply to the 'core terms' of the contract, provided that those terms are in clear, intelligible language. Equally, they do not apply to the price of goods or services or the quality of the goods or services received for that price (but the Sale of Goods Acts will apply).

What do the Regulations say?

- All written terms must be in plain, intelligible language. If there is any ambiguity in a term (i.e. if there are two or more possible meanings) then the interpretation most favourable to the consumer will apply. Any term which is unfair will not be binding on the consumer. There are also provisions allowing the OFT to investigate unfair contracts and apply for injunctions to prevent their continued use.

- So what is an unfair term? The Regulations state that a term will be unfair if it creates ***"a significant imbalance in the rights and obligations of the parties"*** to the detriment of the consumer. This is not particularly helpful - it effectively says that a term will be unfair if it is unfair. However the Regulations do contain a useful list of examples of unfair terms including:

    - binding a consumer into a contract where the business has a choice as to whether or not to perform its obligations;
    - giving the business rights to terminate the contract without providing similar rights to the customer;
    - allowing the business to unilaterally vary the goods or services to be provided;
    - allowing for a consumer deposit to be forfeit if the contract is terminated by the business.

What should businesses dealing with consumers be doing?

- Make sure your terms are in clear plain English.

- Ensure that your terms are readily available to customers, and provided to your customers before a contract is entered into.

- Any terms which a consumer might object to should be clearly identified (and preferably highlighted).

- Consider each of your terms from the point of view of your customer. If you think that the term might be unfair, consider whether you really need to include it. If you do, then check the term with your local trading standards office, or speak to a solicitor.

If you would like any further advice on these matters, please contact **Guy Wilmot** on 020 8394 6531 or email him at guy.wilmot@russell-cooke.co.uk

Effective Debt Recovery

The current economic downturn has led to an increase in unpaid invoices and bad debt with inevitable implications for cash flow. Many businesses are not sure of the best way to try and recover the outstanding debt. This article sets out some of the options available.

Preventing and limiting bad debts arising

- The easiest way to limit bad debt is to have good terms and conditions that clearly set out the payment obligations and to have tight credit control. In particular, you should consider:

    - Asking for a deposit prior to the goods/services being provided.

    - Providing in your terms and conditions for payment of interest on overdue invoices, and/or that title in the goods supplied remains with you until full payment of sums due (a retention of title clause).

    - Seeking some form of guarantee or other security in appropriate cases.

- In the event that a debt becomes a bad debt, prompt action must be taken to maximise the possibility of recovery. This may involve putting in place an internal procedure to follow up late payers by phone or letter. You should also consider whether or not the debtor is good for the money. If they do not have the money to pay you, there may be little purpose in incurring further time and money pursuing them.

Options for legal action

There are a number of ways in which a creditor can pursue a debtor for a debt, each of which is explored in turn below.

A. Pre-action letter and Court action

- Prior to issuing proceedings, you must send the debtor a letter before action setting out the basis of your claim and allow the debtor a minimum of 14 days to provide a response. The Court rules encourage the parties to any potential claim to seek to resolve their dispute by negotiation, mediation or some other means.

- Any claim will either take place in the High Court (if it is for more than £50,000) or the County Court.

- Claims of £5,000 or less are called small claims. They have a simplified procedure for litigants in person. As a general rule legal expenses are not recoverable but a successful litigant in person can recover their Court fees, the reasonable expenses of a party or witness including their travel and overnight expenses, their loss of earnings (limited to £50 per person) and expert fees (limited to £200).

- Claims of over £5,000 have a more formal procedure. A proportion of your legal expenses may be recoverable as described below.

- You can ask the Court to enter judgment against the debtor at an early stage in the proceedings if the debtor does not respond to your claim or if you can persuade the Court that there is no prospect of the defence succeeding. There are Court forms available detailing the procedure.

- If a defence is filed, the Court will provide directions for the future conduct of your claim through to trial and may encourage you to seek to resolve the claim through mediation.

- If you proceed to trial and are successful then the Court may order that you recover a proportion of your legal costs against the debtor. You would normally expect to recover between 50 – 70% of your total costs. However, if unsuccessful you may be required to pay a proportion of the defendant's costs, as well as your own costs.

- If judgment is obtained against the debtor and he still does not pay, there are a number of enforcement options available to you. You need to be sure the debtor has sufficient assets to pay both the judgment sum and any costs order.

B. Statutory Demand

- A Statutory Demand can be served on an individual or a company. It is the first stage to winding up a company or making an individual bankrupt on the basis that a failure to satisfy a Statutory Demand is evidence that the company/individual is unable to pay debts as they fall due.

- A Statutory Demand is in a standard and prescribed form which is relatively straightforward to complete. It requires no reference to the Court before it is served on the debtor. The form sets out details of the amount owed and requires the debtor to pay the amount owing within 21 days.

- They can be used if there is a clear and undisputed debt of more than £750. If an individual debtor disputes the amount owing they may make an application to Court to have the Statutory Demand set aside. A company debtor can apply to the Court for an injunction to prevent a winding up petition being issued or proceeded with. In either case, if the debtor is successful and the Court decides that there is a genuine dispute, the Court is likely to order that you pay the debtor's costs of the application.

- If the debtor fails to comply with a Statutory Demand, then the creditor is entitled to present a bankruptcy petition (in the case of an individual debtor) or a winding up

petition (in the case of a company debtor). This is an expensive process and there are a number of disbursements that you are required to pay.

- If a bankruptcy order is made, your debt will be one of the unsecured debts of the bankrupt and will not be prioritised (although the costs you incur in obtaining the bankruptcy order will be). You will recover the same proportion of your debt as all other unsecured creditors in due course - therefore it may not be in your interests to be the petitioning creditor and incur the expenses referred to above.

C. Mediation

- Mediation should be considered as alternative or in addition to issuing proceedings in cases where the debt is disputed. Mediation is a process by which a third party is appointed to assist the parties negotiate a settlement. A mediator is not a judge and does not make any decision about the merits of the case.

- Mediation may enable you to retain an element of goodwill for the future and keep costs down and may result in a swift resolution to your dispute.

- The Court has made it clear that, in some cases, if you avoid mediation then you may be penalised in costs even if you are ultimately successful at trial.

If you would like any further advice on these matters, please contact **Jenny Raymond** on 020 8394 6469 or email her at jenny.raymond@russell-cooke.co.uk

Costs Of Litigation

Litigation has a reputation for being expensive but that doesn't have to be the case. We recognise that businesses can be severely affected by the costs of pursuing or defending claims. The purpose of this article is to explain a bit more about how costs work and how to ensure that your business gets value for money.

Who pays the costs?

The general presumption is that the unsuccessful party to a claim pays the successful party's costs. Without proper advice on your prospects of success at the outset of a dispute, or without proper representation in ongoing proceedings, you may not only lose your case, but you may also be liable for the other side's costs. On the other hand, if you are properly advised and are successful in your case, you will also be able to recover the majority of the costs you have incurred.

Costs recovery

However, it must be borne in mind that generally the successful party will not recover all of the costs they have incurred. The court typically assesses costs on the 'standard' basis which usually results in the successful party being awarded between 60% and 70% of their actual costs. In extreme and unusual situations the court can order that costs be assessed

on the ‘indemnity’ basis; for example when one party has acted unreasonably in the conduct of the case.

As such, it is obviously important to keep costs manageable and proportionate throughout any dispute. At Russell-Cooke we ensure that our clients are fully aware of any costs they have incurred by providing a detailed estimate of costs at the outset of litigation and discussing fees and expenses with clients on an ongoing basis.

Funding

Previous articles have discussed in detail the various funding options available to Russell-Cooke clients. These may include conditional fee agreements, fixed fees and deferred fee agreements.

If you need any advice in relation to a dispute, or have any queries in relation to this article please contact **Paolo Sidoli** in our litigation team on 020 8394 6547 or email him at paolo.sidoli@russell-cooke.co.uk

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