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1. [Age Discrimination and retirement](#)

One effect of the Employment Equality (Age) Regulations 2006 is that enforced retirement of an employee on age grounds is generally unfair dismissal. However an exemption allows enforced retirement of employees at age 65 or over, subject to specified procedures being followed.

As an aside it is worth noting that a partner in a partnership is not an "employee". The starting off point in the context of a business partnership is thus that requiring a partner to retire on age grounds is always unlawful - it will only be lawful if it can be "objectively justified".

Campaigners on behalf of the elderly have argued strongly that it is wrong that employers should be able to require an employee to retire simply on grounds of age. As Parliament is supreme and Parliament has legislated to allow enforced retirement at age 65 the only avenue open to the campaigners has been to argue that the British rules contravene EU law. So in July 2006, even before the British regulations came into force, the National Council on Ageing, which runs the Age Concern charity but for this purpose is operating under the banner "Heyday", announced that it would take the British government to court.

It did so. This led to the High Court in England referring specific questions to the European Court of Justice in July 2007. The processes of the ECJ involve an official known as the Advocate General providing a formal "opinion" to the Court before a decision is reached. In September 2008 the Advocate General gave his opinion in this case. Usually, but certainly not always, the ECJ judges follow the recommendation of the Advocate General.

The Advocate General's opinion here is essentially that there is no fundamental objection in EU law to a Member State allowing employers to require employees to retire at a specific age provided this can be objectively justified as "*a proportionate means of meeting a legitimate aim*". There was insufficient information made available for the Advocate General to form a view on whether the British "compulsory retirement at age 65" provision could be justified so it follows that this question would have to be remitted back to the national courts to decide.

This is clearly a set back to the campaigners but not a knock out blow.

A decision by the judges of the European Court of Justice is expected by the end of 2008. If the ECJ follows the recommendation of its Advocate General, presumably the campaigners will try to persuade a British court that conditions in the UK are such that allowing an enforced retirement age of 65 is not a proportionate means to achieve a legitimate aim. So the position may not be finally resolved for some time yet.

From a practical point of view, any employee who is required to retire against his will at age 65 or over would be well advised to consider making a claim to avoid falling foul of the time limit rules, usually 3 months from enforced retirement. All such claims are currently stayed pending the decision of the European Court of Justice (under the terms of a practice direction issued by the President of the Employment Tribunals) but as a general rule only claims which were formally lodged within normal time limits will be able to go ahead if the eventual outcome of the case is that the campaigners win.

- For further information click here on [Age discrimination / retirement](#) to go to notes on our website.

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[2. Incapacity Benefit phase out starts](#)

Incapacity Benefit for those who cannot work because of illness or disability is to be phased out. The first stage of the phase out comes into effect on 27th October 2008. As from that date neither Incapacity Benefit nor Income Support will be available to new applicants but instead new applicants will be entitled to a different benefit. This will be called Employment and Support Allowance. Existing recipients will continue to receive Incapacity Benefit or Income Support as before.

The essential difference is not in the amount of the payments but in the conditions for entitlement. The single biggest difference is that all new applicants on and after 27th October 2008 will have to pass through a new form of medical assessment designed to look at what they can do rather than at what they cannot do.

This new Employment and Support Allowance is part of the "carrot and stick" arrangements being introduced under the Welfare Reform Act 2007 in an attempt to ensure that those able to work receive full benefits only if they are genuinely unable to get work. The details of the new benefit are set out in the [Employment and Support Allowance Regulations 2008](#), made in March 2008 (but the details have already been amended twice, in July and again in September).

Most claimants will be required to serve an assessment phase which will normally last for 13 weeks from the start of the claim. They will then move onto the main phase of the benefit which will entitle them to a basic flat rate of benefit plus for most a work-related activity component. They will be required to take part in "work-focused health-related assessments" and work-focused interviews.

The "stick" part of the new Allowance is in regulations 63 and 64. These provide for a reduction in benefit for so long as someone fails to take part in a "work-focused health-related assessment" or work-focused interview when required to do so.

The official March 2008 "impact assessment" covering the Employment and Support Allowance estimated that some 60,000 more people a year will fail the new work capability assessment than are failing the current personal capability assessment. It is expected that 21,000 more appeals will go to a tribunal hearing.

- *For further information click here on [Social Security / employment support allowance](#) to go to notes on our website.*

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[3. Minimum Wage Increase](#)

As from 1st October 2008 the hourly National Minimum Wage rate is increased as follows:-

- adult rate for those aged 22 or more the increase is from £5.52 to £5.73;
- for 18-21 year olds the increase is from £4.60 to £4.77;
- for 16-17 year olds the increase is from £3.40 to £3.53.

When setting these rates the Government specifically rejected a recommendation from the Low Pay Commission that the age for entitlement to adult rate NMW should be reduced from 22 to 21. We understand that union pressure combined with threats to reduce funding to the Labour Party later led to a change of party policy in this respect. It is therefore probable that the age for entitlement to the adult rate will be reduced to 21 when the next increase in NMW takes place (likely to be October 2009), assuming the present government is still then in power.

Apprentices aged 16-18 and those aged 19 and over in their first year = as an apprentice are not entitled to the National Minimum Wage. However = in 2005 the Learning and Skills Council introduced a requirement that employers = pay apprentices a minimum of at least £80 per week and the government = announced in September that this minimum will be increased to £95 a week in = 2009. As the average wage paid to apprentices is stated to be £170 week this = is unlikely to have much effect in practice. Special rules govern the minimum wage payable to agricultural = workers. For this purpose agricultural workers are graded into 6 separate grades. = In England and Wales the minimum wage for a standard (grade 2) agricultural worker is £6.26 per hour from 1st October 2008 = (previously £6.00). Som readers may also be interested to know that as from 1st August = 2008 the minimum salary for trainee solicitors (set by the Solicitors Regulation Authority) is £18,870 pa for those working in Central London = and £16,790 pa for those working elsewhere in England and Wales.

- *For further information click here on [Minimum Wage / 2008 increases](#) to go to notes on our website. =*

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4. [Insolvent employers](#)

In last month's newsletter we looked at the position of employees who = are made redundant. Here is a brief look at employees' rights if = their employer becomes insolvent.

Company directors. As a preliminary, it can sometimes be = difficult to be sure whether a company director is in law an employee - = some obviously are and some non-executive directors obviously are not. = In between there can be a grey area. For those in this grey area it = is important to establish their legal status, which is currently a = "hot potato". An important case = ([Neufeld v A&N Communication in Print Ltd and BERR](#)) concerning the circumstances in which a director whose is also a majority shareholder = can be technically an "employee" is due to be heard by the Court of Appeal in = early December and other cases involving the same issue have been put on hold = pending the Court of Appeal's ruling (the President of the Employment Tribunals = issued a "stay of proceedings" direction in respect of such cases in = September). As a practical matter, similar "time limit" considerations for making = claims apply for company directors as apply for employees compulsorily required to = retire at age 65 or over, set out in our notes above on age = discrimination/retirement.

Employees (*who can include company directors - see above*). If a company is insolvent and is wound up (or a = receiver is appointed) an employee whose employment is terminated can apply in = writing to the Secretary of State for certain payments to be made to = him from the National Insurance Fund to cover some amounts which the employer = has failed to pay. An example is unpaid wages at the rate of a week's pay for up to = 8 weeks, (maximum of £330 per week from 1st February 2008 giving a = maximum of £2,640). Other examples are unpaid notice pay for the minimum = statutory notice period (which varies between one and twelve weeks depending on length of = service) and up to six weeks unpaid holiday pay in respect of the last = 12 months.

On the winding up of a company, wages of up to £800 for up to 4 = months, holiday pay, commission, contractual sick pay and maternity pay and = pay for time off work for trade union duties are preferential debts and so = are payable ahead of ordinary creditors. Redundancy pay and unfair = dismissal compensation are not preferential debts but subject to statutory limits = can be recovered from the National Insurance Fund if unpaid.

Liability for payment of statutory maternity pay and statutory = sick pay moves from the employer to the Secretary of State if an employer is insolvent.

The State Pension Protection Fund can provide some compensation = for members of occupational pension schemes in the event of the insolvency = of the scheme's sponsoring employer if the pension scheme has been under-funded.

If at least 20 employees at one establishment are dismissed as = redundant within a 90 day period and have not been consulted as required by = statute, they will be entitled to substantial compensation (called a "protective = award").

- For further information click here on [Insolvency](#)= to go to notes on our website.

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5. [Employees - don't compete unfairly or else](#)

It can be tempting in hard times, especially for senior = employees in "know-how" and "personal contact" businesses, to jump ship and start = up in competition with their former employer. This note is a reminder = that the courts will be quick to prevent employees acting unfairly in such circumstances even in the absence of express contract terms covering the = situation.

In April this year two senior employees of a consulting and advisory = company specialising in the hotel sector resigned and gave 3 months = notice. Within days their employer found evidence suggesting that they were = intending to go to work for a competitor, taking confidential material with = them. They were suspended and told to stay at home (on full pay). = They hit back at once by saying that there was nothing in their contracts of = employment allowing the employer to suspend them or to place them on = garden leave, that the letters requiring them to remain at home constituted a repudiatory breach of contract by the employer and that as a result they considered themselves free to go to work elsewhere at once. The employer won an injunction from the High Court = preventing them from taking up other employment until their 3 month notice period had expired ([SG = & R Valuation Service Co v Boudrais & Ors QBD on 12th = May 2008](#)).

In a second case three key employees of a company providing = rehabilitation services for persons who have suffered injury, usually as a consequence = of an accident at work or on the road, were ordered to pay substantial sums to = their former employer because they had deliberately misled the employer = regarding their intended resignations. All three had left and = went to work for a competitor organisation with which the = employer had dealings. It was some time before the employer realised who = they had gone to work for.

The High Court held that, given the senior = positions they held, all three had breached their duty of fidelity by = "positively misleading" their employer with regard to their intentions. Two = of them were also in breach of restrictive covenants. In addition to = substantial damages the three employees will have to pay their original employer's = costs and it is understood that their total bill is likely to exceed £1m ([Kynixa = Limited v Hynes QBD on 30th June 2008](#)).

In a third case in August this year the High Court granted an = emergency "springboard injunction" to prevent five former employees of = the UBS Bank poaching staff, customers or clients of the bank. The five had joined a wealth manager company called Vestra Wealth which = had recently been started up by former UBS senior executive named David = Scott. Granting the injunction sought by UBS, the High Court is quoted as saying that "springboard relief is is available to = prevent any future or further serious economic loss to a previous employer caused by = former staff members taking an unfair advantage, an 'unfair start', of any = serious breaches of their contract of employment (or if they are acting in = concert with others, of any breach by any of those others)" ([UBS wins injunction to stop ex-staff poaching clients, The Times 4th August 2008](#)).

The courts have to draw a careful balance between the right of an = employee to do whatever work he wishes and the right of an employer to be protected = from unfair activity by former employees. These three recent examples = show that, in contrast to many cases decided in favour of = employees, the courts will also be careful to protect the interests of employers if = their employees, especially senior employees, overstep the mark.

- For further information click here on [Implied terms in employment contracts / duties of employee to go = to notes on our website.](#)

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6. [Enhanced redundancy pay](#)

Calculation of redundancy pay under most redundancy pay schemes, including the statutory minimum scheme, generally involves a formula favouring long-service employees. It follows that most redundancy pay schemes, including the basic statutory one, are age discriminatory. Whether the age discrimination involved is lawful or unlawful can be a tricky point.

The statutory redundancy pay scheme is lawful because of a specific exemption in the Employment Equality (Age) Regulations. Larger companies often provide enhanced redundancy pay schemes with bigger payouts than required by the statutory scheme. Like the statutory scheme they generally favour older workers, either directly by reference to age or indirectly by reference to length of service. However unlike the statutory scheme they cannot benefit from the exemption noted above. In order to avoid unlawful age discrimination they must either:-

1. satisfy special conditions set out in the Employment Equality (Age) Regulations; or
2. be objectively justified as a proportionate means of achieving a legitimate aim.

The essence of the special conditions is that the enhanced redundancy pay must be calculated in the same way as statutory redundancy pay except that there is no limit on the amount of week's pay which can be taken into account and the amount may be increased (but not reduced) by applying a multiplier either to the amount of a week's pay used in the calculation or to the result of the calculation.

This may sound fairly simple but in practice company schemes can easily fail to meet the conditions. In summer 2008 there have been at least three such cases and at least one of them also failed to satisfy a tribunal that the age discrimination was "objectively justified". The Employment Appeal Tribunal sent the other two back to the first instance tribunal for that question to be reconsidered in the light of its advice.

In the first case a company provided a redundancy pay scheme under which employees would receive a payment of 3 weeks gross pay for each year's service under 40 years of age and 4 weeks gross pay for each year above it. The scheme was unlawful in that it discriminated against younger staff, did not comply with the conditions noted above and was not objectively justified as a proportionate means of achieving a legitimate aim ([Galt and ors v National Starch and Chemical Limited ET case on 14th July 2008](#)).

The second case concerned the ICI enhanced redundancy scheme. This was quite complicated and again did not satisfy the conditions for exemption from the age discrimination rules. A woman claimed that she suffered from unlawful age discrimination as a result. An employment tribunal found in that case that the discrimination was justified but on appeal the EAT found that the original tribunal had identified legitimate aims which the scheme was designed to achieve but "there had been no proper attempt to determine whether the means adopted were proportionate to those aims, having regard to the significant detriment suffered by the claimant" ([MacCulloch v Imperial Chemical Industries Plc - EAT on 22nd July 2008](#)). The EAT sent the case back for reconsideration.

A week later the EAT remitted another "enhanced redundancy pay case" back for reconsideration of the question of proportionality, this time to a fresh tribunal. In this case a Mr Loxley was excluded from a voluntary redundancy scheme because he had reached the age of 60. Further there were tapering provisions in place between the ages of 57-60. Mr Loxley claimed that the scheme discriminated against him on grounds of age discrimination ([Loxley v BAE Systems Land Systems \(Munitions & Ordnance\) Ltd - EAT on 28th July 2008](#)).

In the latter two cases the EAT set out some general guidelines to help determine whether the age discrimination in any particular redundancy pay scheme can be objectively justified as a proportionate means of achieving a legitimate aim. These can be distilled as meaning that the following matters can generally be taken into account in considering justification, although none will be determinative on its own:-

- creating job opportunities for younger people;
- the amount of pension to which the employee will be entitled;
- whether a trade union approved the scheme;
- preventing a cash windfall shortly before retirement;
- providing extra help for older workers because they may find it more difficult to get other jobs.

For further information click here on [Redundancy / enhanced redundancy pay](#) to go to notes on our website.

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[7. Immigrant workers \(non-EU\)](#)

The next stage of the recently introduced "Points Based immigration system" comes fully into operation in November. This is the new system for assessing whether to allow a non-EU worker into the UK. The parts introduced in November will cover what are known as Tier 2 (skilled workers with a job offer) and Tier 5 (Youth mobility and temporary workers). All immigrants from outside the EU in either of these two tiers will require a "sponsor".

The sponsor will usually be an organisation or an educational institution in the United Kingdom that wishes to employ the migrant or has accepted him/her onto a course. In order to become a sponsor, the organisation will need to be licensed by the Home Office (UK Border Agency). This involves making an application to the UK Border Agency which will carry out checks before deciding whether to grant the licence. A licensed sponsor will be able to issue certificates of sponsorship, which it will allocate to migrants who wish to come to or stay in the United Kingdom to work or study.

To be licensed from the November 2008 start date for Tier 2 and Tier 5 workers, applications must be lodged with the UKBA by the beginning of October 2008. The form of the application, or more accurately the list of documents required to be attached to the application, varies according to the type of organisation applying to be a sponsor - the details are set out in Appendix A to a Home Office document called "[Sponsor Policy Guidance](#)". Application fees for a sponsor licence vary between £300 and £1,000 but are typically £400.

- For further information click here on [Immigration / work permits / a general note](#) to go to notes on our website.

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[8. New cases statutes and regulations](#)

You can find on our website summaries of all employment law cases reported in the most recent editions of the IRLR and ICR Law Reports (the two leading series of law reports covering employment

law cases), of recent employment law related Acts of = Parliament and employment law related Bills currently before Parliament and notes on significant new employment law related secondary legislation (statutory instruments, orders and regulations).

- *For further information click here on [List of cases](#) and/or [Acts of Parliament etc](#) and/or [Bills before Parliament](#) to go to notes on our website.*

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9. and finally

The [Evening Standard](#) reports the shadow business secretary, Alan Duncan, as = saying "Some of the recent employment tribunals have been bonkers".

Apparently he has been particular incensed by two tribunal decisions = this summer. [In one](#) a London hair salon had to pay compensation to a Muslim = woman who was refused a job because she wore a headscarf. [In the other](#) a Scottish woman is taking action against Lothian and = Borders Police because it refused her a Pc post on the grounds that she had poor = eyesight. The woman is claiming discrimination on grounds of disability. =

The Evening Standard says that the Tories are = planning to shake up the system. It says plans being considered include "moves = to impose a fee on any litigant who loses their case at an employment tribunal".

It also points to a [September 2005 Press Release](#) from the CBI reporting that it had = found that firms with fewer than 50 staff settle every employment tribunal = claim despite legal advice that they would win almost half of them.

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