

Consultation on the draft Equality Bill

Second Addendum

Considerations regarding redundancy and the basic award for unfair dismissal

Introduction

1. During a presentation on the Equality Bill there was discussion as to the effect of the age discrimination provisions in the Bill on statutory redundancy payments made under the Redundancy Payments Act 1990 (RPA).
2. Because the consultation document of August 2014 does not specifically deal with redundancy (other than the separate proposal on page 42 to insert an enabling power in the RPA which could be used to abolish rebates by secondary legislation) the Council of Ministers agreed that a supplementary paper should be published to set out the possible consequences of the Bill in respect of redundancy and invite consultees to give their views regarding certain options.

The context

3. The general thrust of the Bill is to make age discrimination unlawful and allow employees to continue to work, irrespective of their age, providing they are capable of doing so.
4. In addition to social justice considerations, protection against discrimination on the ground of age is warranted by demographic factors; as populations age and people live longer in Western European countries it is likely that there will be a general trend for employees and other workers to work longer and for Governments to increase the age at which workers can receive a state pension.
5. The Bill protects employees from being dismissed on the ground of their age (though dismissal of an employee who is not capable of doing his or her job will remain a fair reason for dismissal and an employer can still set a retirement age if it can be justified in certain limited circumstances).
6. If the Government is going to protect employees from being unfairly dismissed on the ground of their age then in order to prevent any circumvention of such employment protection measures it also needs to make corresponding changes regarding to the law on redundancy.
7. Since 2011 it has been unlawful to retire workers in the UK on the ground of age or to set a retirement age unless it is a proportionate means of achieving a legitimate aim. The experience of most employers in the UK is that the majority of older workers still wish to retire round about the age they would have retired without the additional employment protection and, where they choose to work on, employers will allow them to do so.
8. The removal of the default retirement age does not in fact appear to have caused any significant problems. There has been no discernible rush of employment tribunal claims

in the UK arising from alleged forcible retirement of older employees or from difficulties related to the performance management of older employees.

9. In view of the UK's experience, the effect of removing the existing exclusion of older employees from being able to claim a redundancy payment is expected to be limited. However, because of differences that currently exist between the statutory redundancy payments systems in the Island and the UK, certain issues do need to be considered.

Existing redundancy law in the Isle of Man

10. An employee with at least two years' continuous employment who is dismissed because of redundancy or laid off or kept on short time for a certain time, is, with certain exceptions, entitled to be paid a redundancy payment by his or her employer.
11. An employee who is, at the date of dismissal, past an employer's normal retirement age of less than 65 (which must be the same for both men and women) or, if there is no such age the age of 65, has no entitlement to a statutory redundancy payment.
12. Where an employee is within 12 months of attaining age 65, the redundancy entitlement is reduced by one-twelfth for each complete month expired since his or her 64th birthday with the amount reducing to nil at age 65.
13. The amount of a redundancy payment is one week's pay, up to a maximum amount which is prescribed by Order, currently £480, for each complete year for which the employee has been continuously employed.
14. There is no maximum number of years which can be taken into consideration.
15. A small employer who makes a statutory redundancy payment to an employee is currently entitled to a rebate from the Manx National Insurance Fund of a certain proportion of the payment, subject to certain administrative requirements. A small employer is one whose workforce, with that of any associated employers, is not more than 40. The amount of the rebate is between 30% to 60% depending upon the size of the employer.

Effects of the Equality Bill on redundancy

16. The Bill will make significant changes to the existing redundancy regime.
17. Firstly, as in the UK Equality Act 2010, the age limit for an employee to receive a redundancy payment will be removed.
18. Secondly, as mentioned in paragraph 2 above, the consultation on the Equality Bill includes a question about the insertion of enabling powers into the RPA which would permit the system of redundancy rebates to be discontinued (as has long been the case in the UK).
19. The Department of Economic Development (DED) considers that because of the proposed changes at 17 and 18, in order to prevent redundancy payments from being unduly onerous on employers it is appropriate to extend the scope of the consultation to

seek views as to whether statutory redundancy payments should be subject to a cap as they are in the UK (see 21 below).

20. Any proposal to cap redundancy payments could, if viewed in isolation, be seen as retrograde to employees' interests. However, when seen in the context of:
- (i) an extension of the eligibility of older employees to be able to claim a redundancy payment and unfair dismissal; and
 - (ii) the considerable extension of employment protection which the Equality Bill will bring,
- then it is considered that the proposals are fair, balanced and reasonable.

Comparison of UK and IOM Redundancy regimes

21. In the UK, calculation of redundancy payments is based on a scale, working backwards from the date of dismissal:

- for each year of reckonable service from the age of 41 – 1½ week's pay;
- for each year of reckonable service from the age of 22 – 40 – 1 week's pay;
- for each year of reckonable service below the age of 22 – ½ week's pay.

The maximum service taken into account is 20 years and the maximum amount of a week's pay to be taken into account is currently £464 (i.e. slightly lower than in the Island) so that the maximum overall redundancy payment in the UK is £13,920 (30 weeks' pay).

22. By way of comparison, there is the potential for employees in the Island who have very long service with their employers to receive a significantly higher redundancy payment than they would receive in the UK. For example, an employee with 35 years' service would currently receive £16,800 (35 x £480) and, particularly with the changes to be made by the Equality Bill in respect of age discrimination, longer periods of service and some higher redundancy payments are possible (though see 7-9 above).

23. In addition to imposing a cap, the UK system is more sophisticated than the Island's system in that it takes account of how old a person was when he or she was made redundant and then applies a factor to the value of a week's pay varying from .5 to 1.5. The factor is intended to take account of how difficult it is likely to be for a redundant employee to obtain another job.

24. If the Island were to change its redundancy system there are a number of possible variations on the existing system and / or the UK system that could be adopted. These are set out at b) below.

Other changes that would flow from changes to the IOM regime

25. If the Island were to move towards a new redundancy payment framework then it would be logical to make two additional changes.

26. Firstly, in both the UK and the IOM, the Basic Award for Unfair Dismissal, one of the elements of the compensation order¹ that a Tribunal can make upon a finding of unfair dismissal, is calculated on an identical basis to redundancy payments. To keep the two systems of payment in step, any change to the system of redundancy payments would need to be accompanied by the same change to the basis of calculation of the Basic Award.
27. Secondly, the UK allows for the provision of enhanced contractual redundancy payments by an employer provided that the employer uses the UK statutory redundancy payment scheme as the initial basis of calculation. (Where the employer uses any alternative system this may constitute unlawful age discrimination). If the Isle of Man adopts the UK system of payments then it would be logical to also adopt this rule.

Possible options for the Island

28. It is considered that the main options for reforming the existing redundancy system and the Basic Award for Unfair Dismissal are as follows:
- a) The DED could retain the existing system (1 week's pay for each year of continuous employment) but extend entitlement to older employees;
 - b) DED could adopt the UK system in which a maximum of 20 years is taken into consideration and a maximum of 30 weeks' pay can be awarded;
 - c) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 20 weeks' pay;
 - d) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 26 weeks' pay;
 - e) DED could retain the IOM system but extend entitlement to older employees and impose a cap of 30 weeks' pay. (The maximum number of weeks' pay would be the same as the UK, albeit that it would take half as long again as in the UK for an older worker to be eligible for the maximum payment).

Questions for consultees

- A1. Do you have any comments on the proposal to remove the age limit on older employees being entitled to claim a redundancy payment?
(NOTE: this will be the effect of the draft Bill)**

¹ Upon a finding of unfair dismissal the compensation regime is as follows:

- a **basic award** of one week's pay for each completed year of continuous employment up to the effective date of termination, (subject to reduction if that date was after the employee's 64th birthday though the Equality Bill will remove the reduction);
- a **compensatory award** based on the employee's loss, including any expenses reasonably incurred in consequence of the dismissal and any other benefits including pensions that might reasonably have been expected but for the dismissal; the award must not exceed a fixed maximum (currently £50,000) except in health and safety and whistleblowing cases;
- a compensation for **injury to feelings award**, if the Tribunal thinks it just and equitable, up to a fixed maximum of £5,000 (though such payments are seldom awarded).

A2. If the age limit for claiming a redundancy payment is removed which system should be used for calculating redundancy payments and the Basic Award for Unfair Dismissal? (please choose an option from paragraph 28 above or suggest an alternative system).

DED/Cabinet Office
10/10/14