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Pension contributions and References

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Employers' pension contributions

One of the recipients of these Briefings has asked me whether an employer is legally obliged to keep paying into a pension fund as part of an employee's remuneration package where the employee chooses to keep working beyond what was the previous "normal retirement age"?

I am afraid this query raises more questions than answers!

As I expect you are by now aware, as from last April the default retirement age (65) was abolished, and an employer is no longer entitled to dismiss an employee simply because they have reached what might have previously been a fixed retirement age.

Employers must now objectively justify any decision to dismiss an employee, and cannot simply do so because they have reached a certain age.

Otherwise they face the prospect of a discrimination claim.

In addition, if objective justification is not possible, then that employee retains his or her entitlement, which **may** include the right to continue to have pension contributions paid beyond what was previously the retirement age.

What if the pension scheme prohibits membership after a certain age? In fact, the Equality Act makes it unlawful for trustees of occupational pension schemes (as well as employers) to discriminate against scheme members and potential scheme members on the basis of their age.

Some schemes have different contribution levels and different entry and retirement ages.

You may remember that in an earlier e-brief (our seventh) I pointed out that insured benefits such as life assurance and private medical cover can be stopped beyond the greater of 65 years or the state pension age.

That would not seem, however, to apply to pension contributions.

It all really depends on what can be "objectively justified", so I suspect that there isn't a "one answer fits all" solution to this, and it may be necessary to consider the provisions of the pension scheme in question.

As always, we are happy to provide advice on specific cases.

Later this year auto-enrolment into pension schemes is set to come into force for employers above a certain size, and therefore in those cases it may be difficult to justify not continuing to pay pension contributions.

References

We are often consulted about these by employers and employees.

There is a natural tension between the position of the employer and that of the employee – the employer wanting not to end up being sued for a reference provided; and the employee wanting to ensure that he or she gets as many complimentary remarks included in it as possible.

But is an employer entirely safe if all he does is to either refuse to provide a reference at all, or (more likely) to limit it to a bald statement of the position the employee held and the period of employment?

A recent case in the Court of Appeal has suggested that, depending on the facts, it might even be negligent for an employer to give a purely factual reference!

Let us say that the employee in question has, in the past, had performance issues, and these are ongoing when he leaves the employment.

What should an employer say in such circumstances?

The golden rule is that a reference must be true, fair and accurate.

In this recent case the employer, entirely honestly and accurately, in providing the reference and in some conversations with the prospective new employer, drew attention to the unresolved issues, but explained that the employee had left his position before the conclusion of any process.

That approach was upheld by the Court of Appeal, which found the reference to be fair - thus meaning that the employee's claim for compensation against his former employer failed.

The Court found that the reference and what was said were both true and accurate, but also fair because, in a telephone conversation between the employer and the prospective future employer, the employer not only explained precisely what the situation was with regard to the disciplinary process, but also drew attention to the employee's good points.

I return to my initial point: is it fair to refuse to give a reference or to insist on only providing a "bare" one?

It is not beyond the bounds of possibility that there could be circumstances where that could be said to be unfair, if it could lead to nuances or innuendos being drawn by any prospective employer.

For example, the future employer might feel that the only reason that a reference is being refused or limited is because there is something that the previous employer knows to the detriment of the employee.

It is therefore important for an employer not to do anything that might give rise to such a feeling!

These cases tend to be "fact sensitive", so it is important to take advice on any particular situation.

BILL FUDGE
For and on behalf of Sharman Law LLP

Note: the information in this note is for general and illustrative purposes only and should not be relied upon as legal advice. Sharman Law LLP would be happy to provide specific legal advice on any particular problem that you have.

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