

The end of the road for retirement?

Many of you will be aware that the default retirement age ("DRA") is due to be abolished on 1 October 2011, with the last date for serving new notices of retirement being 5 April 2011. Whilst there are immediate implications of this (employers need to act quickly if they have any employees they are considering retiring under the current rules), the longer term implications are of more particular concern to charities.

In the future, charities will have to make a choice between setting an internal fixed retirement age (and justifying it) or deciding to address any potential dismissals of older employees on a case by case basis relying upon one of the other potentially fair reasons for dismissal (such as capability, for example). They will also need to consider whether their contracts and policies need amending in light of the changes, for example to remove references to a fixed retirement age.

Even if an employer sets a fixed retirement age, retirement dismissals at that age will not necessarily be fair or free from the risk of an age discrimination claim. A fixed retirement age would need to be objectively justified as being in pursuit of a legitimate aim and be a proportionate means of achieving that aim.

In short, to rely on a fixed retirement age employers will need to show:

- they have a real business need for choosing that particular age (one which will satisfy the courts)
- the age they have chosen actually meets that need; and
- it is a proportionate means of achieving the aim.

The types of business needs which the courts have been willing to accept as legitimate aims include workforce planning, facilitating

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the retention and recruitment of younger employees and "having an age-balanced workforce and intergenerational fairness or sharing job opportunities amongst the generations". However, whether or not an aim is legitimate will depend on the particular circumstances of each employer and therefore it is not possible to say with certainty whether a particular fixed retirement age will be justified. No doubt there will be a flurry of case law on this issue in the next couple of years.

Many charities are choosing to operate without a fixed retirement age going forwards, and instead to address any performance or health issues in the same way as they would for employees of any age (and to ensure that such issues are being dealt with in the same way across the organisation to avoid being perceived to be targeting older employees). This does not prevent employees from taking voluntary retirement, or employers from holding workplace discussions about employees' future plans, provided that such discussions are held with all employees (perhaps as part of the annual appraisal system) and that the issue is addressed by way of asking open questions rather than by making comments or assumptions which could be regarded as discriminatory.

Although the abolition of the DRA does not necessarily mean the end of the road for retirement, it does mean that the comparatively safe route for compulsory retirement at 65 will no longer be an option, and this means engaging in some internal scrutiny and decision making about the future now.

For further information please contact **James Simpson** on **01865 781000** or **james.simpson@henmansllp.co.uk**.



Charitable incorporated organisations update – Win win deferred

We said in our last newsletter that the CIO was at last due to arrive. The Charity Commission has indeed just published more detailed guidance and draft forms of constitution. However the guidance makes it clear that there will be a further delay before the government puts in place detailed regulatory provisions.

It is not clear when the government will do its bit, but new charities should be aware of the further delay and think seriously about forming as a company limited by guarantee if their activities are about to

start and will put the trustees at risk of personal liability. Established unincorporated charities should be aware that even when the CIO is in place priority will be given to new organisations and that the best way of mitigating any concerns about personal liability may continue to be the company limited by guarantee for a while yet.

For further information please contact **Robert Foster** on **01865 781203** or **robert.foster@henmansllp.co.uk**.

A sporting chance?

Sport has not always been charitable. While it has always been recognised as a good cause, in the legal context sport has either needed to establish its credentials within the charitable purposes of education, the relief of poverty or (since 1958) social welfare through the provision of recreation facilities or to carve out a distinctive niche among the other purposes beneficial to the public. Charities Act 2006 changed this by including the advancement of amateur sport in its list of charitable purposes, defining sport as 'sports or games which promote health by involving physical or mental skill or exertion'.

The Charity Commission is now consulting on guidance about the implications of this change. While the results may never create the media (and legal) furore surrounding public schools and other fee-charging charities, the importance of sport to communities and particularly among young people means this guidance will affect a far larger number of people and organisations.

The process began with reviews of the public benefit offered by a leisure trust, a community football club, a playing field charity and a tennis club. These gave the Charity Commission the chance to look at a number of awkward areas such as charities owing their existence and viability to public funding via contracts, membership structures, eligibility based on ability, and excessive private benefit both for beneficiaries and for sponsors. However, the issue that caught the

Charity Commission's eye was the potential for subscriptions charged by a tennis club to exclude the poor. The immediate outcome is that charitable sports clubs need to look at their access arrangements and ensure, for example, by offering cheap off-peak membership or pay and play arrangements, that the less well off can afford to take part.

The other development which sets the context for the review is the recognition of Hitchin Bridge Club as a charity. This highlights the charitable status of bodies encouraging mental skills. By extension it also highlights the question of where (if at all) you draw the line between bridge, poker and Angry Birds.

Among the particular questions which should be clarified in the consultation are whether a sport can promote health through skill rather than exertion, what 'amateur' means in the context of full-time grant funded sportsmen, how broad spectrum activities such as cycling (which is a means of transport, a family recreation and a competitive sport) fit in and whether an online 'community' is entitled to the same treatment as a traditional one.

Robert Foster is a member of the Charity Law Association working party on the consultation. If you would like to feed in to the consultation or discuss any other matter with him please contact him on **01865 781203** or by email, robert.foster@henmansllp.co.uk.

Charity land transactions : A minefield for the unwary

When dealing with charity land trustees, and their professional advisers, must take great care not to fall foul of the Charities Act 1993; it can only be a matter of time before s.36 of the Act makes another appearance in litigation before the highest courts in the land.

In the case of *Bayoumi v. Women's Total Abstinence Educational Union* (2003) the courts held that where a charity disposing of land fails to comply with the procedure set out in the Act, before exchange of contracts, then the contract will be void - neither seller nor buyer can enforce the contract.

Section 36 of the Act obliges charity trustees to obtain and consider a written report from an independent surveyor on the terms of any proposed disposal of land owned by the charity. The report must comply with statutory requirements and, if the report recommends advertising the proposed disposal, the trustees must then do so in accordance with the report. Only after consideration of such a report, and having then concluded that the disposal terms are the best reasonably obtainable, can the trustees proceed with the transaction.

In the *Bayoumi* case, the charity exchanged contracts to sell its former headquarters to P for £3.2m. Days later P sold the benefit of the contract to Bayoumi for £450,000. Before exchange, the charity's solicitors had assured P that the charity had complied with the requirements of s.36. In fact the charity had not and therefore the charity had acted unlawfully in entering into the contract. The contract was void and the charity could not be forced to complete. The charity's solicitors' representations regarding s.36 were of no help

to the buyer and the third party protection provisions in s.37 only apply following a disposition i.e. completion (transfer of the property) not exchange of contracts.

Key Points

- Until (and if) *Bayoumi* is overturned, or the Act amended, the principle of protecting charity land assets from improper disposal overrules the rights of innocent contractual purchasers. On completion of the disposition the position is reversed and the innocent purchaser is protected from the unlawful acts of the charity trustees (s.37).
- For the contract to be binding all the statutory procedures must have been complied with before the contract is exchanged.
- In the *Bayoumi* case the charity escaped a bad bargain, but in other cases buyers have reneged without penalty leaving the charity nursing significant losses.
- Failure to comply with the statutory procedures will constitute breach of trust by the charity trustees and this may lead to financial consequences for them. The Women's Total Abstinence Education Union trustees had a lucky escape - other trustees who fall foul of the Act might not be so lucky.

For further information please contact **George Awty** on **01865 781155** or george.awty@henmansllp.co.uk.

