

# The LA employment alert!

OCTOBER 2009

IN THIS ISSUE:

**Dismissing employees  
with less than 12 months  
service - the dangers**

The Employment Alert is intended to assist you in identifying potential problems which should ring alarm bells and on which you should seek specific advice. It is not intended to be an exhaustive statement of the law or a substitute for seeking specific advice. LA is regulated by the Solicitors Regulation Authority. A list of members is available on request.

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Plus:

- Retirement at 65
- Sickness and holidays
- Independent safeguarding goes live
- Q & A

 LesterAldridge LLP

# Retirement dismissals at 65 – lawful (for the time being)

In a judgment handed down on 25 September the High Court has stated that the default retirement age of 65 is lawful.

3 days before the High Court hearing the Government announced that it was bringing forward to 2010 a review of whether the default retirement age of 65 should be changed or abolished.

The Court emphasised in its judgment that the Government's announcement was a key factor in its decision. The judge went on to say:

"I cannot presently see how 65 could remain as a default retirement age after the review....."

In view of the judge's comment and the Government review, it seems very likely that the default retirement age of 65 will soon be gone. It remains to be seen whether it is raised to 67 or 70 or some other age or simply scrapped altogether.

We will keep you updated.

For the time being, you can continue to retire staff at 65 without the risk of an unfair dismissal or age discrimination claim - providing you follow the statutory procedure!

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## Dismissing employees with less than 12 month's service - is it safe?

The qualifying period for bringing a claim of unfair dismissal is currently one year.

Very often, therefore, it is possible to dismiss an employee whether for misconduct, performance or other reasons, without the risk of a claim. But, in certain circumstances, claims can be brought without this qualifying period.

We set out these circumstances here – you might want to pin this to your wall!

No qualifying period of employment is required in unfair dismissal cases if the dismissal is for one of the reasons shown right.

NB: Please note that this list just relates to unfair dismissal claims (a number of other claims including Discrimination claims can be brought without any qualifying period of service) and in any case where dismissal is contemplated, whatever the period of service, legal advice should be taken.

List of circumstances where the minimum qualifying period for claims of Unfair Dismissal does not apply

- Dismissal related to pregnancy, childbirth, maternity leave, paternity leave, parental leave, adoption leave or dependant care leave.
- Dismissal of a protected shop worker or an opted-out shop worker or betting worker who refuses Sunday work.
- Dismissal for e.g. "whistle blowing" in health and safety related cases.
- Dismissal in connection with the 1998 Working Time Regulations.
- Dismissal of an employee who is a trustee of his employer's pension scheme for performing his functions as such.
- Dismissal of employee representatives for performing their functions as such.
- Dismissal for making a protected disclosure.
- Dismissal for "assertion of statutory rights" (to receive pay slips, rights connected to TUPE, minimum notice etc).
- Dismissal for insisting on being paid the National Minimum Wage.
- Dismissal for enforcing rights under the Tax Credits Act 1999.
- Dismissal in connection with making a request for flexible working.
- Dismissal for taking time off for jury service.
- Dismissal in connection with activities under the Information and Consultation of Employees Regulations 2004.
- Dismissal in connection with national and European works council activities.
- Dismissal for exercising rights under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.
- Dismissal for exercising rights under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.
- Dismissal in connection with trade union recognition.
- Dismissal in connection with protected industrial action.
- Dismissal on grounds related to trade union membership, non-membership or activities, including selection for redundancy on those grounds.
- Dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing.

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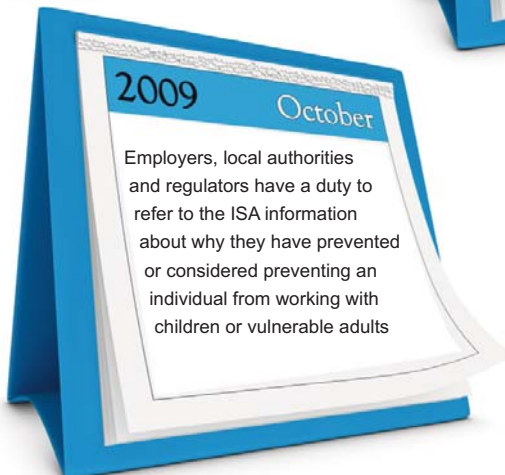
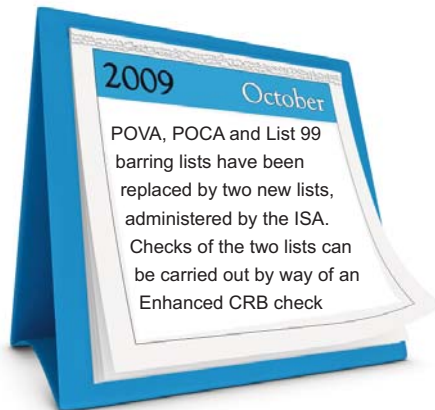
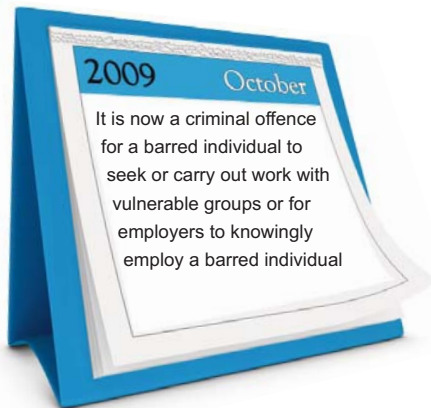
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# Independent safeguarding goes live

The following changes introduced by the new Vetting and Barring scheme in relation to protecting children and vulnerable adults came into force on 12 October:



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“This decision is bad news and leaves employers open to abuse by unscrupulous employees”

## Sickness and holidays

In the case of *Pereda v Madrid Movilidad SA C-277/08* the ECJ has come up with an extremely controversial decision.

They seem to have decided that if an employee books a holiday and then becomes ill so he is unable to take the holiday, or if he becomes ill while absent on holiday, the employer is obliged to provide an equivalent period of holiday at a later date.

Some employers already allow “compensatory” holiday to be taken, often on a discretionary basis, but most do not. This decision is bad news for them

and leaves employers open to abuse by unscrupulous employees who return from a week in Tenerife looking fit and well but claim to have spent the whole week ill in bed.

The good news (for the private sector) is that the decision only affects the public sector - unless the Government amend the Working Time Regulations, which is unlikely.

# Q&A

**On 13 October one of our Managers asked for the day off on 26 October – under Employment Rights Act 1996 s57A(1)(d)**

**Apparently, a few days earlier her child-minder told her she could not work on 26 October and she is unable to make alternative arrangements.**

**We have refused her request.**

**She took the day off anyway. Can we discipline her?**

**Answer**  
No.

This situation is very similar to a fairly recent case involving RBS.

In that case, the Employment Tribunal and, on appeal, the EAT found that the employee had been entitled to the time off and had been subjected to a detriment when she was disciplined for exercising that right.

EAT said that the key elements of the right are that a worker can take such time off as is necessary to deal with unexpected disruption to care for dependants.

The right is not limited to sudden or unexpected emergencies.

In that case the employee had two week's notice but the EAT still found the time off was necessary.

The amount of time between the employee becoming aware of needing the time off and the actual date and efforts made to look into alternative arrangements will be important considerations in deciding whether the time off was necessary.

The more time the employee has to make alternative arrangements, the less likely it will be that it was necessary to take the time off.

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