McDermott Will & Emery

Employment Alert No 186: Employer's Charter: A Health Warning

January 28, 2011

Background

On 27 January 2011, the Department for Business Innovation & Skills ('DBIS') published an "Employer's Charter". The Charter is a list of 11 things that DBIS says employers can do "as long as you act fairly and reasonably", including:

- Making an employee redundant if your business takes a downward turn;
- Dismissing an employee for poor performance;
- Rejecting an employee's flexible working request if there is a good business reason; and
- Asking an employee about their future career plans, including retirement.

We have included a link to the full Charter in the covering email to this Alert.

A health warning

The Employer's Charter needs to be treated with considerable caution: it has not changed the law in any way.

By way of example:

- To avoid unfair dismissal claims: (i) redundancies still require a proper consultation process (and consideration of suitable alternative employment); and (ii) performance dismissals should be made following a proper performance management process.
- When rejecting an employee's flexible working request, employers often need to consider the possibility of an indirect sex discrimination claim. Could you persuade a Tribunal that refusing the request was a proportionate means of achieving a legitimate aim?
- Once the default retirement age is abolished in October this year, any discussions about retirement would need to take place across the whole workforce. Asking only older employees about retirement plans might be used in support of evidence of an age discrimination claim (and could potentially constitute unlawful harassment on the grounds of age).

What does this mean for employers?

Nothing has changed. You should continue to follow best practice in all of your HR decisions and processes.

Consultation

On 27 January 2011, the DBIS also started consulting about whether or not to make changes to employment law, including: (i) increasing the qualifying period for unfair dismissal rights to two years; (ii) introducing additional financial penalties (payable to the Exchequer) for employers who lose claims; and (iii) requiring all claims to be submitted to

ACAS for conciliation before any claim is issued. We have also included a link to the consultation in the covering email to this Alert, for any of our clients who wish to respond. We will keep you up to date with any developments, but for now, again nothing has changed.