

Working without the default retirement age



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Introduction

When age discrimination legislation was first introduced in 2006, it allowed employers to retire employees compulsorily at or over the default retirement age (“DRA”) of 65 as long as they followed a statutory retirement notification procedure.

Following consultation in 2010, the Government abolished the DRA entirely with effect from 6 April 2011. Without it, requiring an employee to retire at any age will amount to age discrimination, unless objectively justified. It may also amount to an unfair dismissal.

This Inbrief explores the practical implications of working without the DRA.

Options for employers post 5 April 2011

Since the removal of the DRA, employers have had two options:

- Retain a retirement age (either the existing age or another) and seek to justify it if challenged; or
- Remove the retirement age and proceed without the ability to require employees to retire at a given age

ACAS has published useful guidance, “Working without the default retirement age”, which provides advice to employers on their options.

Retaining a compulsory retirement age

Employers who retained a compulsory retirement age for employees (or particular categories of employees) could face successful claims of age discrimination and unfair dismissal, unless the retirement age can be objectively justified.

The employer must demonstrate that the retirement age is a proportionate means of achieving a legitimate aim and that the decision to apply that retirement age to the employee in question is also justified.

There is little guidance as to what might be regarded as sufficient justification for a retirement age although ACAS guidance, European and UK case law have suggested the following *may* be legitimate aims:

- workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession)
- the health and safety of employees, their colleagues, or the general public
- ensuring an age-balanced workforce and intergenerational fairness (i.e. sharing jobs amongst the generations)
- ensuring a high level of service and continued competence
- maintaining a collegiate workforce/avoiding undignified performance management of older employees (but see below regarding performance management and stereotypical assumptions)

The Government, however, has stated that there would be only “*limited cases*” where retirements are essential and a compulsory retirement age could be retained.

In order to justify a compulsory retirement age, it is vital for the employer to have clear and cogent evidence, demonstrating the reason(s) for adopting a particular age. It will have to demonstrate why that particular retirement age was chosen, and that there is no less discriminatory way of achieving the same result.

The employer will still need to follow a fair retirement procedure to avoid an unfair dismissal claim. ACAS guidance recommends that the employee should be given adequate notice of their impending retirement and that employers should consider requests to stay on beyond the compulsory retirement age as an exception to the general policy, if circumstances permit.

Removing a compulsory retirement age

For employers who decided to remove the compulsory retirement age, employees will either end their careers when they choose, by resigning, or the employer will have to dismiss them, on fair grounds and following a fair procedure.

Regardless of whether employers retained or removed the DRA, both approaches have important implications for employment practices.

Recruitment

The provisions allowing an employer to refuse to employ a person who is within six months of the DRA were also abolished in April 2011.

As a result, employers who have no retirement age will need to consider all job applications regardless of age, unless directly or indirectly discriminatory job requirements can be justified. To avoid claims of age discrimination in recruitment, employers should ensure that job advertisements do not contain wording which could be construed as discriminatory; that candidates are selected for recruitment using transparent and objective written selection criteria; and that recruitment decisions are documented.

If an employer *can* justify a retirement age, it is

likely that it would also be able to justify refusing to employ people who have already attained that age, or who are very near to it.

Performance management

The Government has emphasised that for most types of work there is no link between age and performance. Assumptions that performance declines with age should be avoided. However, some employers may in the past have avoided having performance discussions with older workers because they would soon be retiring or because they thought it would be an undignified way to treat a person nearing the end of their career. For employers who have not retained a retirement age, it is particularly important to ensure that performance concerns are managed appropriately, whatever the age of the employee.

Employers should check that they have clear and robust performance management processes and apply them consistently. Such processes could include:

- identifying performance issues at an early stage
- establishing whether any training or development may assist
- agreeing targets
- adopting appropriate review periods

Workplace discussions

Employers without a retirement age may still want to ask their older workers about their retirement plans so that the employer can plan accordingly. Concerns have been expressed that such conversations could amount to age discrimination, unless objectively justified.

To avoid inferences of discrimination, employers may want to consider having “workplace discussions” with all employees, either incorporated into their appraisal process or in a separate meeting. The advantage of this approach is that it does not target a particular age group and is actively encouraged by ACAS in its guidance.

The questions asked in workplace discussions would not need to be identical for every employee, but employers should avoid asking direct questions to older workers which could

be seen as discriminatory (whether on age grounds or otherwise). ACAS has recommended asking employees open questions about their short, medium and long term plans and aims. If an older worker indicates in these conversations that he/she is considering retirement then the employer can have more detailed discussions about this.

If employers do wish to have workplace discussions then written records should be kept to avoid disputes in the future.

Flexible working

If an employee indicates that he/she is considering retirement, this may prompt a discussion about changes in working hours leading to retirement. However, employers may face age discrimination claims from younger employees if flexible working arrangements are granted to employees considering retirement but not to other, inevitably younger, employees. Flexible working requests should be treated consistently and take account of business needs. However, it is possible employers would be able to justify differences in treatment, particularly if the flexible working arrangements are for a limited time only.

Ill health

Whilst employers should not make assumptions about the health of older workers, in general terms health will decline with age to varying degrees. As a result it is possible that employers who have removed their retirement age may have to deal with an increased number of ill health issues in the workplace.

Such cases would need to be managed carefully, especially if the employee’s condition amounts to a disability protected by discrimination legislation. Employers have a duty to make reasonable adjustments for disabled employees.

Employers may be able to dismiss employees on ill health grounds. However, to avoid successful claims of unfair dismissal and disability discrimination (if applicable), employers will need to have strong grounds to dismiss and follow a fair process. This will include obtaining medical evidence regarding the employee’s condition, considering the employee’s prognosis and the requirements of the business and

consulting with the employee before making any dismissal decisions. Where an older employee is dismissed on health grounds, the employer may also face claims of age discrimination. Employers will need to show that they would have treated any employee with the same ill health issues in the same way, regardless of age.

Terms and conditions and insured benefits

Employers may not adopt less favourable terms and conditions of employment for older workers, unless justified. However, following concerns that were raised during the consultation regarding the abolition of the DRA, the legislation provides that it is not age discrimination to provide access to ‘insurance or a related financial service’ only to employees aged under 65 (or State Pension Age, if greater).

While the State Pension Age is still 65, the exemption itself only applies to ceasing benefits at 65 or restricting benefits to the under-65s. It *doesn’t* expressly cover a situation where an employer already provides a benefit to age 70, for example. In that situation, a 71 year old could potentially bring a claim comparing herself to a 69 year old. This wouldn’t be covered by the exemption so the employer would have to justify in the normal way.

The exemption is also restricted to the insurance/service being provided pursuant to an arrangement between the employer and a third party (the classic insured benefit situation), although there is a specific provision for employers who are in the insurance business, where they can provide their own product. This means that it won’t necessarily cover employers who self insure.

Occupational pension schemes

As with other terms and conditions, employees aged 65 and over should continue to participate in the company’s pension scheme.

The Government has confirmed that the removal of the DRA will not affect occupational pension schemes, which can continue to apply a “normal retirement age” or “normal pension age” at which employees will be entitled to draw their pension. This means that, depending on the rules of the particular scheme, employees may be able to draw their pension whilst continuing to work.

There are further specific exemptions to the age discrimination legislation dealing with pensions, which remain unchanged.

Share schemes

Share schemes often provide that benefits will differ depending on whether the departing employee is classified as a “good leaver” or a “bad leaver”. Retirees are normally regarded as “good leavers”, while employees who resign are regarded as “bad leavers”. This could cause problems for employers who removed their retirement age as anyone who *wishes* to retire will, in fact, resign.

The Government has confirmed that it has no plans to make legislative or other changes to deal with employee share schemes. Accordingly, employers without a retirement age will need to review the rules of the scheme to identify whether any amendments are needed, and to ensure that the rules are non-discriminatory.

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