

Abolition of the default retirement age

Introduction

As of 6 April 2011, subject to the transitional provisions, the default retirement age (**DRA**) was abolished in England, Scotland and Wales following years of lobbying by groups such as Age Concern. This comes in reaction to, amongst other things, the fact that employees live longer and often have a desire to work beyond the age of 65 to increase the amount they have saved for retirement.

Transitional provisions

Following an initial drafting anomaly, which caused a raft of activity within the legal and HR press, the draft Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (**Repeal of Retirement Age Regulations**) were revised and came into force on 6 April 2011. These state that, from 6 April 2011, retirement is no longer a potentially fair reason for dismissal; and any dismissal on the grounds of retirement will potentially be age discriminatory (unless objectively justified) and/or unfair.

Where an employee was served with six to 12 months' notice of intended retirement before 6 April 2011 expiring after the date of the abolition of the DRA (6 April 2011), the 12-month transitional provisions allow retirement to take place lawfully. There are, however, some technical hurdles to be overcome before employers can benefit from the transitional provisions.

The transitional provisions will only apply when:

- an employee has reached the age of 65 (or, if greater, the normal retirement age for the employment concerned) before 1 October 2011

- a notice of intention of retirement was served on that employee on or before 5 April 2011
- the usual statutory notification requirements and time limits relating to that retirement are met.

If these requirements are met, a retirement will continue in the usual way. However, and for the avoidance of doubt, there is no right to give short notice (where two weeks' notice is given) under the transitional provisions.

Following receipt of a notice of intention to retire him, an employee can issue a request not to retire or for an extension to his retirement date. A request must be made three to six months before the intended retirement date (but with a longstop date for making a request being 4 January 2012, ie three months prior to the expiry of a 12-month notice issued on 5 April 2011). The requirement on employers to consider this request remains. The maximum extension that can be agreed under the transitional provisions is six months as, under the Employment Equality (Age) Regulations 2006, any extension longer than six months will require a fresh notice of intention of retirement to be served and it is now clear that the last date for the service of any notices of intention (5 April 2011) has passed. There is no requirement to reissue a notice of intention where an extension of six months or less is agreed.

The last possible date for retiring an employee under the old statutory regime is unfortunately not clear. There are arguments for the last date being either 3, 4 or 5 October 2012 (having allowed a six-month extension to a 12-month notice of intention served on an employee on 5 April 2011) and the Repeal of Retirement Age Regulations are silent on this point.



Employers have an obligation to consider applications from individuals of all ages and if the candidate is not suitable, justify the decision to reject his application.”

Normal Employment Tribunal practice suggests that the correct date is 3 October 2012, however BIS has indicated that the correct date is 5 October 2012. Unless there is further clarification, this point will need to be litigated to become clear.

Justifying a compulsory retirement age

Although the default retirement age has been abolished, it is still open to employers to maintain an ‘Employer Justified Retirement Age’ (**EJRA**) in employees’ contracts, with any EJRA dismissal being carried out on the grounds of ‘some other substantial reason’. But how can an employer objectively justify the use of a retirement age?

An employer must be able to show that the EJRA is a proportionate means of achieving a legitimate aim. A potentially legitimate aim might be:

- encouraging the recruitment and retention of employees by ensuring that opportunities arise in more senior roles within an organisation by requiring the retirement of older workers
- the continued health and safety of other workers and/or the general public
- limiting the need to performance manage older workers whose capacity to work has diminished with age and instead allowing them to retire with dignity
- assisting and allowing for effective succession planning
- reducing the costs of managing older workers within the workforce.

Whatever the potential justification, an employer will need hard evidence to back up any legitimate aim. As ACAS has put it, “assertions alone will not be enough”. An employer will have a far better chance of being able to justify an EJRA if it has an audit trail showing why it considers compulsory retirement necessary and showing that it has also considered alternative options. Possible examples given by ACAS include posts in the emergency services that require a significant level of physical fitness and other occupations requiring exceptional mental and/or physical fitness such as air traffic controllers. However, even where a legitimate aim has been identified, it will be difficult to persuade the Tribunal that the use of a retirement age across

a business is a proportionate means of achieving a legitimate aim. It will help if a pension is available and if the EJRA has been introduced with union agreement. ECJ case law provides some guidance on this issue.

Where an EJRA is adopted, it is suggested that employees should be given adequate notice and should still have the opportunity to make a request to work beyond it, which the employer should consider.

Insured benefits, share schemes and pension schemes

In relation to insured benefits, the Repeal of Retirement Age Regulations helpfully carve out the need for equal treatment on the grounds of age for group risk insured benefits (eg life assurance, permanent health insurance and private medical insurance). These benefits can therefore be withdrawn when an employee reaches the higher of 65 or State pensionable age (currently 65 but rising to 66 in 2016), subject to any possible breach of contract claims.

There has been no change to the legislation regulating company employee share schemes. However, it may be necessary for businesses to revisit their employee share option scheme rules in light of the removal of ‘retirement’ as a potentially fair reason for dismissal. Many schemes allow for retirement to be a ‘good leaver’ reason, whereas a capability dismissal or resignation (eg due to retirement) would almost certainly see an employee exiting the business as a ‘bad leaver’. The same may apply to bonus provisions in contracts of employment or separate bonus scheme rules.

The Government has confirmed that the abolition of the DRA does not affect occupational pension schemes or the setting of a “normal retirement age” under such schemes.



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Recruitment

The Equality Act 2010 allowed employers not to consider applications from individuals aged 64½ (or, if different from the DRA, six months younger than the normal retirement age) or above. This has now been abolished, except where an employer can objectively justify a maximum recruitment age. Therefore, employers have an obligation to consider applications from individuals of all ages and if the candidate is not suitable, justify the decision to reject his application. A decision not to employ an applicant because of his age will have to be objectively justified.

Dealing with older workers

Whilst the DRA has been abolished, this does not mean that employees cannot retire of their own volition; they simply cannot be forced to retire by their employers. They should resign and give the appropriate period of contractual notice. It is essential therefore that honest and open discussions are held with employees about their career plans to try and formulate a mutually beneficial plan for the future and to avoid having to manage older employees if their performance should decrease.

ACAS suggests that regular meetings should be held with all employees and not just those nearing retirement age, to discuss short, medium and long term career aspirations. Building these discussions into a regular framework, such as the appraisal process, should make it less threatening for both employees and management. Other sources have suggested however that directing these sorts of conversations at older workers only is justifiable, although litigation will be required on this point to know for certain. However these meetings are held, it is important to bear in mind that questions need to be couched in the right way to ensure that employees do not feel they are being forced out of the business.

If it is not possible to reach an agreement with an employee about when he will retire, it may become necessary to dismiss an older employee on the grounds of capability if he becomes unable to do his job. Obviously managers need to be aware

of this potential and should treat employees with dignity throughout any performance management procedure and avoid trying to suggest to an employee that his 'time is up'. There should be no assumption that an older worker will not be able to make the necessary improvement. In essence, consistency between the performance management of all workers is essential as it is no longer possible to let an older employee simply coast to retirement if his performance drops, as was possible before 6 April 2011.

Failing to manage an older employee's reduced performance may open up the potential for younger workers to bring claims, ie if a younger worker was dismissed for performance related reasons but an older worker in the same or worse position was not.

Action points for employers

- decide whether the benefits of having an EJRA outweigh the risks of potential litigation (and implement a fair retirement procedure if you opt for an EJRA)
- formalise a procedure through which discussions can take place with employees about their future career plans and aspirations
- brief managers on the need to address performance management issues consistently across the organisation
- think about ways to change the culture of your organisation. Many organisations have not recognised the default retirement age for some time and have built up a culture where age and experience are valuable commodities
- review your contracts, policies and procedures to ensure that they reflect the current legal position



- decide whether it is necessary to amend employee share scheme rules or other schemes that include good and bad leaver provisions
- review the way your organisation deals with the provision of pensions. With employees working longer and new rules requiring employer contributions to be made into pensions for more workers, this could have a financial impact on your business
- decide whether to withdraw insured benefits from those aged 65 and above.

Training

We are able to deliver a training session on life after the default retirement age. If you would like us to run this session in-house for your managers, please email us at info@bondpearce.com.

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