

Briefing Note: Abolition of the Default Retirement Age

An Introduction to the Briefing Note

The Government has recently announced that it intends to phase out the default retirement age of 65 on 1 October 2011. Accordingly, the last date for giving notice of compulsory retirement to any employee already aged 65 or who will be 65 on or before 30 September 2011 is 5 April 2011. Once abolished, employers will no longer be able to rely on the default retirement age to justify the compulsory retirement of employees aged 65 or over and any attempt to do so will potentially give rise to claims for unfair dismissal and unlawful age discrimination.

This briefing note is not intended to provide legal advice and should not be relied upon as such. We recommend that you contact us for advice on your specific circumstances

Briefing Note
March 2011

Summary:

Urgent action may be needed by business owners in advance of changes in April.

For detailed advice on all employment law matters please contact:

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Current Position

Under the current law the default retirement age allows employers to compel employees aged 65 or over to retire without any risk of claims for unfair dismissal or age discrimination provided the prescribed statutory procedure is strictly followed (see below). There is no requirement to justify the decision. Such retirement will be presumed to be fair.

An employer may have a normal retirement age outlined in contractual documents, or as part of a retirement policy or procedure. In the absence of such a policy, the default retirement age of 65 will automatically apply. If the employer's normal retirement age is 65 or above, the policy is deemed to be lawful. If the normal retirement age is below 65, the employer will need to be able to objectively justify it with clear evidence.

Where an employer has a fixed retirement age, an employee has the right to request to work beyond this age. The employer must follow strictly the 'Duty to Consider' procedure. This involves informing an employee in writing of their intended retirement date and of their right to make a request to work beyond this retirement. Employers must give proper consideration to such a request but can reject it without providing a good reason. This notice must be given at least 6 months but no more than 12 months before the intended retirement date.

When is the Default Retirement Age Being Abolished?

The default retirement age will be abolished with effect from 1 October 2011. There will be a twelve month transitional period (6 April to 5 April 2012) so that retirements already in progress can continue through to completion, provided that:

- The notification of retirement is issued prior to 6 April 2011
- The employee is 65 or over on 30 September 2011
- All requirements of the statutory retirement procedure have been met (i.e. the Duty to Consider procedure outlined above has been followed).

The last available date to provide the Notice of Intended Retirement is 5 April 2011. The last effective date of termination for such dismissals must be no later than 4 April 2012.

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Key Implications

Employers will no longer be able to regard 65 as the 'safe' age at which to retire employees. Instead they will have to be able to objectively justify a compulsory retirement at this or, indeed, any other age to avoid liability for age discrimination. Whether employers decide to retain a fixed retirement age or decide when to retire people on a case-by-case basis, they will still have to be able to objectively justify the decision. This is going to be far from easy, especially as retirement will no longer be considered a 'stand alone' fair reason for dismissal. Employers will not only have to justify the retirement age chosen but they will also have to show that retirement was a substantial enough reason to justify the dismissal of an employee holding the position which the employee concerned held.

It will entail demonstrating that it is a legitimate aim to retire employees, or that particular employee (as the case may be), at that age. This aim may be, for instance, to encourage career progression and staff retention within the business, or to avoid undignified capability or performance procedures, if the work is mentally demanding or physically tiring but in such cases evidence must be gathered to establish objectively the justification. In this scenario it is important to avoid against stereotyping... Such an aim must be balanced against the impact on those affected. The chosen age for compulsory retirement must therefore always be a proportionate means of achieving a legitimate aim of the business.

In terms of workforce planning, there will no longer be a clear point at which to have a discussion with older workers about their future plans and when they might cease to work in the business. In the past these discussions tended to take place in the months leading up to an employee's 65th birthday. Employers may therefore wish to review their workforce planning and management processes and when to have such discussions with older staff. We would recommend employers give some thought to introducing a policy or procedure to instigate such discussions so as to avoid the risk of discrimination claims.

Options for Employers

Employers only have two options: abandon fixed retirement ages altogether or else retain a fixed retirement age that will withstand the objective justification test.

If fixed retirement ages are to be retained, the employer will need to be able to justify the retirement age, whether it applies across the business or just in respect of some roles. The employer will have to show that the discriminatory effect of the fixed retirement age is significantly outweighed by the legitimate aim of the policy. In addition, the employer will have to show that it had no reasonable alternative to retirement at that age in order to pursue that legitimate aim. It will be necessary for employers to provide evidence of objective justification - mere assertions alone will not be enough. Most commentators believe that this will be a difficult test for employers to meet, although some will be more able to objectively justify a retirement age than others, for example, air traffic controllers, pilots and firemen. The policy could, for example, give the employer the right to move the employee to a less demanding role when he reaches a certain age.

In considering what might be a legitimate aim, the following factors may be of relevance:

- The need to run a business efficiently
- Training requirements of the job
- Health and safety of employees
- Career progression opportunities

Employers will also have to give detailed consideration to what is a reasonable retirement age, taking into account:

- The nature of the organisation
- The various roles employees perform
- The physical and mental requirements of these roles and
- All other relevant factors.

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It should also be borne in mind that it may not be appropriate to set a single uniform retirement age across the organisation, e.g. if operational reasons will support early retirement for critical/operational staff but not, for example, administrative workers.

If fixed retirement ages are abandoned, the employer will still need to be able to justify the decision to retire a particular employee in any given situation. A fair dismissal procedure must still be followed in relation to all employees. It may therefore be prudent to consider other potentially fair reasons for dismissal such as capability as this may be more applicable. Another significant change is that employees will no longer cease to be entitled to a redundancy payment when they attain the age of 65.

Impact on Benefit and Pension Schemes

The government has indicated that it intends to introduce a specific exemption in respect of group insured benefits such as life insurance, income protection and health insurance. This exemption will permit such benefits to be withdrawn for employees aged 65 or over. The age at which they can be withdrawn will rise in line with the state pension age. The government has also indicated that the abolition of the default retirement age does not affect occupational pension schemes and does not affect the setting of a "normal retirement age" for the purposes of occupational pension schemes. However, it will still be necessary for employers to review their benefits packages to ensure they remain valid. For example, any reference to a now abolished fixed retirement age would have to be reviewed and amended.

Action Points for Employers

- Identify any employees who will be 65 on or before 30 September 2011 and consider whether it is desirable to retire them. If so, instigate the statutory retirement procedure so that Notice of Intended Retirement is served on the employee before 6 April to expire no later than 4 April 2012.
- Mark 5 April 2011 in the diary as the last day on which notices of dismissal under the default retirement procedure may be issued.
- If any intended retirements are planned or have been instigated to take effect after 4 April 2012 these will need to be reviewed urgently and if agreement cannot be reached with the employee to amend their retirement date to fall before 4 April 2012, it may be necessary to serve a fresh notice of intended retirement. Any promotions which have been planned on the back of such retirements may also have to be reviewed.
- If necessary, amend the fixed retirement age specified in the contract of employment or operated as a matter of practice, especially if contracts provide for the automatic termination of employment at the age of 65. If keeping a fixed retirement age, consider what objective justification there is for this. Secure evidence of this.
- Update your Retirement Policy to reflect any changes with regard to the retirement, age and the duty to consider procedure. Consider introducing annual "Staying On" meetings with employees once they reach a particular age or address all employees' future plans during annual appraisals so that a particular section of the workforce is not singled out.
- Tighten up appraisals and performance management across the whole organisation so that older workers are not receiving greater scrutiny than others. It should be possible to demonstrate that performance management criteria is applied consistently, regardless of age. Build discussion about future aspirations and plans into the appraisal process for all employees. It is important to avoid asking questions which could be seen as discriminatory and is best to ask open questions about the employee's plans and aims for the short, medium and long term. Once an employee has indicated that they do wish to retire there is no problem in talking to them about the date for their retirement and any changes they may wish to make to their duties, days or hours in the lead up to retirement.

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- The current statutory provision which allows employees to turn down job applications over 65 or who are 6 months from their 65th birthday will be abolished alongside the default retirement age, meaning that if you fail to recruit someone 65 or over simply because of their age it will amount to unlawful discrimination unless the decision can be objectively justified. Recruitment and Equal Opportunities Policies and Practices may therefore need to be amended.
- Review and renegotiate, if appropriate, any benefit schemes to ensure they remain valid.
- Seek specialist legal advice to assist with the implementation of these changes. Our highly regarded Employment Team will be delighted to assist or answer any questions that you may have.

For further information contact Paul Maynard, Head of Employment Law at Gaby Hardwicke Solicitors.

If you would like to know more about this topic or our other legal services, please contact:

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