

technical factsheet 156

Retirement

Provisions relating to retirement are contained within the Employment Equality (Age) Regulations 2006. They apply to England, Scotland and Wales, with Northern Ireland covered by Employment Equality (Age) Regulations (NI) 2006. The law prohibiting age discrimination came into force on 1 October 2006, with some pension related matters introduced later in the year.

Default Retirement Age

For all employees, the default retirement age is 65, unless the employer can justify having a lower one. The employer may have a higher normal retirement age within its organisation, and some large institution now have a retirement age of 70.

Basic principles

The legislators were swayed by the need for businesses to have certainty about their workforce, by arguments about succession and by other difficulties that would be caused by allowing employees to work as long as they wanted to. This would leave employers having to take the same dismissal action against a person of 70 as they would have to in relation to a much younger member of staff.

The decision was therefore taken to permit a mandatory retirement procedure where, as long as the employer carries out the proper procedure, the retirement will not result in an unfair dismissal or age discrimination claim. A claim was taken to the European Court of Justice in 2008 by a number of charities, such as Age Concern, under the banner of an organisation called Heyday. The claim that was made was that in providing that employers can force retirement at 65 was fundamentally contrary to the European Directive. The claim has not succeeded and the court stated that such a procedure was not unlawful in itself; they have returned the case to the High Court to determine whether the government can show that the procedure is justifiable on social policy grounds in general terms.

How does it work?

The basic principle is that it will **not** be unlawful to dismiss:

- an employee
- a person in Crown employment
- a relevant member of the House of Commons or House of Lords staff

where:

- the person is at or over the retirement age of 65
- the dismissal is by reason of retirement

Where will this be deemed?

- The employee is 65 or over
- The normal retirement age for the position, if there is one, is 65 or over and the employee has reached that age
- The statutory 'duty to consult' procedure has been followed (see below)
- The contract is terminated on the intended day of retirement

There are two potential liabilities for the employer if the procedure is not followed correctly

- age discrimination
- unfair dismissal

The employer avoids liability for age discrimination as long as he fulfils his duty to consult the employee, and even if he does not, as long as he does so by 14 days before the intended date and otherwise complies with the procedure, he will still not be liable for age discrimination. However, it may well be an unfair dismissal (see below)

Exceptions

The following are not covered by the procedural rules, and their dismissals will have to be **individually objectively justified**

- an employee under 65
- an employee who is over 65, is still working, and whose normal retiring age (NRA) was under 65
- where the employer has been guilty of procedural failure
- people who are not employees, Crown employees or House of Commons/Lords staff eg partners in a professional firm

Unfair dismissal

Retirement is deemed fair dismissal if the procedure is carried out and other conditions are fulfilled as above, but if the notification procedure is not carried out by the fourteenth day before the day of dismissal, then the dismissal will be **automatically** unfair.

If early retirement is justified under the age discrimination provisions, the employer will still have to carry out the proper retirement procedure and, if he does so, the dismissal will be neither age discrimination nor unfair.

Note that the one year qualification period remains for unfair dismissal for all relevant purposes.

Statutory Retirement Procedure – the Duty to Consider Employer's duty

The following procedure applies to **employees only**

There is a duty on the employer to notify the employee of

- The date on which he intends the employee to retire, and
- The employee's right to make a request

not more than one year and not less than six months before that date

Where the employer fails to notify the employee of his right to request, that duty continues up until two weeks before the operative date of termination. If the employer has properly provided this notification, then the employee must make a request as laid out below between three and six months before the intended date of retirement. If the employer does not provide this notification, then the employee can make his request at any time in the last six months before the intended date of retirement.

Statutory right to request not to retire

An employee can make a request in writing not to retire on this intended date – s/he can request that the employment continue

- Indefinitely, or
- For a stated period, or
- Until a stated date

The meeting

An employer must hold a meeting to discuss the request within a reasonable period after receiving it. The employer and employee must take all reasonable steps to attend the meeting. The employee has a right to be accompanied at that meeting which is the same as that enjoyed by employees undergoing a disciplinary, other than that s/he has no right to be accompanied by a trade union (TU) representative who is not a co-worker. There is an award of no more than 2 week's pay, capped currently at £350pw for a failure to allow the employee to be accompanied

There is no need to hold a meeting if, before that reasonable time elapses, the employer has already agreed to extend the employment indefinitely or for an agreed time, which the employer has confirmed by notice to the employee.

If it is not practicable to hold a meeting within that time frame, the employer complies with this duty if he considers any representations made by the employee.

The employer will give notice of his decision as soon as is reasonably practicable after the date of the meeting, and that notice will specify the length of the extension, if it is not indefinite. If the employer says no, there is no requirement to give any reasons – he simply states that the employer wishes to retire the employee on the date on which the retirement is to take place.

Appeal

The employee is entitled to appeal if his/her request is refused, or s/he gets a shorter extension than s/he wanted. This appeal should be held within a reasonable period after the employee gives notice (in writing and dated) that s/he wishes to appeal, and similar rules apply in relation to appeals as to first meetings above. Again there is no requirement to give reasons, and no requirement that the person hearing the appeal should be more senior than the one that presided over the first meeting.

A failure to follow this procedure will result in a compensation payment not exceeding eight weeks' pay. If an employer is so late with his procedures that the intended date of retirement arrives before the meeting and appeal take place, then the dismissal is not effective and the contract of employment continues until the day after the procedures are complete, which is now the deemed intended date.

There is no need to hold a meeting when:

- Before the end of the period when it would be reasonable for a meeting to be held, the parties agree to continue the employment indefinitely, or for a stipulated period, and the employer gives the employee notice of that, or
- It is not reasonably practicable to hold a meeting and the employer considers the employee's request without a meeting, considering any representations made by him

There is no need to go through the retirement procedure again if:

The extension agreed on the intended date is six months or less – in this case the agreed extension will be worked and the retirement take place on the agreed date without further procedural requirements.

Early retirement by consent

This has always been regarded in law as a consensual termination and not a dismissal. However, it is suggested that it is a good idea to go through the statutory procedure in relation to these people to be on the safe side.

Workers and age discrimination

The provisions in relation to retirement only apply to employees and therefore where an employer is seeking to retire agency workers, or casuals or other workers operating under contracts for personal service, they will have to justify the retirement.

This is particularly interesting in relation to **partners in a partnership**. They are not employees and are not covered by the provisions. It seems likely that general retirement at the same time as everyone else ie 65, would generally be reckoned to be justifiable, but retiring people earlier than that may well be a problem. A recent case in the Employment Appeal Tribunal reversed the decision at first instance that having a retirement age of 65 in a small firm of solicitors was objectively justified. Although the firm had a potentially legitimate aim in maintaining a congenial culture by limiting the need to expel partners through performance management, that did not justify a retirement age of 65 in the absence of evidence that performance tended to decline at that age. It would therefore be advisable for partners to remove any mandatory retirement age in their partnership deeds, unless they feel able to justify it by reference to their particular firm.

Normal retirement age (NRA)

If an employer has an NRA of under 65, even where he does not **in fact** retire anyone before that date can lead to difficulties. The net effect is far from clear, but the safest approach to take seems to be to ensure that everyone has a NRA of at least 65, to be on the safe side.

Letting employees carry on beyond their retirement age

There is a danger here – such employees may be retired in accordance with the statutory scheme with no danger of an allegation of age discrimination or unfair dismissal, but the other discrimination strands eg disability, still apply to them. Thus if e.g. it was a general practice of the employer to keep employees on after 65 and one of them felt he was being retired early because of his disability, it would be open to him to argue this. Thus the safest course is probably to retire everyone at 65, thus no possibility of such an argument exists.

Thus, if an employer does adopt a differential retirement strategy, it should be sure that there is no argument on race, sex, or most likely disability discrimination.

Retirement pension schemes

Trustees and managers of occupational pension schemes cannot discriminate against a member or potential member of a scheme in carrying out any of their functions, including admission.

The Regulations do not apply to pension benefits accrued and age discriminatory practices which occurred prior to 1/10/06

These rules do not apply to personal pension schemes, except in relation to contributions by an employer.

There are many aspects of the provisions of pension schemes which are specifically provided for, and which are permissible and the most important are as follows

It is **not** unlawful

- for an occupational pension scheme to set minimum or maximum age limits for a person's admission to a scheme – different ages can be set for different groups or categories of worker
- to set a minimum level of pensionable pay that a person must receive in order to gain admission to the scheme, or to vary the level of contributions dependant upon someone's pay level
- to use age criteria for actuarial calculations in relation to a scheme to eg calculate contributions, pension commutation etc
- to provide differences in employee or employee contributions because of different levels of pensionable pay
- to pay a 'bridging pension' to men to compensate for the fact that they do not receive a state pension at the same time as women.
- to refuse to pay a survivors benefit to widows etc below a certain age ie more than a given number of years younger than the member
- to calculate pension benefits by reference to years of service, and to place a maximum on the number of these years that can be taken into account, or a maximum on the level of pensionable pay used to calculate benefits.
- to provide that pension benefits are only provided to members who have completed more than a minimum period of pensionable service, as long as it is not more than two years.
- To close the scheme to new members

Remedies for Age Discrimination

- A declaration that there has been discrimination
- A recommendation as to future action eg by the employer
- Compensation – this is unlimited and interest payable on the sum may be ordered
- The complaint must be made within three months of the alleged discriminatory act (although the court can extend it in limited circumstances)

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