

Living without a default retirement age

Employment aspects

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The abolition of the Default Retirement Age (DRA) raises a number of employment-related issues for employers.

Key action points for businesses will be to:

- consider whether the business wishes to retain a fixed retirement age (likely to be difficult) or abandon all fixed retirement ages
- carry out a review of contracts of employment and related policies
- decide on whether to implement a new retirement policy, potentially linked to the provision of pension entitlement and/or flexible retirement
- consider updating, implementing and providing training on new capability and performance management policies
- consider the continued provision of any group risk insured benefits and undertake a review of the terms of all such policies.

Does this mean that employees are no longer able to retire?

No, it does not mean that employees are unable to retire, but an employer will not be able to dismiss an employee for reason of retirement unless it can be objectively justified. An employer is still able to dismiss an employee for any of the remaining five fair reasons, provided that an appropriate procedure is followed. This means that all employees should be treated consistently in relation to the reasons for dismissal regardless of their age.

What changes should employers make to how they manage older employees?

Previously, the DRA has provided employers and employees with a controlled and (some would argue) dignified exit from working life. The main impact is likely to be a change in focus to managing the performance of older employees. Employers will need to take care to treat older employees in the same way as all other employees and to ensure that capability, dismissal and performance management policies are consistently applied

across the workforce. This is important to avoid any perceived discrimination both against older employees and younger ones.

Performance must be measured against a known and fair standard, such as requirements in a job description and agreed performance targets, which must be reviewed and clearly communicated. With more emphasis being placed on the capability and performance management policies as a route of fairly dismissing employees, it is likely that managers will require training and support in implementing any new or amended policies and in making subsequent decisions under them.

Is it still possible for an employer to set a compulsory retirement age?

Yes. However, if a compulsory retirement age is adopted (or retained after 1 October 2011) and an employer cannot objectively justify it, then any dismissal by reason of retirement will potentially amount to unlawful age discrimination and unfair dismissal. Therefore, if a compulsory retirement age is adopted or retained, the business needs to be able to show:

- that there is a legitimate aim in retaining the compulsory retirement age
- that having that particular retirement age meets that aim
- that it is proportionate to use that retirement age as a means of meeting that aim
- that there is no other appropriate alternative (and less discriminatory) way of meeting the business need.

Essentially, an employer would need to show that they have considered and balanced the potentially discriminatory impact of any compulsory retirement on employees against the benefits achieved for the business and also that they have considered whether or not an alternative means of achieving the business aim could be met in a less discriminatory way. A detailed analysis of these considerations would be needed in order to evidence this justification process.

It is anticipated that tribunals will be looking very closely at attempts to justify retaining a compulsory retirement age and that it would be difficult to do so. Therefore, businesses should consider very carefully whether they really need a fixed retirement age and, if so, whether it could only apply to certain employees

and/or at certain sites. If a business does wish to implement or retain a compulsory retirement age, one option may be to consider seeking collective agreement to the proposed compulsory retirement age with a recognised trade union.

If there is no fixed retirement age, how do employers discuss retirement plans with employees?

If there is no fixed retirement age, there will no longer be an obvious time to approach older employees to discuss their future plans. This will still be something that most employers would wish to discuss, especially with those employees approaching the age where they may decide to take the benefit of any pension entitlement. There may be other considerations, such as whether the employee may want to defer any retirement benefits and/or any flexible retirement options.

Employers may wish to ask employees' intentions so as to consider workforce and succession planning. Two possible options as to how this could be initiated are:

- build discussions with all staff about their future plans into an existing appraisal system
- introduce a written "retirement and pensions policy" for discussing future plans with any employee who is within a certain time period (say six months) of qualifying for their pension.

Whilst having such a policy is still open to challenge, it is likely it could be objectively justified with reference to business requirements, workforce and succession planning. Care will still need to be taken in implementing and using such a policy to avoid any complaints of discrimination, and evidence (through, for example, consultation or workforce surveys) may be needed to defend such a policy if it was subsequently challenged.

What about insured benefits?

There is an exemption which enables employers that provide group risk insured benefits to withdraw certain benefits for employees at or over 65 (although this will rise in line with the state pension age) even if those employees continue working beyond that age. These benefits include life insurance and health and medical insurance.

Employers may wish to review and evaluate the cost of benefits which employees receive (for example, pension, life insurance, permanent health insurance and private medical insurance). For employees to remain in employment after the age of 65 certain benefits such as medical and life insurance are likely to be more expensive for older employees and employers will need to decide whether to rely on the exemption for group risk insured benefits. If relying on the exemption, advice should be taken on how to reduce the risk of breach of contract and constructive dismissal claims.

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