

**We recently wrote about the abolition of the default retirement age (DRA) and warned about the fact that the last date to use the current system is 5th April 2011 with a termination date no later than 30th September 2011. With the recent publication of the ACAS guidance “Working without the default retirement age” we turn our minds to the question of how employers will go about retiring employees in the future. This is not a question that the ACAS guidance answers very well.**

Before the introduction of the Employment Equality Age Discrimination Regulations in 2006, employers could impose retirement on their employees as employees over the age of 65 or the Company’s normal retirement age were excluded from the right to claim unfair dismissal.

When the Labour government consulted businesses about the Age Regulations, employers fought hard to retain the right to impose retirement and won. Under the current system, employers can force compulsory retirement at the age of 65 or over without it being deemed to be an unfair dismissal or age discriminatory provided they follow a set procedure. One of the principal aspects of the procedure is that, if the employee requests to work beyond the retirement age, the employer must meet the employee and consider whether to allow the employee to do so. There is also a right of appeal. Under the procedure there is no need for the employer to justify their refusal to allow the employee to continue working.

With the abolition of the DRA, retirement will cease to be a fair reason for dismissal and employers will cease to have to comply with the duty to consider whether to allow an employee to work beyond the set retirement age. Consequently, any retirements from 1st October 2011 can potentially lead to claims of unfair dismissal and age discrimination.

This is the first time that any employee forced to retire will be able to challenge his or her retirement and there is very little case law to assist employers in knowing what amounts to a fair retirement.

The government had said that there would be guidance for employers. ACAS has recently produced the guidance. Although it is 20 pages long, the short summary is:

- while we can suggest some ways to deal with retiring your staff, when it comes down to it, every retirement will be a dismissal that could be fair or unfair depending on the facts in each circumstance;
- as retirement will cease to be a fair reason for dismissal, if you dismiss an employee, to be fair it has to be for one of the reasons listed in the Employment Rights Act 1996 – redundancy, conduct, capability, can’t continue to work without breaching legislation, and for some other substantial reason, which ACAS accepts will be the most likely fair reason; and
- while it will still be possible to set a retirement age for your business, you will only know whether it is fair once case law develops.

In essence, we are all casting about in the wind until there are sufficient cases through the employment tribunal system to guide us on roughly what will and will not be acceptable (bearing in mind this will still depend on the facts in each case).

Hmm..is it really that bad? Perhaps not, so what we want to do is set out what we do know.

Employers can no longer regard 65 or any other age for that matter as a safe age to retire employees. Instead, you will have two choices: either to remove any fixed retirement age and deal with each potential retirement on a case by case basis; or set a retirement age in your business (ACAS refers to this as the Employer Justified Retirement Age or EJRA). Either way, the specific retirement or the EJRA will have to be objectively justified.

To be objectively justified, you will need to identify a legitimate aim pursued in a proportionate manner and by that we mean that the means to pursue the legitimate aim meets that aim and no further.

There have been a number of cases about retirement and what would amount to a legitimate aim. However, these cases did not necessarily scrutinise the reason for the dismissal that carefully and in two cases, the suggested legitimate aims were potentially discriminatory. They should be used with caution in the knowledge that if your legitimate aim is challenged in an employment tribunal, the tribunal may decide, on the facts in your case, that your aim is not legitimate.

The cases also give some suggestion as to what evidence you might have to gather in order to work out whether retirement is a proportionate means to achieve your legitimate aim and covers matters such as asking whether the employee's income will be replaced by a pension, or whether consensus was reached through collective and/or individual agreement.

Again, ACAS has accepted that any employment tribunal will scrutinise whether retirement is proportionate in the circumstances of your case.

Looking on the positive, we recommend the following:

- Identify any imminent retirements and make sure to use the old system – we wrote about the transitional arrangements in our blog. ([employease.wordpress.com](http://employease.wordpress.com) under the category retirement).
- Check any retirements already notified where the retirement date is on or after 1st October 2011 – they are going to be outside the current system
- Look at any promotions that you have planned on the basis of retirements – do you need to make any changes?
- Review your documentation – do you need to make any changes to your contracts, handbooks and retirement policy?
- ACAS recommends having regular open conversations with staff about their future plans, so you should think about building this into your performance appraisal system – ask everyone, not just older employees!
- Think about training management – you don't want to ruin a good appraisal system by a manager asking someone when they intend to retire.
- If you decide to set a retirement age, gather evidence to show it is proportionate, use any works group or trade union for discussion, think about alternatives.

However, our main advice is that if you intend to make any retirement after 1st October 2011, you will have to be prepared and we strongly suggest you take advice. Even following the above suggestions, there will be no guarantee that your retirement will not be the subject of an employment tribunal battle. With no case law, you may only find out whether what you did was right or wrong when your employee brings a claim in the employment tribunals.

The reason for the abolition of the DRA seems to have been to encourage employers

announcing an employer's charter and is shouting about removal of red tape, our fear is that the abolition of the DRA will mean that employers will now have to go through hoops in order to justify any retirement on or after 1st October and there will be a lot more employment tribunal cases as a result.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at [info@employease.co.uk](mailto:info@employease.co.uk).

Twitter: <http://twitter.com/EmployEase>  
Blog: <http://employease.wordpress.com>

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