

Repeal of the Default Retirement Age: It is coming soon!

The Government intends to repeal the default retirement age (DRA). From next year, compulsory retirement at age 65 or over can be challenged by the employee. The DRA will be repealed on 1 October next year, with transitional measures in force as early as April 2011– only five months away.

Ernest Hemingway commented that retirement was the ugliest word in the English language. Employers with retirements coming up are likely to feel some sympathy with Hemingway's views. With the DRA, retirement had been one of the safest reasons for termination of employment, because there was no need to justify the retirement. A tribunal decision has already challenged this state of play and from 5 April 2011 it will become a minefield.

Under the current system employers can force compulsorily retirement at the age of 65 or above without it being deemed to be unfair dismissal or age discrimination, provided they follow a set retirement procedure. The main features of the procedure are:

- written notification of retirement between 6 to 12 months before the retirement date
- a shorter notice of up to two weeks before the retirement date is possible but will lead to an award of up to eight weeks' salary
- the written notification must inform the employee of his right to request not to retire
- if the employee requests not to retire, the employer must hold a consultation meeting and inform the employee of his decision in writing
- the employee has a right to appeal the decision and the employer will need to hold an appeal meeting.

From October 2011 the DRA will disappear and so will the compulsory notification procedure. We are expecting a code of practice to be published shortly that will explain what the new procedure for retirement will be. However, after the repeal of the DRA, any dismissal by reason of retirement will leave the employer open to a claim of unfair dismissal and age discrimination. Retirement being always based on age, an employee will simply have to show that he was retired for the burden of proof to shift to the employer, who will then need to demonstrate that in retiring their employee they were pursuing a legitimate aim in a proportionate manner. This is going to be assessed on a case by case basis.

Between the 6 April 2011 and 1 October 2011 there will be a transition period. In its current draft form, the transitional arrangements can be summarised as follows:

- Employers will be unable to issue new notifications of retirement using the DRA notification procedure on or after 6 April 2011.
- There will be a six month transitional period, so that retirements can continue through to completion, provided that:
 - notification of retirement is issued by the employer prior to 6 April 2011
 - the date of retirement falls before 1 October 2011, and
 - all requirements of the DRA procedure are met.

The two week notice procedure will no longer be available as of 6 April 2011.

If the transitional measures are implemented in its current form, you have until 6 April 2010 to retire your employees who are 65 or over before 1st October 2011 under a relatively safe procedure. Those hitting 65 after that date will come under the new scheme.

Now before you rush off like the owner of Longleat and retire all your employees aged 65 or over, see <http://bbc.in/fNRXRv>, you should consider the risks of bad publicity and low staff morale. You should also take into account a recent tribunal decision. In *Ayodele v Compass Group plc*, the London Central Employment Tribunal awarded an employee, who was compulsorily retired at 65, over two years' salary for age discrimination and unfair dismissal deciding that the procedure followed by the employer was a sham.

The draft legislation for the DRA had contained a requirement that employers must act in good faith when refusing an employee's request to continue to work. However, after hard lobbying from employer pressure groups, the final version of the legislation did not contain any duty to consider the request in good faith. It was also made clear that the refusal of the request to work beyond the DRA need not be justified. At the time, commentators saw the procedure as a tick box exercise.

In the *Ayodele* case, the employer had correctly held a meeting and an appeal meeting with the employee before retiring him. The tribunal decided that these meetings were a sham and that the legislation contained an implied duty to act in good faith when considering a request not to retire.

This decision has been appealed to the EAT. While it is unlikely that the EAT will approve an implied duty to act in good faith when this duty was specifically deleted from the legislation, the case may however survive the EAT on its facts. What is very clear when reading the transcript is that the employer attended both formal meetings with one agenda alone: to inform the employee that the company would not deviate from its policy to retire at the DRA. It is very clear from this case that the tribunals expect there to be a consultation meeting. A meeting that consists only of the employer telling its decision to the employee is a meeting that is unlikely to be described as consultation.

If one of your employees is due to retire before 1st October 2011 and you have not started the process, make sure that the notification happens sooner rather than later and before 6th April 2011. This will allow you to take advantage of the DRA while we still have it. However, make sure that you still follow the spirit of the law. When an employee has asked not to retire at the DRA you should hold a meeting where you listen to what he has to say before taking a decision.

We will keep you up to date with developments on this subject, in particular, any code of practice setting out the new retirement procedure.

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.

We hope you find this update useful. Should you wish to unsubscribe from this free update, please email us at the above address and your name will be removed. This e-mail does not constitute legal advice on any particular situation you may have.



© EmployEase: The Employment Practice Ltd 2010