

Retirement under the Age Discrimination Regulations

As we mentioned earlier this year, one of the most significant additions to legislation that may affect your business is the Employment Equality (Age) Regulations. The final draft of the Regulations has been approved by Parliament and ACAS has now published a guide for employers entitled *Age and the Workplace*. The Regulations will outlaw age discrimination in recruitment, promotion and training. This e-mail focuses on retirement, which has become one of the most technical aspects of the Regulations. We will keep you informed of other aspects of the Regulations in future e-mail updates. The Regulations come into force on 1st October 2006.

There are three significant changes to the law relating to retirement. The Regulations introduce a default retirement age of 65 (to be reviewed in 2011) and a retirement procedure. They also abolish the upper age limit for claims of unfair dismissal.

1 When can I retire my employees?

With a new default retirement age of 65, the Regulations require that employers must objectively justify earlier retirement ages. Retirement at the age of 65 may in certain circumstances also be unlawful.

Before 65?

It will still be possible to have a retirement age below 65. However, you will have to provide an objective justification as to why your business requires an earlier retirement age, otherwise the retirement will be an automatically unfair dismissal and age discriminatory. An objective justification is defined as a proportionate means of achieving a legitimate aim and needs to be proven. Neither the DTI Guidance on the Regulations nor the ACAS guide venture to provide any example of what would be an objective justification for a retirement age below 65. We looked for guidance from countries that have already introduced age discrimination legislation, it was not encouraging. For example, in an Australian case, it was decided that the retirement of a 60-year-old pilot was unlawful, despite the fact that it was in compliance with an international rule that prevents pilots above the age of 60 from holding a pilot licence. We think that in the UK justifying a pre-65 mandatory retirement age is likely to be

very difficult in all but the most exceptional of cases.

The most cautious course of action is not to set a retirement age below 65. Should you need to do so, we recommend that you speak to us about your retirement age.

At 65?

Whilst the legislation introduces a default retirement age of 65, retirement at 65 will not always be fair. Prior to the Regulations, an employee needed to be younger than 65 or younger than the normal retirement age applicable in the company (NRA) to claim unfair dismissal. The NRA could be above 65. Under the Regulations, the default retirement is 65 or the NRA. What is a company's NRA? The age at which employees at a particular role or level in a company are normally retired. For example, although your contracts set the retirement age at 65, custom and practice in your company is that most of your managers work until the age of 68. This means that you will not be able to compel a manager to retire at 65, because your NRA will be considered to be 68. As you will appreciate, there may be more than one NRA in your business. The Regulations have not done away with the idea of having an NRA, and if you do compel an employee to retire before the NRA, even if it is after the default retirement age of 65, it could still be an unfair dismissal and age discriminatory.

2 What Retirement Procedure do I use?

Employers are now expected to plan their employees' retirement by following a procedure. This procedure applies no matter the retirement age selected. It is modelled on the existing procedure for dealing with requests for flexible working, with one significant difference. Unlike the request for flexible working, a refusal to allow some one to work beyond the NRA does not have to be justified.

The procedure requires that before retiring an employee, you must notify the employee in writing no more than 12 months and no less than 6 months before retirement is due of:

- his or her impending retirement; and

- his or her right to request to continue working longer.

If you do not notify in the correct time, the employee could ask the employment tribunals to make an award of compensation of up to 8 weeks' pay. A week's pay is currently capped at £290.

What happens if I don't notify in time?

Although you may have missed the six month deadline, all is not lost. The failure to notify by the deadline is not fatal to the fairness of the dismissal, so long as you remember to notify at least two weeks before the date you have set for the retirement.

However, if you have not notified at all and have missed the two week deadline, and go on to compel a retirement, the retirement will be considered as an automatically unfair dismissal. If you have missed all the deadlines, it would be advisable to delay the retirement and take advice on how to go through some form of notification process.

What do I do if an employee asks to continue to work?

If an employee exercises his or her right to request to continue to work longer, you must consider the request without unreasonable delay. To do so, you will be expected to organise a meeting to discuss the request, and, within 14 days of the meeting, set out your answer to the request in writing. If you refuse the request, you must confirm in writing the date on which the retirement will take effect and set out the appeal procedure. The appeal should be heard by a more senior manager who did not take part in the decision to refuse the request. You do not need to explain why you are rejecting the request, and our advice would be to give no explanation as if you give an explanation, the employee may wish to challenge it.

If one of your employees is due to retire soon after 1st October 2006, you will not have the time to follow the notification procedure. There are transitional arrangements for retirements between 1st October 2006 and 30th April 2007.

3 Can my decision be challenged?

Before 1st October 2006, employees older than the state retirement age or a company's NRA cannot bring a claim for unfair dismissal. From 1st October, they will be able to do so.

During the consultation on the draft Regulations, the Government found itself faced with some strong and conflicting views on retirement. There was opposition to the idea of any compulsory retirement age and support for the idea that any termination of employment at any age could be unfair. This group were successful in persuading the Government to abolish the upper age limit for unfair dismissal, but they were not the winners in the lobbying exercise. The groups supporting a compulsory retirement age were the clear winners since not only did they get a state retirement age of 65, not 70 (granted this will be reviewed in 5 years) but more importantly, they made a significant change to the draft version of the Regulations.

Originally, the draft Regulations stated that employers were required to consider a request to continue to work 'in good faith'. This was amended after consultation to say that the request should be considered 'within a reasonable period'. As a consequence, the retirement provisions have become merely procedural. Employers are not compelled to explain a decision to reject a request. This means that if the reason for the termination of employment is retirement at 65 or the NRA and the procedure has been followed, the tribunals are going to have very little opportunity to decide that a retirement was unfair.

There will be a strong presumption that the termination was for genuine retirement if an employer complies with the procedure. An employee will be able to claim unfair dismissal but his burden of proof if the procedure is followed will be very heavy.

The consultation documents gave two examples of when a planned retirement could be considered unfair. Where you retire an employee while you are in the midst of a redundancy exercise that could potentially affect that employee, and where you retire an employee during a performance or conduct process. We are expecting to see tribunal claims over the next few years that help establish just how far the tribunals

will be able to look beyond the decision to retire an employee. We will keep you posted.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0207 831 5052, 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 2007