

employment focus

Abolition of the default retirement age

Luke Green looks at the abolition of the default retirement age.

When age discrimination legislation came into force in 2006, employers were permitted to retire employees provided they had reached a certain age (currently 65) and also followed certain processes. This was known as the default retirement age (DRA). So long as the employer complied with this process, they were not at risk of a claim of age discrimination or unfair dismissal.

The DRA was abolished on 6 April 2011, removing the automatic right to retire employees at 65. Employers can now face claims for unfair dismissal and age discrimination if they forcibly retire employees.

However, the employer will be permitted to have an "employer justified retirement age" (EJRA) if it can establish an objectively justified reason for this. Also, there are transitional provisions to deal with the phase out of the DRA.

Transitional provisions

An employer may complete a retirement where notice has been issued under the DRA provisions on or before 5 April 2011, provided that the employee reaches the age of 65 (or their normal retirement age, if this is greater) by 30 September 2011. Care should be taken to ensure the DRA provisions are complied with in full.

A normal retirement notice under the DRA lasts between six and twelve months. However, an employee may make a request to work beyond their retirement date. If a 12 month notice was served on 5 April 2011, the last date they could request to work beyond their retirement date will be 4 January 2012. If the employer agrees, the retirement date can be extended by a further six months up to the beginning of October 2012. There are various technical arguments about exactly which date it can be extended to, but 3 October 2012 is the safest date to use.



When do the changes take place?

Aside from the transitional provisions, from 6 April 2011 employers will need to show an employer justified retirement age (EJRA) to retire an employee. Essentially, an employer must consider whether retaining a retirement age is necessary in its business, and if so, what the retirement age should be and who it should apply to. The employer must provide objective justification for the retention of a retirement age, for example, a particular legitimate aim such as health and safety reasons, or specific issues in regard to workforce planning.

If the employer can show an employment tribunal that these specific reasons made it necessary to retain the retirement age for that employee, and that there is no less discriminatory way of achieving this objective, they will be able to defend an age discrimination claim. They will, however, still be exposed to a claim for unfair dismissal, so will have to follow a fair process, with the normal requirements of notice and consultation.

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Welcome

I am pleased to introduce the spring 2011 edition of Hill Dickinson's Employment Focus. Hill Dickinson's Employment and Pensions team continues to strengthen its position, with key developments in our Sheffield office following the appointment of Angela Brumpton.

In this issue Luke Green and Lisa Turner address the important issues surrounding the removal of the default retirement age, a development that will affect the majority of employers. The important questions are:

- Can you proceed with your current retirement plans?
- Is a retirement age essential for your business after 5 April 2011?
- If so, will you be able to make a case to justify retaining a retirement age in your workplace?
- Will performance management and appraisal processes need to be reviewed?
- How will the change in the law affect your benefits and pension packages?

We also examine recent redundancy cases, remind ourselves of the second wave of law coming in under the Equality Act, consider additional paternity leave, and have a look ahead at the changes on the horizon.

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Without automatic retirement rights, what's next for pensions?

Lisa Turner looks at the impact the removal of the default retirement age (DRA) has on pension schemes.

There has been much discussion about the removal of the automatic right to retire, and employers also need to be aware of the effect on pension schemes.

Occupational pension schemes

The Government states in the response that it:

"...considers that the removal of the DRA does not affect occupational pension schemes. The absence of a DRA does not affect the setting of a 'normal retirement age' or 'normal pension age' for the purposes of occupational pension schemes".

Whether in practice the removal of the DRA will affect occupational pension schemes is not yet clear. Flexible retirement and the desire amongst employees to continue to accrue pension benefits or draw their pension whilst continuing in the employer's service is likely to become more popular following the abolition of the DRA.

A recent article in Professional Pensions refers to research that indicates a third of employers believe abolition of the DRA will prompt them to better promote their pension scheme and rethink their practices for older people. Employers will inevitably think about the pension scheme as a tool to encourage older people to give up work by ensuring they have sufficient pension income to afford to retire.

Group risk insured benefits

The Government has said that it intends to introduce an exemption to the principle of equal treatment on the grounds of age where group risk insured benefits are provided by an employer such as income protection, death in service benefits and health insurance. The Government is of the view that this is the safest way to guard against these benefits either being greatly reduced or withdrawn.

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'Professional Pensions "Abolishing DRA will bolster company scheme promotion" dated 24 January 2011 (research conducted by Hargreaves Lansdown)



DRA

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The Government has not provided specific guidance on what would amount to an EJRA, and we await the development of case law in this area.

Due to the difficulties in establishing an EJRA, it is thought many employers will do away with having a retirement age. The issue that then presents itself is; how do employers manage employees as they approach and pass their former retirement age?

It will still be permitted for an employee to volunteer to retire, although employers should be cautious in how they approach this issue. If the employer raises the issue, it may be perceived that this is a discriminatory act (putting pressure on the employee to leave), giving rise to an age discrimination claim. Accordingly, employers will need to ensure line managers are advised of the potential risks.

Employers who face an employee with deteriorating performance will need to deal with the matter under normal performance management procedures. The emphasis here is that the procedure has to be in accordance with the normal rules. Invoking additional reviews because of an employee's age will in itself be discriminatory. An older employee whose performance is dipping should be treated in the same way that an employee in another age group. Managers need to be warned about linking any performance review in with discussions of retirement and/or age. Consistency needs to be maintained across the age groups, with non-discriminatory reasons being established for any disparity in treatment. Most employers are recognising a need to formalise and tighten-up the performance review process.

Actions

- Check current retirement procedures are in line with phase out of the DRA.
- Review whether you want an EJRA in your organisation, and if so who for. If you are taking this option you will need to conduct a detailed review of the justification for having an EJRA, support this with evidence (expert in most cases), consider if consultation with the workforce is appropriate and assess your risks.
- Review your retirement policies, staff handbook and contracts of employment as they relate to retirement and amend as necessary. It is recommended legal advice is taken before varying terms.
- Ensure your performance review processes and appraisal systems are up to the task. Also check that you have sufficient safeguards to protect against discriminatory treatment.
- Train managers and staff on the issues and their responsibilities.

- Do your pension provisions refer to the DRA? If so, they will need to be reviewed.
- Do your share options/share schemes refer to retirement? This is often the case in relation to good leaver/bad leaver clauses. If so, these will need to be reviewed.
- Do your benefits such as life insurance and health insurance refer to retirement? There are particular exceptions permitted here, but they should be reviewed for compliance.

The loss of the automatic retirement age will see many employers facing a cultural shift in how they approach managing their workforce. Those who set out a clear plan in how they are going to meet their objectives arising from this change will be much better placed to deal with the consequences of the removal of the DRA.

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The Equality Act - further changes

Kate Duffy discusses the further provisions to the Equality Act still to be introduced.

The main provisions of the Equality Act 2010 (EA) came into force on 1 October 2010. So far, the EA's implementation has introduced the widening of tribunals' powers of recommendation, harmonisation of the strands of discrimination, the inclusion of discrimination on the grounds of association and perception, as well as a widening of disability rights. It has also brought into force new rules on pay secrecy clauses and pre-employment health queries.

Positive action

Prior to the EA, discrimination law permitted general positive action. This has been continued by the EA, so where an employer reasonably believes that a group who share a protected characteristic suffer a disadvantage, have different needs, or are under represented, they may (but are not required to) take proportionate measures to overcome these issues. Examples of this may be the provision of language classes or prayer facilities.

The EA introduced positive action in recruitment and promotion from 6 April 2011. This will allow (but not oblige) an employer to apply positive action in recruitment and promotion to address the disadvantage or under-representation of protected groups, provided that the person with the relevant characteristic was 'as qualified' as those they were in competition with. In order to use positive action, the employer must not have a policy of more favourable treatment towards the protected group, and the action must be a proportionate means of achieving a legitimate aim.

There has been much media interest and debate on this requirement and there will be much dispute about what 'as qualified' means:

- Will it permit someone who is less suitable but reaches the minimum bar of qualification to take priority?
- What if the employer puts in place positive action for one disadvantaged group, but fails to do so for another?

As employers are not specifically required to implement positive action, it is recommended that they take clear advice before implementing a policy in this regard.

It should be remembered that positive action does not allow employers to discriminate in the selection for dismissal, or in terms and conditions of employment (exempt under the normal disability rules).

Combined discrimination

The Government has confirmed that the combined discrimination provisions due to be implemented in April 2011 will be delayed.

Combined discrimination had been included in the EA in an effort to address the recognised problem that those with two or more protected characteristics are much more likely to be the subject of discrimination. Currently the employee needs to bring separate claims for, for example sex and race. Under the new provisions individuals would be able to claim that unlawful treatment was due to a combination of these two characteristics. They could also bring separate claims for each characteristic.

Whilst it is recognised that the proposed changes will be made for laudable reasons, it has been questioned how this will assist the alleged victim. It may make certain discrimination claims very complex. For example, a person who believes that they have suffered discrimination based on three protected characteristics (e.g. gender, race, and sexual orientation) could bring six claims (race and gender; race and sexual orientation; race; gender; and sexual orientation).

The Government Equalities Office has confirmed that ministers are looking at how best to take forward these provisions and they have also confirmed that guidance will be published twelve weeks before they come into force.

The public sector equality duty (PSED)

The general PSED came into force on 6 April 2011. It replaces the former three separate duties that require public bodies to take into account gender, race and disability equality, and extends it to a wider range of protected characteristics, including age, religion and belief, sexual orientation and gender reassignment.

The general PSED is to eliminate unlawful discrimination, harassment and victimisation, advance equality of opportunity and foster good relations between people who share a protected characteristic and those who do not. There are also specific duties, including the requirement to publish a range of equality data. These are expected to be introduced from July 2011.

The Equality Act Code of Practice

The Equality and Human Rights Commission's new Code of Practice for the Equality Act came into force on 6 April 2011.

Further information is available from:

http://www.equalities.gov.uk/equality_act_2010/public_sector_equality_duty.aspx

Compromise agreements

The position remains the same in relation to the anomaly on compromise agreements. Due to the drafting of the EA, some have queried whether compromise agreements are enforceable in relation to discrimination claims. There have been calls for the wording to be rectified by statute, but as of yet, the Government has not responded to this. In the interim, it is advised that you take specific advice on this point if you are dealing with settlement of a discrimination claim(s).

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Redundancy in the spotlight

Adrian Fryer highlights some interesting redundancy law cases from the past year.

Consultation on scoring of selection criteria

Employers selecting which employees are to be made redundant will often find themselves faced with scoring a group of employees against a set of selection criteria. Employers who are subject to collective consultation obligations will consult on the content of the criteria. The question that often arises is; to what extent does the employer need to consult individually with the employee about the fairness of the scoring? In Pinewood Repro Ltd t/a County Print -v- Page (EAT), an employee was in a pool with two others for redundancy. He scored the lowest, although the differences were small. He challenged his score for 'flexibility', but his employer refused to explain its reasoning, other than to say that the scoring was factual and correct. The EAT agreed with the tribunal that this was inadequate information from which fair consultation could take place. It was right that the employee should be given an opportunity to understand the relevant matters fully, to express views, and for the employer to consider those views properly. It was particularly relevant in this case that flexibility is such a subjective area.

Interviewing as part of the search for alternative employment

In Morgan -v- The Welsh Rugby Union UK, the EAT considered the use of interviews in selecting an employee for an alternative position after his post had been made redundant. Mr Morgan was one of three candidates interviewed for a new post created as a result of the restructure. He was unsuccessful and claimed that his subsequent dismissal was unfair as he was more qualified for the position.

However the employer claimed that another candidate had been more impressive during the interview.

The EAT agreed with the employment tribunal's decision that the dismissal was fair. Although an employer needs to demonstrate clear objectivity in the selection of employees for redundancy, a greater degree of subjectivity will be permitted in the appointment to an alternative position. A competitive interview process will normally be acceptable, provided the employer acts fairly and reasonably.

Collective consultation on non-renewal of fixed term contracts

In the case of Lancaster University -v- The University and College Union, the collective consultation obligations arose following the non-renewal of the fixed-term contracts of more than 20 employees. The university should have consulted on ways of avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. However, the university had a long-standing procedure with the union, where it simply sent a list of the contracts that were due to expire, marked "for consultation". The University did not provide the requisite information nor did it consult. They had followed the same process for over 12 years, until it was questioned by a new union officer as being in breach of the collective consultation obligations. The tribunal agreed the university was in breach, and awarded 60 days' pay to each affected employee.

When to start collective consultation

The Court of Appeal heard the case of United States of America -v- Nolan in 2010, where it considered when an employer must start collective consultation. This has long been a point of dispute. The EU Collective Redundancies Directive requires consultation where an employer "is contemplating collective redundancies". S.188 of TURL(C)A, that brought the directive into effect, requires the employer to consult when it is "proposing to dismiss".

There is a strong body of opinion suggesting that "proposing to dismiss" indicates a later stage in the employer's thought processes than "contemplating collective redundancies", and that S.188 does not properly implement the Directive. However, the court noted that the European case of Akavan Erityalojen Keskusliitto (AEK) ry and ors -v- Fujitsu Siemens Computers Oy (ECJ) seemed to suggest that 'contemplating redundancies' requires an intention or plan to make collective redundancies - which is arguably consistent with the TULR(C)A's 'proposing to dismiss' formula. As it found the position unclear, the Court of Appeal has referred the case to the ECJ and we await the outcome.

Employers, particularly in the public sector who are bound by the wider-reaching Directive, need to be cautious that they are not delaying the commencement of consultation past the point when their obligations arise.

Suitable alternative employment and maternity leave

An employee whose job becomes redundant during her maternity leave period is entitled to be offered any suitable available vacancy that exists with her employer, its successor or an associated employer, before her old contract ends.

- The position must be both suitable in relation to the employee and appropriate for her to do in the circumstances.
- The terms must not be substantially less favourable than those of her previous contract.

The EAT found in Simpson -v- Endsleigh Insurance Services Ltd and other that the two provisions should be read together, and unless a vacancy satisfies both tests it will not be a suitable alternative. As a result, the employer in this case was not obliged to offer an employee, who had worked in London, a vacancy in Cheltenham. The work was suitable

and appropriate for her to do in the circumstances, but its location was substantially less favourable to her and it did not, therefore, amount to a suitable alternative vacancy.

Sex discrimination on redundancy scoring

It is also arguable that those on maternity leave can have preferential treatment in the selection process on account of an exception in the Equality Act 2010: *"no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth"* [s.13(6), formerly in s.2(2) of the SDA 1975].

This was tested recently in De Belin -v- Eversheds Legal Services Ltd. Mr De Belin was a solicitor. He was put in a pool for redundancy with his colleague who was on maternity leave. He scored 0.5 lower than his colleague and was made redundant. Mr De Belin received a minimum score (0.5) on 'lock-up' (the speed of receiving payment for billing). His colleague was given a maximum score (2) on account of her

being on maternity leave. This was despite the fact that if she had been assessed for the period immediately prior to her maternity leave, she would have received 0.5. Mr De Belin raised the issue in consultation and raised a grievance. He was dismissed. The tribunal found he had been unfairly dismissed and discriminated against on the grounds of sex. The case was appealed and the Employment Appeal Tribunal upheld Mr De Belin's complaint.

The case highlights the need to carefully examine how you balance the requirement to seek ways to mitigate the potential unfairness of being on maternity leave, against the principal of equal treatment. In this case, the decision to award a maximum score despite evidence that she was previously on line for a minimum score, will have been persuasive.

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Additional paternity leave - what has changed?

The Additional Paternity Leave Regulations 2010 are now with us, and employers need to ensure they are compliant.

In an attempt to support fathers' involvement with family commitments and to allow flexibility between couples, the Government has introduced additional paternity leave (APL). Eligible employees will be allowed to take between 2 and 26 weeks' APL before the child's first birthday. This is in addition to the existing entitlement to 2 weeks' paid ordinary paternity leave.

The Regulations affect parents whose babies are born on or after 3 April 2011, or who, in relation to adoption, are notified of having been matched on or after 3 April 2011.

The right to take APL applies to the child's father, or the mother's spouse/partner (of either sex). In the case of adoption, the entitlement is granted to those who have been matched with a child for adoption, and are the spouse/partner (of either sex) of the adopter who has elected to take adoption leave.

However, APL may only be taken where the other spouse or partner has returned to work with some of their statutory maternity or adoption leave untaken.

APL may only be taken in multiples of complete weeks; it must be taken in the period beginning 20 weeks after the birth or placement for adoption, and end 12 months after the birth or placement for adoption.

If the leave is taken during the mother's statutory maternity pay period, they will be entitled to additional paternity pay at the rate of statutory maternity pay.

There has been a great deal of discussion about whether an employer who offers contractual maternity pay in excess of the statutory entitlement would be obliged to offer comparative terms to fathers who take APL.

The argument is that to fail to offer comparative contractual terms under APL would be discrimination on the grounds of sex. If this may apply, employers need to consider their position. Some employers may provide comparative contractual pay from April, however given the uncertainty, others may choose not to enhance APL at the present time and await developments. It is likely that there will be legal challenges on this issue, and if it is a concern for your organisation it may be appropriate to take advice on the point.

The Government estimates that around 400,000 men a year will qualify for APL under the new regulations: how many will take up the offer remains to be seen.



Looking ahead

Bribery Act 2010

The Bribery Act is set to introduce a new corporate offence of failing to prevent bribery by individuals acting on behalf of an organisation. The only defence open to employers will be to show that they have "adequate procedures" in place to prevent bribery and corruption. The guidance on the Act has recently been published and we expect the Act to be in force this summer.

Removal of the two tier code

On 23 March 2011, the Code of Practice on Workforce Matters in Local Authority Service contracts and the related guidance (the "two tier code"), were withdrawn with immediate effect.

New tribunal award limits

From February 2011: the Employment Rights (Increase of Limits) Order 2010 increased the limits of certain employment tribunal awards and other amounts payable under employment legislation:

- Maximum compensatory award for unfair dismissal - from £65,300 to £68,400
- Maximum limit on a week's pay - from £380 to £400
- Minimum basic award for certain unfair dismissals (dismissals for reasons of: trade union membership or activities; health and safety duties, pension scheme trustee duties; acting as an employee representative) - from £4,700 to £5,000

The rise in the limits applies where the event that gives rise to the award or payment occurs on or after 1 February 2011.

From 11 April 2011: the Government has also announced increases to the following payments:

- The weekly rate of statutory sick pay will increase from £79.15 to £81.60.
- The prescribed weekly rate of statutory maternity, paternity and adoption pay will increase from £124.88 to £128.73 (or 90% of normal weekly earnings if lower).
- The weekly earnings threshold for all the above payments will rise from £97 to £102.
- Maternity Allowance will increase from £124.88 to £128.73 (or 90% of normal weekly earnings if lower), with the earnings threshold remaining at £30.

Right to request time off to train

The right to request time off to train has been in force since April 2010 for employers with 250 or more employees. The proposed extension of this right to all employers has been delayed.

Flexible working

The Government has announced it will not be extending the statutory right to request flexible working for parents of 17 year olds.

Agency workers

Despite previous indications of a review, the Agency Workers Regulations 2010 are still due to come into force in October 2011. We are currently awaiting the ancillary Guidance from BIS that was due to be provided in "early 2011".

Guidance on determining disability

In February 2011 a revised version of the draft Guidance on matters to be taken into account in determining questions relating to the definition of disability was presented to Parliament. If the draft is not disapproved within a 40-day period, it will come into effect on 1 May 2011. The draft guidance can be accessed here (<http://odi.dwp.gov.uk/docs/law/ea/ea-draft-guide.pdf>).

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