

## **DEALING WITH RETIREMENT**

### **Abolition of the default retirement age**

From 6 April 2011, employers are no longer able to issue notifications of retirement to employees on the basis of the (now repealed) default retirement age provisions. The statutory retirement procedure has also been abolished.

The changes do not mean that an individual can no longer retire, but that the decision as to whether or not to retire, and the timing of retirement, is now a matter of choice for him or her rather than being the employer's decision. Many employees will still want to retire, depending on their individual circumstances and lifestyle choices.

### **Compulsory retirement and age discrimination**

The Equality Act 2010 makes age discrimination unlawful, unless it can be justified objectively. Compelling employees to retire because of age constitutes direct age discrimination, which is unlawful, unless justified. Although theoretically possible, it is likely to be very difficult in most employments to justify forcing people to leave their job because of age.

Therefore, employees' contracts of employment cannot be terminated automatically when they reach age 65 (or any other specified age). This is the case even if the employee had previously agreed to a retirement age of 65, and a clause to that effect is contained in his or her contract of employment. If the employer compulsorily retired the employee because of age, this would enable the employee to bring tribunal claims for age discrimination and unfair dismissal.

### **Voluntary retirement**

Unlike compulsory retirement, voluntary retirement is usually regarded in law as termination by mutual agreement or as a resignation, so it does not constitute a dismissal. Employers may continue to operate voluntary retirement schemes as they are unaffected by the removal of the facility to retire employees.

### **Justification for compulsory retirement**

Compulsory retirement is potentially valid if the employer can show that there is a legitimate aim underpinning its retirement policy, and that compelling employees to retire at the stated age is a proportionate means of achieving that aim.

This means that:

- there must be a legitimate aim of a public interest nature, for example staff retention or workforce planning;
- the aim must be consistent with the social policy aims of the state, for example sharing out employment opportunities fairly;
- the retirement policy must contribute to the achievement of the stated aim in that particular business;
- retiring employees at the stated age must be appropriate, when the importance of the aim is weighed up against the discriminatory effects of the policy; and
- there must not be another, less discriminatory, way of achieving the same aim.

If a compulsory retirement policy relies on an assumption, it will not be justified. Concrete evidence would be required to show that the employer's justification applies.

It is likely to be extremely difficult to justify a compulsory retirement age. Unless there are exceptional circumstances associated with the nature of the employment you should not continue to compel employees to retire.

### **Managing employees without a compulsory retirement age**

Following the abolition of the default retirement provisions, the issue of effective performance management has become even more important, because the employer cannot now dismiss employees because they have reached a certain age.

### **The importance of regular appraisal**

Holding regular appraisal discussions with employees can contribute towards effective performance management. Ideally you should hold regular discussions, at least on an annual basis, with every employee (irrespective of their age) to review performance, assess training and development needs and discuss the employee's and your future plans and the impact that these are likely to have. You should also discuss the employee's likes and dislikes, which may change over time, and what motivates him or her. Provided that the appraisal process is applied in the same way to every employee, there should be no age discrimination.

### **Planning for the future**

An important part of the appraisal discussion is the employee's aims and ambitions. You should ask the employee where the employee would like to see him- or herself in the short, medium and long term. Holding a discussion about future plans with

every employee will enable you to establish if and when the individual is thinking about retiring.

### **Avoiding age discrimination**

You should take care that you do not inadvertently discriminate on the ground of age when carrying out appraisals.

| <b>Don't say</b>   | <b>Do say</b>   |
|--|---|
| I suppose you'll be retiring soon?   | What are your aims and plans career-wise for the next year or two?  |
| Don't you think you're getting a bit long in the tooth?  | The company encourages all staff to develop their capabilities throughout their working life.                           |
| There's no point in training you in the new technology now that you're 65.                                 | We are offering all staff the opportunity to be trained in the new technology - how do you feel about this?             |
| You seem to be making more mistakes than usual lately, have you thought about retiring?                    | There are some performance issues that I'd like to discuss with you.  |
| We are expanding our operations, but I don't suppose you want to be considered for a new role at your age. | We are expanding our operations and I am asking all staff if they would like to be considered for any of the new roles. |

It is not necessary to ask all employees the same questions at their appraisal interview to avoid discriminating. Asking everyone the same questions regardless of their circumstances could lead to absurd consequences. What is important is that you explore all the relevant issues with each employee in an open way and avoid making assumptions based on age.

### **Contractual notice**

Where the employee indicates an intention to retire at some point in the future, this will not be contractually binding on him or her. Until the employee has given notice to terminate his or her contract, the employee will be entitled to a change of mind about the timing of his or her retirement.

### **Succession planning**

When you discussing future plans with individual employees, you should consider the experience and skills that each employee has and how these might best be deployed. For example, if an employee indicates an intention to retire within the

next year, this would give the manager the opportunity to consider a number of possibilities, including:

- how the company can retain the knowledge, skills and experience that the employee gained while employed;
- how such knowledge, skills and experience could be passed on to other employees;
- whether or not there is anyone in the organisation who might be a suitable replacement for the employee when he or she retires;
- whether or not the older employee would be suitable for, and agreeable to, taking on a mentoring role in respect of less experienced staff or a prospective replacement; and
- whether or not the employee would like to reduce his or her working hours or take on a less responsible, or different, role in the run-up to retirement, and if such options are feasible from the organisation's point of view.

### **Managing capability**

Following the abolition of the default retirement age provisions, it is no longer possible for employers to disregard failings in the performance of older employees on the basis that they will be retiring from the organisation soon. Nor can employers use retirement as an excuse to dismiss employees who might be experiencing difficulties with their work.

You should give each employee feedback on his or her performance on a regular basis, and should not put performance problems aside until the annual appraisal interview. This may help to prevent a perception of unfair or discriminatory treatment.

These principles apply to all employees, whatever their age. Managing capability will not amount to age discrimination as long as you apply the same standards to everyone and give all employees the same opportunities for training and development.

If you treat older and younger employees differently when managing performance, this is likely to constitute age discrimination.

### **Dealing with employees whose performance is declining**

When an employee's performance falls below the standards that are required, you should raise and discuss the relevant issues with the employee without delay, with a view to identifying the cause of the problem and seeking a resolution.

You should explore what you could do to assist the employee to improve to the required standard. This might involve making adjustments to the job role, the provision of training, and referral to occupational health if you think that the employee's health is having an adverse impact on performance. Although an employee can be dismissed fairly on account of unsatisfactory performance, the employee must first have been given fair warning and a fair opportunity to improve to the required standard.