

Managing retirement without a compulsory retirement age

Introduction

The default retirement age was removed in April 2011. As a result, there are no provisions in UK law specifically permitting an Employer to dismiss an Employee because they have reached a particular age. To be lawful, any such dismissals would need to satisfy the test of fairness in the Employment Rights Act 1996 and also be justified within the meaning of the Equality Act 2010.

Contracts and policies

Very few organisations are allowed to operate a retirement age therefore Employers should ensure that their policies and provisions in their handbook and contracts of employment make clear that Employees will not be expected or required to retire at any particular age.

Good practice is for Employers to carry out an audit of their policies to identify and amend those that make a reference to retirement, for example:

- recruitment policies that set a maximum age for new recruits;
- policies on benefits that include group risk insured benefits such as private medical cover;
- diversity policies; or
- flexible working policies.

Retaining a retirement age

Employers should only consider operating a practice of retiring Employees compulsorily at a particular age if it can be objectively justified. This is defined as a "proportionate means of achieving a legitimate aim".

To justify such a policy the Employer will have to show that it serves a legitimate business need that cannot adequately be met in some other, less discriminatory, way.

Routinely retiring Employees at a certain age will be a justifiable approach only in a small minority of cases and so Employers that wish to operate a policy of requiring Employees to retire will have to consider seriously the business aim on which that policy is based and will have to be prepared to show that the policy on retirement is an appropriate and proportionate means of achieving this aim.

Age-related benefits

The continued employment of Employees who have reached the age of 65 has caused a number of concerns for Employers that provide benefits based on, or backed by, insurance policies.

Many of these benefits, particularly those relating to health, are not available to Employees who have reached the age of 65 or could be available to them only at considerable extra expense.

To deal with these concerns, sch.9 to the Equality Act 2010 includes an exception providing that it is not discrimination for an Employer to make arrangements for, or afford access to, the provision of insurance or a related financial service for a period that ends when the Employee reaches the age of 65 (or the state pensionable age when that is higher). Nor is it discrimination for the Employer to refuse to extend such benefits to Employees who have reached that age.

The exception covers only the situation where the benefit in question is provided to the Employer's Employees by an insurance firm as a result of an arrangement with the Employer. It does not allow

for a benefit provided wholly by the Employer, for example contractual sick pay, to be limited to Employees under the age of 65. Employers should therefore examine any age-related benefits to see if they can extend these to all Employees or ensure that they are covered by a specific exception or that they can otherwise be justified.

Retirement policy

It remains open to individual Employees to choose to retire at any age.

Where the Employee chooses to leave, this will amount to a resignation and the normal requirement for the Employee to give notice to the Employer will apply.

If they do not already have one, Employers should consider introducing a policy explaining the process by which Employees can indicate their intention to retire, while making clear that there is no expectation that they will retire at a particular age.

Employees should put their intention to retire in writing, giving appropriate notice of resignation in accordance with their contract of employment. Employers could encourage Employees to discuss with them their intention to retire at an earlier stage than the point at which they give formal notice, to allow for any appropriate preparatory steps to be put in place.

Discussions about retirement

Many Employers were concerned that the removal of the default retirement age would prevent them from discussing retirement options with Employees.

There is no reason for an Employer to avoid such a discussion, provided that it ensures that it does not amount to, or result in, less favourable treatment because of age.

Discussions around retirement therefore need careful handling. There is a risk of discrimination occurring – or being perceived to occur – if the manager conducting the interview gives the impression that the Employee's retirement is the desired outcome.

Managers should be made aware of the importance of ensuring that any such interview does not create the impression that the Employer is trying to persuade the Employee to retire.

Employers should consider incorporating discussions about retirement into a wider process of discussing the Employee's current work and future plans. Employers can conduct these discussions as part of a wider appraisal process, but there should be no assumption or suggestion that retirement would be an appropriate solution to any problems that the Employee may be experiencing at work.

Provided that the discussion takes place in a supportive context where the Employer makes it clear that the Employee is entitled to continue working, and the organisation would welcome their doing so, there is no reason why an Employer cannot discuss directly with an Employee what their retirement plans may be.

The Employer should keep a record of any such discussion.

Where an Employee does indicate that they plan to retire at or around a specific age, it will be appropriate for the Employer to discuss how the transition to retirement can best be achieved. There may be issues of handover and succession planning to be considered and the Employee may wish to discuss flexible working options for the period leading up to retirement.

Employers should be aware that, even if an Employee expresses a general intention to retire at a particular age, unless they are actually giving notice of resignation, such discussions will not be binding. An Employee is entitled to change their mind prior to retirement, and it could be discriminatory for the Employer to take steps to enforce the Employee's retirement, or to treat them less favourably as a result.

While discussions prior to retirement may be helpful to both the Employer and the Employee in planning the way forward, Employers should not take any irreversible steps with regards to the planned retirement before the Employee has actually given notice of resignation.

Pre-retirement advice

Where the Employee does intend to retire it may be appropriate for the Employer to offer access to advice on financial planning.

The form that such advice takes will vary. In some cases, the Employer will simply provide the Employee with a statement of their pension entitlement.

Some Employers also provide access to courses for Employees nearing retirement age where they are given an opportunity to discuss the various pension options available to them.

Pre-retirement courses are usually run by external providers such as independent financial advisers. Such courses may include wider financial planning issues dealing with savings, investments and property, as well as advice on non-financial aspects of adjusting to retirement.

Rather than offering pre-retirement courses to Employees only at a certain age, the Employer could inform all Employees that courses are available to Employees who are planning to retire. It would be for each Employee to decide when they wanted to attend such a course.

If an Employer offers a pre-retirement course to Employees at a certain age, it should make clear that this does not mean that it expects those Employees to retire at any particular time. Older Employees are likely to find pre-retirement courses helpful even if they continue working for a number of years after attending the course.

Flexible working

It may be that in the run-up to retirement, or instead of retirement, an Employee wishes to work on a more flexible basis. This may involve, for example, working shorter hours, working on fewer days of the week, or travelling less.

There is no formal requirement for an Employer to make allowances for this, although many Employers would see the benefits of retaining the expertise and experience of Employees by facilitating such arrangements.

One issue that may concern Employers is whether or not offering flexible working facilities to Employees approaching retirement could be seen as discriminatory in relation to other Employees.

It is true that applying a different rule on flexible working to Employees approaching retirement could amount to less favourable treatment of younger Employees and could potentially be discriminatory. However, such treatment may also be justified under the Equality Act 2010 as a proportionate means of achieving a legitimate aim and the Employer could argue that offering flexible working options is an appropriate way of encouraging and rewarding loyalty, or a useful way

of retaining the skills and experience of Employees who would otherwise not wish to continue working on a full-time basis.

This argument has not yet been tested in the employment tribunals and courts.

Workforce planning and succession planning

Employers may want to plan for the retirement of Employees to ensure that key skills and experience are not lost. Knowing that a particular Employee will retire on a given date allows the Employer to recruit a replacement in time for an appropriate transition to take place.

Working without a retirement age means that Employers have less information on which to base their overall workforce planning, and they can no longer assume that an Employee will retire in any particular time frame.

In relation to individual succession planning, an Employer may want the retiring Employee to hand over the role to a successor. This may involve the Employee mentoring an individual or even handing over some responsibilities before the retirement takes effect.

Any specific succession planning should be focussed on the period after the retiring Employee has given notice, as an Employee who has given an informal indication of an intention to retire could change their mind.

While this may leave Employers in some uncertainty, it should be remembered that most succession takes place when an Employee chooses to leave for a reason other than retirement, for example when they have found another job.

Employers should therefore look to undertake appropriate succession planning for all roles, not just those occupied by Employees approaching pensionable age.

Performance management

Employers should ensure that performance management is carried out fairly and consistently, regardless of the Employee's age.

In particular, they should not assume that a performance problem will soon be resolved because the Employee in question is approaching retirement age.

In the past many Employers faced with a poorly performing Employee approaching retirement age may have waited until they could retire them rather than seek to manage their performance.

Employers that believe that an Employee intends to retire may still be tempted to do this however, if the Employee opts not to retire and indicates that they intend to continue working indefinitely, the Employer may feel that it then needs to take steps to address the Employee's performance and the problem here is that such steps could be seen as a reaction to the Employee's decision not to retire, and therefore in some respects motivated by age and amounting to discrimination.

To avoid such an inference, the Employer will need to show that it manages performance consistently regardless of the age of the Employee.

Employers must be careful not to assume that performance inevitably deteriorates as Employees get older nor make unjustified allowances for Employees who are approaching retirement, as this may amount to discrimination against younger Employees whom they treat less leniently.

Fair dismissal

Retirement is not a potentially fair reason for dismissal. Any dismissal must satisfy the same test of fairness, irrespective of the age of the Employee.

The Employer must have a potentially fair reason for dismissal, such as conduct, capability or redundancy, and must behave reasonably in dismissing the particular Employee for that reason.

It must follow the same procedures for capability or misconduct in relation to an Employee who has reached what was once retirement age as for any other Employee.

Disability discrimination

The provisions on 'discrimination arising from disability' set out in the Equality Act 2010 increase the potential for claims that a decision to dismiss an Employee because of performance amounts to disability discrimination.

Under s.15 of the Act, unfavourable treatment because of 'something arising in consequence' of an Employee's disability will amount to discrimination, unless the Employer can show that the treatment is a proportionate means of achieving a legitimate aim.

Many individual dismissal decisions may be prompted by the Employer's concern that the Employee is no longer 'up to the job'.

However, when performance issues are the result of a condition such as, for example, arthritis, this will create the potential for a disability discrimination claim.

Employers will need to take this into account when carrying out performance management of older workers. They should also be aware that where an age-related condition is affecting an Employee's performance there may be a duty to make reasonable adjustments so the Employee can continue to work. This may involve allowing flexible working options or altering the content of the job itself.