



Briefing

Employment, Pensions and Benefits - July 2010

End in sight for the default retirement age of 65

After many months of speculation about what's going to happen to the default retirement age of 65, the government has today announced a consultation exercise on phasing it out from 6 April 2011 with its eventual removal from 1 October 2011.

Background

The Employment Equality (Age) Regulations came into force on 1 October 2006 and prohibited discrimination in employment and training because of age. Controversial from the start, was the default retirement age (DRA) of 65 which prohibited retirement on a compulsory basis below that age unless it was objectively justified. The introduction of the DRA was accompanied by a statutory 'retirement procedure' whereby an employer had to give notification of an individual's proposed retirement date within 6 to 12 months of that date. An employee then had the right to request working beyond retirement age and the employer would then have to consider that request. The DRA was the subject of immediate legal challenge by Age Concern but the previous government, after protracted legal proceedings, was able to justify its introduction of the DRA (see [e-bulletin no.20](#)).

It's all change now though. In today's joint statement the Minister for Employment Relations and the Minister for Pensions said, "We believe everyone should have the freedom to retire at the time that's right for them". In essence, the government is of the view that those who need or wish to work past 65 and are able to do so should not be denied the opportunity simply because they have reached a particular age.

Reasons for the change

The policy background is clear and there are a range of reasons for encouraging individuals to work longer:

- demographic change with people living longer
- financial benefits to both the individual and the wider economy
- the health and social benefits people gain from working
- the removal of the costs and associated administrative burden of the statutory retirement procedure

What is proposed?

The government proposes to phase out the DRA from 6 April 2011 and retirements under the DRA will cease completely on 1 October 2011. If however, employers want to retain a compulsory retirement age in their organisation they will only be able to do so if they can objectively justify it. This is likely to be difficult to do for the vast majority of employers. The statutory retirement procedure will also be removed.

Following removal of the DRA, any dismissal of an individual will need to be conducted adopting a fair procedure and for a potentially fair reason for dismissal namely, capability, conduct, redundancy, illegality or some other substantial reason.

It is important to note that the DRA applies to 'employees' as defined by the Employment Rights Act 1996 and so, a number of groups will be unaffected by the removal of the DRA including those professions where there is a statutory age limit such as commercial pilots or partnerships.

The government recognises that there will be certain cases caught unfairly by the phasing out and eventual removal of the DRA. However, it is of the view that there is a need for legal certainty and a six months period for transitional arrangements will come into force on 6 April 2011 whereby:

- employers will be unable to issue new notifications of retirement using the DRA on or after 6 April 2011
- retirements that are already underway, that is, notification is issued before 6 April 2011 can continue through to completion if the date of retirement falls before 1 October 2011

The consultation paper contains useful examples of how the proposals will work in practice:

- Person A is given notification of their retirement date in February 2011 and their 65th birthday is 30 September 2011. The notification precedes 6 April 2011 and the retirement will be completed before 1 October 2011. A can be compulsorily retired using the DRA subject to the statutory retirement procedure being followed.
- Person B is given notification of their retirement date in February 2011 but their 65th birthday is 5 October 2011. Although the notification precedes 6 April 2011 because they do not reach their 65th birthday until after 1 October 2011 they cannot be compulsorily retired using the DRA process.
- Person C is not notified of their retirement date before 6 April 2011 and although their 65th birthday is on 30 September 2011 they cannot be compulsorily retired because the notification does not precede 6 April 2011.

After 1 October 2011, employers will not be able to use the DRA to compulsorily retire employees and, as mentioned above, if they wish to use a retirement age they will have to be able to demonstrate this is objectively justified.

Notwithstanding the removal of the statutory retirement procedure, the government recognises that the meeting between employer and employee is of benefit to both parties because it provides the opportunity to have some discussions about future plans. On that basis, the government has specifically asked in the consultation paper whether it would be useful to have formal guidance on how to discuss retirement in a mutually beneficial way or whether a statutory Code of Practice including guidance which covers retirement discussions should be prepared.

The government accepts that removal of the DRA could have unintended consequences in the specific area of insured benefits such as life assurance, medical cover and income protection schemes as well as employee share schemes. The government has asked for input from organisations with specific concerns about these issues.

The consultation period ends on 21 October 2010 and the government intends to publish its response in November 2010. Please click on [this link](#) to access the consultation paper.

It does appear highly likely, notwithstanding that we are still in a consultation phase, that the DRA will be removed from 1 October 2011. In preparation for this employers should:

- consider whether they still want a compulsory retirement age and if so how they can (if at all) objectively justify it

- review all the employees who are approaching retirement age and identify if those employees can be given notice of retirement in accordance with the transitional arrangements
- look at benefits such as pension, life assurance, permanent health insurance and private medical insurance and ascertain the likely cost of continuing those benefits for employees aged 65 and over
- revisit contracts of employment and handbooks and consider what amendments will need to be made to take into account the removal of the DRA

Interestingly, today's announcement coincides with the Court of Appeal's decision in [Seldon v Clarkson Wright & Jakes](#) which involved the compulsory retirement of a partner in a firm of solicitors at the age of 65. The Court of Appeal upheld the Employment Tribunal and EAT's decisions that the firm could justify the mandatory retirement of Mr Seldon at 65. Its objectives of ensuring that associates were given the opportunity of partnership after a reasonable period, that the retirement age assisted in planning the partnership and workforce across individual departments and limited the need to expel partners by performance management, contributed to a congenial and supportive culture at the firm. These were legitimate objectives for the firm and were sufficient to establish the defence of justification. Mr Seldon had argued that the firm's objectives were not social policy objectives and rather, were aims of self interest which could not be legitimate. The Court of Appeal disagreed, if the aim was to provide employment prospects for young people and encourage young people to seek employment by holding up good promotion prospects this was consistent with the government's social policy. As the firm acted consistently with this social aim the compulsory retirement age was justified.

Whilst this case involved age discrimination and partners as opposed to employees, its findings will be looked at in detail by employers seeking to objectively justify any compulsory retirement age for employees after October 2011. Whether the courts adopt the same approach in dealing with employees as it did with self-employed partners will no doubt be the subject of further cases.

More information

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