

Employers must face up to reality of retirement changes

You might have missed it, but April 2011 was the last opportunity for employers to compulsorily retire staff who will have reached the age of 65 by the end of September this year.

Little in the world of employment law stands still it seems but the end of this long-established tenet of employment law, the default retirement age, marks something of a societal and cultural turning-point.

Many employers had already embraced the practice of retaining staff beyond retirement age but for some this change will take some time to adapt to.

Generally, most people, employees and employers alike, seemed to like the fixed retirement age since it allowed for workplace succession planning, a future for younger staff and a dignified exit for those reaching the prescribed age.

Now that the compulsory retirement of those aged 65 is no longer available to employers, unless the employee wishes to retire, any termination of an employment contract will need to be done on one of the permitted fair grounds, the most common of which are redundancy, capability or conduct.

In other words there will be no difference permitted when dismissing a 65 year-old or a 25 year-old. The new rule applies to all employers no matter their size or resources.

The new rule applies to all employers no matter the size or resources of the organisation. Which is really where we thought we were going to be in 2006 when the Employment Equality (Age) Regulations came into force.

Challenges to that UK legislation, however, went as far as the European Court of Justice but ultimately failed. Its judgement in September 2009 made it clear that the challenge failed as a result of the point in time to which they related and that compulsory retirement would not be immune to challenge indefinitely.

Thereafter the Government brought forward a planned review of 65 as the default retirement age, despite surveys undertaken at the time of the judgement finding that three quarters of employers wanted, in the prevailing economic circumstances, to retain a compulsory retirement age. The Government, for its part, decided not to increase it but to scrap it altogether.

It is still possible for employers to seek to justify a retirement age of their own (a so called Employer Justified Retirement Age) but the prospects of successfully demonstrating to the tribunals and courts that a set retirement age can be objectively justified are likely to be limited to employers where there are major health and safety issues that demand high levels of physical or mental fitness in the case of, for example, emergency workers or air traffic controllers.

ACAS has published guidance on "Working without the Retirement Age" and recommends that employers "have regular conversations with employees about the employer's expectations of them, the employee's performance and future plans" and "when you have someone approaching or beyond retirement age, you should ensure that any poor performance is addressed as it would be for other employees".

The removal of the default retirement age will also impact on compensation calculations, as until now it has been possible to cap any compensation for future loss of earnings at 65. Now claimants are able to argue that they would have worked on until 80 or older.

It will be interesting to see how quickly we adapt to the latest change. Not so long ago it was possible for employers to discriminate against disabled or gay people and to pay women less than men for the same job. Within the memory of many it was also possible for employers to stop women working when they got married or when they had a child. Now it is hard to imagine that these things were permissible.

A few years from now we will have adapted to this major change too. In the short term, however, open dialogue as ACAS recommends is likely to be a useful tool, as are putting in place across-the-board performance monitoring and appraisal systems.

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