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Employment: Retirement Age

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Summary

This note deals with the compulsory retirement of staff (not the State Pension Age).

As a result of age discrimination legislation which came into force in 2006 ([*The Employment Equality \(Age\) Regulations 2006*](#)) compulsory retirement ages became unlawful unless they could be justified. However, this was subject to a national Default Retirement Age (DRA) of 65 which allowed compulsory retirement for those over that age, provided employees were given the opportunity to exercise a right to request working beyond retirement age.

The Coalition Government abolished the DRA. Detailed proposals were published on 29 July 2010 setting out the intention to phase out the DRA. The phasing out of the DRA began in April 2011 and was completed in October 2011. As of 1 October 2011, the [*Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011*](#) abolished the DRA.

Under current law, a policy of compulsory retirement constitutes direct age discrimination unless it can be justified as being a proportionate means of achieving a legitimate aim.

1. Current Position

1.1 End of the Default Retirement Age

The [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011 \(SI 2011/1069\)](#) came into force in April 2011 and abolished the Default Retirement Age (DRA) from 1 October 2011. Employers can no longer use the DRA to retire employees compulsorily. The Coalition Government has committed to review in 2016 the removal of the DRA.¹ Guidance on the practical implications for employers of removing the DRA has been published by [Acas](#).² Under current law, if an employer wishes to enforce a retirement age policy it has to demonstrate that the policy is objectively justified.

1.2 Justification

Under the [Equality Act 2010](#) compulsory retirement is a form of direct age discrimination. However, unlike other forms of direct discrimination, direct age discrimination is lawful if it can be justified. In order to justify a policy of compulsory retirement an employer would need to show that the policy:

- 1 pursues a legitimate aim;
- 2 is a proportionate means of achieving that aim.³

The courts have recognised a number of potentially legitimate aims for compulsory retirement, including:

- promoting access to employment for younger people;
- the efficient planning of the departure and recruitment of staff;
- sharing out employment opportunities fairly between the generations;
- ensuring a mix of generations of staff, to promote the exchange of experience and ideas;
- avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job, which may be humiliating for the employee concerned; and
- avoiding disputes about the employee's fitness for work over a certain age.⁴

In order to demonstrate that a policy is proportionate an employer must show that it is "necessary". A policy will not be necessary if less discriminatory means of achieving the aim are available. It must also be introduced in the least discriminatory way reasonably possible. For example, if it is possible to stagger the introduction of a retirement age, so as to mitigate its negative effects, it is likely that its immediate introduction would be disproportionate.⁵ The assessment of proportionality involves weighing the importance of the aim against the severity of the disadvantage caused.

In *Seldon v Clarkson Wright and Jakes* [2012] the Supreme Court described this exercise as follows:

... the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance

¹ Department for Business, Innovation and Skills, [Phasing out the Default Retirement Age](#), July 2010, p26

² Acas, [Working Without the Default Retirement Age](#), 2011

³ [Equality Act 2010, section 13\(2\)](#)

⁴ See: *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, para 50

⁵ [European Commission v Hungary](#) [2012] EUECJ C-286/12, para 73

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management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.⁶

As this passage makes clear, whether a retirement age policy is a proportionate means of achieving a legitimate aim is a question of fact, to be considered in the context of each individual case. *Seldon* concerned the mandatory retirement of a partner in a law firm. The question in that case was whether this constituted age discrimination, which, as indicated, the Supreme Court answered in the negative, holding that it was potentially justifiable. The Supreme Court then remitted the case to the employment tribunal, in order for it to decide whether in the particular circumstances of Mr Seldon's case the mandatory retirement policy was in fact justified. The employment tribunal concluded that it was, on the basis that it was a proportionate means of achieving staff retention and planning the future of the firm.⁷ However, the dispute had been ongoing for some seven years; the judge stated that societal norms about working beyond 65 had changed since 2006 and that had the tribunal been called to judge the same facts today it may have come to a different conclusion.⁸

⁶ [Seldon v Clarkson Wright and Jakes \[2012\] UKSC 16](#), para 62

⁷ ['Seldon's retirement at 65 was justified'](#), *Solicitor's Journal*, 30 May 2013

⁸ *Ibid*

2. Background to the Default Retirement Age and its abolition

2.1 EC Directive

In November 1999, the European Commission introduced proposals for a directive establishing a general framework for equal treatment in employment and occupation, which covered discrimination on grounds of age.⁹ After much discussion and revision, political agreement was reached at the Employment and Social Policy Council on 17 October 2000.¹⁰ The [Directive establishing a general framework for equal treatment in employment and occupation](#)¹¹ was adopted on 27 November 2000 (“the Framework Directive”). It prohibits discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation. Member States had until 2 December 2006 to implement the Directive’s provisions on age.

2.2 Provisions on age

The Directive imposes a general prohibition on both direct and indirect discrimination on grounds of age in various areas of employment, including dismissals.¹² However, the Directive permits age discrimination where it can be justified. Article 6 of provides:

...Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

2.3 Employment Equality (Age) Regulations 2006

At the time that the Framework Directive was adopted, UK law permitted employers independently to set a retirement age for their employees. The [Employment Equality \(Age\) Regulations 2006 \(SI 2006/1031\)](#), which came into force on 1 October 2006, arose out of the need to implement the Framework Directive. The Department for Trade and Industry (now the Department for Business, Innovation and Skills) summarised the effect of the Regulations:

The Regulations apply to employment and vocational training. They prohibit unjustified direct and indirect age discrimination, and all harassment and victimisation on grounds of age, of people of any age, young or old.

As a result of this, employers could no longer independently set a retirement age for their employees unless this could be justified. However, the Labour Government took the view that having a retirement age could benefit employers’ ability to manage their workforces, and considered that employers may wish to retire employees without the prospect of having to justify this in an employment tribunal. In view of this, the Regulations introduced the national DRA. The rationale for this was set out in a [Written Ministerial Statement](#) on 14 December 2004, by the then Secretary of State for Trade and Industry, Patricia Hewitt:

⁹ COM (1999) 565 final, 25 November 1999

¹⁰ DfEE press release, 17 October 2000, *UK reaches political agreement on new EU anti-discrimination directive*

¹¹ 2000/78/EC

¹² Article 3 (1)

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The treatment of retirement age is an important aspect of the implementation of this legislation. We have consulted widely on this issue, both formally and informally, and have listened to a range of strongly held views. We have carefully balanced the arguments on all sides, and have decided that the legislation, which will come into force in autumn 2006, will provide for a national default retirement age of 65 and a right for employees to request working beyond the set retirement age. The decision to have a national default retirement age will be reviewed after five years.

In setting the default age, we have taken careful note of a number of representations we received in the course of consultations which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. While an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily.¹³

As noted above, this marked a change from the previous position whereby employers could set the retirement age for their employees:

Until now, companies have been able to set the age at which their employees retire without any need to justify their choice. So employees may have had to retire at age 60 or even younger, whether or not they wished to continue working. Currently only 30 per cent of people are in employment by the age of 65 and a major part of the response to the ageing society will be for more people to choose to work to that age.

Following the implementation of this decision, employers will only be able to set their own retirement age for all or some of their workforce below 65 where they can objectively justify this. They would be subject to challenge and would have to show that it was appropriate and necessary to do so.

The default age is not a compulsory retirement age. Employees will be able to work beyond that age wherever they and their employers agree. Indeed, the Government welcome such agreement, and through the right to request is actively encouraging it.

This decision on retirement age has no direct implications for occupational or state pension arrangements. The Government have emphasised that it has no plans to change the state pension age once it has been equalised for men and women at 65, and we shall continue to provide for pension schemes to set normal retirement ages if they need to.

The default age will be accompanied by a right for employees who want to continue to work beyond the default age or their employer's own justified retirement age to have their request considered seriously by their employer. This right will follow the model of the right to request flexible working for parents with young children, where it has been successful in changing the culture towards more family friendly working. This policy will ensure that employers listen to employees who want to keep working and think about whether they can agree. In doing so, it will help promote a culture change including on workforce planning and the design of employee benefits, and move towards a position where fixed retirement ages are relied on only where they can be objectively justified by the employer.

We will monitor the impact of the default age from the outset. Five years from implementation we will subject to formal review the question of whether this remains appropriate. The review will be firmly grounded in evidence, and amongst other things it will look at relevant data on trends in life expectancy; the number of individuals working beyond 65; and the impact of the regulations on business, including the evolution of business practice with respect to the degree of reliance on retirement ages for workforce planning. If at the point of the review the evidence suggested that we no longer needed the default retirement age at 65, we would abolish it.¹⁴

At the time of its introduction, it was expected that the DRA would be reviewed after five years, in 2011.

¹³ HC Deb 14 December 2004 cc127 - 130WS

¹⁴ Ibid

2.4 Legal challenge

Soon after the Regulations came into force the DRA was challenged by way of judicial review. The case was brought by the National Council on Ageing ("NCA") which at the time operated under the names Age Concern and Heyday. Proceedings began in the High Court, where the NCA claimed the DRA was incompatible with the Framework Directive in view of the fact people over age 65 could not choose to continue working.¹⁵ The High Court referred the case to the European Court of Justice (ECJ) for a ruling on the Regulations' compliance with the Directive. The ECJ delivered its ruling on 5 March 2009.¹⁶

The ECJ held that a DRA may, in principle, comply with the Directive, provided it could be shown to be a necessary means of achieving a legitimate aim. In view of this clarification the matter was remitted back to the High Court for determination. The High Court handed down judgment on 25 September 2009,¹⁷ and held that the Regulations complied with the Directive.

2.5 The review and abolition of the Default Retirement Age

On 13 July 2009 the then Prime Minister, Gordon Brown, decided to bring forward to 2010 the review of the DRA, as reported by *BBC News*:

A review of the default retirement age, which allows employers to compel staff to retire at 65, is to be brought forward by a year, the government says. BBC home editor Mark Easton says the move effectively signals an end to the default retirement age. The majority of people retire before 65, but 1.3 million people work beyond state pension age. Many more say they would if their employer permitted it.

The employers group the CBI said the move was "disappointing". **The review had been expected in 2011 but will now take place next year.** Ministers have brought the review forward to respond to changing demographic and economic circumstances ... Explaining the change in the timing of the review, Prime Minister Gordon Brown said: "Evidence suggests that allowing older people to continue working, unfettered by negative views about ageing, could be a big factor in the success of Britain's businesses and our future economic growth."

The TUC welcomed the move. "It cannot be right that an employer can sack someone simply for being too old," said TUC general secretary Brendan Barber. "Employees should have choice - neither forced by employers to give up work, nor forced by inadequate pensions into working longer than they should."

In view of these comments, it was expected that the DRA would be abolished, although the review was due after the May 2010 general election. Notwithstanding the change of government, this expectation persisted. The Coalition Agreement contained the following:

We will phase out the default retirement age...¹⁸

On 3 June 2010 the Government provided an update on the position:

The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Baroness Wilcox): We are committed to phasing out the default retirement age, but it is important to do this in a way that allows individuals and employers to adapt

¹⁵ Equal Opportunities Review, *In the News*, EOR No.158, November 2006; Age Concern news release, [Heyday takes Government to court over mandatory retirement age](#), 3 July 2006

¹⁶ [R \(on the application of The Incorporated Trustees of the National Council on Ageing\) v Secretary of State for Business, Enterprise and Regulatory Reform](#) Case C-388/07

¹⁷ [Age UK, R \(on the application of\) v Attorney General \[2009\] EWHC 2336 \(Admin\)](#) (25 September 2009)

¹⁸ Cabinet Office, [The Coalition: our programme for government](#), May 2010

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to the new situation. BIS and the DWP have assembled a considerable body of evidence on this issue. Once this has been analysed we will set out the way forward.¹⁹

Detailed proposals were published in a consultation document on 29 July 2010:

The Government has decided to phase out the DRA...Removal of the DRA will begin in April 2011, with transitional arrangements covering the period until 1 October 2011.

Phasing out the DRA is just one of the steps that the Government is taking to enable and encourage people to work for longer, alongside reviewing when the State Pension Age should reach 66 and ensuring there is effective support for those out of work to find work. There are a range of reasons for pursuing these policies, including demographic change; the financial benefits to both the individual and the wider economy; and the health and social benefits many people gain from working later into life.

As well as removing the DRA to enable people to work for longer, the Government is also proposing to help employers by removing the administrative burden of the current DRA-associated retirement procedure – the so-called 'right to request' working beyond retirement, which an employer has a duty to consider.

Although the Government is proposing to remove the DRA, it will still be possible for individual employers to operate a compulsory retirement age, provided that they can objectively justify it.²⁰

On 13 January 2011 the Government published its [response](#) to the consultation, confirming that it would proceed with abolishing the DRA. The [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011](#) came into force on 6 April 2011, and began a phased abolition of the DRA which concluded in October 2011.

¹⁹ [HL Deb 3 June 2010 c WA10](#)

²⁰ BIS, [Phasing out the Default Retirement Age, Consultation document](#), July 2010, p5

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