SpeechlyBircham

Insight

Default retirement age

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The changes to the age legislation

The ability to dismiss an employee fairly on reaching the default retirement age of 65, if the procedure set out in the legislation is followed, is going to be phased out from 6 April 2011 and completely abolished on 1 October 2011. The abolition of the default retirement age will have a major impact on employment policies and practices which all employers should be considering and if ignored may give rise to claims of age discrimination. It is important for all employers to give active consideration now well in advance of the final deadline for change to minimise the risk of claims in the future.

Preparing for the abolition of the default retirement age

The abolition of the default retirement age will affect most employers across the UK. The recent 'State of HR Survey' of HR professionals conducted by Speechlys, together with Kings College, indicated that 78% of the employers answering the survey currently have a retirement age of 65 years of age but only 33% of those employers said that they considered the issue to be on the HR agenda for them this year. In our view few of those employers will be able to maintain that a retirement age at 65 can be retained post 1 October 2011. So most will be affected by the change and will need to start planning how to respond sooner rather than later.

Can you rely on the procedures to dismiss before 1 October 2011?

The government has confirmed that employers with a retirement age of 65 can still use their compulsory retirement age to retire employees who have their 65th birthday on 30 September 2011 or an earlier date. But in order to do so the employers must follow the statutory retirement procedures set out in the act and notify employees before 6 April 2011, so that their retirement will be completed before 1 October 2011. Some employers will seek to take advantage of this transitional period but such action can have a negative impact if an employer seeks to clear out older employees in a manner that appears insensitive and ill considered.

Do you need to abolish your retirement age?

The biggest single decision many employers will face is whether they can justify retaining a retirement age of 65 or indeed any retirement age in the contract of employment at all. If an employer does wish to retain a retirement age, the age chosen will need to be objectively justified. This means that the employer will have to prove that the retirement age is a "proportionate means of achieving a legitimate aim". In practice whilst it may be easy to prove a legitimate aim it will be far more difficult to justify that the retirement age chosen is a proportionate means of achieving that legitimate aim.

This issue was considered in a recent Court of Appeal decision of *Seldon v Clarkson Wright and Jakes*. This decision considered whether the firm could objectively justify

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retiring partners of a law firm at 65. The case did shed some light on how a court might approach the issue but whilst two of three aims were considered legitimate, limiting the need to remove a person from the organisation by way of performance management was not considered a legitimate aim. Equally the recent and much publicised case of *Miriam O'Reilley v BBC*, though not specifically related to compulsory retirement, suggests that customer preferences may not constitute a legitimate aim.

If you have and want to retain a retirement age for your employees, you should therefore ask yourself three questions:

- What aim are you hoping to achieve by retaining the retirement age?
- Is this a legitimate aim?
- Is there another means of achieving your aim, without requiring a retirement age?

When you answer these questions you will need to have evidence supporting your views. It is important to critically challenge the answers given as the court will require you to be able to show that the issues have been fully analysed and in particular that you are not relying on subjective assumptions about age.

In the event that you decide that your retirement age is not objectively justified and you decide that it should be removed this may have knock on effects on other terms of employment. For example any enhanced redundancy schemes operated will need to be reviewed and if there is a cut off age of 65 this will not be justified unless you can also justify the retirement age.

Employee benefits post 65?

Most employee benefits are stated in contracts of employment to be paid to their employees up to age 65 or the employee's normal retirement age. This reflects the terms upon which such benefits are provided by insurers in the market. Employers were concerned that if such benefits could not be provided post the age that insurers were prepared to provide cover, any employee who continued in employment post the retirement age could bring a discrimination claim for the failure to provide benefits available to other younger employees.

The Department for Business, Innovation and Skills has responded to this problem and has confirmed that there will be a statutory exemption for the non provision of group risk insured benefits. This will apply to such benefits as income protection, life assurance, sickness and accident insurance, including private medical cover. However, share option schemes will not be exempt and it will be necessary for these schemes to be amended to permit employees to secure the benefits even after any stated cut off date such as their normal retirement age.

What other changes will need to be made to employment policies and procedures?

If there is to be no retirement age in the contract it will be necessary for employers to trawl through their contracts, policies and procedures to identify where references are made to the retirement to ensure changes are made. These changes may also have to reflect the fact that more employees are likely to continue in employment beyond any previously stated retirement date. The extent of the changes will be dependent upon the provisions in these documents.

The loss of an end to employment with dignity?

Employees who wanted to continue in employment did not necessarily see retirement at 65 as a dignified end to their employment. But how will employers adjust to the loss of the default retirement age, which gave them a safe way to end the employment of employees at 65?

Many employees may still choose to leave voluntarily when they reach 65, as they may have been planning and indeed looking forward to their retirement. Where this is the case it will be necessary for those employees to give notice to leave their employment in accordance with their contracts of employment.

Many employees will want to continue in employment for longer, on the same terms or in some cases on different terms or in new roles. Those that wish to continue in employment will then continue until either the employer or the employee gives notice. If the employer gives notice of termination then the employer will have to follow the normal rules with regard to dismissal to avoid unfair dismissal claims.

This requirement will require employers to consider making changes to their normal procedures to ensure that employees are treated fairly. The government has made it clear in the Employer's Charter (http://www.bis.gov.uk/assets/biscore/employment-matters/docs/e/employerscharter.pdf) that it is OK for an employer to ask an employee if they intend to retire. Nevertheless employers who ask that question will have to ensure that there are age neutral procedures in place and followed, to ensure an employee's intentions are understood. Provided questions about an employees future career intentions are asked of all employees, regardless of age, possibly as part of any normal appraisal round, this should allow employers to ask the question in a neutral fashion and will allow them to put in place appropriate succession planning.

Where an employee continues in work, but their performance deteriorates, then the employer will have to consider taking action to implement a performance management programme, possibly leading to the termination of the employee's employment. Again what will be important is to ensure that any such programme is age neutral. This may well require such programmes to be moderated to ensure that they are not implemented in an aggressive manner to weed out older employees, or that unwarranted assumptions about older workers and their abilities or their intentions do not drive the programme. Remember the Government drew attention to research, which shows that older worker productivity does not usually decline, at least up to the age of 70, where workers receive the same level of training as younger workers.

The government has avoided trying to legislate to deal with the issues that may arise and is relying on ACAS to produce guidance for employers to assist them make the necessary adjustments. The ACAS booklet can be found at http://www.acas.org.uk/CHttpHandler.ashx?id=2976&p=0. The guidance emphasises the need for there to be dialogue between employer and employee about the issue. Any dialogue about performance will need to be carefully managed to avoid allegations by an employee that it is weighted against older employees.

Training

Employers will also need to rethink how they deal with training requests. It was acceptable to decline requests for training from older workers but this will no longer be acceptable. Employers will have to rethink their approach to training and indeed there may be a greater requirement to support older workers.

Certainly employers will be well advised to consider further diversity training. When the Act was first introduced a great deal of training was given to employees on how their approach to recruitment and the management of employees needed to be age neutral. Managing of the termination of employment of older employees will be difficult and it may require procedures to be changed and in particular the setting of objective and measureable performance criteria in any performance management programme will need careful consideration.

Contact

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