You can’t retire me!

David Regan discusses the implications for dentists as the retirement age is abolished

The question of how to deal with older members of staff, particularly those who have worked for a business for a long time, is a difficult one for managers. At present, employers must follow a fairly strict retirement process which penalises them for failing to comply, but which does allow them to choose to retire an employee without the employee having any say in the matter. With effect from 6 April 2011, this process will begin to fall away and, from 1 October 2011, it will be age discrimination to dismiss someone by reason of retirement.

History of Retirement

Retirement is a relatively recent historical phenomenon. The concept of retirement on a state pension was invented by Chancellor Otto von Bismarck of Germany in the late 1800s as a response to the rising tide of socialism which was sweeping through Germany. In 125 years on, the notion of employees reaching the age of 65, retiring and receiving a reasonable income from their combined state and privately funded pensions has become more difficult to uphold.

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an attempt to promote his government as protecting the interests of the working class, Bismarck announced that every German person over the age of 65 would be entitled to receive a state pension. The arbitrary state pension age of 65 (which in those days cost little as few people lived to reach the age of 65) then found its way into national law in many developed countries.

25 years on, the notion of employees reaching the age of 65, retiring and receiving a reasonable income from their combined state and privately funded pensions has become more difficult to uphold. The abolition of the default retirement age therefore stands both as a liberal gesture of social equality, as well as a pragmatic response to the difficulties posed by ageing population and declining returns on investment for pension funds.

Changes to Retirement

The key changes to the law on retirement are as follows:

• Notices of intended retirement date cannot be issued from 6 April 2011 onwards
• The default retirement age will be abolished with effect from 1 October 2011

What does this mean for employers?

Notices of intended retirement can now only be issued for employees who are 65 or over on or before 30 September 2011 and the notice of intended retirement date for that employee must be issued no later than 5 April 2011.

Alternatives to the default retirement age

1. Speak to the employee ‘off the record’: Whilst this option is tempting, trying to speak with an employee ‘off the record’ is fraught with difficulty. In brief, simply saying ‘this conversation is off the record’, or ‘without prejudice’, does not mean that the employee cannot use the conversation against the employer. Therefore an employee could argue that these discussions are an attempt to force them out on the grounds of their age, and consequently sue for age discrimination. If the employer is considering retiring, and

2. Speak to the employee ‘on the record’: The best time to do this is during annual appraisals, or at regular meetings. Indeed, it may make sense for employers to discuss future plans with all employees at appraisal time, as this will give the employer a better idea of who is looking to progress within their role, and who is considering retiring, and

plan accordingly.

3. Keep a close eye on performance: Many employers are concerned that the change in law means that they will be stuck with staff members who cannot perform and who cannot be retired. This is not the case. In fact, under the new law, employers will have to keep a closer eye on who is performing well, and manage all employees’ performance equally, regardless of age or length of service.

4. Set a corporate ‘normal retiring age’: Contrary to popular belief, employers will still be able to set a ‘normal retiring age’ for employees. Although this will be age discrimination, this will be justifiable if the decision can be shown to be a proportionate means of achieving a legitimate aim.

5. Set out Compromise Agreement: One possible solution is to issue a notice of retirement to the employee with an intended date before October 2011, then open ‘without prejudice’ discussions with the employee on the basis that you will let them stay past that date, if they sign a Compromise Agreement.

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The process to be used would be as follows:

- Issue the employee with the notice of intended retirement date (to be before 1st October 2011)
- Enter into ‘without prejudice’ discussions regarding the employee continuing to work past that date
- Once an agreed date has been set, enter into a Compromise Agreement with the employee.

There are two important components to the Compromise Agreement:

1. That it is a condition of the Compromise Agreement that the employee signs a second Compromise Agreement (a copy of which is annexed to the first Agreement) at the end of his employment
2. That any payments due under the first Agreement are not to be paid unless the second Agreement is signed.

The advantage to this approach is that, if the employer refuses to sign the second Agreement, he does not receive any payments due under the first Agreement. Furthermore, if he does bring any claims for age discrimination as a result of his dismissal at the date agreed under the first Agreement, then he will be in breach of contract, and any sums that he claims should be ‘damages’ that the employer can claim back.

- This relatively simple proposal could save employers from the dilemma of choosing between losing valued staff before they are ready, or allowing staff to continue with no clear idea of when they plan to retire.

Difficulties

Succession planning

The most obvious difficulty for employers will be that there is no longer a ready-made timetable for retirement, meaning the path to senior positions could be blocked. Employers may also feel unable to ask when an employee is intending to retire, leading to ‘shock’ retirements that leave the employer without a proven successor.

Employee Relations

Employees may also find it difficult to start discussions about retirement with employees as detailed above. Even if they do, many employees may not take kindly to the idea that they should retire if they are not ready to do so. In addition, under the ‘old’ law, employers have often been allowed to continue to retirement with managers overlooking lapses in judgment or incremental changes in performance which can be attributed to an employee’s age. Moving forward, employers will be faced with the unpleasant task of performance managing longstanding, cherished employees if they are not up to task rather than allowing them to continue with the knowledge that retirement is just around the corner. This could cause particular problems where employees work as part of close-knit teams, such as in the hospital catering industry, with employees becoming known not just to other catering staff, but also to wider hospital staff. In such cases an adverse reaction from the employee could prompt a backlash against the catering manager.

What is a ‘legitimate aim’?

Cases under the ‘old law’ have found legitimate aims to be workforce planning, enabling recruitment and retention of younger employees, avoiding adverse impact on pensions and benefits, ensuring continued competence, and having an age balanced workforce ensuring job opportunities amongst the generations. However, employers will need to be careful when implementing a normal retirement age and will need to show that they have balanced the employee’s rights and dignity against the needs of the business.

Flexible Working

In practice, some employers may be happy to allow an employee to continue working as long as they choose, and many employees will most likely want to at least reduce their hours, if not finish working completely, as they age. It is important to note that the abolition of the default retirement age has no effect upon the flexible working law which is currently in place, and employers will not be under a duty to allow older employees to work reduced hours unless they are eligible for flexible working in the usual way.

Performance Management

In addition to the employee relations issues highlighted above, managers must ensure that performance management processes are implemented fairly across the entire range of employees in order to avoid any accusations of age bias, or trying to force out the older members of staff. In addition, managers will need to watch for age related disabilities and, if any disability is found, will need to consider whether or not any reasonable adjustments may need to be made in relation to the employee and their employment.

Exceptions

There are two exceptions to the abolition of the default retirement age:

1. It does not affect occupational pension schemes and the setting of a “normal retirement age” for the purposes of occupational pension schemes.
2. Employers may withdraw benefits for employees at or over the age of 65 (with the age at which withdrawal will be legal rising in accordance with the state pension age). This exemption deals with a key concern of employers, namely that the rising costs of benefits and insurance for employees over the state pension age could make the provision of these benefits prohibitively expensive.

Conclusion

The abolition of the default retirement age has the potential to have a large impact on businesses, as staff may choose to remain in their position longer, hindering succession planning, and employers and managers will be forced in many cases to invoke disciplinary procedures to manage the performance of longstanding employees, with a subsequent negative effect on morale. However, where there is clear ongoing dialogue between managers and staff, and all parties are open to sensible communication, there is no reason why employees continuing to work past the current default retirement age should prove to be a problem.

 Indeed, managers may find that retaining the services of a valued, longstanding employee for a reduced number of hours during the working week may allow more junior members of staff to learn from someone who would otherwise previously have retired and to gradually take over their role as they ease towards the date at which they intend to retire.

In addition, employers are still free to choose to set a retiring age for their business, provided that they are able to justify this.

About the author

David Regan is a solicitor in the Employment Team at Mundays Solicitors LLP, a leading regional practice which provides quality advice to corporate and private clients. Established in 1960, Mundays has a diverse client base that includes major national and international companies as well as smaller businesses, individuals and families. Mundays specialises in Banking, Construction, Corporate & Commercial, Dispute Resolution, Employment, Family, Insolvency, Private Wealth, Property, and a wide variety of industry sectors.

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