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 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.

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.

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 any employee could argue that these discussions are an attempt to force them out on the grounds of their age, and consequently for age discrimination.

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 for advancement, who is happy 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 retire-
  ment date (to be before 1st October 2011)
- Enter into ‘without prejudice’ discussions regarding the em-
  ployee 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 com-
ponents 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 un-
   der the first Agreement are not
   to be paid unless the second
   Agreement is signed.

The advantage to this
approach is that, if the employ-
ee 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 Agree-
ment, then he will be in breach
of contract, and any sums that
he claims should be ‘dam-
ages’ that the employer can
claim back.

This relatively simple pro-
posal could save employers
from the dilemma of choosing
between losing valued staff be-
fore 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 timeta-
ble 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**

Employers may also find it dif-
ficult 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, employees
have often been allowed to con-
tinue to retire with manag-
ers overlooking lapses in judg-
ment or incremental changes
in performance which can be
attributed to an employee’s age.

Moving forward, employers
will be faced with the unpleas-
ant task of performance man-
aging 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 em-
ployees work as part of close-
knit teams, such as in the hos-
pital catering industry, with
employees becoming known
not just to other catering staff,
but also to wider hospital staff.
In such cases an adverse reac-
tion 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, avoid-
ning adverse impact on pen-
sions and benefits, ensuring
continued competence, and
having an age balanced work-
force ensuring job opportuni-
ties amongst the generations.
However, employers will need
to be careful when implement-
ing 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
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 abo-
lication of the default retirement
age has no effect upon the flex-
ible working law which is cur-
rently in place, and employers
will not be under a duty to al-
low 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 disabili-
ty is found, will need to consid-
er whether or not any reason-
able adjustments may need to
be made in relation to the em-
ployee and their employment.

**Exceptions**

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

1. It does not affect occupa-
tional pension schemes and
the setting of a “normal retire-
ment 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, name-
ly that the rising costs of
benefits and insurance for
employees over the state pen-
sion age could make the provi-
sion of these benefits prohibi-
tively expensive.

**Conclusion**

The abolition of the default
retirement age has the potential
to have a large impact on busi-
nesses, 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 proce-
dures to manage the perform-
ance of longstanding employ-
ees, 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 communica-
tion; there is no reason why
employees continuing to work
past the current default retire-
ment age should prove to be a
problem.

Indeed, managers may find
that retaining the services of a
valued, longstanding em-
ployee for a reduced number of
hours during the working
week may allow more junior
members of staff to learn from
someone who would oth-
wise 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 re-
tiring age for their business,
provided that they are able to
justify this.

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**About the author**

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