Abolition of the Default Retirement Age – Actions for Employers

The coalition government will abolish the default retirement age of 65 on 1 October 2011. However, the last date upon which retirement notices can be given is 31 March 2011.

Therefore next year requiring an employee to retire because of their age will be both unfair dismissal and age discrimination – unless the employer can justify this.

The main options for employers are:

- To maintain a compulsory retirement age for all employees – or for some occupational groups – and be ready to defend this as objectively justified in an employment tribunal.
- To take the view that employees will not wish to continue to work when they are no longer capable of performing well and therefore the issue will look after itself.
- To refresh and improve performance management and capability processes so that any issue with under performance with age can be fairly and safely addressed.
- Set up straightforward arrangements so that sensible and practical discussions can be had with employees about retirement and about reducing their duties as they get older, and generally encourage open discussion on this topic.

Maintain a compulsory retirement age

The employer will need to be able to persuade an employment tribunal that this is a ‘proportionate means of achieving a legitimate aim’. It is easy enough to identify a ‘legitimate aim’ for a compulsory retirement age, such as:

- health and safety
- ensuring a high standard of performance for employees
- workforce planning
- sharing out job opportunities across the generations.

However, it is much more difficult to show that compulsory retirement is a ‘proportionate means’ of achieving that aim. For an age-discriminatory practice to be proportionate, the employer has to satisfy a tribunal not only that the strategy is effective but also that there is no other means of achieving the same aim which would be less discriminatory.
For example, if the argument is health and safety, it is a legitimate aim to ensure that people whose jobs are safety critical, such as train drivers and surgeons are fit to do their jobs. However it is quite another thing to satisfy an employment tribunal that automatically dismissing everybody over a particular age is a proportionate means of achieving this. For example, what about employees whose health deteriorates (possibly without this being obvious) before that retirement age? Using careful medical checks with possibly more frequent ones for older employees might be the key to fairness.

Before deciding that automatic retirement on age grounds is justified, a tribunal is likely to want evidence to show that the risk of unexpected and catastrophic sickness is more likely above a particular age and could not be detected by adequate medical assessments.

What’s more, it is unlikely that a health and safety based retirement age could apply to the whole of an employer’s workforce.

**Relying upon the common sense of employees to retire when they are no longer capable of their jobs**

The reality is that most employees will not want to stay on when they are no longer capable of doing their jobs well. However, the exceptions to this general rule may become more numerous as occupational pensions become less valuable.

**Performance Management/Capability**

Employers should ensure that their performance management systems and capability procedures are clear and effective and that managers have the training to use them. Performance management systems should contain guidance on setting clear performance standards and processes for dealing with failing employees. Capability is a fair reason for dismissal but an organization needs to demonstrate, in writing, they managed the process fairly and organizations need to understand this is a separate process to the disciplinary procedure which address misconduct.

**Discussions about retirement and stepping down**

It seems likely that increasing numbers of people will want to remain at work for longer than at present, but quite possibly in less demanding jobs. Reducing the duties or responsibility or the hours of work of older employees may be of great benefit to both them and the employer under a flexible
working policy. This could be undertaken together with the provision of lifestyle retirement planning organized over several years.

The concern of some employers is how to have discussions about this topic without the very raising of this issue being regarded as age discrimination. On the part of the employees there is often a matching concern that their making the suggestion that they might go part time or take a demotion will be seen as admission that they are no longer capable of their current role. So long as discussion of this issue is known by employees to be routine, then the legal risk created by raising the issue is low.

**Further Actions for Employers to Take**

- Review policies, procedures and employment contracts
- Provide training for managers (particularly younger managers who may not appreciate future concerns of older employees)
- Treat older employees as all other employees, using appropriate HR policies to manage employment issues that arise

For more information contact Sandra Beale FCIPD.

SJ Beale HR Consult Ltd

Tel: 07762 771290

Email: info@sjbealehrconsult.co.uk

Web: www.sjbealehrconsult.co.uk