

Independent Community Pharmacist Magazine

Date: June 2011

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Pharmacy and the Law

Beware the recent retirement law changes

Richard Hough, a practitioner in pharmacy law, takes a look at the implications of the abolition of the statutory retirement age for employers



Until recently, employers have been able to rely on retirement as a fair reason for terminating a contract of employment. Where an employer wanted to retire an employee at or beyond the age of 65, the requirements of the statutory Default Retirement Age (DRA) procedure had to be met. These imposed a strict timetable and process whereby an employer was placed under an obligation to consider any request made by an employee to continue working beyond the statutory retirement age. If an employer correctly followed the process, any resulting dismissal would be treated as being on the grounds of retirement and would not amount to an unfair dismissal or unlawful discrimination on grounds of age.

However, the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 came into force on April 6, 2011, which effectively abolish the statutory DRA of 65 and will have a huge impact on how employers operate their businesses. The regulations are applicable to all employers and all company sizes and sectors in England, Wales and Scotland.

Although the DRA will not be completely scrapped until October 1, 2011, transitional arrangements have been put in place from April 6, 2011, which mean that employers do not have much time to get to grips with the proposals. If an employer wishes to dismiss an employee on the grounds of retirement and has not already issued notice to the employee under the statutory procedure, it is now too late to do so and any lawful dismissal of older workers (where required) will now have to be on the grounds of capability, conduct or redundancy.

Unless a statutory notice of retirement was issued prior to April 6, 2011, an employer can no longer lawfully terminate employment on the grounds of retirement unless it can justify a Company Retirement Age (CRA). Justifying a CRA will require forward planning, detailed analysis and a sound business case to support the retirement age chosen.

This effectively now gives employers three options:

1. Abolish a retirement age entirely
2. Apply a justifiable CRA (65 or another age) across the whole of the workforce, or
3. Apply a justifiable CRA to specific roles or individuals

To justify a CRA, an employer will need to demonstrate that it is "a proportionate means of achieving a legitimate aim". This will require a sound business rationale and one which has been carefully considered in advance and properly recorded and explained in a retirement policy or statement.

Any attempt to justify a company retirement age after a dismissal of an employee on retirement grounds is unlikely to be looked on favourably by the Employment Tribunal

Employers will undoubtedly need to carry out a reasoned and genuine analysis of their business to establish a sound business justification for imposing a CRA on its employees. Any attempt to justify a company retirement age after a dismissal of an employee on retirement grounds is unlikely to be looked on favourably by the Employment Tribunal.

Unfortunately, very little guidance is available as to what employment tribunals are likely to accept as justification. However, the threshold of justification will undoubtedly be high and employers will only have very limited

scope in their arguments for justifying the retention of a retirement age in their business.

The Government's recent consultation response mentioned circumstances where retirement age might be considered "essential" for health and safety reasons or succession planning. It is clear that for some roles, particularly those which are physically demanding (eg, fire fighter) or mentally demanding (eg, air traffic controller), the imposition of a retirement age will be justifiable. Although the point has yet to be tested, one can immediately see the applicability of such circumstances to pharmacy, where the accurate dispensing of medicines requires a high level of concentration, mental demands are high and the consequences for making an error can be extreme.

Some other potential justifications for a introducing a CRA might include:

- The provision of opportunities for younger workers
- Allowing employees to plan a controlled and dignified exit
- Assisting employers in workforce planning or
- Supporting career development and succession planning.

Little guidance is available as to how high the hurdle of justification will be for employers. Until case law evolves, employers will not know the degree of evidential burden they must meet in order to be compliant with the law. At present, employers should, therefore, assume that the burden will be high and would be well advised to rely upon robust statistical and well researched evidence before imposing a retirement age on the basis that (for example) "those employees aged over 65 who are involved in the supply of medicines are more likely to make dispensing errors and so will be retired at that age".

Given the present uncertainty surrounding this issue, employers should obtain legal advice before introducing any CRA. If employers decide not to introduce a CRA, the only lawful way to effect the dismissal of an older worker will be on the grounds of capability, conduct, illegality and redundancy. In practical terms, most dismissals of older workers will be on the grounds that their performance is no longer to the standard required of the business. It is, therefore, essential that all employees (not just those over 65) are subject to regular and effective performance review procedures.

In light of the abolition of the DRA, employers will also need to address some other issues as set out below.

Policies and procedures

A new retirement procedure will be required to deal with employees' "retirement" after April

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6, 2011, whether or not a CRA is retained. An employer will have to consider how it intends to deal with other dismissals (eg, capability, performance, etc) of older workers. Consideration should be given as to whether any absence management policy needs to be adjusted to accommodate older workers. Disciplinary and performance management procedures should also be reviewed.

Contracts of employment

If a CRA is introduced, contracts of employment may also need amending. Employers should always be aware that variations of contract can trigger certain legal obligations and legal advice should, therefore, be sought before contract amendment.

Benefits

Employers should also review any benefits which are currently offered to older employees, eg, health insurance, death in service, etc. Employers will be able to rely upon an exemption to withdraw insured benefits for employees at or beyond the age of 65, though this exemption will rise in line with the state pension age. This means that employers may be able to withdraw such insurance benefits from those employees who remain employed but are over the age of 65. This is particularly useful for employers as the cost of providing such benefits to employees older than 65 can be incredibly expensive.

It should be noted that company sick pay is not usually an insurance-based benefit and, as such, does not appear to fall under the insurance benefit exemption. The withdrawal of such a benefit based on age would therefore amount to direct age discrimination under the Equality Act 2010.

Pension

The Government has stated that the abolition of the DRA will not affect occupational pension schemes and will not affect the setting of a "normal retirement age" for the purposes of occupational pension schemes.

Above all, even if no CRA is adopted, employers should commit to discuss with employees their retirement plans to help with workforce and succession requirements.

ACKNOWLEDGEMENT

The author would like to thank Jonathan P'Anson for his invaluable contribution to this article.

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