Farewell to the default retirement age

The Government has recently confirmed that the statutory default retirement age ("DRA") will be abolished with effect from 6 April 2011, less than five years after the statutory retirement process was introduced. Opinion is divided as to whether the decision to remove the statutory DRA (which, ever since its introduction, has sparked controversy) is the right one. But, what are the practical implications of its abolition for employers? And how do the transitional provisions, which apply up until 6 April 2012, help employers?

The facts

Since October 2006, employers have been able to retire employees compulsorily when they reach the age of 65, without offering any justification for the dismissal, and without fear of an unfair dismissal or age discrimination claim landing on their desk (provided they follow the correct retirement procedure). However, from 6 April 2011, employers cannot rely on the DRA as a fair reason for dismissal. Indeed, retirement is to be removed as one of the fair reasons for dismissal under section 98 of the Employment Rights Act 1996.

For employers to be able to rely on the DRA during the period 6 April 2011 to 6 April 2012, they need to comply with the transitional provisions, a draft of which were published earlier this month. To do so, employers must issue notices to employees informing them of their retirement date on or before 5 April 2011. The retirement date must fall no more than 12 months after the notice is given. This is sensible, since otherwise an employer could give notice tomorrow, for five years time, to an employee aged 60 today. So, the last retirement notices, under the statutory DRA, must go out no later than 5 April 2011.

Crucially, however, the draft regulations appear to have overlooked that some employers will have retained older employees on their books, and may well have given them notice to retire under the existing legislation. Understandably, the regulations do not want to permit employers retiring anyone younger than 65 (the current statutory DRA). However, the legislation does not address the employee who is already aged 65 by 6 April 2011.

This oversight has created a drafting anomaly which requires employees to turn 65 between 6 April and 30 September 2011, rather than requiring them be at least aged 65 by 30 September 2011. This would mean that employees who have already turned 65 could not be forced to retire, even if they have already been given notice of a retirement to take effect on or after 6 April 2011. Our view is that this cannot have been the Government's intention and so, as long as employees turn 65 by 30 September 2011 and the correct notice is given by 6 April 2011, employers will be able to continue to rely on the DRA. We understand that the Government has informally indicated that the transitional provisions will be amended to this effect. If not, we shall send out another update to advise on the implications of this.

The removal of the statutory DRA does not mean that employers will no longer be able to retire employees at a fixed age, but they will need to objectively justify a retirement age so that the dismissal is for "some other substantial reason" and potentially fair. Employers will also be required to follow a fair dismissal procedure.

One concern over the removal of the DRA was that employers would stop providing benefits such as life assurance and medical insurance for the whole workforce, given the increased costs in continuing to provide the benefits to those aged over 65. The Government has responded to this by introducing an exception to the principle of equal treatment on the grounds of age. Employers may safely withdraw insurance benefits or a related financial service for employees aged 65 or over (rising in line with the UK state pension age). However the benefits must otherwise be provided to all the employer's employees or to a class of those employees. So for some senior

management roles, which may have lucrative and special insurance benefits attached, it may be difficult to withdraw the benefits safely at age 65. Moreover, this is going to require contracts to be amended since employees may have rights to continue to enjoy the benefit under the contract itself.

Impact

The ease with which employers will be able to objectively justify a retirement age once the DRA has been abolished is not yet known. However, it is our view that it will be far from easy to satisfy a Tribunal that a compulsory retirement age is justified. An employer must be able to demonstrate that the retirement age is a "proportionate means of achieving a legitimate aim", i.e. that it meets a real business need and this need cannot be met by less discriminatory means. There has been a recent case where a compulsory retirement age of 65 was upheld in a situation where the DRA did not apply. However, the Court of Appeal took into account the fact that 65 was a lawful DRA when deciding that the choice of such an age was fair. They also indicated that, once the DRA is removed, the choice of a compulsory retirement age will be subject to closer scrutiny. Therefore, it may be difficult for an employer to prove why a particular age is justified and why a different age was not chosen. Additionally, just the other day, the Supreme Court granted permission to the individual challenging his retirement to appeal the decision and so the decision could yet be reversed.

Given the potential difficulties of justifying a company retirement age (and the undoubted increase in claims of age discrimination and unfair dismissal), employers may decide to refrain from forcing employees to retire altogether. If that is the case, when dismissing an employee, they will need to rely on one of the fair reasons for dismissal, the most obvious being "capability". Doing so will emphasise the importance of proper performance management, and career management for staff who might otherwise have been allowed to go through to the statutory DRA.

Recommendations

- Identify any employees who turn 65 between 6 April and 30 September 2011 and, if desired, issue them with a notification of retirement by 5 April 2011, making sure you give a maximum of 12 months' and a minimum of 6 months' notice. It is vital that the existing retirement procedure is followed to the letter.
- Do not take any action to withdraw notices already issued to staff aged 65 and over by 5 April 2012, but watch out for developments on the wording of the draft regulations.
- Consider whether to issue notices to staff aged 65 and above as at 5 April 2011, if they are to be retired before 5 April 2012, but recognising that this assumes the regulations will be amended to remove the anomaly identified above.
- Consider whether to impose a fixed retirement age, bearing in mind the likely difficulties you will face in justifying one.
- Train managers on the increased importance of good performance management and ensure that you have effective performance management processes in place.
- Consider establishing a procedure for dealing with your older employees whereby you hold regular discussions with them regarding their long-term aspirations, perhaps when carrying out appraisals. Aim to manage older employees rather than force them to retire. You may find that the majority of employees do not wish to work past the age of 65 and may be willing to enter into an agreement whereby they confirm the date upon which they will retire.

If you have any questions about any of the issues raised in this legal update, please contact your normal Employment contact or:

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