

Labor & Employment

Employment Law

Age Discrimination

Abolition of the Default Retirement Age: What Are the Implications for UK Age Discrimination Law?

Contributed by Sharon Tan, McDermott Will & Emery UK LLP

Synopsis

The introduction by the UK Government, in October 2006, of legislation prohibiting workplace age discrimination¹ presented a notable challenge to long-standing cultural and social norms. The legislation originally regulated, but did not prohibit, mandatory retirements at or after a 'default retirement age' of 65 (the DRA). Five years on, changes in the legislation have removed that default retirement age. This article examines the social and legal ramifications for employers.

Background

The protected characteristic of age was the last of nine strands of anti-discrimination legislation to be introduced into English law but has potential to be the most far-reaching of all. Because the scope of the legislation extends (unlike the approach adopted in some other jurisdictions including, notably, the United States) to

individuals of all ages, every individual thus has the potential at many different stages of life to bring himself or herself within the scope of the very broad protection afforded by the legislation.

Stereotypical age-related attitudes and prejudices continued to pervade pre-October 2006 UK workplaces in the same way they once did in relation to sex. Conscious and unconscious discrimination based on age was tolerated. Indeed, it was – in the setting by most employers of a mandatory retirement age – integral to employer/employee relations.

Attitudes towards age differences have come under much closer scrutiny following implementation of the Age Regulations in 2006, yet remained during the last five years condoned in the workplace in the context of retirement. Many workers, young and old, believed that retirement should occur by the age of 65; a perception that was reinforced by the existence of the DRA enshrined in the Age Regulations themselves.

.....
**Conscious and unconscious
discrimination based on
age was tolerated.**
.....

The DRA and its Abolition

The purpose of the DRA was to permit employers lawfully to force employees to retire at, or after, the age of 65 (or below in (rare) circumstances where a lower normal retirement age was capable of objective justification). Its application was bolstered by an ability, on the part of employers, lawfully to refuse to employ a candidate who was within six months of his or her 65th birthday, but tempered by a new right by employees to use a statutory process to request that the employer consider

Originally published by Bloomberg Finance L.P. in the Vol. 5, No. 40 edition of the Bloomberg Law Reports—Labor & Employment. Reprinted with permission. Bloomberg Law Reports® is a registered trademark and service mark of Bloomberg Finance L.P.

This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. Bloomberg Finance L.P. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.

allowing them to continue to work. Provided the process was properly followed, if the decision was negative, the resulting dismissal could not be challenged as age discriminatory or as amounting to an 'unfair dismissal'. Unfair dismissal is a statutory claim available to employees who have acquired at least one year's service.² It involves assessment of the reasonableness of the dismissal (including the fairness of the procedure followed) and requires the employer to establish that the dismissal was for one of a set list of statutory reasons.

The choice of 65 for the statutory DRA had strong cultural roots but these have themselves been subject, in recent years, to considerable change. The age of 65 was, until 2006, the cut-off age, beyond which employees were barred from bringing claims of unfair dismissal. For many years it has also been the age at which men are able to claim a state-funded pension. There too, change is now evident in the form of a forthcoming staggered increase in the state pension age to 67 for both men and women. The growing trend for workers choosing to work beyond age 65 is driven in large part by financial necessity, as evidenced by a survey, cited by the UK Government, which revealed that 51 percent of employees aged 50 and over could not now afford to retire³.

The DRA was implemented as legislators sought to balance an effective means of preventing the proscribed discrimination against the creation of an unnecessary fetter on the ability of employers to manage the needs of their businesses. Shortly after its implementation however, it was the subject of criticism by the High Court (ruling in a highly publicised case) which described it as having a "greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment."⁴ This litigation, and the worsening change in economic outlook, prompted the UK Government to accelerate a long-promised review that ultimately resulted in abolition of the DRA during 2011.⁵

What Does This Mean for Employers?

As of 6 April 2011 the concept of retirement, as a statutorily 'fair' reason for dismissal (subject to the right to request continued employment procedure) has been abolished and with it the DRA of 65.⁶ What are the practical consequences of these changes?

– Loss of Retirement Dismissals Guaranteed To Be 'Fair'

Employers were still able, despite the advent of the Age Regulations, to rely on the certainty that mandatory retirement at an age set contractually was guaranteed to be 'fair' as a non-individualized means of succession planning. All that was required was for the retirement to involve an employee who was age 65 or above (or less if the employer had a lower contractually set normal retirement age capable of objective justification) and for a simple process to be adhered to.

Now almost any dismissal of an individual before, on or after his or her 65th birthday can be challenged as age discriminatory

and as constituting an unfair dismissal, unless it is clearly not age-related but rather for one of the remaining five statutorily 'fair' reasons for dismissals in the United Kingdom. These are reasons related to: (1) capability; (2) conduct; (3) redundancy; (4) statutory prohibition of continuing employment; or (5) some other substantial reason justifying the dismissal of an employee holding the position which the employee held. A fair procedure must also be followed in the usual way. As explained above, failure to ensure either a statutorily fair reason or a fair procedure will result in a finding of unfair dismissal⁷.

What now constitutes a fair retirement procedure will depend on the circumstances but it is likely that this will require, at a minimum, an open dialogue with the employee concerned, during which the proposal to dismiss and supporting rationale are discussed, and at which alternatives are explored in good faith.

– Increased Risk of Age Discrimination Claims

Any dismissals will also amount to unlawful discrimination if the employer was motivated primarily by the employee's age and is unable objectively to justify this. Objective justification requires a legitimate aim and proportionate means of achieving it, as explained further in practical terms below.

– Restriction on Recruitment Practices

Previously lawful recruitment practices precluding the hire of those who were within six months of their 65th birthday will, if findings of discrimination are to be avoided, need to be discontinued in nearly all cases and replaced with practices that are entirely merits-driven. Continued operation of such practices will now require objective justification.⁸

– Exception for Employer-Provided Benefits

The age of 65 does remain relevant (at least until the state pension age is increased) in the context of employer-provided benefits. This is due to a limited carve out that permits provision of a lesser level of certain insurances and related financial services for employees who have attained an age in excess of 65 (or the state pension age if greater). This exception has been implemented in recognition of the costs associated with providing such benefits for employers above a certain age.

It is worth pausing to mention that abolition of the DRA will be of no consequence for those who are not (or were not at the relevant time) party to a contract of employment in the strict legal sense as such individuals, e.g. independent contractors or partners, were never within the scope of the DRA.

Future Use of a Normal Retirement Age

What if an employer previously operated a normal retirement age or wishes to do so in future?

The abolition of the DRA does not mean that all normal retirement ages (NRAs) selected by individual employers and communicated to employees, either as a contractual term or as a general policy, are now necessarily defunct as well. But the vast majority are because objective justification will be limited.

An objectively justified NRA may still result in a fair dismissal but it will, as outlined above, still require identification of one of the remaining five statutory reasons and implementation of a fair procedure.

How is objective justification, be it of a dismissal based primarily on an employee's age or an NRA, now to be achieved? How are employers to cross this, relatively high, threshold?

Cost is likely to be one of the driving forces behind a proposal to retire employees, particularly if older employees are perceived to be more expensive than other, more junior employees, who may be equally capable but, perhaps due to historical changes in the job market, less well remunerated.

Objective Justification

As noted above, the test is that the employer must first identify a 'legitimate aim' and then demonstrate that the chosen means of achieving that aim are proportionate.

It is instructive, in considering this question, to look not only to guidance from the European Court of Justice (the ECJ) but also to pre-abolition cases in which the English Courts considered justification of a NRA for those, such as partners or independent contractors, who have always fallen outside the scope of the DRA. In so doing however, great care must be exercised due to the highly fact sensitive nature of the analysis involved. Prior acceptance of an objective justification based on one set of facts does not mean that the same result would necessarily be secured if a slightly altered factual background were in play.

Some general principles can, however, be tentatively drawn from the aims that have been proffered to the Courts, and accepted as objective justification for a potential dismissal based on age/ NRA, to date:

– Extreme Limit on Number of Available Posts

The following reasons have previously passed the test:

- achievement of a balanced age profile in order to secure the best possible allocation of available posts amongst different generations of employees, thereby improving quality of performance,⁹ and
- the need to hold out promotion prospects for more junior employees as a means of facilitating recruitment and retention and the avoidance of the 'indignity' of performance management processes for older workers who were under-performing and who could otherwise be retired.¹⁰

How many employers are, however, likely to be able to rely on these as legitimate aims which they are able to implement in a proportionate way in practice? These aims may, in reality, be restricted to those employers who have an extremely limited number of available posts for reasons outside their control (e.g. public bodies whose funding is limited by the State). We have yet to see cases in which employers have asserted that they needed to dismiss an employee at a particular age specifically to appoint a younger employee. Succession planning could be more cautiously approached by appointment to certain coveted senior posts for fixed terms, perhaps, as is now commonplace for directors. That would diminish the risk of an age-based claim.

– Requirement of physical fitness

The physical demands required of certain roles have, in very limited cases, also been considered a legitimate aim. It will, however, be a rare situation indeed in which an employer will lawfully be able to identify a single age as a proxy beyond which all employees can legitimately be said to fall short of the requisite level of physical fitness.

In the vast majority of cases, individual consideration of the employee's level of physical or mental fitness will be required. Reliance should therefore be placed on achievement of this aim in very limited circumstances and, even where it is a potential option, careful thought should be given to the cut-off point selected and the quality of the evidence available to support that choice. For individuals who fail, it would be better to rely on individual capability dismissals rather than have a blanket dismissal at a particular age.

– Importance of pension provision

Emphasis has been given, by the ECJ, to the quality of the pension provision in place and the consequent impact on the financial security of employees affected. For example, in one case, employees were not considered to be unduly prejudiced by dismissal at a particular age to further an aim of encouraging recruitment if they were entitled to "a pension the level of which cannot be regarded as unreasonable" (equivalent to 72 percent of salary).¹¹

Were this rationale to be followed in the United Kingdom a distinction might be drawn in practice between public-sector employers, who traditionally provide more beneficial pension provision, and private-sector employers, whose pension provision tends to be somewhat less generous.

– Cost

Cost is likely to be one of the driving forces behind a proposal to retire employees, particularly if older employees are perceived to be more expensive than other, more junior employees, who may be equally capable but, perhaps due to historical changes in the job market, less well remunerated. Can cost alone be used as a basis for objective justification? The position appears to be that it cannot.

The ECJ has stipulated that it will be necessary for the employer to put forward evidence in support of its arguments on objective justification and that mere generalizations will not suffice.¹² Advance collation of appropriate evidential support is strongly recommended before proceeding either to retire an employee or to implement an NRA, as the onus will be on the employer to demonstrate an objective justification.

Conclusions

This is a fast-changing area of law in the United Kingdom in relation to which employers and their legal advisers need to be vigilant. Practical steps employers might wish to consider now, in light of the changes highlighted in this article, include:

- **Revisiting existing policies and procedures:** to remove any references to retirement ages, retirement procedures and/or maximum (and minimum) ages for recruitment.
- **Giving careful consideration to any decision(s) to retain a normal retirement age:** identify the rationale that will be relied on in the face of challenge and consider what evidence is available to support the assertion being made.
- **Focusing on performance management:** review existing procedures and train managers where necessary. Ensure that effective appraisal systems are in place across the board and that standards are consistently applied. Put in place systems to ensure that performance management is pursued with the same vigour at all organizational levels.
- **Considering training:** be mindful of exposure to claims of vicarious liability and consider whether workforce training is required to raise awareness of the unlawful nature of discriminatory attitudes or stereotypes and the potential consequences.

- **Maintaining an open and regular dialogue with all employees:** ask all employees open questions about their short, medium and long term career aspirations at regular intervals and be open minded to, and ready to suggest, alternative options such as variations in working hours.

Sharon Tan is a partner in the firm of McDermott Will & Emery UK LLP, based in its London office. Her practice focuses on all aspects of contentious and non-contentious employment law.

¹ *Employment Equality (Age) Regulations 2006 (SI 2006 No. 1031)*, now superseded by the *Equality Act 2010*, referred to in this article as the "Age Regulations".

² Subject to some limited exceptions where one year's service is not required.

³ Quoted by the UK Government in: *Phasing out the default retirement age: Government response to consultation, impact assessment, January 2011*, Department for Business Innovation & Skills

⁴ *R (on the application of Age UK) v Secretary of State for Business Innovation and Skills [2009] IRLR 1017*

⁵ *Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011 No. 1069)*

⁶ Abolition of the DRA is subject to a series of transitional provisions that are beyond the scope of this article.

⁷ In most cases for any dismissal involving an employee with at least one year's continuous service.

⁸ A maximum recruitment age was accepted, by the European Court of Justice as being objectively justified in the case of *C-229/08 Wolf v Stadt Frankfurt am Main [2010] IRLR 244* based on the requirement for fire fighters to have a minimum level of physical capability.

⁹ *Cases C-250/09 and C-268/09, Vasil Ivanov Georgiev v Tehnicheski Universitet – Sofia, filial Plovdiv C-250/09 and C-268/09 and Rosenblatt v Oellerking Gebäudereinigungsges mbH [2011] IRLR 51*

¹⁰ *Seldon v Clarkson Wright and Jakes [2010] IRLR 865 and Rosenblatt v Oellerking Gebäudereinigungsges mbH [2011] IRLR 51 and Fuchs and another v Land Hessen C-159/10 and C-160/10*

¹¹ *Fuchs and another v Land Hessen C-159/10 and C-160/10*

¹² *Fuchs and another v Land Hessen C-159/10 and C-160/10*