AGE DISCRIMINATION: IS RETIREMENT DISMISSAL FAIR?

This article appeared in Employment Law Journal – March 2006 – Number 68

Much has been written about the draft Employment Equality (Age) Regulations 2006 (EEAR), how they will impact on employment relations and what employers will need to do to safeguard against potential discrimination claims. However, there has been little detailed discussion about how age equality affects the provisions on unfair dismissal in the Employment Rights Act 1996 (ERA).

Changes to ERA

Section 98(2) of ERA sets out the potentially fair reasons for dismissal that are available to employers. It has been amended to include the employee’s retirement as a further potentially fair reason (s98(2)(ba)).

A new subsection 2A has also been introduced, covering dismissal:

- on the planned retirement date (s98ZA);
- on another date, where retirement is the only reason for dismissal (s98ZB); and
- on another date, where retirement is one of the reasons for dismissal (s98ZC).

In addition, a new subsection 3A has been introduced. This states that where an employee is retiring, the question of whether the dismissal is fair or unfair shall be determined in accordance with a new s98ZD.

Section 98ZD, which covers the fairness of a retirement dismissal, is completely different from s98(4), which continues to apply to other types of potentially fair dismissal. Under s 98(4), the question is whether, in the circumstances, the employer acted reasonably in treating the reason given as a sufficient reason for dismissing. Under s98ZD, fairness does not depend on such substantive issues but on whether the employer has complied with the procedures under the EEAR.

The EEAR and the ERA therefore need to be considered together.

The EEAR

The EEAR are due to come into force on 1 October 2006. The new Regulations will:

- require employers to inform employees in writing, at least six months in advance, of the date on which the employer intends them to retire;
- introduce a new duty on employers to consider an employee’s request to continue working beyond that intended retirement date (the “duty to consider” procedure); and
- remove the upper age limit of 65 for unfair dismissal and redundancy rights, giving older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement.
Upper age limit removed

The current bar on employees beyond “normal retiring age” from bringing an unfair dismissal claim will go. However, regulation 29 of the EEAR allows employers to retire employees at or above the age of 65 and to set retirement ages within their organisations at or above 65, without being guilty of unfair dismissal. In addition, employers will be able to justify retirement and retirement ages below the national default retirement age if they can satisfy the general test of objective justification by proving that it is a “proportionate means of achieving a legitimate aim”.

The duty to consider procedure

The Government’s stated intention is to encourage employers and employees to enter into a dialogue on the issue of retirement. It has therefore introduced a duty for employers to consider a request to work beyond a planned retirement date, which is modelled on employees’ existing right to request flexible working.

The main rules of the duty to consider procedure can be found in Schedule 7 to the EEAR:

An employer that intends to dismiss an employee by reason of retirement must give at least six, and not more than 12, months’ notice in writing to the employee. At the same time, the employer must inform the employee of the right to request to work longer than the intended retirement date and explain that it will have a duty to consider any such request. An employer that fails to do this may have to pay the employee compensation of up to eight weeks’ pay.

If the employer does not inform the employee as specified above, there still remains an on-going duty (until two weeks before dismissal) to inform the employee of the intended retirement date and the right to request deferment of that date. Where the employer fails to inform the employee at all, the dismissal will be automatically unfair.

An employee who wants to continue working beyond the intended retirement date must make this request between 12 months and six weeks before that date. The six-week deadline does not apply if the employer has failed to inform the employee about the right to request.

If the employee makes a request, the employer will have to consider it. Unless it agrees to the request, the employer will have to hold a meeting with the employee to discuss it. It must then inform the employee of its decision within two weeks. It is important to note that even if the intended retirement date passes, the employment will continue until this process has been complied with.

The employee has a right of appeal within two weeks of receiving the employer’s decision. Should the employee decide to appeal, the appeal meeting can take place even after the retirement has taken effect.

Employers that rely on the default retirement age will not be at risk of losing a claim for unfair dismissal, provided they follow the duty to consider procedure correctly and the reason for dismissal is genuinely retirement.

The time limits ensure that the discussion takes place sufficiently close to retirement for both parties to be able to decide what they want, and give the employer time to consider any request the employee makes to continue working.

Employers should note that:

- the statutory disciplinary and dismissal procedures will not apply to retirement dismissals – only the duty to consider procedure will apply; and
- there is no qualifying period – any employee coming up to retirement will be able to make the request not to be retired.
What will happen in practice?

The duty to consider procedure allows for a later retirement date than the default retirement age of 65. Once a new date is agreed, the employee will enjoy the same employment rights as someone who has not yet reached the default retirement age.

Unless the employer and the employee have reached a mutual agreement, the duty to consider procedure applies each time a new retirement date approaches. The procedure therefore applies whether:

- the age at which retirement takes place is 65 or above;
- the retirement in question is the first retirement occasion, or retirement at the end of an extension following an earlier request; or
- the moment of intended retirement is the moment when the term of employment ends (for an employee on a fixed-term contract).

The employee has the right to one request and one appeal at each retirement occasion, but the entire process can be repeated towards the end of each extension period, and there is no limit on the number of extensions. So if an employee stays on (with their employer’s agreement) to, say, 66, they can then make a further request to stay on beyond that age, and the same procedure must be followed (see example 1).

The employee’s statutory right is to request to continue working under the same terms and conditions as applied before the retirement date. However, there is nothing to prevent the employee proposing, or the employer suggesting, a different working pattern that might suit them both better. Neither side will be obliged to accept proposals for change.

Other reasons for dismissal

Employers cannot simply use the new retirement procedure to dismiss employees who are above the retirement age, regardless of the real reason for the dismissal. If the principal reason for dismissal is redundancy, competence, conduct or some other substantial reason, then the employer will need to follow the statutory dismissal procedures laid out in the Employment Act 2002 (Dispute Resolution) Regulations 2004. If the employer seeks to avoid these procedures by proposing to retire the employee, and the employee feels that the retirement was for another reason, they will be able to claim unfair dismissal.

However, it should be noted that the EEAR differentiate between a planned retirement dismissal and other retirement dismissals.

A retirement will be considered to be planned where it:

- takes effect at the national default retirement age of 65; or
- takes effect at the employer’s normal retirement age; or
- the employer has informed the employee of the retirement date at least six months in advance.

In these circumstances, the EEAR presume that the reason for dismissal is retirement. The employer will therefore enjoy a high degree of protection against claims from the employee that the retirement was not genuine (provided of course that the duty to consider procedure has been followed). The employee, on the other hand, will have a heavy burden of proof if they want to show that the dismissal was for a different reason.

Where the retirement is not planned, but is unexpected, the burden of proof lies with the employer to show that the dismissal was for retirement purposes and not for any other reason (see example 2).
A radical change

Consultation has revealed how complicated the new law on retirement will be. However, it is clear that this legislation will be the most radical change to the law on unfair dismissal for a generation.

The impact on the provisions of the ERA will undoubtedly be significant in that employers will only be able to make fair dismissals for retirement purposes where there is a genuine reason for retirement and the duty to consider procedure has been followed. The changes in the law look set to be very effective in providing older workers with more rights, not to mention the ability to negotiate working past the usual retirement age.

Example 1: Repeating the right to request

ABC Ltd (the employer) has a contractual retirement age of 67. Daisy (the employee) is approaching 67; but she is leading a project which is expected to continue for a further year beyond the contractual retirement age.

There is no immediate need for ABC to retire Daisy when she reaches 67. It may want her to go on working until the project finishes. If neither ABC nor Daisy actively raises the issue of retirement, the employment will continue unchanged beyond the age of 67.

Alternatively, ABC may initially intend to retire Daisy at the age of 67. It notifies her of the retirement date and the right to request longer working seven months before this point (in accordance with the duty to do this at least six months ahead of time).

Daisy puts in a request to continue working two months before the retirement date (in compliance with the six-week deadline). Although she does not need to make any specific proposals in her request, she proposes to keep working until the project has been completed. Upon receipt of the request, ABC concludes that this is a good idea, and agrees to it without holding a meeting (as permitted by the EEAR).

ABC and Daisy have not agreed a clear new retirement date. In order to retire Daisy at the end of the project, ABC will therefore still have to notify Daisy of the exact retirement date six months in advance in order to benefit from the concept of “planned retirement.” At that point, Daisy will again be able to put in a request to continue working beyond the planned retirement date (if she so chooses).

Example 2: the real reason for dismissal

Both CDE Ltd (the employer) and Frances (the employee) let the moment where she reaches 65 go by without discussing retirement. When Frances is 66, CDE informs her that she will be retired in one year’s time. Frances believes that the real reason for dismissal is not retirement but competence (ie that CDE thinks she is no longer up to the job). CDE has informed her more than six months in advance, so this is a planned retirement. Unless Frances has convincing evidence, an employment tribunal will find it difficult to uphold her claim.

Alternatively, CDE agrees with Frances that she will continue working for three years beyond the default retirement age of 65. Two years into this period, CDE makes a number of employees under the age of 65 redundant. Instead of making Frances redundant, however, it retires her with less than six months’ warning. Frances could make a claim for unfair dismissal, redundancy and age discrimination. In defending these claims, it would be for CDE to satisfy the tribunal that the dismissal was a retirement; and in this situation that would be difficult.

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