



News Story
18.08.06

Age discrimination and retirement

The Employment Equality (Age) Regulations 2006, which prohibit age discrimination in employment, come into force on 1 October 2006 and they will require you to review many of your current employment practices, policies and procedures. Some of the most important provisions of the new regulations relate to the procedures that employers must in future follow to retire an employee.

Retirement age

The regulations provide for a national default retirement age of 65, which permits an employer to dismiss an employee on the ground of retirement at or above the age of 65 without the need for objective justification. The default retirement age applies in the absence of a normal retirement age (NRA) established by the employer. You can set a normal retirement age that is either 65 or higher than 65. However, where you set a normal retirement age which is lower than 65, this will have to be objectively justified, otherwise it will be unlawful. The Government has indicated that it will be extremely difficult for employers to objectively justify a lower retirement age than 65.

The 'duty to consider' procedure

Before you can dismiss an employee on the ground of retirement, under the regulations you must follow a specific statutory procedure, known as the 'duty to consider' procedure. If you get the procedure right, the retirement dismissal is fair. However, if you get the procedure wrong, the dismissal can be automatically unfair. The fairness of a retirement dismissal is therefore all about the correct procedure having been followed. There is no test of good faith or no requirement of reasonableness on your part. Under the procedure, you have a duty to consider an employee's request to continue working beyond their retirement age.

Under the procedure, if you wish to retire an employee, you must notify them in writing of their intended compulsory retirement date not more than 12 months and not less than six months before that intended retirement date. At the same time, you must advise them they have a right to request to continue working beyond the intended retirement date. If the employee makes a written request to work longer in accordance with the set procedure, you have a duty to consider it and you must hold a meeting within a reasonable period to discuss their request. The employee's request must propose that employment should continue, following the intended retirement date, either indefinitely, for a stated period or until a stated date. Where you have complied with the duty to notify, the employee's request should be made more than three months but not more than six months before the intended retirement date. After the meeting, you must notify your decision in writing as soon as reasonably practicable and the employee has a right of appeal against your decision if you either refuse their request or grant it but for a period which is less than the employee proposed. The appeal procedure follows the same format as the initial meeting procedure, except that the decision on an appeal is final.

Special transitional provisions apply in respect of retirements between 1 October 2006 and 31 March 2007. Always seek legal advice in case of doubt.

Unfair dismissal

If you fail to comply with the duty to inform by no later than six months before dismissal, this entitles an employee to seek compensation of up to eight weeks' pay (capped at the statutory limit for a week's pay). Therefore, if you notify after six months but thereafter carry out a fair retirement dismissal, you are nevertheless liable to pay compensation for this failure to notify on time.

Regardless of the default retirement age, the regulations remove the current upper qualifying age limit (usually 65) for claiming unfair dismissal. This means employees over the age of 65 can claim unfair dismissal, although a retirement dismissal can be fair in certain circumstances.

If you retire your employee on or after they reach your normal retirement age (or age 65 if there is no normal retirement age), you give the required notice under the procedure and the dismissal takes effect on the intended retirement date that you notified to the employee, retirement will be deemed to be the reason for dismissal. Again, any normal retirement age lower than 65 will need to be objectively justified.

However, conversely, if you retire the employee before their normal retirement age (or age 65 if there is no normal retirement age) or if the dismissal takes effect before the intended retirement date that you notified to the employee, retirement will not be the reason for dismissal.

If you notify the employee late under the procedure (i.e. later than six months before the intended retirement date), it will be left to the employment tribunal to determine whether retirement is or is not the reason for dismissal.

Even if retirement is the reason for dismissal, if you have failed to comply with the duty to provide written notification to the employee of their intended retirement date and of their right to request working longer by two weeks before the intended retirement date, or you fail to fully comply with either the 'duty to consider' procedure or the appeal procedure, the dismissal is automatically unfair, giving you no defence to any subsequent employment tribunal claim for unfair dismissal.

Further help

If you have access to the CybHR Online service, CybHR Documents now includes all of the letters you will need to ensure a fair and happy retirement. You will find the following five letters in the 'Letters' drop-down list:

- Letter Notifying Employee of their Intended Retirement Date
- Notification of Retirement Meeting to Discuss Employee's Request to Continue Working
- Confirmation of Outcome of Retirement Meeting
- Notification of Retirement Appeal Meeting
- Confirmation of Outcome of Retirement Appeal Meeting.

In the 'Forms' drop-down list, you will find the following form for your employee to use if they wish to request to work longer:

- Request to Continue Working Beyond Retirement Date Form.

