

Why snuffing out the DRA too quickly may be counterproductive

The Employment Lawyers Association (ELA) has voiced a number of concerns

in its response to the government consultation on how the default retirement age (DRA) should be phased out, writes *James Davies*.

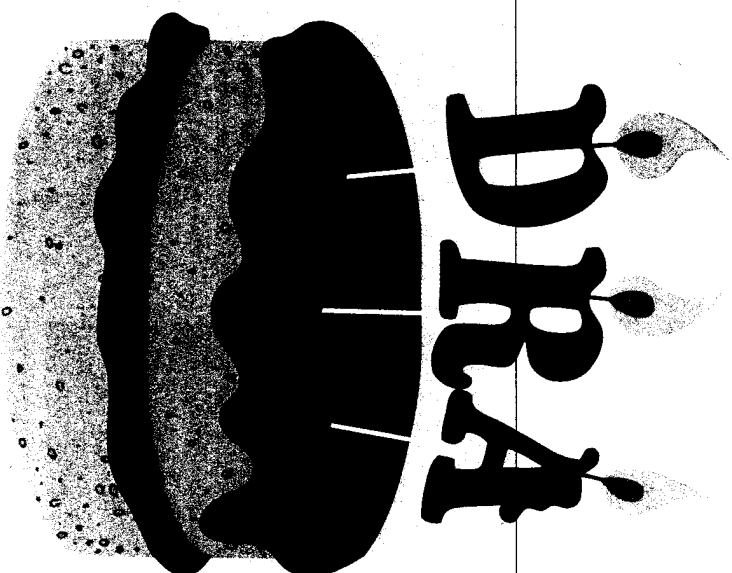
The ELA is particularly worried that there is not enough time to develop guidance for employers on how to manage without a default retirement age. The DRA will be removed on 1 October 2011, but in reality employers have just over four months to go because they must give six months' notice of retirement under current laws. This brings the abolition date forward to 1 April 2011.

The ELA recommended that the DRA's removal should be deferred a further six months to give time for developing guidance and for employers to adapt. It would be counterproductive if rushing

through changes aimed at prolonging working lives resulted in employers prematurely retiring workers they might otherwise have kept on.

Key points

- Abolition of the DRA should be postponed for six months
- More guidance is needed on retirement discussions, pre-retirement flexible working and insured benefits
- Retirement should remain a fair reason for dismissal



Employers are also concerned about discussing retirement plans with employees. It is possible that inferences of age discrimination could be drawn. Codes of practice or guidance are needed to clarify the steps employers can take without risking claims.

The ELA also suggested further guidance on the right to flexible working for those approaching retirement. Employers need to be clear about what steps they can take without being sued by younger workers for age discrimination because such flexibility might not be available for them.

Organisations are likely to shy

away from the risks associated with maintaining a compulsory retirement age after the DRA has gone. These will only be lawful if objectively justified. But some employers will choose to retain compulsory retirement ages, particularly as recent case law seems to encourage this, especially where workplace planning needs justify it.

To be lawful and to defeat an unfair dismissal claim, an objectively justifiable retirement must also be a fair dismissal. But it looks like retirement will be

removed from the list of potentially fair reasons for dismissal under the current proposals. To avoid uncertainty, it would be better to retain retirement at an objectively justified age as a fair reason for dismissal or to put it within the "some other substantial reason" category for justifying someone's dismissal.

This would work in the same way as dismissing an employee hired to cover maternity leave potentially amounts to "some other substantial reason" for dismissal.

The government also invited thoughts on how removing the default retirement age would affect insured benefits. Employers must grapple with the increased cost - or even unavailability - of providing benefits such as medical insurance, life assurance, critical illness and income protection to the over 65s, which might be difficult to justify. The cost and availability of insurance is particularly challenging for employees over 70.

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