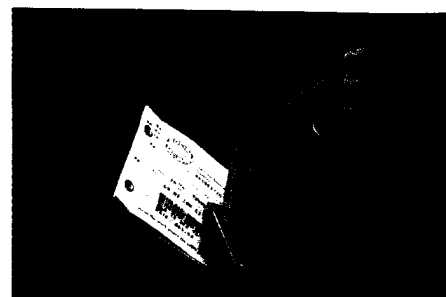


# Retired by default

**James Davies** reports on some age-old issues & the demise of the DRA



© Rex Features/David Cole

In its response to the government's consultation document on phasing out the default retirement age (DRA), the Employment Lawyers Association (ELA) concluded that the proposals to phase out DRA from April 2011, with transitional arrangements until the repeal date of 1 October 2011, give insufficient time to adapt to the end of the DRA and could lead to employers retiring employees early to avoid uncertainty. At a time when the job market is increasingly unstable, the proposals could have serious consequences for "older employees".

The proposals raise a number of issues. Will employers be able to discuss retirement with their staff? How will the transitional arrangements work? Will retirement be a potentially fair reason for dismissal?

ELA recommends that the repeal of the DRA is put back until at least April 2012 to give the government time address these issues and to develop fully the new retirement regime. The government proposes to remove the procedural requirements set out in Sch 6 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031), including employers' duty to give at least six months' and not more than 12 months' notice of retirement and employees' right to request to work beyond their retirement age.

ELA believes that employers need an authoritative, but non-prescriptive, code of practice which adopts a constructive framework for retirement discussions. The code should set out principles of best practice in relation to: initiating discussions where the employee has not raised the issue of their retirement; amending or reducing hours/duties/responsibilities; and managing actual retirement.

Employers should be able to tailor any suggested process to their circumstances without risking complaints of age discrimination. Employees should feel free to discuss their retirement plans without being subjected to any detriment. Ideally, discussions should focus not on retirement *per se*, but on planning for the future.

## Transitional arrangements

Under the proposed transitional arrangements, new retirement notifications cannot be issued on or after 6 April 2011. As it is extremely unlikely any guidance on conducting fair retirement-related dismissals will have been drafted before then, the transitional arrangements ensure a quick phase-out of the DRA at the expense of providing certainty to employers. The risk is that fearful employers, who are uncertain of the fair procedure for new retirements, will retire employees with an intended retirement date before 1 October 2011 early under the old procedure where they might have otherwise been willing to let those employees to continue working.

## “The proposals could have serious consequences for ‘older employees’”

To phase out the DRA without having detrimental effects on employers and employees, ELA recommends that the notification window under the old scheme is extended and the DRA repeal put back until at least April 2012 to enable consultation of employers on any new guidance and proper development of the new retirement regime.

## Potentially fair reason?

Removing the DRA will not necessarily mean all retirement ages will be unlawful but that employers will have to justify any retirement age. Cases such as *Seldon v Clarkson Wright and Jakes* [2010] EWCA Civ 899, [2010] All ER (D) 309 (Jul) suggest that this may be possible in appropriate circumstances. A further issue is whether or not retirement will be a potentially fair reason for dismissal. In the absence of Sch 6, an employer wishing to dismiss an employee for retirement will have to justify the dismissal under the Equality Act 2010 and comply with

the unfair dismissal provisions under the Employment Rights Act 1996 (ERA).

Assuming that an employer can justify its normal retirement age, there are a range of options.

(i) Leaving "retirement" in the list of fair reasons in ERA, s 98: this approach would mean that once the employer's compulsory retirement age itself is justified its application in an individual case would need little justification and the fairness of the dismissal would depend on the procedure followed by the employer.

(ii) Providing that a justified retirement amounts to "some other substantial reason": this approach would mirror that to the dismissal of employees taken on temporarily to cover maternity leave and has the advantages of option (i), with the added benefit of pointing the parties towards the case-law on "some other substantial reason" dismissals for understanding what a fair procedure would be in relation to retirements.

(iii) Deleting retirement from the list: this would encourage the cultural shift away from age discrimination by making it clear that dismissing an employee because they have reached a certain age is not necessarily in itself a fair reason for dismissal.

ELA recommends either option (i) or option (ii), each of which would provide greater clarity than leaving it for employers to argue that retirement can amount to "some other substantial reason" and employees to argue that the government did not intend retirement to be a fair reason for dismissal even where the retirement age can be justified. Pushing back the DRA repeal date until at least April 2012 will give the government time to carefully think through these options. **NLS**

**James Davies** of Lewis Silkin is sub committee chairman of ELA's legislative & policy committee which is consulting with ELA's members and responding to the government's consultation document on *Phasing out the Default Retirement Age*