

# Age discrimination (4)

New legislation coming into force on 1 October 2006 will protect against discrimination on the grounds of age in the fields of employment and vocational training. This guidance note, the final in a series of four on age discrimination, looks at the new law in relation to dismissal and retirement.

The Employment Equality (Age) Regulations 2006 (SI 2006/1031) will outlaw unjustified indirect and direct discrimination at all stages of the employment relationship, up to and including its end.

The Regulations are likely to impact on the termination of employment relationships where:

- the employer retires the employee, ie openly terminates the employment by reason of the employee's age;
- the employee alleges that age played a part in his or her dismissal, but the employer denies this; or
- the reason for the dismissal is potentially indirectly discriminatory.

## RETIREMENT

Where an employer terminates an individual's employment by reason of age this is generally known as a compulsory or mandatory retirement. An employee's decision to retire is technically a resignation.

An employee's retirement age should not be confused with his or her pension age. Traditionally, the age at which an employee is required to leave employment and the age at which he or she is entitled to draw a full pension have been the same. However, the two ages do not necessarily match, and with most retirement ages now being put back to 65 or over, it will become increasingly common for the retirement age and the pension age to differ.

Requiring an employee to stop work because he or she has reached a particular age is one of the most obvious examples of action that would amount to direct age discrimination, and the consultation exercise that led up to the age Regulations focused on the appropriate approach to mandatory retirement. The first consultation exercise in 2003, *Age matters*, suggested that employers should have to justify compulsory retirement either at any age or under the age of 70. However, employers' organisations argued for a lower default age at which employees could be retired without legal challenge.

The government was persuaded by these arguments and decided on a default retirement age of 65. Retirement that satisfies the definition in the Regulations and takes place at or after the age of 65 will, therefore, be lawful and will not amount to age discrimination. Assuming it satisfies the

procedural requirements, it will not amount to unfair dismissal. Employers will, however, have to justify retirement ages under 65.

The government has said that in 2011 it will review whether or not there is a continuing need for the default retirement age of 65.

## Unfair dismissal/age discrimination

Section 98 of the Employment Rights Act 1996, which deals with the fairness of dismissals, has been amended to add retirement as a fair reason for dismissal. Employers are not required to go through the normal statutory dismissal and disciplinary procedure to dismiss fairly by reason of retirement. Instead they must follow the prescribed retirement procedure, which is outlined below.

There is a specific exemption at reg. 30 of the age Regulations for retirement at or after the age of 65. Without the exemption this would amount to age discrimination.

## Definition of retirement

After the publication of draft age Regulations last year, considerable concern was expressed that employees would challenge whether retirement was the real reason for their dismissal, particularly if other employees in their organisation were permitted to remain in employment beyond retirement age.

The government responded to these concerns by making the definition of retirement linked solely to process – if the employer follows the retirement procedure, the dismissal is deemed to be by reason of retirement.

For the purposes of both unfair dismissal and age discrimination, whether or not the reason for dismissal is retirement is determined in accordance with new provisions inserted into the Employment Act 1996 by the age Regulations. In accordance with ss.98ZA to 98ZF of the Act:

- where there is no normal retirement age, a dismissal before the age of 65 cannot be by reason of retirement;
- a dismissal before a normal retirement age cannot be by reason of retirement;
- where the employer does not have a normal retirement age, a termination at or after the age of 65 will be by reason of retirement if the employer has given the notice required by the duty to consider procedure (see below) and the

## KEY POINTS

- The Employment Equality (Age) Regulations 2006 introduce a default retirement age of 65.
- Employers that wish to set a retirement age under 65 will have to justify this objectively. It is likely that this will be possible in only exceptional cases.
- A retirement age of 65 or over will allow employers to retire employees at the chosen age, or over, provided that the "duty to consider" procedure is followed.
- Where an employer sets no retirement age it will be able to retire employees from age 65 onwards.
- Retirement is defined by the retirement process having been followed.
- Even where the correct procedure has been followed, although employees will not be able to claim age discrimination or unfair dismissal, claims on other grounds, such as disability discrimination, will still be possible.
- To avoid expensive age discrimination claims on termination, employers should ensure that their performance management and equal opportunities policies are strictly observed.

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contract terminates on the intended date of retirement;

- where the employer has a normal retirement age of 65 or over, a termination at that normal retirement age will be by reason of retirement if the employer has given the notice required by the duty to consider procedure and the contract terminates on the intended date of retirement;

- a dismissal at an objectively justified age under 65 will be by reason of retirement if the employer has given the notice required by the duty to consider procedure and the contract terminates on the intended date of retirement;

- in other cases, the tribunal will determine whether or not the reason or principal reason for dismissal is retirement, having regard in particular to whether or not the employer has followed, or sought to follow, the duty to consider procedure.

#### **Duty to consider working beyond retirement**

Employers' duty to consider requests from employees to work beyond retirement is set out in Sch. 6 of the age Regulations.

#### **Employment Rights Act 1996**

##### *Fairness*

##### **98 General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (ba) is the retirement of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

...

(3A) In any case where the employer has fulfilled the requirements of subsection (1) by showing that the reason (or the principal reason) for the dismissal is retirement of the employee, the question whether the dismissal is fair or unfair shall be determined in accordance with section 98ZG.

...

##### **98ZG Retirement dismissals: fairness**

(1) This section applies if the reason (or principal reason) for a dismissal is retirement of the employee.

(2) The employee shall be regarded as unfairly dismissed if, and only if, there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the following provisions of Schedule 6 to the 2006 Regulations [duty to consider working beyond retirement] –

- (a) paragraph 4 (notification of retirement, if not already given under paragraph 2),
- (b) paragraphs 6 and 7 (duty to consider employee's request not to be retired),
- (c) paragraph 8 (duty to consider appeal against decision to refuse request not to be retired).

The duty consists of the following steps:

- The employer must advise the employee in writing, no more than 12 months and no less than six months before the retirement date, that it intends to retire the employee, and notify the employee that he or she has the right to request to stay on beyond retirement.

- If the employee wishes to continue working beyond retirement, no more than six months and no less than three months before the retirement date, he or she must request, in writing, to stay on. The employee must specify whether the request is to stay on indefinitely, for a stated period or until a stated date. The employee can make only one request in relation to a retirement date.

- The employer must hold a meeting within a reasonable period to consider the request. The employee has the right to be accompanied at the meeting by a fellow worker, but not a union representative. If the colleague is unavailable at the time proposed by the employer, the employee can postpone the meeting, provided that he or she can propose a time that is convenient for all the parties and falls within seven days of the date set by the employer.

- As soon as reasonably practicable after the meeting the employer must notify the employee in writing of its decision. This decision could be: to agree to the request; to refuse the request; or to permit the employee to stay on, but for a different period than that requested by the employee.

- The employee has the right to appeal this decision. Any appeal must be made as soon as reasonably practicable after the date of the decision.

- The employer must convene a meeting to hear the appeal within a reasonable period of receiving notice of it. As soon as reasonably practicable after the appeal meeting, the employer must notify the employee of its decision in writing.

If the employer fails to give six months' notice of the intended retirement, it is still able to notify the employee of the impending retirement date up to two weeks before the date. There is a penalty for missing the six-month deadline of up to eight weeks' pay (with a week's pay currently capped at £290 per week). In this situation, the employee's deadline to make a request to stay on is extended to the retirement date, and the employment continues until the procedure is completed.

If the employer misses the six-month deadline, the dismissal will not automatically be deemed to be by retirement. Provided that notice is given to the employee at least two weeks before retirement, under ss.98ZD(5) and 98ZF(1) of the Employment Rights Act 1996, an employment tribunal must have regard to the following in determining the principal reason for dismissal:

- whether or not the employer has notified the employee of the proposed retirement date and right to request to stay on at least two weeks before the retirement date;

- if so, how long before the proposed retirement date this notification was given; and
- whether or not the employer followed, or sought to follow, the procedure relating to the duty to consider requests to stay on.

If the employer misses the two-week deadline or otherwise fails to follow the procedure, the dismissal will be automatically unfair and will almost certainly amount to unlawful age discrimination.

The employer is under no obligation to give any reason for rejecting a request to stay on. The obligation to consider the request in good faith that was contained in the draft version has been removed from the final age Regulations.

However, this does not mean that rejections of requests will be immune from challenge. There is no reason why a refusal could not be challenged as discriminatory on grounds other than age. The most relevant ground is likely to be disability discrimination, particularly where health issues have contributed to the decision to reject the request to continue working beyond retirement.

With this in mind – and to assist good workplace relations – it would be prudent for employers to give reasons for refusing requests. A failure to do so would render the right of appeal futile and damage goodwill, and would be likely to lead to suspicion and challenges under other discrimination laws. It would be advisable for employers to focus on employees' failure to fulfil exceptional reasons for granting their request – such as their not having particular skills that are in short supply – rather than concentrating on their weaknesses.

Many employers will discuss retirement with employees informally prior to the start of the 12-month period before retirement age at which the formal retirement procedure can start. Such discussions may still take place, but employers should distinguish them from the formal procedure and ensure that the latter is followed correctly.

### Transitional procedures

Transitional procedures set out in Sch. 7 of the age Regulations apply where the retirement date falls before 1 April 2007.

Schedule 7 covers four different scenarios:

- Where notice of dismissal is given before 1 October 2006 and is at least four weeks in length (or contractual notice if this is less than four weeks), as soon as practicable after 1 October the employer must notify the employee of his or her right to request to stay on.
- Where notice of dismissal is given before 1 October 2006 and is less than four weeks in length (or less than contractual notice if this is shorter than four weeks), the employer must notify the employee of his or her right to request to stay on by the intended retirement date.
- Where notice of dismissal is given on or after 1 October 2006 and is at least the length of the

### Employment Equality (Age) Regulations 2006 (SI 2006/1031)

#### 30 Exception for retirement

(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the [Employment Rights Act 1996], a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

(2) Nothing in Part 2 [discrimination in employment or vocational training] or 3 [other unlawful acts] shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

(3) For the purposes of this regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of the 1996 Act.

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employee's contractual notice (or the statutory minimum notice if longer), the employer must notify the employee of his or her right to request to stay on before or at the time of giving notice.

- Where notice of dismissal is given on or after 1 October 2006 and is less than the employee's contractual notice (or less than the statutory minimum notice if longer), the employer must notify the employee of his or her right to stay on by the intended retirement date.

In each case, the employee must submit his or her request four weeks before the intended retirement date or, if this is not reasonably practicable, as soon as reasonably practicable after notification of the right (although not more than four weeks after the termination). The employee can make the request before he or she receives the employer's notification.

Under the transitional provisions, if the process has not been completed by the intended retirement date, the process will continue but the employment will terminate. This is in contrast to the situation after the end of the transitional period when, if the employer has not completed the process, the employment will continue until the process has been completed.

### Working beyond retirement age

If an employer grants an employee's request to stay beyond retirement age, it must not discriminate in the terms on which the employee is employed. This can be particularly tricky with regard to some insured benefits such as life assurance, critical illness and medical cover. It is also far from clear whether an employer will be able to justify ceasing pension benefits for employees working beyond normal retirement age.

An employer cannot require employees to change to self-employed status in order to continue working after retirement age. However, it would seem that requiring an employee to agree to a fixed-term contract after retirement would not amount to discrimination in the terms on which the employee is employed because the Regulations specifically anticipate requests to stay on being dealt with by extending employment for a fixed period or to a fixed date.

The procedure relating to the right to request to stay on will apply again at the end of the extended period – or at an earlier date if the employer elects to retire the employee – unless the extension is for six months or less after the retirement age.

#### Justifying retirement under 65

The default retirement age of 65 means that an employer that wishes to set a retirement age under 65 would have to justify this objectively by showing that the retirement represents a proportionate means of achieving a legitimate aim. It seems that this will be possible only in exceptional cases, so very few employers will be able to retain retirement ages below the default age.

One example of a situation where it might be possible to justify objectively an earlier retirement age is where aeroplane pilots fly internationally. At present, French law prohibits aeroplane pilots over the age of 60 from flying over France.

It is, however, highly unlikely that generalisations about the declining health, fitness or stamina of older workers would justify a pre-65 retirement age. Employers can achieve their aim of protecting health and safety, or of having a

competent workforce, by other less discriminatory means, such as individual testing.

#### Setting retirement ages

Taking into account that only in exceptional circumstances will employers be able to justify objectively a retirement age under 65, realistically they have the option of:

- setting their retirement age at 65;
- setting their retirement age at an age over 65, for example 70; or
- abolishing any mandatory retirement age.

There is nothing to prevent an employer from setting different retirement ages for different groups of employees, provided that this does not infringe other discrimination laws by, for example, indirectly discriminating on grounds of sex.

If the employer sets the normal retirement age at 65, it can retire employees at 65 or at any time after. If the employer sets its normal retirement age later than 65, at 70 for example, it cannot retire employees before that age (ss.98ZC and 98ZD of the Employment Rights Act 1996). If an employer abolishes its retirement age, it can retire employees from age 65 (ss.98ZA and 98ZB).

Employers that allow employees to work on beyond retirement might choose to set an age at which all employees must nonetheless retire. For example, an employer that operates a retirement age of 65 might grant the requests of some employees to work beyond that age, but require all employees to cease work at 70. One advantage of this is that it would set a limit on compensation and prevent employees bringing claims for loss of earnings based on assertions that they would have continued working beyond the age of 70.

However, the normal retirement age in relation to an employee is set out in the s.98ZH of the Employment Rights Act 1996, and is “the age at which employees in the employer’s undertaking who hold, or have held, the same kind of position as the employee are normally required to retire”. An employer would need to be careful that it was not allowing so many employees to continue beyond 65 to 70 that the latter became the normal retirement age.

#### Pre-retirement winding down

Some organisations have traditionally permitted employees to wind down in the period immediately before retirement, either on reduced pay or without any reduction in pay. This will discriminate against younger workers, who will not benefit from the arrangement because they are not approaching retirement age. Employers will now have to justify this practice objectively.

The aim of assisting employees to acclimatise to life after work would seem legitimate. If pay is cut to reflect the reduced hours, it may be easier to justify the practice as a proportionate means of achieving the aim. It would probably also be necessary to make the winding-down period

#### Employment Rights Act 1996

##### 98ZE Normal retirement age below 65: dismissal at or after retirement age

- (1) This section applies to the dismissal of an employee if –
- (a) the employee has a normal retirement age,
  - (b) the normal retirement age is below 65, and
  - (c) the operative date of termination falls on or after the date when the employee reaches the normal retirement age.
- (2) If it is unlawful discrimination under the 2006 Regulations for the employee to have that normal retirement age, retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (3) Subsections (4) to (7) apply if it is not unlawful discrimination under the 2006 Regulations for the employee to have that normal retirement age.
- (4) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) the contract of employment terminates on the intended date of retirement, retirement of the employee shall be taken to be the only reason for dismissal by the employer and any other reason shall be disregarded.
- (5) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, but
  - (b) the contract of employment terminates before the intended date of retirement, retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (6) In a case where –
- (a) the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) there is an intended date of retirement in relation to the dismissal, but
  - (c) the contract of employment terminates before the intended date of retirement, retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (7) In all other cases where the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, particular regard shall be had to the matters in section 98ZF when determining the reason (or principal reason) for dismissal.

**Employment Rights Act 1996****98ZA No normal retirement age: dismissal before 65**

- (1) This section applies to the dismissal of an employee if –
- (a) the employee has no normal retirement age, and
  - (b) the operative date of termination falls before the date when the employee reaches the age of 65.
- (2) Retirement of the employee shall not be taken to be the reason (or a reason) for the dismissal.

**98ZB No normal retirement age: dismissal at or after 65**

- (1) This section applies to the dismissal of an employee if –
- (a) the employee has no normal retirement age, and
  - (b) the operative date of termination falls on or after the date when the employee reaches the age of 65.
- (2) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) the contract of employment terminates on the intended date of retirement,
- retirement of the employee shall be taken to be the only reason for the dismissal by the employer and any other reason shall be disregarded.
- (3) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, but
  - (b) the contract of employment terminates before the intended date of retirement,
- retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (4) In a case where –
- (a) the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) there is an intended date of retirement in relation to the dismissal, but
  - (c) the contract of employment terminates before the intended date of retirement,
- retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (5) In all other cases where the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, particular regard shall be had to the matters in section 98ZF when determining the reason (or principal reason) for dismissal.

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available to younger workers electing to retire early, as it would seem difficult to restrict it to employees above a certain age.

**Non-employees**

The default retirement age applies only to employees, and not to other categories of worker covered by the age Regulations. Retiring, for example, self-employed consultants, agency workers, non-executive directors or partners will require objective justification, even if they are aged 65 or over.

This was a deliberate decision by the government, and businesses should not assume that tribunals will accept that similar principles apply for non-employees as for employees, and that retirement for them at age 65 or over will be justified.

The government is alive to concerns that the default retirement age must be justified in order to comply with the Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC), from which the age Regulations emanate. The Department of Trade and Industry's rationale for justifying the default age is explained in paras. 99 to 101 of its notes to accompany the Regulations<sup>1</sup>. Reference is made to two social policy objectives:

- workforce planning; and
- avoiding an adverse impact on the provision of occupational pensions and other work-related benefits.

It is arguable that these policy aims apply less strongly outside the employment relationship. An organisation wishing to apply a retirement age to, for example, partners would have to show that it had identified a legitimate aim, such as workforce or succession planning, and considered less discriminatory ways of achieving this aim. If few partners work through to retirement age, it might be difficult to justify the need for a retirement age.

**DISPUTED DISMISSALS**

Experience in the US, where federal age discrimination laws have been in force for nearly 40 years, shows that, despite the legislation having been enacted to help older blue-collar workers overcome discrimination in recruitment, the laws are used more by highly paid, white, male executives on dismissal.

It is predicted that this pattern will be mirrored in the UK, with claims being brought by dismissed "pale stale males". There are a number of reasons for this forecast:

- Such individuals will already be in dispute with their employer.

■ They will often be frustrated by the inadequacy of unfair dismissal compensation.

■ They are unlikely to have realistic claims under other discrimination laws, such as the Sex Discrimination Act 1975 or the Race Relations Act 1976.

■ They will have sufficient resources to sue their employer.

■ As they will be highly paid, their future losses will be significant and, despite the new age Regulations being intended to address this issue, they are likely to find it difficult to secure equivalent alternative employment.

■ They may be less concerned than younger employees about the possible impact of their claim on their future employability.

■ They are likely to perceive that their age played a part in their dismissal.

■ Employers may be vulnerable to claims on account of poor performance management of senior executives and inadequate attention to equal opportunities and diversity.

■ Current stereotypes and prejudices mean that these employees often suffer discrimination.

It is not difficult to foresee, for example, a dismissed 50-year-old managing director arguing that his removal, ostensibly for performance

reasons, was prompted by his age. The managing director's case will be helped if his replacement is younger and if the performance concerns about him have not been documented. Compensation, which prior to the age Regulations would have been limited to notice pay and a maximum unfair dismissal award of around £60,000, might now represent the best part of 15 years' pay. In some cases, this could exceed £1 million.

The possibility of such claims should prompt employers to ensure that the performance of all employees is managed in a clear, consistent, transparent and well-documented manner, and that diversity and equal opportunities are taken sufficiently seriously to avoid inferences of discrimination being drawn and the burden of proof being reversed on to the employer to prove that it did not discriminate.

#### INDIRECTLY DISCRIMINATORY DISMISSALS

Where an employer applies a "provision, criterion or practice" in deciding to dismiss an employee, and this provision, criterion or practice puts persons of the employee's age or age group at a particular disadvantage, this will amount to unlawful discrimination on age grounds, unless the employer can justify its actions by showing

#### Employment Rights Act 1996

##### 98ZC Normal retirement age: dismissal before retirement age

- (1) This section applies to the dismissal of an employee if –
- (a) the employee has a normal retirement age, and
  - (b) the operative date of termination falls before the date when the employee reaches the normal retirement age.
- (2) Retirement of the employee shall not be taken to be the reason (or a reason) for the dismissal.

##### 98ZD Normal retirement age 65 or higher: dismissal at or after retirement age

- (1) This section applies to the dismissal of an employee if –
- (a) the employee has a normal retirement age,
  - (b) the normal retirement age is 65 or higher, and
  - (c) the operative date of termination falls on or after the date when the employee reaches the normal retirement date.
- (2) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) the contract of employment terminates on the intended date of retirement, retirement of the employee shall be taken to be the only reason for the dismissal by the employer and any other reason shall be disregarded.
- (3) In a case where –
- (a) the employer has notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, but
  - (b) the contract of employment terminates before the intended date of retirement, retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (4) In a case where –
- (a) the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, and
  - (b) there is an intended date of retirement in relation to the dismissal, but
  - (c) the contract of employment terminates before the intended date of retirement, retirement of the employee shall not be taken to be the reason (or a reason) for dismissal.
- (5) In all other cases where the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, particular regard shall be had to the matters in section 98ZF when determining the reason (or principal reason) for dismissal.

that the provision, criterion or practice represents a proportionate means of achieving a legitimate aim.

There are a number of common circumstances in which a dismissal could be indirectly discriminatory on grounds of age.

### **Redundancy selection**

#### ***Last in, first out***

In carrying out redundancy programmes, at present it is common for employers to select those individuals who joined the organisation most recently – last in, first out (LIFO). This practice is likely to put employees in younger age groups at a particular disadvantage.

It might, however, be justifiable in some cases. The employer's aim is likely to be to reward loyalty. Using LIFO might be a proportionate means of achieving this aim, particularly if it is used as one of several criteria or as a tie-break where employees have scored equally on other criteria. It is more likely to be justified where there is limited availability of less discriminatory criteria, for example where the employer is forced to select from a group of employees and it is difficult to distinguish between their respective competence. Generally, it would be inadvisable for an employer to adopt LIFO as the only criterion, if there were other factors that could be taken into account.

#### ***Experience***

Selecting for redundancy on the basis of experience has the potential to disadvantage younger employees, who are likely to have less experience than older employees. Use of the experience criterion is more likely to be a proportionate means of achieving the aim of retaining the most competent staff where it is used as one of several criteria or where it is difficult to assess competence on another basis.

#### ***Potential***

This is a common and particularly risky criterion as it is fraught with subjectivity and, at times, is merely a proxy for youth. Employers continuing to base decisions on “potential” will need to be able to show that this was assessed objectively and without discrimination.

#### ***Flexibility***

The Regulations protect all ages and age groups, not just the young and the old. Flexibility, where it is linked to work hours, has the potential to disadvantage those with caring responsibilities. Not only will these employees probably be women but there is also a strong possibility that they will be within the age group likely to have young children. Flexibility might be a legitimate criterion but the employer should be in a position to demonstrate that the ability to be flexible is necessary.

#### ***Absence***

Another common selection criterion is absence records. Employers should already be alert to the necessity not to discriminate on grounds of disability or sex with regard to absence. They will now need to ensure that they are not unjustifiably disadvantaging employees from age groups with higher absence records. Perhaps counter-intuitively, it is not older employees who have most periods of absence. For men, it is those in the 16–24 age band; and for women, those in the 25–34 age band<sup>2</sup>.

The discriminatory impact is likely to be relatively low, however, and employers using absence as one of several criteria are likely to be able to justify this.

#### ***Proximity to retirement***

It will be directly discriminatory to select employees for redundancy on the basis that they will reach retirement age soon in any case. It is unlikely that an employer would be able to justify this, except where the selected individuals are very close to retirement.

#### ***Fitness***

Employers can set standards of fitness that employees must achieve to remain in employment. Testing employees is a legitimate alternative to using age as a proxy for health or fitness and therefore retiring employees young in physically demanding jobs or those where their health and safety, or that of third parties, would be particularly at risk.

However, if an employer sets unnecessarily stringent standards and dismisses employees who do not attain them, this could indirectly discriminate against older employees.

### **SUMMARY**

The approach to retirement that should be taken proved one of the most contentious areas in the consultation in advance of the finalisation of the Regulations. The government's approach of having a default retirement age of 65 will improve the position for employees under 65 who wish to carry on working, and mean that all but a minority of retirement ages are increased to at least this age. It remains to be seen what the impact will be on the over-65s, particularly bearing in mind the uncertainty of any cost justification for not providing pension and insured benefits to employees of this age.

The key consideration for employers in retiring employees will be to ensure that they follow the procedure set out in the age Regulations and notify employees of their retirement and their right to request to stay on.

Employers will need to review their performance management and redundancy procedures and address any issues that could result in their falling foul of the age Regulations in making performance or redundancy dismissals.

1. [www.dti.gov.uk/files/file27136.pdf](http://www.dti.gov.uk/files/file27136.pdf).
2. Labour Force Survey, Office for National Statistics, May 2006.