

Working without the default retirement age

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Introduction

The default retirement age (DRA) is being phased out over a transitional period running until 30 September 2011¹. Details will be set out in Regulations coming into force on 6 April 2011.

The last date on which an employee can be given notice of retirement under the DRA is 5 April 2011. Under the DRA employers must give a minimum of six months notice of retirement but no more than 12 months notice. Retirements notified on or before 5 April 2011 can continue through to completion provided that the following conditions are met:

- the DRA procedure, as set out in the previous Employment Equality (Age) Regulations 2006, is followed correctly (including the employee's right to request to stay on is given serious consideration by the employer); and
- the person retiring has reached 65 or the normal retirement age (if this is higher) before 1 October 2011. Therefore an employee must be 65 by 30 September if they are to be retired using the DRA.

Employers will not be able to issue notifications of retirement using the DRA after 5 April 2011.

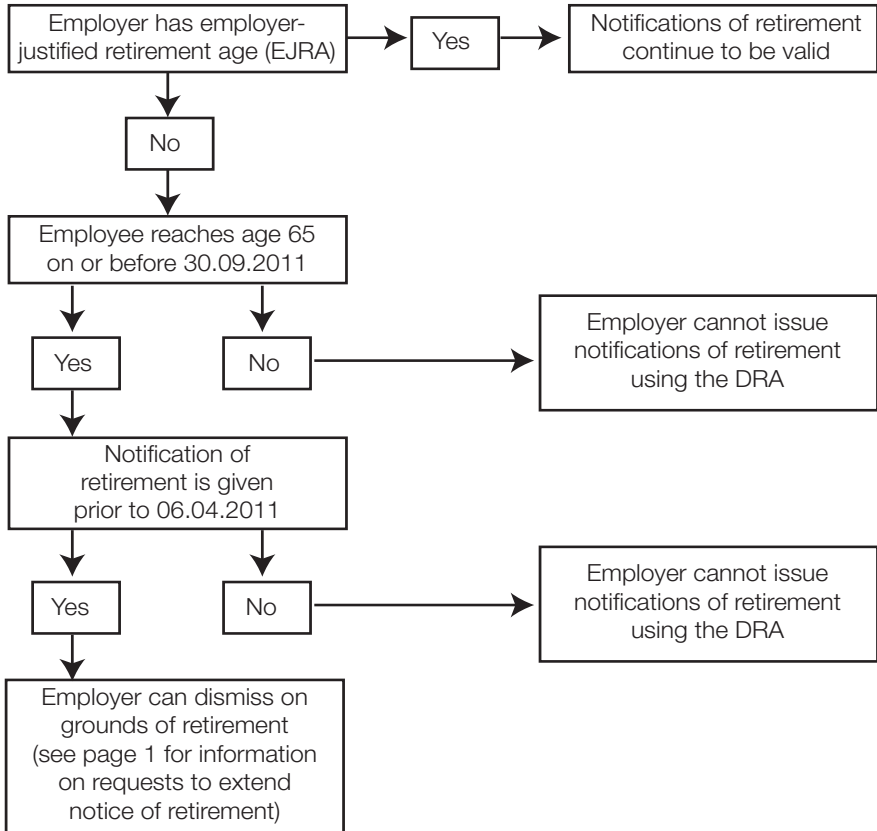
The provision allowing short (two weeks') notice of retirement, will also be repealed on 6 April 2011, and such short notice notifications will not be permitted on or after this date.

If an employee requests an extension of their period of notice of retirement you can agree this and still rely on the DRA provisions to enforce the retirement, providing that the extension is no more than six months and the employee retires on or before 5 October 2012. The employee's right to request to work beyond retirement ceases on 5 January 2012.

For employer-justified retirement ages, all notifications made prior to 6 April 2011 will continue to be valid, and there is no reason to curtail any notifications made under the former DRA arrangements prior to that date.

¹ At the time this guide was published (March 2011) the Government's decision to abolish the DRA was subject to Parliamentary approval.

Transitional Arrangements Flowchart



General principles

The removal of the default retirement age (DRA) is an opportunity for you to review your practices and processes for managing employees and their performance.

Good people management is the best way to adapt to the removal of the DRA. Talking to your employees and allowing them opportunities to communicate openly and regularly is essential.

Having regular conversations with all employees about your expectations of them, their performance and future plans are invaluable. These should not be limited to younger or older employees. Whilst the process of managing performance of staff does not have to be overly bureaucratic, it is advisable to keep a basic record of conversations, objectives and progress.

You do not have to treat people of different ages exactly the same. However, they should be treated fairly and consistently ensuring that there is not more favourable treatment of an employee because of their age unless you can objectively justify the treatment as a proportionate response to a legitimate need.

Example: Richard is 25 and is returning to work after a long period of stress-related absence. The manager sets Richard's sales targets at half of the rest of the members of the team for the first few months to allow him the chance to undertake missed training and developmental events. Ben who is in his 50s, and is also a member of the team, is being dismissed on capability grounds after failing to reach his targets for some time, despite help from the employer. Ben says this is age discrimination and points to Richard. The employer is able to show that although this may appear to be discriminatory he can explain the difference in targets as a legitimate and proportionate way of reintroducing staff who have been absent for long periods back into the workplace and would apply this equally to all staff on returning to work of any age.

When you have evidence of poor performance, this should be addressed. It is not necessary to have a complicated policy and procedure to do this, but you should ensure that you have a fair system for dealing with performance issues.

When you have someone approaching or beyond pensionable age, you should ensure that any poor performance is addressed as it would be for other employees.

Example: Jill, who is 30 years old, works as part of a sales team in a telecommunications company. She has struggled to achieve her targets this year as companies cut budgets and view her products as luxury items.

Jill has a mid-year review with her line manager who gives her a poor marking and advises that unless her performance improves her job may be under threat.

Jill is understandably upset, but she discovers she is not the worst seller on the team. Sixty-four year old Penny has had very low figures for the past two years, yet she has received a 'satisfactory' marking on her mid year report.

Jill and Penny have identical job descriptions and targets; the only difference appears to be their ages. Jill speaks to her Trade Union rep who advises her to put in a complaint of age discrimination.

Employer Justified Retirement Age

Even without the DRA, it may still be possible to retire an employee lawfully at a set age provided that the retirement age can be objectively justified, which means that it is a proportionate response to a legitimate aim. We refer to this in our guidance as Employer Justified Retirement Age (EJRA). The justification of a set retirement age will be particularly important in the event that such a policy is challenged in an employment tribunal.

Case-law around EJRA will develop once the DRA has been abolished. Currently EJRA's tend to be used in exceptional circumstances in which an employer has a retirement age under 65. For example, posts in the

emergency services which require a significant level of physical fitness or other occupations requiring exceptional mental and/or physical fitness such as air traffic controllers. Alternatively, they have been used where the working relationship in question is not covered by the DRA regulations, for example, by partners in a law firm (partners are not covered by the DRA).

Employers who wish to use an EJRA need to consider the matter carefully. They will need to ensure that the retirement age meets a legitimate aim, for instance workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession) or the health and safety of individual employees, their colleagues and the general public. As well as establishing a legitimate aim an employer will also need to demonstrate that the compulsory retirement age is a proportionate means of achieving that aim.

The test of objective justification is not an easy one to pass and it will be necessary to provide evidence if challenged; assertions alone will not be enough. When looking to establish an EJRA it can be helpful to first set out the reason why you wish to do so clearly on paper. Then ask yourself whether you have good evidence to support this reason and then finally consider if there is an alternative, less or non-discriminatory way of achieving the same result. Throughout, you should always remember that you need to show 'objective' justification not 'subjective' justification.

Having established an EJRA, any retirement of an employee as a result will be considered as a dismissal for some other substantial reason*. Employers should also follow a fair procedure in retiring people at the compulsory retirement age. You should give the employee adequate notice of impending retirement and, if circumstances permit, consider any request by an employee to stay beyond the compulsory retirement age as an exception to the general policy – although it would be important in such circumstances to ensure consistency of treatment as between employees who might request to stay on.

Dismissal

Unless it can be objectively justified it is no longer permissible to dismiss an older worker on grounds of retirement. Older employees can still voluntarily retire at a time of their choosing and draw any occupational pension they are

* S98 (1)(b) Employment Rights Act 1996.

entitled to in line with the scheme's rules. Removing the DRA does not mean that employees will never be able to retire. It just means that employers cannot force employees to retire at a set age unless the age can be objectively justified. Open discussion between employers and employees about future plans, conducted in an atmosphere of trust can help facilitate the transition from work to retirement for both the individual and the business. Some points to consider about how to encourage and get the most out of these discussions are given below.

Workplace discussions

Whatever the age of an employee, discussing their future aims and aspirations can help you identify their training or development needs and provide an opportunity for you to discuss your future work requirements and how these impact on the employee. These discussions may be new for some employers whilst for others they may be a normal part of their management process. It is for you to decide whether you wish to hold workplace discussions or not but they are a good way of raising the issue of retirement with older employees.

For all employees workplace discussions may involve a discussion around where they see themselves in the next few years and how they see their contribution to your organisation. These discussions can take place as frequently as you see fit but it is good practice to hold them at least annually.

Whatever the size of your organisation, these discussions can be simple, informal and confidential. You might find it helpful to use the following framework for carrying out these discussions:

Workplace discussions – areas to talk about

- Performance to date against targets, activities and outcomes
- Developmental or training needs
- Future plans (employer)
- Aims and aspirations (employee)
- Future performance

(see annex 1 for a description of each area)

Whilst such discussions are best undertaken voluntarily and in an atmosphere of trust, you, as the employer, need to be able to plan your workforce requirements to meet future business needs. Employees have a right to be treated fairly and should participate in these discussions in as open and frank manner as they possibly can.

These discussions do not have to follow exactly the same questions to all employees irrespective of where they are in their careers. However you must not ask questions which could be seen as discriminatory, for example:

Example: Rouji works on the production line in a car factory and is having a workplace discussion with her supervisor. Rouji, who is 25 is asked whether she intends to start a family. After the meeting Rouji feels uncomfortable with this question and tells the line manager Julia who assures her that was not the intention. However Rouji feels she is being treated worse than her colleagues and she makes a claim for sex discrimination.

And

Example: Joe is called into a workplace discussion and is told that he is getting a bit “long in the tooth” and why doesn’t he retire and avoid an undignified sacking. Joe is shocked by this news as he has never been told he was not doing his job well and was a valued member of the company. Joe asks to stay working but the boss then says he is blocking opportunities for younger workers who need the money more than he does. After the meeting Joe is deeply upset and worried that the boss is going to treat him badly.

Joe talks to the local citizens advice bureau and claims age discrimination against his boss and the company.

Workplace discussions may also help identify employee aims and aspirations that were previously unknown:

Example: Hanif, who is six months short of his 60th birthday, has worked on the production line of a small electronics company for 10 years. When Hanif arrives for his workplace discussion, his manager fully expects him to say that he will be retiring and drawing his pension when he gets to 60. However, somewhat to the manager's surprise, at the interview Hanif says that he would like to move from the production line into the company's admin office. In discussion it turns out that Hanif looks after all of the accounts and administration for his wife's fashion shop and is well used to dealing with figures and correspondence. The company have been looking, without success, for a new accounts clerk and it is therefore agreed that Hanif will undergo some developmental training to familiarise himself with the company's systems before moving to the accounts section on a trial basis.

Asking open questions can provide you with the basis of workplace discussions and can avoid suggesting discrimination. A useful exercise is to ask employees about plans and aims for:

- the short term
- the medium term
- the long term.

This will help you to organise training and development and appropriate succession plans, and should not just be limited to older workers. It also allows employees to focus their future goals.

When discussing future plans also think about the skills your workforce possesses and how best to deploy these. Holding such discussions could help match your needs with your employees' aspirations and benefit your business.

Workplace discussions about future aims and aspirations can apply to all staff.

Example: Brian is asked by the boss during a workplace discussion where he sees himself in the next few years. Brian, who is 60, tells the boss he is thinking of leaving to draw his pension in 18 months or so. They further discuss succession issues and how the company can retain all the accumulated experiences that Brian has for the benefit of other employees.

The boss points out that Brian can change his mind as with any change of circumstances although once he has handed his notice in then it may well be final as the employer would not be obliged to accept a withdrawal of notice.

Whilst it is not necessary for workplace discussions to be held as part of a formal appraisal process some employers may find it helpful to do so.

Example: Lin is 35 and has just got married. Before he decides to settle down and have kids, he wants to travel around Asia. He is not sure how to raise this with his employer as he would prefer a career break, rather than leaving the company.

During his end of year review, Lin's manager asks him about his short-term and long-term plans. Lin explains his desire to go travelling for a year, but also highlights that he sees his long-term career with the company.

Lin's manager does not want to lose Lin as he is a very productive member of staff, and so arranges a six month career break for him, with the guarantee of a job on his return.

The outcome of workplace discussions should be recorded and held for as long as there is a business need for doing so. It would be good practice, build trust and aid transparency to give a copy of the discussion record to the employee.

For further information see the Acas guide on *How to manage performance* at www.acas.org.uk

Managing your business needs and employee expectations

Setting work objectives and expectations

Objectives, targets and work expectations do not need to be identical for all employees. However, they should not be different for reasons of age or other protected characteristics unless you can justify these (see the more detailed Acas guide, *Age and the workplace* on objective justification).

The Acas guide, *How to manage performance* gives a range of suggestions for objectives and a framework for assessing them.

Example: John is a production manager and tells you he wants to downshift his working life as he approaches his final year before his pension is payable when he also intends to leave your organisation. You make arrangements to accommodate a more flexible working shift for John in line with your flexible working policy that you apply to other employees consistently, and adjust his performance expectations proportionately. John is keen to pass on his knowledge and you therefore engage him in training and mentoring his successor passing on his acquired knowledge and skills.

Disability discrimination

As employees get older they may possibly acquire more impairments than a younger employee so you need to be careful that your decisions do not discriminate against an employee because of disability. If an employee is disabled, or you suspect they may be disabled, you must make reasonable adjustments to remove any barriers to their performance.

Poor performance

If an employee is performing poorly you should discuss this with them to establish the causes. Failure to address poor performance in older workers

because, or in the expectation, that will be leaving soon to draw their pension, or that it may be seen to be undignified, may well be discriminatory. You should also avoid falling into the stereotype that poor performance is more likely to be associated with older workers.

Establishing the reasons for poor performance, setting improvement periods and agreeing what training and development would help the employee meet your work or business expectations are key to managing this conversation.

Example: Kumar who is 64 years old has been a good and loyal employee of his company for 30 years but recently his performance has begun to show signs of decline. At a workplace discussion it becomes clear that although Kumar will soon be old enough to retire and claim his company pension he does not want to leave work as he needs the money it provides. His manager says that he is happy for Kumar to remain but that his performance must improve. They talk about what must be done and Kumar says that things will improve. Unfortunately over the next few months his performance does not improve and his employer therefore instigates the company's unsatisfactory performance procedure. Kumar is called to a formal meeting at which a performance improvement plan, including special training, is agreed. Despite the improvement plan Kumar's performance does not get better and he is called into another formal meeting where it is explained that unless his performance improves in the next six months he will have to be dismissed. Despite this warning, and further help from the company Kumar cannot reach a satisfactory performance level and, reluctantly, his employer decides to dismiss him on capability grounds.

Handling insured benefits

Some employers provide group risk insured benefits (including income protection, sickness and accident insurance, as well as private medical insurance) for their employees and their employees' dependents. These benefits will be exempt from the principle of equal treatment on the grounds of age so that it will be possible for employers to cease to provide or offer insured benefits to employees aged 65 or above, even if they continue working beyond that age. The age at which group risk insured benefits can be withdrawn will increase in line with increases to State Pension Age.

Some frequently asked questions about working without the DRA . . .

- Q** I have an employee who is not performing as well as I would wish, I was hoping to use the DRA to dismiss him when he reaches 65 but now cannot do this because the law has changed. What can I do?
- A** You may use one of the reasons for fair dismissal. However, a workplace discussion (see page 6) can help you better understand the employee's intentions regarding their retirement. If they intend to retire then you can allow this to happen but remember an employee can change their mind. Where an employee is performing poorly and their performance cannot be improved, you have the option of dismissing them on the grounds of capability.
- Q** Do I have to have a retirement discussion with my employees?
- A** No, there is no requirement to talk to employees about their future plans but you may find it helpful to do so for your own organisational and succession planning purposes.
- Q** If I discuss retirement with an older worker can I leave myself open to a claim of age discrimination?
- A** Not if properly handled. Employers may reasonably want to know about an employee's future aims and aspirations. The important thing is not to single out older workers. If you are going to ask older workers about their plans it is good practice to also ask other, younger workers, about their plans as well, perhaps as part of an annual appraisal meeting.

Q What can I say to an older employee at a meeting to discuss their future plans?

A It is best if you start any discussion in a general way. Perhaps asking the employee what their future plans are or how they see themselves developing in your organisation over the next year or so. Any direct questions such as “are you planning to retire in the near future” or “you seem to have been slowing down of late, have you thought about retirement” are best avoided. Once an employee has indicated that they do wish to retire there is no problem in talking to them about the date for their retirement and any adjustments they may wish to make to their working arrangements or hours in the lead up to retirement.

Q Can I protect myself by getting an employee to sign a contractual agreement that they will retire at a certain date?

A There is nothing to stop you from coming to a contractual agreement with an employee about their future retirement date but it is unlikely to have any legal force. Employees cannot sign away their employment rights except in certain circumstances where they are legally advised and sign a compromise agreement. Compromise agreements can only be made however, where an employee has a case they can bring to an employment tribunal eg, for unfair dismissal, which is unlikely to be the case in these circumstances as the employee will still be in employment.

Q What can I do if an employee had indicated that they will retire on a certain date but then do not do so?

A If an employee has given formal notice to leave, you are under no obligation to let them withdraw their notice. However if an employee tells you during a discussion that they are planning on retiring, they may change their minds before formal notice is given.

Where an employee decides not to retire and no notice has been given, the first thing to do is to discuss with the employee their reason for not retiring. This can help to establish whether there is any issue that you, as an employer, might be able to help them overcome thus allowing them to retire on the due date or shortly thereafter. Ultimately however, if they decide that they do not wish to retire, for whatever reason, then you cannot compulsorily retire them as this will leave you open to a complaint of unfair dismissal.

Annex 1: Workplace discussions – points to consider

1 Performance to date against targets, activities and outcomes

A job title and a brief description of the main objectives and duties of the role will give you an indication of the performance measures that would help you determine if the employee is meeting the business needs of your organisation.

In some jobs performance may be measured in quantitative terms; in others it may be a narrative account of the individual's contribution to the organisation. Performance can be based on outcomes, what the employee has delivered or equally performance can be based around volumes or activities that you particularly value.

It is good practice to agree these expectations with an employee, and ensure these are 'SMART' (Specific, Measurable, Achievable, Realistic and Timebound)

2 Developmental or training needs

Discussing individual performance may identify areas where the employee needs further support of training. Don't make assumptions about an individual's needs based on their age or length of experience and treat employees consistently in this area.

Employees do not have to undertake further training but if their performance is below what you would expect of them, then you should insist as you do not have to tolerate an employee who is not performing satisfactorily.

3 Future plans (employer)

This is about how the employee's skills and abilities can be matched to your future business plans. It is your opportunity to set out where you see the organisation in the short to medium term and the sorts of skills and abilities that will be needed.

This part of the discussion can cover alternative and flexible working patterns where the business case for the organisation can match the needs of the employee.

4 Aims and aspirations (employee)

This part of the discussion is about the employee and their plans for the future. The range of issues covered may be very wide; for some it might be their aspirations for different roles within the company, for others, who may be approaching a time when their pension becomes payable, it may cover where they see themselves working in your organisation.

You cannot hold an employee to what is said in this part of the discussion. They can change their mind but it gives you the opportunity to start thinking about the longer term and succession planning.

Where an employee indicates that they do wish to retire at some future date they may well want to discuss adjusting their working hours, reducing their duties or altering their job in some other way as a lead up to retirement.

However, you do need to think carefully before you change an employee's job in the light of information given at this stage of the discussion. If you transferred an employee from a project without their agreement when they tell you they intend to leave and draw their pension in the coming year you may well face a claim for age discrimination and be required to justify why you did this.

5 Future Performance

Just as part 1 of the workplace discussion is a backward review of performance and activity, so, having discussed the organisation's and the individual's plans, this final part of the discussion looks to the immediate future and it is where you set out your expectations for the employee.



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Remember, it is not discrimination to have different objectives for employees undertaking the same roles to reflect training or other reasons, such as returning from a period of absence or as a reasonable adjustment for a disabled employee. Setting objectives differently just because the employees have different ages is likely to be discriminatory.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information, go to the Acas website www.acas.org.uk

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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