CONSULTATION ON PHASING OUT THE DEFAULT RETIREMENT AGE

ELA RESPONSE

Introduction

The Employment Lawyers' Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent both Claimants and Respondents in the Courts and Employment Tribunals. It is not, therefore, ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative & Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by ELA's Legislative & Policy Committee under the chairmanship of James Davies of Lewis Silkin to respond to the Consultation Document on *Phasing out the Default Retirement Age*. Its comments are set out below. A full list of the members of the sub-committee is annexed to the report.

A1 The Government intends to remove the DRA. Do you agree that Schedule 6 of the Age Regulations should also be removed?

Yes.

A2 If you disagree, please explain why:

N/A

B1 If Schedule 6 is removed, the laws on unfair dismissal and age discrimination will still apply. Do you have any concerns about how these laws would operate in the absence of Schedule 6?

Yes.

B2 If you have concerns, please describe them.

1. What is a fair procedure for retirement-related dismissals?

It will take time to develop the law applicable to retirement-related dismissals and so initially it will be difficult for employers to know what procedure would be fair. For example, would the retirement dismissal be fair if the employer did not notify the employee of the impending retirement at least six months in advance, as currently required by Schedule 6? Must it consider

requests to continue working beyond retirement through a process that is as formal as that in Schedule 6? Brief guidance similar to the ACAS code of practice on disciplinary and grievance procedures (although not necessarily in the form of a statutory code) might be useful for employers.

Disputes around compulsory retirement generally arise because of a mismatch in the expectations of the employer and employee and, in our view, economics will drive increasing numbers of employees to challenge decisions to require them to retire. The discussions and procedure leading to a compulsory retirement will be instrumental in managing the expectations and clarifying the wishes of both employer and employee. Therefore, the guidance would be extremely important and the ELA suggests that it be produced by both ACAS and the EHRC working together, given the cross-over between the equality requirements and fair dismissal requirements.

2. Consider retaining retirement as a fair reason for dismissal

It is not clear why 'retirement' should be removed from the list of fair reasons for dismissal in section 98 of the Employment Rights Act 1996 (the "ERA") as a result of the removal of Schedule 6. Although 'retirement' was not included in that list prior to the introduction of the Age Regulations in 2006, that was because employees did not have a remedy for unfair dismissal if they were dismissed at the age of 65 or the employer's normal retirement age. This is no longer the case. Alternatively, if 'retirement' is removed from the list, it is not clear why the statute could not specifically provide that a dismissal for retirement that is justified under the Equality Act 2010 (the "Equality Act") amounts to "some other substantial reason".

In the absence of Schedule 6, an employer wishing to dismiss an employee for retirement will have to justify both the dismissal under the Equality Act 2010 and comply with the provisions on unfair dismissal in the ERA.

To require an employee to retire lawfully under the Equality Act the employer must be able to show:

- that it has a normal retirement age (which might vary according to the position of the employee);
- that its normal retirement age is a proportionate means of achieving a legitimate aim; and

- that its decision to apply its normal retirement age to the employee is a proportionate means of achieving a legitimate aim.

Assuming that an employer is able to justify its normal retirement age under the Equality Act, the government then has a choice between:

(1) leaving 'retirement' in the list of fair reasons in section 98 or providing that a justified retirement amounts to "some other substantial reason", both of which mean that the ERA requirements focus on a fair procedure; or

(2) deleting retirement from the list, which means that the ERA requirements focus on the substantive reason for dismissal as well as the procedure.

Option 1: Keep 'retirement' in the list of fair reasons in section 98 ERA

At the moment retirement is in the list of fair reasons in section 98. If it were retained (or redefined as "retirement at an age which can be objectively justified under the Equality Act") and Schedule 6 were deleted, the drafting would need some amendment to deal with the removal of the definition of "intended retirement age" currently included in Schedule 6, which accommodates retirement dates agreed as extensions beyond an employer's normal retirement age for that job.

Arguments in favour of this option

Given that issues about the legitimacy and proportionality of operating a compulsory retirement policy at all would be addressed under the Equality Act, keeping retirement as a fair reason for dismissal in section 98 is simpler in that it avoids the employee and employer (and potentially a Tribunal) repeating the same types of arguments under the head of "some other substantial reason". It is consistent with the Court of Appeal's comments in *Seldon v Clarkson Wright and Jakes* [2010] EWCA Civ 899 that, once the employer's compulsory retirement age itself is justified, its application in an individual case will need little justification. Of course it has to be recognised that there may be a mismatch between the employer's reasons for adopting a retirement age (for instance, to retire no longer competent employees without a competence process) and the circumstances of an employee (who is unquestionably fully competent). This was the issue in *Seldon* and it is understood that the Equality and Human Rights Commission have supported Mr Seldon in an application to the Supreme Court for permission to appeal the judgment of the Court of Appeal in relation to the approach it took.

Option 2: Delete retirement from the list of fair reasons in s98 ERA but provide that justified retirement amounts to "some other substantial reason"

Alternatively, the government could delete retirement from the list of fair reasons in section 98 ERA but provide that a dismissal for retirement that satisfies the requirements of the Equality Act will be 'some other substantial reason'. To accommodate retirement dates agreed as extensions beyond an employer's normal retirement age it would also be necessary to specify that the operative date of termination falls on or after the normal retirement age.

In a number of cases statute has specifically provided that a dismissal shall be treated as being for a substantial reason which can justify the dismissal. For example, section 106 of the ERA provides that the dismissal of employees taken on temporarily to cover employees who are absent because of medical suspension, pregnancy, childbirth, adoption or additional paternity leave may be justified under the heading of 'some other substantial reason', so long as certain conditions are fulfilled. Similarly, under regulation 7(3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, employees dismissed for a reason connected with a transfer that is an economic, technical or organisational reason entailing changes in the workforce shall be regarded as having been either for redundancy or 'some other substantial reason' under section 98 ERA.

Arguments in favour of this option

The benefits of this option are the same as those of option 1. Further, ELA's view is that this option is preferable to option 1, as it is clearer to provide that retirement that is either justified or unchallenged on equality grounds amounts to "some other substantial reason" rather than simply retaining retirement in the list of fair reasons in section 98. It would also have the benefit of pointing the parties toward the case-law on "some other substantial reason" dismissals as a starting point for understanding what a fair procedure would be in relation to retirements.

Option 3: Delete retirement from the list of fair reasons in section 98 ERA without providing it amounts to "some other substantial reason".

If retirement were deleted from the list of fair reasons in section 98 ERA, the employer would have to show that the decision to require the employee to retire falls within one of the other reasons in the list, such as capability or "some other substantial reason".

Arguments in favour of this option

Deleting retirement from the ERA makes it clear to employers that dismissing an employee because they have reached a certain age is not in itself a fair reason for dismissal, and there must either be other substantial reasons for the dismissal or some other ground such as capability. This would encourage the cultural shift away from discrimination on grounds of age. As a matter of policy, employers should be required to justify not only the existence of their compulsory retirement policy under the Equality Act but also its application to an individual under the ERA. We can also see that employees might argue that the removal of retirement as a potentially fair reason for dismissal demonstrates an intention that retirement should not be a fair reason for dismissal, otherwise it would not have been removed from the list.

3. Recruitment of employees at or near retirement age

The Equality Act currently provides that it is lawful to discriminate against a person older than or close to the employer's normal retirement age or the age of 65 in relation to recruitment. It is not consistent to remove the default retirement age without also removing the references to the age of 65 in this regulation.

C1 Thinking about retirement discussions between an employer and an employee, do you think it would be useful to have:

- Formal guidance on how to discuss retirement in a mutually beneficial way
- A statutory code of practice, including guidance, which covers retirement discussions
- None of the above
- Something else (please state below)

C2 Please explain your answer.

The ELA supports formal guidance for both employers and employees regarding how to discuss retirement in a mutually beneficial way, including guidance in relation to:

- initiating discussions with employees where the employee has not raised the issue of their retirement;
- guidelines for amending or reducing hours/duties/responsibilities;
- managing actual retirement.

In particular, we support a statutory code of practice which adopts a constructive framework such as that contained in the ACAS statutory code for avoiding and resolving discipline and grievance issues at work (the "ACAS Code"). We recommend that the code set out principles of best practice regarding what both the employer and the employee should do to manage the ongoing employment of older workers and provide a framework for addressing retirement and succession planning matters. ELA research indicates that employer opinion is divided regarding whether employers want guidance or a more formal code of practice. What is agreed is that any guidance or code must neither be prescriptive nor punitive. Of key importance is to ensure that employers have the ability to tailor any suggested process to suit their business needs.

In particular, we advocate that any code should provide a mechanism by which employers can hold discussions on retirement-related matters without being at risk of grievances from employees provided the employer adopts a fair and reasonable approach (which is not just process-driven); and/or complaints of age discrimination. Equally employees should feel free to discuss their retirement plans without being subjected to any detriment.

The abolition of the Default Retirement Age ("DRA") will leave employers in an unprecedented situation. The DRA provided the opportunity for both the employer and the employee to have sensible discussion regarding retirement. The DRA has been criticised as providing a mechanism for the automatic retirement of employees irrespective of their value to the business or their desire to continue working. However, our experience is that while this has undoubtedly been the case for some employees, the current DRA mechanism has also provided a safe forum for discussion and the opportunity for agreement to be reached for employees to continue working either on the same or a reduced basis, or with a plan to reduce duties at a future point in time. Where employment has continued, our experience is that, once used, the DRA mechanism has helped to manage expectations on both sides and promoted continued dialogue between the employer and employee, allowing both to plan appropriately. It has provided certainty and has been very welcome for that reason. Employers, in particular, are concerned by the apparent uncertainty they will have to deal with, in the absence of the DRA mechanism. Appropriate guidance will give them some reassurance and confidence in managing their older workers, in the absence of the DRA.

We are particularly keen that clear guidance should be issued to support small employers who may not have a dedicated HR function to avoid the risk that excessive management time will be taken up trying to manage retirement in the absence of guidance.

The ELA is strongly against a statutory procedure or, indeed, any code of practice that contains mandatory steps, in light of the acknowledged failure of the previous statutory disciplinary and grievance procedures. Any code of practice needs to allow flexibility for employers of all sizes and administrative resources so as to be appropriate for whichever sector they operate in.

Research undertaken by ELA members suggests that employers are overwhelmingly in favour of a code of practice containing guidance which is supportive rather than overly prescriptive or potentially punitive.

We would recommend that the code of practice be reviewed no more than 18 months after the DRA has been abolished, to assess its effectiveness.

C3 If you believe that additional guidance or a code of practice would be helpful, what topics do you think should be addressed? For example flexible retirement options, changes to duties and working hours, etc.

1. In answer to questions C1 and C2, the ELA considers some form of additional guidance in relation to retirement discussions between an employer and employee is necessary and would be beneficial to both employers and employees. We consider this should adopt a framework similar to the ACAS Code.

2. It may not be necessary to have a statutory code of practice but, in ELA's view, some form of guidance in codified form which employers, unions and employees can rely upon is required. In ELA's view, it would be sensible for ACAS to take the lead on any code but with input from the Equality and Human Rights Commission or consultation with them to be consulted on the contents of any draft code produced by ACAS.

3. There is concern on the part of employers that if they raise discussions about retirement at a certain point in an employee's career/at a certain age that, in itself, would be considered an act of age discrimination. However, ELA considers that those acting for both employers and employees recognise that there needs to be a forum for discussing an employee's wishes and plans in relation to retirement, as well as any concerns or practical arrangements that need to be made in relation to working beyond what has traditionally been the retirement age for most employees.

4. Conversations about career planning/continuing to work/retiring should form part of discussions with employees from an agreed stage in their careers and could be had at appraisal time, preferably on an annual basis. While ELA recognises that not all employers have a formal appraisal process, it remains good practice and most large and medium-sized

employers do have such mechanisms in place. The addition of a discussion about employees' plans to work and related issues would not be too onerous an addition to that process. Consideration does still need to be given to organisations that do not have a formal appraisal process and guidance provided as to when these discussions could be held.

5. There is a concern about the age at which such discussions would commence or be introduced. One approach is that discussions about career plans/retirement would be applied to all employees regardless of age. In ELA's view, the risk with that approach is that it is seen as an artificial/"tick box" exercise with employees in their 20s and 30s who are nowhere close to considering their retirement options and is therefore not very pragmatic. The age at which it may be appropriate to commence such discussions may differ depending on the industry, the employee's role and so on.

6. We understand that in Australia their new framework includes an obligation to speak to every employee after the age of 50 and, at all levels, about career planning and to ensure no one feels targeted. These meetings are called "staying-on discussions" and can be part of every employee's regular appraisal.

7. We understand that in France where organisations have more than 50 employees, an employer has an obligation to produce a "senior plan", providing provisions and objectives in order to retain those at age 50-plus or to recruit those at age 50-plus. Whilst this is an important equality and diversity issue, in fact it is driven by the consequence of demographic change and the need to ensure those who can work do continue to work and benefit the economy.

8. It would be helpful if the code/guidance made it clear that the focus was not necessarily on *retirement* but on *planning* for the future and that this could take place at any time and for example at 50, 55, and 60 with the focus being a career discussion about the employee's plans and career development where appropriate, rather than a "retirement" discussion. The code/ guidance could set out suggested questions to be discussed. These could be referred to as career development/future planning meetings rather than retirement discussions if there are concerns about what is implicit in the latter term. It is important that the discussions have a positive, enabling angle to them, as otherwise they could be experienced by employees as annual ordeals during which they have argue for their right to continue working.

9. There are certain possible topics for discussion at these meetings that the ELA suggests are referred to in any code but it should be made clear that it is not a limited or prescribed menu and that any relevant issues the employer or employee wishes to raise should also be discussed. The suggested topics are set out below with comments in some cases:

9.1. **Flexible working arrangements including:**

- Remote working
- Home-working
- Part-time hours
- Different start and finish times/flexi-time
- Compressed/annualised hours

Whether any of these will be available will depend upon the employer's policy on flexible working as we understand there is no proposal currently to provide a right to request flexible working to workers over a certain age.

9.2. **Changes to duties and appropriate training and support in relation to any changes to duties.**

This could include, for example, agreeing to remove an employee from work which requires a particular level of physical strength or eyesight, if those abilities have deteriorated, and onto a different kind of work.

9.3. **Taking periods of unpaid leave additional to contractual or statutory holiday entitlement.**

9.4. **Any training or adjustments which would assist with continued working beyond a certain age.**

9.5. **Any performance issues.**

9.6. **Fitness for work: health and safety issues/medical exams/eye tests**

In certain industries the health and safety of the individual employee, his or her colleagues or members of the public is at stake if that employee is not medically fit for work. In those sectors it may be advisable to have a discussion about health and safety after a certain age, as well as the option for employers to require compulsory medical exams or eye-tests after a certain age. In the ELA's view, this should be strictly limited to roles where there is a clear health and safety issue, i.e. danger to the individual/colleagues/members of the public if the person is not fit for work; *not* simply a concern about diminishing performance. In order for

it to comply with the requirements of the age discrimination provisions of the Equality Act any such discussions arising as a result of an individual reaching a certain age would have to be objectively justified.

9.7. **Disability/health concerns/sickness absence (where relevant)**

If age-related medical conditions amount to a disability which is, or could be, protected by the disability discrimination provisions of the Equality Act, then an employer will need to consider what its obligations are under that legislation; including the requirement to make reasonable adjustments.

9.8. **Continued access to overtime**

No assumptions should be made that an individual will not want to continue doing overtime after a certain age. However, as many employees rely on doing overtime to keep their wages up, this is a sensitive issue and unless health and safety concerns apply, then overtime should remain open to older employees. There may be a health and safety issue in relation to this for two reasons:

(1) the health of the individual employee may suffer if doing long hours at an advanced age and the employer has a duty of care to the employee; and

(2) the employer has a duty of care to all employees and members of the public where the employee operates in a safety-critical environment.

9.9. **Personal circumstances**

It may be advisable to have a discussion about the employee's personal circumstances, including, for example, whether or not they have caring responsibilities. This ensures the employer has a full understanding of the reasons for a particular flexible retirement option the employee may be suggesting. However, the employee's privacy is also important and a discussion about personal/family reasons for the changes is something that could be left as an option for an employee to raise only if he or she wishes to.

9.10. **Pension provision**

Pension provision is likely to affect an individual's decision to continue working or not. Likewise, if going onto part-time hours and a lower salary commensurate with that could have a detrimental impact on any final salary pension, this will also need to be considered.

Whether an employee is entitled to a state pension (particularly if state pension age is increased) may also affect their decision to retire. Individuals should be encouraged to obtain information about their pension options as part of this process.

10. In ELA's view, it would be important to allow trial periods for any new arrangements agreed with employees, with a timetable for further consultation and after consideration has been given to, for example, training.

11. Whatever measures the code/guidance suggests, consideration should be given to how it dovetails with existing grievance and disciplinary procedures as well as the law of unfair dismissal, disability discrimination and the impact any of the measures might have on the other protected strands such as race and gender.

12. Any measures an individual employer proposes to introduce in relation to career planning/retirement discussions should be consulted upon with a recognised union, if there is one, or, if there is none, with employee representatives or, if that is not possible, with individual employees. This is important in order to ensure employers and employees understand the others' needs/concerns and to create trust rather than mistrust around the process. If these discussions are going to work, and the code/guidance is going to be implemented effectively, the workforce will need to see it as a collaborative process introduced in the interests of the employees as well as the employer. The ELA recognises that employees' representatives will wish to be consulted about the implementation of any procedure to hold such discussions, while employers will, in contrast, wish to design and unilaterally implement the process it considers best suited to its business needs.

D1 Do the proposed transitional arrangements strike the right balance between the policy aim of quickly phasing out the Default Retirement Age (and realising the benefits of doing so) and respecting the position of employers who have already made plans based on its use?

No.

D2 If no, please explain your answer.

The proposed transitional arrangements do not strike the right balance.

Currently an employer is required to notify an employee at least six months, but no more than 12 months, before the employee's intended date of retirement (for the majority of employers this is usually the relevant employee's 65th birthday) in order to effect a fair dismissal on the grounds of retirement.

It is currently proposed that the DRA will be repealed from 1 October 2011 and that, under the transitional arrangements, new notifications will not be allowed to be issued on or after 6 April 2011. Whilst these proposals do ensure a quick phasing out of the DRA, this is at the expense of providing the required level of certainty to employers to ensure that employees with an intended retirement date between now and 1 October 2011 are not simply retired under the old procedure because employers are scared of the unknown where they might have otherwise been more willing to let those employees to continue to work.

Before employers are forced to make a decision as to whether to retire an employee under the old scheme, they should be given opportunity to see how retirement will be dealt with after 1 October 2011, i.e. by being given time to consider any code of practice/guidance which is put in place. As such it is recommended that the notification window under the old scheme does not expire before any new scheme has been finalised and put in place, and employers have been given the opportunity to consider how this will affect their business.

Given that the consultation is closing on 21 October 2010, while the last notifications will have to go out by April 2011, it is extremely unlikely that the details of any new scheme, including any draft codes of conduct/guidance, will have been drafted before April 2011. The ELA considers it to be extremely important that there is opportunity for consultation regarding any draft code of conduct/guidance, but the transitional arrangements do not allow for this. As such, in order to achieve the correct balance and realise fully the benefits of phasing out the DRA, without it having a detrimental effect on both employers and employees, it is recommended that the DRA should not be repealed until April 2012. This allows an opportunity to consult in relation to a draft code of practice/guidance and gives employers the opportunity to plan sufficiently in the full knowledge of exactly what will replace the old system. The current transitional arrangements should be extended to cover this period. This is a significant change for employers and, therefore, sufficient time needs to be given for its implementation in order to achieve success.

Currently, it is proposed that the DRA be repealed as of a certain date and that, after that date, no retirements can be effected fairly by means of the old procedure. This does not align well with that fact that, under the old procedure, notification of retirement can be given between 12 and 6 months prior to the intended date of retirement. This means that notifications given prior to 6 April 2011, whilst lawful when given, will be void if the intended retirement date falls after 1 October 2011. This creates confusion. The potential for such uncertainty can already be seen from

the way the transitional provisions are currently drafted. For example, if a retirement notification were issued on 6 April 2011 it would be void in any event, for giving insufficient notice. It is also not clear from the proposals whether an employer would be able to effect a fair retirement dismissal (subject to fulfilling the correct notification obligations) on 1 October 2011 or not or whether the cut off date is, in fact, 30 September 2011.

Given the way the notification procedures are drafted it is suggested that a more certain way of phasing out the DRA is to implement its phasing out by reference to the date of notification i.e. no notifications are allowed to be given on or after 1 October 2011.

E1. Responses to an earlier call for evidence on the Default Retirement Age raised possible impacts on insured benefits and Employee Share Schemes if the DRA is removed. If relevant, please describe any concerns you have below:

Insured benefits

Insured benefits provided by employers to their employees include:

- Life assurance;
- Medical cover;
- Critical illness schemes; and
- Income protection schemes.

With life assurance, medical cover and critical illness schemes, the issue is that the premium charged by insurers can increase significantly if cover is extended to older workers, particularly beyond the age of 65 or 70. Beyond 70 it can even be difficult to secure cover in some cases.

Employers might try to justify refusing cover beyond a particular age or providing a cash benefit in lieu of cover. However, as case law currently suggests cost alone cannot justify discrimination, it is unlikely many employers will confidently rely on justification to distinguish older workers.

The Equality Act will make it unlawful for insurers to discriminate on the grounds of age in the provision of insurance benefits unless the insurer can objectively justify such treatment. However, these laws will not come into force for some time, leaving a period where insurers can lawfully discriminate but employers will be employing more and more employees over 65. The obvious consequence will be that some employers will remove insured benefits from all staff, rather than navigate this area.

We suggest that an exception should be introduced into the legislation to clarify the employer's duties, at least until the Equality Act measures covering goods and services comes into force. One option would be to provide that it will not amount to age discrimination to stop insurance benefits after 65 (or 70), possibly provided compensatory benefits are covered.

Additional complications arise with income protection schemes. These schemes traditionally provide a proportion of income is paid until retirement, in case of long-term ill-health. Indefinite schemes are being replaced by fixed-term ones paying benefits for, say, 5 years. But even today, we believe, such shorter-term schemes are in the minority.

With the abolition of the DRA, the issues regarding income protection schemes break down into the following:

1. providing insurance cover to those over traditional retirement age;
2. stopping cover at traditional retirement age for those in receipt of long-term benefits;
3. stopping cover at traditional retirement age for those in receipt of fixed-term benefits.

These are already issues with some schemes where the threshold age is 60 from before the introduction of 65 as the DRA. However, they will be exaggerated with the abolition of the DRA. We are aware of employers who have refused requests to work beyond 65 on account of the complexities with income protection schemes.

Employers might be able to argue that the age at which pension benefits replace the insured benefits is the age at which employers can stop benefits. However, should this be the earliest time at which an employee can draw a pension, or the age at which the employee can draw a pension which has not been reduced for early receipt? What is the position with the many employees who do not benefit from a company pension? Would this be the state pension age?

Should workers beyond 65 be entitled to a replacement benefit on the basis that, in not receiving this benefit, they are receiving a lower total compensation?

We believe that these issues need addressing either in the context of guidance (statutory or otherwise), on justification, or in exceptions within the legislation.

Employee Share Schemes

The impact of age discrimination laws has raised questions on the operation of share schemes since their introduction in 2006. These schemes divide into approved and unapproved schemes.

The various HMRC-approved schemes require or permit retirement ages to be incorporated into the scheme rules in order to secure tax advantages.

The approved schemes break down into four types: Share Incentive Plans (SIPs); Save-as-you-earn (SAYE) Plans; Company Share Option Plans (CSOPs); and Enterprise Management Incentive (EMI) schemes.

SIPs and SAYE Plans require schemes to set a specified age at which employees can exercise options and benefit from tax advantages (SAYE Plans) or at which employees who leave by reason of retirement can benefit from tax advantages (SIPs). Most schemes set this age at the earliest permissible under the legislation (50 for SIPs and 60 for SAYE Plans). With CSOPs, the scheme is permitted, but not obliged, to include a retirement age (no lower than 55) after which an employee who leaves by reason of retirement may benefit from tax advantages.

It is generally assumed that employers will be able to rely on the legislation to justify any allegation of age discrimination. It is, however, debatable whether or not the underlying legislation is compatible with EU discrimination law.

SAYE schemes also require a participant who retires at, or after, the age at which they are "bound to retire in accordance with the terms of their contract of employment" to be able to exercise options within a six month window. With the abolition of the DRA, very few employers will maintain a retirement age in their contracts of employment. This provision will, therefore, make little sense and should, ideally, be amended.

With EMIs and unapproved schemes, there is no obligation to mention retirement ages but these schemes generally provide that retiring employees should be treated as "good leavers" with beneficial exercise terms.

As there is no minimum age provided for in the legislation governing EMIs and unapproved schemes, employers who elect a minimum age are vulnerable to challenges from younger employees who might "retire" but not benefit as "good leavers" that they have been unlawfully discriminated on the grounds of age. Without a minimum age to point to, the employer might not find it so easy to justify this scheme rule. However, this uncertainty has existed since 2006 and is not affected by the abolition of the DRA.

Another issue relates to the definition of "retirement". It is not defined in the legislation relating to the various approved schemes and is not easy to define. Some schemes do attempt to define it. HMRC has given guidance on the definition (EIM 15300), which draws a very broad definition

and states that an employer can "retire" from one employment while taking up employment with another employer.

Apart from the provision referred to above, regarding the point at which participants in SAYE schemes are bound to retire, the issues with share schemes and age discrimination laws predate the proposed removal of the DRA. Nonetheless, UK laws on retirement and are probably incompatible with EU laws and ripe for review.

There is a difficult philosophical question to address: should employees who retire be treated more favourably than those who leave for other reasons and, if so, how do you define retirement? Should this be related to age and, if so, can this be lawful? Should a 40 year old who leaves to become self-sufficient on a Scottish island be treated any differently from a 60 year old who "retires"? If retirement means stopping working, is it practical to judge this?

E2. Is any action, such as additional guidance, needed to address either of these issues?

Yes – both

Please explain your answer below:

See above.

October 2010

Members of sub-committee

James Davies, Lewis Silkin, Chair
Ivor Adair, Russell Jones & Walker
Sue Ashtiany, Nabarro
Robin Allen QC, Cloisters
Emma Butler, AXA
Claire Dawson, Russell Jones & Walker
Rachel Dineley, Beachcroft
Peter Frost, Herbert Smith
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