

# **The ageing workforce and the abolition of the Default Retirement Age**

Issues forum – March 2011





# The ageing workforce and the abolition of the Default Retirement Age

## Time to embrace those grey hairs?

At the time of writing, employers can still use the Default Retirement Age (DRA) to retire workers when they reach the age of 65. On 13 January 2011, the Government confirmed that the DRA will be abolished from 1 October 2011. From this date, no employee can be compulsorily retired by an employer when they reach 65 unless that retirement can be objectively justified. This effectively means that the last date upon which retirement notices can be issued using the DRA is 31 March 2011.

The proposed changes, applicable to all employers and all company sizes and sectors will have far reaching consequences. Best practice organisations will be planning now, accepting the need to take a fresh look at the management of issues which previously may have had little or no legal risk. However those who fail to make necessary changes in good time may face significant and costly consequences.

This issues forum will discuss the implications of the removal of the DRA, including the potential impact in the civil claims arena and will highlight some of the practical issues that employers will need to consider in managing older workers and across the workforce more generally.



## Background to the DRA

The Employment Equality (Age) Regulations 2006, which came into force on 1 October 2006, provide for a DRA of 65 that employers can rely on if they wish. The regulations make earlier retirement ages unlawful unless employers can objectively

justify them. The regulations also introduced a statutory right for individuals, within a defined process and notification period, to request postponement of retirement beyond the age of 65. The employer has a reciprocal duty to fairly consider such requests.

## Abolition of the DRA

With the abolition of the DRA on the 1 October 2011 the following changes will take effect:

- The last day on which employees can be compulsorily dismissed on the grounds of retirement is 30 September 2011;
- The last day to provide the requisite six months' notice of dismissal under the DRA procedure is therefore 30 March 2011;
- Employers can still rely on the DRA provisions after 30 March 2011 and before 6 April 2011 but only if they use the short notice provisions, which entitle an employee to claim compensation (subject to a maximum of eight weeks' wages) in the event of dismissal;
- Employers will not be able to issue any new notifications of compulsory retirement using the DRA on or after 6 April 2011;
- If the date of retirement falls after 1 October 2011 the DRA will not apply and the employer will need to objectively justify retirement. If they cannot they will risk facing unfair dismissal and age discrimination claims for forcing workers to retire.

## Why abolish the DRA now?

The Government's reasoning is the economic and other benefits of extending working lives including the reduced burden on pension funds, increased income tax revenues and reduced welfare payments. It will also help to counter the demographic challenges posed by a dwindling working population and an increasing retired population.

*"In 1911 there were 10 individuals of working age for every pensioner, today there are about 4; and in 2055 there will be 2. One in four babies born today is expected to live to 100."*

*(Lord McKenzie of Luton, DWP Under-secretary, July 2008).*

There is wider acceptance of the benefits older people can bring by remaining in the workforce and evidence showing an increase in employees wanting to work past the DRA of 65. This is due in part to economic necessity as increased life expectancy has resulted in lower pensions (HSE Horizon Scanning Intelligence Group Demographic study – Report, 2206). There is also anecdotal evidence to support the argument that enforced retirement has a detrimental impact upon the mental, physical and social wellbeing of older people. Improved health and physical capacity in later life means employees now have the desire to do more.



*"In a study by the Chartered Institute of Personnel Development 2007 11% of the workforce was already working past the DRA. In a survey of 1000 workers 38% planned to work beyond the DRA. If flexible working was available the percentage intending to work beyond the DRA increased to 57%."*

*(HSE Horizon Scanning Intelligence Group Demographic study – Report, 2206).*

However others have taken a more negative view, suggesting that scrapping the DRA will leave a vacuum, raising a large number of complex legal, employment and practical questions which employers will have to overcome.

## Contractual retirement ages

1. Two thirds of businesses already operate without a fixed retirement age. This gives employers an opportunity to retain skilled and experienced staff, and opens up on-going and future work options for older workers. Increasingly, it will be for employees to consider when and how they retire.
2. Following abolition of the DRA an employer will still be able to operate their own compulsory retirement age provided they can objectively justify it as a proportionate means of achieving one or more legitimate aims.
3. Research indicates that performance in most jobs is unaffected by age until at least 70 years. Unless there is a specific health and safety related reason that is job specific, it may be difficult for employers to justify imposing a fixed retirement age below 70 years.
4. Even with a contractual retirement age employers will still need to consider the fairness and even-handedness of dismissal, including the procedure that's adopted and will still need to seriously consider an employee's request to continue working.



## Redundancy and older workers

Employers considering redundancies should ensure that all staff involved in the selection and decision making process are aware that it is unlawful to make a decision based on age unless this can be objectively justified. This follows the logical argument that employers should try and keep the staff with the skills, experience and performance essential to the running of the business, whatever their age. However there will also be arguments that it prevents talent and ideas from new recruits entering and positively influencing the organisation.

If voluntary redundancy is considered an option organisations will need to focus on the areas of the business that need scaling back or on the workforce as a whole and avoid making assumptions about people which lead to workers of particular age groups being targeted.

Voluntary early retirement may be an option for certain age groups if permitted by an occupational pension scheme. This should be one option within a wider voluntary redundancy offer that is age neutral.

## Capability dismissals

In the absence of a contractual retirement age employers will have to identify and justify fair reasons for dismissing an employee. This raises a number of potentially complex issues particularly around how employers manage their appraisal and employee review processes i.e. they are likely to come under increasing scrutiny.

- There will need to be clarity and consistency around what underperformance actually means and how it can/should be measured, recorded and managed as part of the appraisal process for all employees
- Employers will still be required to provide coaching and assistance together with clearly defined and measurable goals to help the employee improve their performance - allowing sufficient time to determine whether the employee has achieved the required/desired improvement.



## Flexible working

Flexible working is a popular option for older workers as it allows people to make a gradual transition between full-time work and retirement. However, if flexible working is not open to all, then targeting it at older workers would need to be objectively justified. It may be difficult to justify offering flexible working arrangements to older workers, but not to other groups, such as parents of young children. Organisations should take the opportunity to review all working options and offer a range of working patterns that meet the needs of the job and the business to all workers.

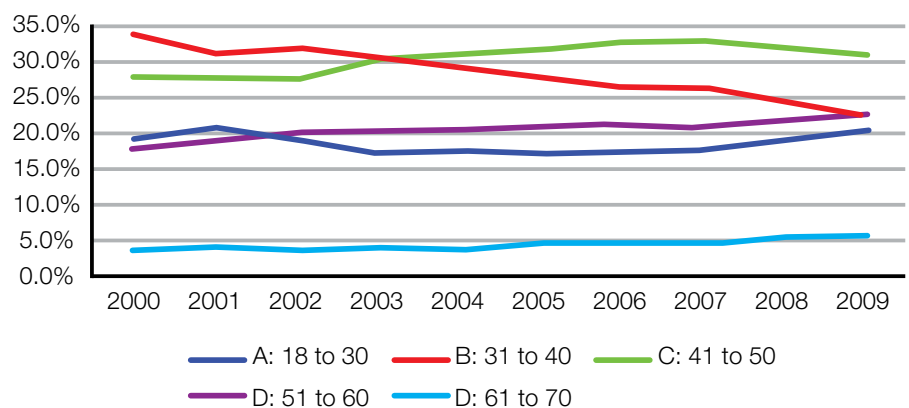
## Civil claims impacts

The civil claims arena will not be unscathed by these changes as the demographics in the working population gradually change. Whilst impacts on accident claim frequency are less certain there is an anticipated rise in disease claims and conditions generally more prevalent in older workers. It is likely that reserves, particularly for larger value claims, will increase. For example:

- For large claims where individuals can no longer return to work following an accident or as a result of disease or ill-health due to work, future wage (and other) losses will be claimed beyond the current DRA
- There is potential for a double whammy effect with the anticipated reduction in the discount rate (yields generated by index-linked government stock) for future loss settlements. The rate is currently at 2.5% but is likely to be reduced to between 1.5% and 2% which will have significant impact on high value claims. At the time of writing and to further compound this issue, claimant firms are already recommending that large settlements be delayed until the Lord Chancellor completes his review, thus further adding to legal costs

- Other claims costs such as recoverable benefits and NHS charges are also likely to increase as recovery rates for older people are longer and the length of hospital stays are increased (BUPA report “Healthy work, Challenges and Opportunities to 2030”)
- Degenerative conditions such as disease, cancers and arthritis are more prevalent with age and there will be an anticipated increase in claims for such conditions. Consequently there will be an increased focus on medical causation issues, i.e. whether conditions are work related, or are accelerated or aggravated by work
- At first blush the QBE data below (see Fig 1) might suggest that older workers have an increasing propensity to claim, perhaps partly due to psychological / generational factors. However this data is two dimensional and it may simply reflect the true changes in the age demographic of QBE clients' employees over this period. Ultimately, you as employer should have the means to assess and analyse whether the age, accident and claims profile of your workforce needs further consideration.
- Loss of pension claims are likely to increase and will become more complex, as well as potential claims for the loss of employer contributions
- On a positive note however, age is unlikely to affect the general damages component of claims and the ‘care and assistance’ components of large claim settlements may actually reduce.

**Fig 1: % of Accident Claims by Age of Claimant at Date of Accident**





## The realities of ageing

The ageing process affects the body and mind in a number of ways. Whilst it would be unfair and unwise to consider older workers as a homogenous group, statistics (rather obviously) show that the death rate naturally increases with age; muscle power and lung function starts to decrease from middle age and eyesight, hearing and joints degenerate. Various mental changes can also occur in older workers notwithstanding a varying approach to problem solving from their younger counterparts i.e. a tendency to use experience as opposed to working a solution from first principles.

In the civil claims arena musculo skeletal disorders (MSD) represent a significant cohort of personal injury claims. Self reported MSD caused or made worse by work increase for older workers and the Guidance to the Manual Handling Operations Regulations 1992 recognises that back pain and MSD increase with age...

*"An individual's physical capacity varies with age, typically climbing until the early 20s, declining gradually during the 40s and more markedly thereafter. It should be recognised that the risk of manual handling injury may be somewhat higher for employees in their teens or in their 50s or 60s".*



However it is also probably true that psychosocial factors may be as important in predicting sickness absence from back pain and it is interesting that the estimated prevalence of self reported stress, depression or anxiety caused or made worse by work is less prevalent for older employees (55+).

With an ageing workforce there is likely to be more ill-health, more frequent and longer levels of absence (BUPA report "Healthy work, Challenges and Opportunities to 2030"). Whilst older workers are not necessarily more prone to work-related accidents, when they do suffer an injury it is more likely to be severe and require a longer recuperation time, particularly when harbouring pre-existing and/or degenerative conditions.

However, and generally speaking, age is not an indication of capability and does not in itself determine an employee's physical or mental ability to do a job.



## A pro-active strategy?

Health and Safety and Occupational Health services in conjunction with their Human Resource colleagues should be gearing themselves up to develop strategies for the employment of an older working population. For example:-

- Risk assessments will need to factor in age related changes such as MSDs, eyesight, hearing and reaction times. Safety professionals should advocate common sense steps to compensate for decrements in performance in these areas
- Poor workplace design and inflexible working practices are more likely than age to prevent staff from being fully effective and the physical demands from work can often be minimised by making changes following pro-active consultation
- Individual (or more personalised) risk and capability assessments are likely to feature more prominently in the work place. These tools will be invaluable not only to monitor performance but also to proactively address areas within businesses that require consideration such as training. Older workers may have different learning styles which should be acknowledged e.g. an increased reliance on IT/web based training and support may be less suited to an older audience



- A significant challenge for employers will be the robust management of capability assessments in the context of performance management for all employees. It will likely fall to line managers to continually monitor the progress of employees performance levels but it will require a joined up approach from both HR, H&S and occupational health departments.

Generally speaking best practice employers will already be dealing positively with the above issues through the risk assessment process and facilitating regular formal or informal discussions with employees (old and young), allowing them to talk openly about any health and safety issues they may have and respond positively to any issues or concerns.

## Conclusion

The abolishment of the DRA will lead to an increase in the average age of the UK workforce bringing a number of challenges for Employers. Contractual Retirement Ages (CRAs) can still be enforced but will need to be objectively justified and can still be challenged by employees. The experience of employers will vary between industries as it will be easier to justify a CRA for physically demanding job roles such as construction as opposed to clerical roles.

With change often comes fear, but amongst some real negative consequences, there will also be some unjustified preconceptions around the realities of the ageing process and having an older workforce. There are undoubted benefits that employing older workers will bring. Indeed the changes may trigger a more holistic approach to employee wellbeing with occupational health professionals being more involved in the performance management and appraisal process covering the areas of health and capability for all employees.

QBE recommend that employers start to investigate, embrace and communicate the changes they will need to make now in terms of internal policies, procedures, practices and attitudes in preparation for when DRA is abolished.



## Author biography

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