

Age Discrimination: 5 Steps To Knowing When An Employee Is Unfairly Dismissed By Way Of "Retirement"

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The Employment Equality (Age) Regulations 2006 - SI No 2006/1031 - came into force on 1 October 2006 to protect employees from being dismissed unfairly by reason of their age. The Age Regulations make it unlawful to discriminate against employees, job seekers and trainees because of their age – both old and young. The protection covers direct and indirect discrimination, harassment and victimization. Employers and employees alike must familiarise themselves with these far reaching changes.

This article addresses:

(1) the particular unfairness of “early retirement” which essentially involves retirement ages being arbitrarily fixed below 65 without justification; and

(2) the requirement for a fair procedure to be followed in all retirement dismissals. Section 98 of the Employment Rights Act 1996 is amended to include a new potentially fair reason for dismissal - that of retirement. As with other reasons for dismissal, it remains the case that the employer must “show” any Employment Tribunal what the reason for dismissal is.

If the employer wishes to be able to rely on retirement as a reason for dismissal, the chances of successfully doing so are greatly increased if he follows the procedures set out in the Age Regulations. That is to say that at least 6 months prior to the dismissal (but no more than a year prior to the dismissal) he notifies the employee of the date on which he intends that the employee should retire and he informs the employee that the employee has a right to request to work beyond retirement age. This is known as the 6 month rule.

The Age Regulations remove the upper age limit for claiming unfair dismissal and redundancy and give older workers the same rights to claim unfair dismissal or receive a redundancy payment as younger workers, unless there is a genuine retirement.

Where Retirement Dismissal Is Unfair

There are 5 circumstances where genuine “retirement” cannot be the reason for dismissal no matter what the employer argues in an Employment Tribunal and where dismissal will therefore be unfair. Those 5 circumstances of unfair dismissal are:

No Fixed Retirement Ages Specified

(1) The employee has no fixed retirement age, but the dismissal takes effect before the employee reaches the age of 65. The default retirement age in the absence of one having been specified is now 65. It should be noted, however, that an employer will not be able to rely on the default retirement age of 65 to retire employees earlier than he would otherwise, for example if the employees retirement aged had previously been set at 68.

Fixed Retirement Ages Specified

(2) The employer has a fixed retirement age which is below the age of 65, the dismissal takes effect after that age, but the reduced retirement age is not “objectively justified”. This means that the employer has to establish what objective and proportionate reason exists to warrant a lower retirement age. This will be rare.

(3) The employee has a fixed retirement age whether above or below 65, but the employee is dismissed for retirement before the employee reaches that previously fixed age.

6 Months Notice Rule

(4) The employee has a fixed retirement age over the age of 65, the employer gives notice to dismiss within the 6 months rule, but the dismissal takes effect before the intended date of retirement date so notified.

(5) The employer does not notify the employee in accordance with the 6 months rule, but he does notify the employee of an intended date of retirement, but the dismissal takes effect before that intended date of retirement.

Right to work beyond the intended retirement date

If the employee indicates his wish to exercise his right to request working beyond the intended retirement date the employer must arrange a meeting. If the employer has notified in accordance with the 6 months rule, the request must be made at least 3 months but not more than 6 months before the intended date of retirement. If the employer has failed to notify in accordance with the 6 months rule, the request can be made at any time within the six month period

before the intended date of retirement.

The employer must hold a meeting with the employee within a reasonable period after receiving the request unless, during that period, the employer and employee agree that the employee is to retire later or it is not practicable to hold a meeting within the period. If it is not practicable to hold a meeting within the period the employer must still consider the request.

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