

Employment Equality (Age) Regulations 2006

The TAEN Guides to the Age Regulations are primarily for individual employees, jobseekers and learners and aim to give a simple, clear explanation. They are neither a legal opinion nor a statement of Government views.

7 : Retirement

The Age Regulations have created a new set of rules about retirement and retirement ages, including the introduction of a 'national default retirement age' and concept of 'fair retirement procedure' as a justification for dismissal.

Definitions

Retirement age, occupational pension age and state pension age are often confused and assumed to be the same thing. They can be at the same age for some individuals, but for many they are not. It is important for understanding the Regulations to keep them distinct.

A '**retirement age**' is when you are expected to retire (unless you have retired before that date).

A '**pension age**' is the age at which you can take your full pension entitlement.

If you take pension earlier than the specified pension age you may get less pension; if you take it later you may get more. This is mainly relevant to those who have a pension based on their final salary and their number of years' service. The alternative type of pension based on the amount of contributions paid in during working life does not have a specific 'pension age'.

The right to retire

The new rules on retirement ages do not affect your right to retire if you want to and have built up sufficient pension savings to finance your retirement. The legislation is not about forcing you to work longer. It is about removing barriers to extending your working life if you want or need to go on working.

Default retirement ages and fair retirement procedure

The Regulations introduce the concept of a 'default' or fixed retirement age. The national default age is 65. This does not force employers to have a default retirement age or, if they do, to have one of age 65. The major change is that it will be unlawful to have a fixed retirement age below age 65 unless it can be justified. These arrangements do not apply to contract workers, office holders and partnerships.

The law also introduces a Fair Retirement Procedure. If this is followed correctly, a retirement at, or after, the fixed retirement age cannot be challenged as unfair dismissal. It may, however, be challenged if the procedure is not followed correctly.

Options for employers

An employer may adopt one of four policies:

- To have a **fixed retirement age of 65** by implementing the national default retirement age. This is expected to be the policy adopted by the great majority of employers.
- To have a **fixed retirement age below age 65**, justified by exceptional circumstances such as health and safety or the heavy nature of the work. Examples could include firemen, some police or some industrial jobs.
- To have a **fixed retirement age above age 65**.
- To have **no fixed retirement age**. Age of retirement is a matter of agreement between employer and each employee. Research shows this is the present situation in the majority of UK enterprises, although less so in large businesses.

You should seek clarification if your employer has not made clear what their new retirement policy is.

Fixed retirement ages under 65

If an employer wishes to maintain a fixed retirement age under 65 (for example at age 60) and some employees wish to work beyond that age, then they would need to challenge the grounds on which the retirement at age of 60 is being maintained. The employer has to show what exceptional circumstances justify this.

There are occupations where average retirement ages are likely to be fairly young. However, this does not mean that the opportunity to work to a later age should be

ruled out for everyone by a fixed retirement age. Personal capacities at different ages can be very varied.

In order to meet the requirements of the legislation, the test in a Tribunal for a fixed retirement age below 65 is likely to be a tough one for an employer. If you work for an enterprise that wishes to keep a pre-65 fixed retirement age and you want to stay in work - you should seek advice.

Handling a request to stay beyond default retirement age

The employer has a new **duty to inform** you of their intentions before you reach their fixed retirement age, be it at, before or after 65. You may of course have already declared your intention to retire at that point (or may have already retired before reaching their fixed retirement age).

You can **request to stay** on after the retirement age if you want to. This has of course always been the case informally, but is now established formally in the law.

If you ask to stay on then the employer has a **duty to consider** it and is obliged to hold a meeting with you 'within a reasonable period' (assuming, that is, that the request is not immediately accepted). You have the right to be accompanied at the meeting.

The employer has to give you a written response within two weeks either agreeing to, or refusing the request. If agreeing to it, the employer has to make it clear whether the extension is for a defined period or open-ended.

There is no obligation on the employer to give a reason for turning down your request.

This has important implications for how the fair retirement procedure may work in practice. It may lead to many employers declining (or accepting) all requests on the basis that to accept some and refuse others without any explanation will create awkward situations.

If your request has been turned down, you can appeal against the decision but it is not clear that the employee has any leverage to persuade the employer to change their mind in that situation.

Timelines for the process

The correct timelines for the procedure is for your employer to inform you of their intention concerning your retirement **between 12 and six months before your 65th birthday** (taking a fixed retirement age of 65 as the example). You must make the request to stay on three months before your 65th birthday, i.e by 64 and three-quarters.

If the employer follow this timeline, you cannot challenge it on any grounds, even if you suspect that there may be other reasons for saying they want you to leave.

If the employer waits until **less than six months before your 65th birthday** you have to respond with a request to stay on by the date of your 65th birthday. You can do two things:

- If circumstances suggest that there is another motive for your employer asking you to go, you can, if you wish, challenge the motives (unlike the situation where the employer's notice is more than six months). If that challenge is upheld at the Employment Tribunal then it becomes unfair dismissal and you would be entitled to compensation.
- In addition, you can claim compensation of up to eight weeks' pay if your employer fails to inform you of his intentions by six months before your 65th birthday. In that situation, you would effectively be paid for up to two months after your 65th birthday, even if you had ceased working.

If your employer fails to tell you their intentions by **two weeks before your 65th birthday** and then tells you to go, that is automatically unfair dismissal and you would be entitled to compensation.

If the whole procedure starts fairly close to your 65th birthday and the employer has not

responded to your request by the date of your 65th birthday your employment is protected after your 65th birthday until a meeting has taken place and you have received a response. If you appeal against the decision the employer is not obliged to keep you while that is going on.

Terms and conditions for staying on

An employer could agree to you staying on but in a different job or on different terms. If it is the same job, your existing terms and conditions of employment are protected and there cannot be regression from them. If you are offered a different job with different terms and conditions and refuse it, then you would not have redress against that situation.

An employer may agree that you stay on, but on a fixed-term contract. If this is for six months or less and the employer makes clear that the latter date is your 'intended date of retirement', then departure at the end of the period is automatic. (This is rather obscurely mentioned in para 5(4) of Schedule 6). If the contract is for longer than six months then you have a right to request a second extension and the planned retirement procedure is repeated. This could create an incentive for many extensions to be limited to six months.

Transition period: employees

A transition period from Oct 1st 2006 to March 31st 2007 was built into the Regulations because by definition employers were not able to give a full six months' notice to those whose 65th birthdays fell within six months of October 1st 2006.

In practice, many employers used this transition period to retire existing employees who were already over 65. As a result, the Legislation appeared to have had a perverse consequence of reducing work opportunities for some people over 65. It is likely that in many cases this action was based on the misunderstanding that

employers would not be able to retire people over 65 because they are now covered by Employment Legislation. In fact, employees over 65 have less employment protection than those under 65 and can be retired at any time without explanation with six months' notice providing the correct procedures are followed.

There are two further possible motives for not retaining people over 65:

- that it would be hard to enforce a default retirement age for those reaching 65 if existing workers are over that age, and
- there is a concern about action under the Disability Discrimination Act if over-65s selected for retirement were those with failing health who might otherwise have been able to stay at work if 'reasonable adjustments' were made.

Early voluntary retirement

This was extensively used in the last 20 years by employers who had occupational pension schemes as part of downsizing or restructuring exercises and/or part of 'succession planning'. Often an enhanced package was offered to help facilitate the departure of those aged over 50 who could draw their pension from the age of 50. However, this practice has become much less widespread because of pension fund deficits. From 2010, as a result in changes to pensions regulations, the earliest age at which an occupational pension can be drawn will rise from 50 to 55.

Under the Age Regulations these procedures can continue for existing employees; but for employees taken on from October 2006 the calculation of pension right must be based on a strict actuarial approach i.e. not build in any financial incentive to depart early (or conversely, financial advantage from staying longer) beyond what is actuarially justified.

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