

## Guide

### The Equality Act 2010

The TAEN Guides to the age related provisions of the Equality Act 2010 are primarily for employees, jobseekers and learners and aim to give a simple, clear explanation. The relevant provisions were formerly contained in the Employment Equality (Age) Regulations 2006 but since October 2010 they have been found in the Equality Act 2010.

## Retirement

The Employment Equality (Age) Regulations 2006 created a set of rules about retirement ages and the retirement process including the introduction of a “default retirement age” and the concept of a “fair retirement procedure”.

These rules were abolished with effect from 6 April 2011, meaning that there is now no default retirement age of 65. It remains a matter for each employer to decide if they have a normal retirement age or just deal with each individual on his or her own merits.

If your employer has a normal retirement age and your employment is terminated just because you have reached it, you may have a claim for unfair dismissal and age discrimination. A key issue will be whether your employer can justify its normal retirement age as a proportionate means of achieving a legitimate aim. The answer could be different for different types of business, or even different for different parts of the same business.

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## The right to retire

You still have a right to retire when you want to. The legislation is not about forcing you to work longer. It is about choice.

Your pension scheme will stipulate the age when you can first draw your pension. This does not have to relate to the date when you can be required to retire from your employment, and so your pension age may be before or after that retirement date. As a consequence, if you think you have built up sufficient pension savings to finance your retirement, you might decide to retire at your pension age - even though you are free to work until a later retirement age with your employer. The legislation does however protect your right to work longer should you so wish.

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## Early voluntary retirement

From April 2010, as a result of changes to pensions regulations, the earliest age at which an occupational pension can be drawn rose from 50 to 55.

Enhanced packages offered for early voluntary retirement can continue for existing employees who started before October 2006 (when the Age Regulations came into operation). However, for all other employees, the calculation of pension rights must be based on a strict actuarial approach, i.e. not based on any financial incentive to depart early (or, conversely, financial advantage for staying longer) beyond what is actuarially justified.

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### The old law

#### Retirement ages

The old rules still apply if notice of the intention to retire the employee was served before 6 April 2011. **What appears in the remainder of this guide is only relevant in those cases.**

The Age Regulations introduced a default retirement age of 65, which made it lawful for employers to retire staff, provided the proper procedure is used. However, employers do not have to have a retirement age of 65.

A variety of different arrangements can be lawful as follows:

- A fixed retirement age of 65 – this is very common.
- A fixed retirement age below the age of 65 – this is only lawful if justified by exceptional circumstances such as, for example, health and safety or the particular nature of the work, if there is evidence that workers over a certain age are less able to carry this out. Examples include some firemen and police officers.
- A fixed retirement age above age 65.
- No fixed retirement age – since the age of retirement is a matter of agreement between an employer and each employee, it is open for agreement to be reached that there be no fixed retirement age.

In any doubt, you should seek clarification from your employer as to what their retirement policy may be.

These arrangements do not apply to contract workers, office holders and partnerships, in respect of which any retirement age needs to be justified.

### **Fixed retirement ages under 65**

If an employer operates a fixed retirement age under 65 (e.g. 60), staff who wish to work beyond that age, will need to challenge the grounds on which the retirement age of 60 is being maintained. The employer would have to show what exceptional circumstances justified the earlier retirement age.

There are occupations where the average retirement age may well 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 vary.

It is likely to be a tough task for an employer to justify a retirement age below 65 and so if you want to stay on at work you should seek advice.

### **Requesting to stay beyond retirement age**

The Age Regulations introduced a procedure which, if correctly followed, means that a retirement at your retirement age (whether before, at, or after 65) cannot be challenged as unfair dismissal. It may however be challenged if the procedure is not followed correctly. Any retirement below 65 will need to be objectively justified.

Employers must inform you of their intentions before you reach your fixed retirement age (be it at, before or after 65). This is a statutory duty. Of course, you may already have declared your intention to retire by that stage (or indeed may have already retired).

You can request to stay on after the retirement age if you want to. There is now a formal process to be followed if you do so.

If you make a written request to stay on, your employer has a duty to consider that request 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 to that meeting by a work colleague or a trade union representative.

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

Importantly, there is no obligation on your employer to give a reason for turning down your request.

If a request has been turned down, you can appeal against the decision, but in the absence of any reason it is not clear that the employee has any leverage to persuade the employer to change their mind in that situation. It is worth asking for a reason.

### **Timelines for the process**

The correct timeline for the procedure is for your employer to inform you of their intention concerning your retirement between 12 and 6 months before your 65th birthday (assuming for these purposes a retirement age of 65). You must make the request to stay on three months before your 65th birthday (i.e. in this example by the time you reach the age of 64 and 9 months).

If the employer follows this timeline, you cannot challenge it as unfair on any grounds, even if you suspect that there may be other reasons for saying that 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 then take action as follows:

- 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 before retirement age). If that challenge is upheld at the employment tribunal then it becomes an unfair dismissal and you would potentially 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 fixed retirement age. In that situation, you would effectively be paid for up to eight weeks after your fixed retirement age, even if you have ceased working (although this is capped at the statutory maximum – currently - £400 per week).

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

If the whole procedure starts 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 a decision the employer is not obliged to keep you while that is going on.

### **Terms and conditions for staying on**

The employer can 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 can not 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 that is for six months or less, and the employer makes clear that that date is your "intended date of retirement", then departure at the end of the period is automatic.

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.

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**If you are concerned you may have experienced discrimination fill in the online questionnaire (EqualityXpress) at [www.rjw.co.uk/equalityxpress](http://www.rjw.co.uk/equalityxpress). Russell Jones & Walker Solicitors will then contact you with their opinion on your claim. The service is free and 100 per cent confidential.**

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The information in this guide was prepared by the award winning employment department at Russell Jones & Walker Solicitors

Care has been taken to ensure that the information provided in this Guide is accurate up to the date of publication (6 April 2011). However, we do not accept responsibility for mistakes or omissions. In particular, the information provided is for general educational purposes only and is not intended to be legal advice, taking into account your particular circumstances. Please do not use this information to disregard any legal advice, nor to delay in seeking legal advice or representation because of any material contained in it.

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