

Flexible Retirement and Pension Provision: DWP Consultation

TAEN – The Age and Employment Network and Help the Aged welcome the opportunity to comment on the Department for Work and Pensions (DWP) Consultation Paper of October 2007 on Flexible Retirement and Pension Provision.

TAEN worked closely with the former Department of Trade and Industry and with DWP on the preparation of the Age Regulations and was a member of the Government's Advisory Group for five years. TAEN was also a member of the Group convened under the Chair of Rita Donaghy of ACAS to resolve policy on the treatment of retirement ages in the Age Regulations.

Help the Aged has been closely engaged with DWP on all aspects of pension reform and legislation. Both organisations played an active advisory role to the Pensions Commission.

Extending working life: flexible retirement

We warmly support Government policy to encourage a flexible pattern of downshifting in later career and gradual flexible retirement. We believe that this will make a constructive contribution to later average retirement ages which are an essential part of the overall policy response to increased longevity and measures to ensure adequate income in retirement.

We campaigned for changes in pension rules to make it possible to combine earned income and pension income simultaneously from the same employer. We were therefore pleased when the Government took steps to introduce this in the Finance Act 2004.

It is encouraging that there are 1.4 million more over-50s in the workforce than in 1997 and that the employment rate gap of over-50s with the overall employment rate has fallen steadily. But an important objective of extended working life is to provide opportunities to save for retirement. So we have argued that quality of work and terms of condition of employment for workers over 50 is as important as the strictly numerical increase in numbers of workers.

Although there has been an increase in numbers of older workers, on average they earn less and frequently are employed in jobs below their level of experience and skills. The Annual Survey of Hours and Earnings (ASHE) data shows the extent of the decline in average earnings with age, a phenomenon similar to the gender pay gap. Jobcentre Plus data shows that over-50s, once on benefits, stay longer than under-50s on benefits and that the scale of the penalty between the two groups has widened. This is a reflection of the barriers which remain in the job market.

Against this background it is clearly important that older employees, many of whom are working to build an adequate retirement income, are not disadvantaged in pension terms and conditions and opportunities to save.

The Age Regulations and flexible pension provision

The leading employer representative bodies from the private and public sector took part in the detailed preparatory work on the Age Regulations. This included work on how they affected pensions. It was recognised that age was and is a fundamental dimension of pension arrangements. Hence a list of features of occupational pensions was agreed, on which pension managers could continue to use age as a criteria, exempt from potential challenge that their actions were age discriminatory. This list was extended in December 2006 to take account of industry concerns.

This degree of advance shared decision-making casts serious doubt on the representations that have been made to the DWP about the impact of the Age Regulations on management of flexible retirement. Employer organisations did not argue this prior to the legislation.

We also note that the anxiety employers have expressed about whether pension arrangements might be open to challenge under the Age Regulations is not matched by a similar concern about whether their conduct in relation to recruitment, promotion, training and retention of older workers is in contravention of the Age Regulations. In particular, the widespread actions taken by employers to remove existing employees over the age of 65 before the end of the six months transition phase to the full DRA was far from the spirit and intention of the Age Regulations.

The Consultation Paper presents no evidence to support an apparent contradiction between the Age Regulations and policy to encourage flexible retirement and pension provision; it simply notes that it is an argument that has been put forward for not taking action to encourage flexible retirement.

Many of the Government Age Positive champions have set an example by changing their pension and employment terms to encourage flexible working, gradual downshifting and partial draw down of pensions. If it is possible for them to do this (often to their commercial benefit from effective deployment of older workers in the business) it is not clear why others should find it impossible.

For all these reasons we question the motivation and validity of the argument that the Age Regulations are a barrier to implementation of employment policies to promote flexible working life.

Scenarios for flexible, later working.

We request that the Government prepare a summary of the responses to the Consultation listing clearly the main scenarios in which it is perceived that there may be a problem. In the following paragraphs we discuss some of the possible scenarios.

Retention of employees after an NPA of 60 until a DRA of 65 or later, where those employees, through long service, have already reached the maximum pension entitlement under a DB scheme.

The argument may be that retention of such employees on a less good pension is open to the challenge that there is age discrimination in the terms and conditions of one (older) group compared to another.

Many employees, even though on DB schemes, will nevertheless have only modest pension income. Their motivation for continuing to work beyond the maximum years of their existing

pension scheme may include a wish to enhance pension income. We see no reason why a second pension scheme could not be offered. As with new recruits to the business this new scheme may be a DC scheme with a less generous employer contribution than the old scheme. So that automatically creates two groups of employee with a differential in their terms, largely based on their age. This situation is the subject of an exemption in the Age Regulations which can also apply to those extending working life after NPA. It is not a valid reason for refusal to offer flexible working.

Retention of employees after a NPA of 60 until a DRA of 65 or later, where those employees have not yet reached the maximum entitlement in their DB scheme because they have not done the full years of service.

In this case we suggest occupational schemes can be extended beyond NPA with the same contribution levels as for employees under NPA. If so no age discrimination occurs and extending working life and saving is incentivised. We look forward to understanding the position of those who believe that there is a potential conflict with the Age Regulations.

Working beyond DRA

It is apparently argued that this will be difficult to arrange without having pension arrangements which are different from other (younger) employees. The response of employers to the Age Regulations suggests that in many cases the intention has been to minimise or avoid keeping employees after 65. The transition phase disposal of existing workers over 65 took place so that employers could more readily refuse all or any request to work beyond DRA from those reaching 65. It was based on the mis-understanding that the transition represented the last chance to “get rid” of older workers – when in fact they can of course be retired at six months notice at any time under the DRA rules.

We have argued that the DRA is itself discriminatory and open to challenge in the Courts. But while the DRA exists it clearly represents an exemption under the legislation. Arrangements for those working after the DRA should therefore be readily covered as a consequence of the DRA. We believe that the Government can provide reassurance to employers on this.

Part time working and part draw down of pension

We recognise that this involves administrative adjustments for pension schemes. But the response since the option came into force in April 2006 has been disappointing. We see no valid excuse for not implementing the arrangements which the Government have made. They were introduced because employers wanted them. This was to deal with the irrational situation that employees who had reached full pension or wanted to work part time had to move to a competitor business where they were allowed to earn while receiving a pension from their previous employer. We believe that the Government should take a robust line with employer groups on implementing this, pointing to the examples of companies who have done so effectively.

Death in service terms

It may be argued that there is an enhanced probability of death in service for over 65s. However the first step should be a rigorous examination of the evidence, as it is not clear to us that there is a statistically significant shift. To the extent that it is proven, then age-based adjustment of death in service terms might be a legitimate and proportionate response. It should be possible to handle this without jeopardising extending working life, as opposed to using it as an excuse for back peddling on employment of older people.

Next steps by Government

1. **There should be a much clearer understanding of the merits of the specific ways in which it is argued by some that policies to extend working life and the Age Regulations are in contradiction.** The Government should bring forward a summary of the evidence presented in the Consultation for a judgement to be formed by all parties, including Trades Unions and bodies such as ourselves promoting the interest of older workers.
2. **The Government should reject the proposition that there should be a blanket exclusion of pension schemes from the Age Regulations.** That is an invitation to less good terms and conditions of employment being offered to older workers which will undermine the extension of working life.
3. If some employer concerns are found to have some validity, such that the risk of an employee challenge of age discrimination does appear real, then we suggest that there is scope for the Government to provide some assurances about the steps it will take to support policies of extending working life, and provide reassurance to employers about the risks they perceive.

Response to the Consultation questions

In the light of the commentary above we have the following response to the questions in the Consultation Document.

What constitutes age discrimination in relation to flexible retirement?

Q1. We would welcome your views on what you believe might constitute direct or indirect age discrimination in relation to flexible retirement.

We have yet to see any valid example of ways in which flexible retirement and pension draw down could constitute direct or indirect discrimination. The validity of any examples put forward should be tested rigorously.

Q2. It would also be helpful if you could indicate practices which you believe should be exempt or which could be objectively justified.

The existing extensive list of exemptions is adequate and additional exemptions are not needed.

Scheme members after NPA

Q3. We would welcome your views and opinions on the retention of NPA below 65. Do you believe this is critical to the workforce planning and smooth operation of pension schemes?

NPAs below 65 are critical to neither workforce planning nor the smooth operation of pensions. As the DWP will be aware, less than 20% of employees retire in the year they reach their NPA, so it provides no fixed assumption for workforce planning. If NPAs currently below 65 were revised to some higher level, this would represent a worsening of employee benefits and would have a direct impact on transfer values. The avoidance of age discrimination does not require any such change.

Q4. We also welcome your views on the operation of the DRA/NRA and NPA when flexible retirement is provided. Do you have any suggestions for change which would provide generic solutions?

Q5. We in particular welcome comments on how pension provision is handled after NPA (if before DRA/NRA).

Options for working after NRA or DRA are discussed above.

Drawing benefits and continuing to work

We are aware that in some cases drawing benefits and continuing to work is not an option.

Q6. Who do you think are the reasons for this?

Q7. How common a practice do you think this is?

Q8. Do you or don't you consider such a practice discriminatory – and why?

Q9. What are the specific scheme rules and legislative provisions which create the problems in this area?

There are no valid reasons for not being able to combine draw down of pension and continuing to work. If Pension Scheme rules say that it is not possible then it only requires change of Pension Scheme rules. It is not discriminatory because the option is based on the threshold age for draw down of an occupational pension (50 rising to 55, which is exempt from the Age Regulations.)

Further benefits

Q10. Do you, as the employer, trustee or pension administrator offer the same scheme as that offered to new entrants therefore treating everyone in the same way?

Q11. If there is a waiting period should this be waived?

No comments.

Q12. Do you, as the employer, trustee or pension administrator allow the member who has reached their maximum number of years service permitted by the scheme to continue to accrue benefits in that scheme?

Q13. Do you, as the employer, trustee or pension administrator allow them to continue to accrue up to their maximum and then be treated as above if they still have not reached NRA or above? We'd be grateful to know your reasons for your answer.

See commentary above on working after reaching maximum years on a DB scheme or continuing to accrue after NRA.

Unable to take pension unless they leave employment

Q14. What are your views on this? Is there a concern that this may continue to promote an early exit from the labour market – and why?

See commentary above on working after reaching maximum years on a DB scheme or continuing to accrue after NRA.

Not providing benefits after NPA

Q15. What are your views on not providing benefits after NPA?

It is unacceptable not to offer benefits for working after NPA

Drawing part benefits

Q16. Is there any evidence that if this option (allowing part benefits etc) were to be pursued further it would have a detrimental effect on the scheme provision?

Q17. Please tell us any other views or suggestion which you believe should be considered?

No comments

Preservation

Q18. Do you agree that this would be the simplest solution?

Q19. Are there other solutions you could share with us?

No comments

The provision of death benefits beyond a certain age

Q20. What are your views on this? Do you believe there are any occasions where it may be justifiable to not provide death benefits to employees after NPA? And why?

Any adjustments to death benefits based on age should be based on rigorous actuarial evidence about age and life expectancy. It should be kept in mind that employers typically offer the most generous pension and death benefits to those occupational groups with the longest life expectancy and the smallest (or no) occupational benefits to the occupational groups with the lowest life expectancy. If the risks associated with death benefits through working later are a concern to employers then the first step would be to address this anomaly.

**TAEN - The Age and Employment Network/Help the Aged.
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