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Retirement Age and the Manx Equality Bill



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Advocate John Aycock of M&P Legal reviews an aspect of the pending equality legislation that will have an impact on most Manx employers - pensioning off the retirement age.

What will happen to retirement ages when the Equality Bill comes into operation in the Isle of Man? That is a question I am frequently asked because it is well known that the new law will introduce age discrimination protection to the Isle of Man.

Well the short answer is that fixing a compulsory retirement age will amount to unlawful direct age discrimination unless the employer can show that retirement is objectively justified as a proportionate means of achieving a legitimate aim. That aim must be both of a public interest/social policy nature and be relevant to the particular employer's circumstances. An aim relevant only to the employer and/or based solely on cost might not be sufficient to justify an enforced retirement age.

Where a fixed retirement age cannot be justified, staff will have a right to continue to work until either they retire voluntarily or they are no longer capable of carrying out their employment to an appropriate standard whereupon this could be managed through the employer's capability procedures.

One effect of this sea change is that many 'silver sector' staff will need contracts of employment adjusting. At present Manx employers can and do set their own normal

retirement age with the law only intervening to ensure there is parity between men and women. Some of the statutory employment protection under the Employment Act 2006 currently disappears with retirement. For instance, employees who have reached their normal retirement age or, where there is no such age the default age of 65, have no protection against unfair dismissal, save where the dismissal is for an automatically unfair reason such as making a protected disclosure. Similarly, if made redundant such employees presently have no entitlement to a statutory redundancy payment. The Equality Bill will remove these exclusions and give older employees the same protections as others.

The Manx Government consultation document on the Equality Bill cites research from Age Equality UK, the UK charity, showing that nine out of ten people in their sixties were against forced retirement. Prolongation of the opportunity to work is consistent with the gradual increase in the state pension age which is soaking into our society both in the UK and the Isle of Man; it may also be particularly helpful for the Island which has both a labour shortage and an ageing population profile.

Manx employers therefore will have to re-think contracts and policies before the age of 65 is removed as the 'safe' age to retire employees. They will need to consider whether to discard fixed retirement ages altogether or retain a fixed retirement age that can be objectively justified.

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How will all of this work in practice? Well, the Island can look to the UK as an indicator of how pensioning off the fixed retirement age might pan out. Age equality regulations were first introduced in the UK in 2006. The Equality Act 2010 of Parliament initially maintained a default retirement age of 65 but was subsequently amended in 2011 to remove the compulsory retirement age as a potentially fair reason for dismissal.

During this six year bedding in period many UK employers have abandoned fixed retirement ages but others have opted to retain their retirement age and argue that it is objectively justified. A recent study in "Personnel Today" identified some key trends in the UK since the default retirement age was removed. One perhaps surprising trend identified was that there has not been a rash of Tribunal cases resulting from older workers being managed out of the business because of capability. The problems tend to occur when employers concoct poor performance as a ruse to dismiss an older worker. Thus a sixty year old sales person who was dismissed after management suggested customers were not happy with his "old fashioned approach" succeeded in his age discrimination claim.

In another English case an employer applied inappropriate pressure on a sixty five year old manager to retire. When that employee was then selected for redundancy he was able to successfully claim that a younger

manager would not have been treated in this way. Looking at all the evidence, the Tribunal decided that the real rationale behind the redundancy selection was ageist and unlawful.

Perhaps the most difficult area remains justification of a fixed retirement age (the Employer Justified Retirement Age or EJRA) and thus satisfaction of the 'legitimate aim' test. Many factors influence this, such as public policy attitudes to retirement ages (as evidenced by the rising state pension age), the capability issue (for instance when the employment might involve significant physicality) and overall workforce planning. UK ACAS guidance comments as follows: *"Employers who wish to use an EJRA need to consider the matter carefully. They will need to ensure that the retirement age meets a legitimate aim, for instance workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession) or the health and safety of individual employees, their colleagues and the general public. As well as establishing a legitimate aim an employer will also need to demonstrate that the compulsory retirement age is a proportionate means of achieving that aim."*

So as the UK has found, equality legislation does not entirely abolish compulsory retirement ages. An employer may be able to rely on a normal retirement age if it is a proportionate means of achieving a legitimate aim but objective justification is likely to prove difficult in many cases and will require



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careful thought. Most Manx contracts of employment I currently see have a contractual retirement age. At present, that remains enforceable. With the forthcoming equality legislation, things will change. Transitional arrangements will probably apply so the change will be phased (as happened in the UK). An implementation timetable is expected before the end of the year.

The author is head of employment law at M&P Legal, Advocates Solicitors & Attorneys with some 26 years' experience of advising on employment law issues in three different jurisdictions.

M&P Legal is an established Manx law firm with highly experienced Advocates and Solicitors who regularly feature as recommended in the Legal 500 and Chambers & Partners legal directories. The practice deals with Isle of Man litigation such as debt recovery, personal injury, employment, contract, injunctions, enforcement of UK judgments, professional negligence; private client matters such as probate and wills, conveyancing; and corporate/commercial, banking, trusts and insolvency.

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Christopher J Murphy
Joint Managing Director
cjm@mplegal.im



John T Aycock
Joint Managing Director
jta@mplegal.im



Christopher M Brooks
Counsel
cmb@mplegal.im



Damian P Molyneux
Counsel
dpm@mplegal.im



Nadine V Roberts
Associate
nvr@mplegal.im



Amelia J Quinn
Trainee Advocate
ajq@mplegal.im



Carol A Young
Conveyancing Manager
cay@mplegal.im



Niall M Prentice
Paralegal Assistant
nmp@mplegal.im