

## **Retirement Guide**

### **Introduction**

This guide has been prepared to assist both employers and employees dealing with retirement in a fair and appropriate way. It recognises that, while employees have a right to be treated reasonably, employers also have a right to manage their businesses and to ensure that employees conduct themselves in a way that contributes to business success.

While larger businesses are likely to have more detailed and extensive procedures, it is important to recognise that the obligation to behave reasonably applies to businesses of all sizes and in all sectors. In deciding cases of retirement, the Jersey Employment and Discrimination Tribunal (the 'Tribunal') must take into account the employer's size and administrative resources, but this does not mean that small businesses are entitled to behave unreasonably. The principles set out in this guide are designed to apply to employers with one or two employees just as much as they apply to larger businesses with hundreds of employees.

It is hoped that this guide can contribute to the success of businesses in Jersey by setting out a clear framework of reasonable and fair treatment, without burdening employers with excessive bureaucracy. This will help employers deal effectively with issues that arise in the workplace and help employees to raise their concerns in a constructive and proportionate manner and to act reasonably throughout the process.

The principles set out in this guide are designed to be as straightforward as possible. Employers who are unsure as to how a particular case should be handled can seek free advice and guidance from the Jersey Advisory and Conciliation Service (JACS).

### **BACKGROUND**

The law on the forced retirement of employees is about to undergo a transition. From 1<sup>st</sup> September 2018 **all** dismissals for retirement irrespective of the age of the employee. Retirement will become one of the potentially fair reasons for dismissal, but employees will still be able to claim unfair dismissal if they believe that the employer has acted unreasonably in requiring them to retire. The dismissal will also amount to direct age discrimination unless the employer can show that it is justified – a 'proportionate means of achieving a legitimate aim'.

### **THE PURPOSE OF THIS GUIDE**

The main purpose of this guide is to help employers to ensure that a fair process is followed in retirement and to help employees understand what they should expect from their employer when approaching retirement age. It is applicable to any dismissal for retirement at an age below pensionable age.

It is important to recognise that each case must be determined by the Tribunal on its own merits and that there is therefore no guaranteed method for an employer to ensure that any retirement dismissal will be fair or objectively justified.

The guide sets out procedures for an employer to follow to ensure that a decision about retirement is fair and in the best interests of the business, including; giving employees sufficient notice of their proposed retirement date and the opportunity to request to continue working. Following the guide is not, a legal obligation in itself. The guide does not however make a retirement automatically “fair” if the employer has followed the procedure. Nor does it provide that a dismissal is automatically unfair if an employer fails to follow any of the specified procedures.

## **WHEN RETIREMENT IS THE REASON FOR DISMISSAL**

An employer first should ensure that retirement is genuinely the reason for proposing to dismiss an employee. For a dismissal to be by reason of retirement it will generally be expected that

- The employer has a clear retirement age which applies to the relevant class of employee.
- At the intended date of retirement the employee will be at or over a particular retirement age
- Less than 12 months but more than 6 months before the intended retirement date, the employer initiates the retirement procedure (as detailed below)
- The employer terminates the employee’s contract on the intended date of retirement.

Once it is established that the reason for dismissal was retirement, the question of whether the retirement was fair will be a matter for the Tribunal. A key factor will be whether the employer has adopted a reasonable procedure in the run up to the retirement.

### **Fundamental Principles of Objective Justification**

The fundamental requirement in justifying retirement is to act reasonably. What is reasonable will vary depending on the circumstances of the case including the size and administrative resources of the employer. However employers of all sizes should be in a position to observe the basic standards of reasonableness. In practice, this means that employers will need to:

- have a clear understanding of why an employee needs to retire at X age;
- take an objective approach, rather than assume that X age means that any employee is no longer able to undertake their role;
- apply a fair and consistent approach across the business to retirement to ensure all employees are treated in the same manner;
- make any decisions based on the ability of an individual to undertake their role;

- start to consult early with an affected employee to get an understanding of what their expectations are;
- consider whether any reasonable adjustments can be made to enable an employee to remain in the business;
- give consideration to changing hours/shifts or work patterns ie part-time or flexible hours;
- look at whether there are any suitable alternative roles in the business eg maybe a less physical role for any employee who is struggling with any manual work;
- ensure evidence is kept in respect of any meetings/conversations with the employee;
- bear in mind that decisions based on cost alone are unlikely to justify retirement.

Have a conversation with the affected employee to understand what their expectations are regarding remaining in the workplace – it would be an idea to do this before there is any impact on their ability to undertake the role. This discussion will enable the employer to look at workforce planning including any promotion or recruitment.

Whilst an employer would not be expected to create a new role to retain older employees, some flexibility is likely to be seen as fair and equitable. Can the role be shared between two or more employees; can the hours be more flexible or part-time; is there a more junior role that the employee could consider moving in to; is there a less physical role that could be undertaken?

If an employer is looking to dismiss an older employee on the grounds of cost savings, this may be considered when looked at in conjunction with other grounds, for example, succession planning. However evidence is likely to be required by the Tribunal to demonstrate that retirement was not solely based on saving money.

The fundamental principles of fairness are expected to be followed by employers of all sizes. In determining any complaint, the Tribunal or a court will take into account the size and administrative resources of the employer, along with any other information that is relevant to the case

**The Code of Practice for Disciplinary and Grievance Procedures** or the company's **Capability Procedure** should be borne in mind if the employer is considering the performance of an employee which may be impacting on their ability to continue to work in their role. This requires a fair process to be followed including an investigation of all the facts and the employee being made aware that, if improvement in their performance is not seen, they may risk losing their job. Some jobs are more physical than others and if an employee is unable to demonstrate the level of fitness that may be required then a performance management process can be followed. As always this process should be objective and clear for both parties.

The termination of a contract by retirement is potentially a fair dismissal, but due process and record keeping will be essential to show that the grounds for dismissal were fair and therefore ultimately the dismissal was fair.

## Objectively Justifiable

Retirement may be justifiable where there are good reasons and an employer will need to be able to show evidence to refute any claim of age discrimination. The Tribunal will consider whether retirement is a **proportionate means** of achieving a **legitimate aim**. Note that for the two year transition period starting in September 2016, the employer will not need to show justification for the retirement of an employee at or above the State's pensionable age.

Proportionate means, for example, that the retirement must contribute to a legitimate aim and the employer must have evidence that the practice of retirement is actually achieving that aim. The aim should be of sufficient importance and benefit to outweigh any potential unfairness or discrimination and there should be no reasonable alternative to retirement available to the employer.

A legitimate aim must correspond with a real need of the employer, for example;

- Economic factors such as **business needs and efficiency** are legitimate aims, but may not be considered legitimate if the employer intends to retire the employee simply to save money on a large pension package or circumvent redundancy.
- Maintaining the **health and safety** of the individual and others is a legitimate aim, however this may not be sufficient. Airline cabin crew could be forced to retire at age 60 on health and safety grounds, however this is not a legitimate aim unless the employer can show evidence that most employees over age 60 would not be able to meet the requirements of the post, plus justify why regular competency testing is not a more proportionate means of dealing with performance issues, rather than retirement.
- Legal considerations may provide legitimate aims, for example airline pilots over the age of 60 are prevented from flying in the airspace of some European countries, so retirement at age 60 may be a proportionate means, depending on that particular airlines travel routes.
- The particular training requirements of the job for example needing to undergo regular medicals/fitness assessments etc

## SUMMARY

**EMPLOYEES - What you can do if your employer wants to make you retire against your will and below pensionable age.**

- 1) Remind your employer that changes in the legislation mean that you can claim unfair dismissal and your retirement might be found unfair.
- 2) Make a request not to retire, and put forward arguments for the employer to allow you to continue working.

- 3) Be aware of the time limit for submitting a claim to the Tribunal. For unfair dismissal and/or age discrimination, you must submit a claim within **8 weeks** of being dismissed.
- 4) Consider making an application for flexible working if part-time hours may assist you in remaining in the workplace.

**EMPLOYERS - What you can do if you want to retire an employee at or before normal retirement age**

- 1) Ensure that this is a genuine retirement, not a dismissal for some other reason.
- 2) Give the employee plenty of advance warning prior to their intended retirement date and given them the opportunity to ask to continue working.
- 3) Keep evidence of objectively justifiable reasons for the retirement of this employee to present to the Tribunal, if required.

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