CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

WE KNOW HUMAN RESOURCES

a guide for employers

EMPLOYMENT OF OLDER EMPLOYEES & RETIREMENT

CONTENTS

INTRODUCTION

Since 1999 the Human Rights Act has made it unlawful to discriminate on the basis of age by removing the exception that previously applied to older people. Older employees cannot either be required to retire, or caused to retire, although they can still agree to retire. Age, as the law underlines, is not a reliable guide to job performance and so there is no justification for a mandatory age of retirement.

These Guidelines offer advice both about retirement itself and about the employment of older employees. From being the automatic event it was once, retirement, like all other aspects of business and employment, is now something to be managed.

THE LINK BETWEEN RETIREMENT AND NEW ZEALAND SUPERANNUATION

In New Zealand, the tendency has been for the age of retirement to be linked to the age of eligibility for the universal state pension, currently New Zealand superannuation. Consequently, in the 1970s, when the age of pension eligibility reduced from 65 to 60, the age of retirement also tended to move downwards. But of recent years, as the age of eligibility for New Zealand superannuation has increased (65 as at 1 April 2001) that trend has reversed and the age of retirement has been gradually moving up again. With compulsory retirement no longer possible because there is no upper limit beyond which age discrimination cannot be claimed, the retirement/New Zealand superannuation link could become weaker. Statistics suggest, however, that this will not necessarily be the case, although without any kind of superannuation surcharge, the link may weaken simply because employed persons are able to receive both earnings from employment and unreduced superannuation.

The existence of a link between the age of eligibility for New Zealand superannuation and the age at which employees opt to retire is supported by recent Household Labour Force Survey statistics. Labour force participation rates for those aged 60-64 rose from 26.3% in 1990 to 46.3%. in September 2000. Over the same period the number of persons in the workforce over 65 years of age also increased from 6.8% to 7.9%. However, even without age discrimination legislation, there has always been a group of people continuing on in paid employment, regardless of state superannuation eligibility.

Given that New Zealand superannuation will, for the foreseeable future, continue to be available at age 65, it may be that the number of people who want to go on working beyond that age will not continue its recent increase to any great extent.

GRADUAL RETIREMENT

Gradual retirement is often suggested as a means of overcoming what, to many, is the “shock” of moving too rapidly from working to not working, and also as a way of adjusting work demands to any decline in capabilities or stamina which might be associated with age.[1] Gradual retirement allows older people to stay longer in work than they might otherwise and can open up employment opportunities for others while retaining experience within the employing organisation.

Gradual retirement is usually taken to involve not so much a reduction in work effort but a reduction in work time.[2] Quite a lot has been written about its benefits but, although often advocated, there is little evidence that gradual retirement is, or has been, much practised.

In New Zealand, the reduction, in the 1970s, of the age of eligibility for universal superannuation to 60 is probably one reason why gradual retirement has not been much considered. Then, in the 1980s, as unemployment began to increase, the introduction of the early retirement concept provided a further disincentive to gradual retirement.

Overseas, where gradual retirement initiatives have been tried, there have been reports of difficulties with work organisation, particularly in respect to continuity and co-ordination.[3] At times a lack of commitment has been identified from those working part-time who no longer appear to look on their work as an important part of their lives.

On the latter point, it seems that while older people tend to react favourably to the idea of being able to retire gradually, actual behaviour is not always in accordance with this reaction. Studies have tended to show that where early retirement is available, it is accepted more readily. It may also be that replacement jobs allowing part-time work to be undertaken are not in themselves as acceptable to employees since they will no longer enjoy the responsibility of their former positions. This is particularly true for older managers who may not be able to cope with the feeling that they are not as needed as they once were.[4]

The above is less likely to be true where older employees move from their "career job" to different full- or part-time employment with a different employer, or into self-employment.[5] Such moves, while not strictly to be thought of as gradual retirement because they involve working either for a new employer, or on the individual's own behalf, may well be a better means of ensuring that at least some older employees can extend their working life than is the kind of text book gradual retirement often praised, but not much used.

EMPLOYMENT OF OLDER EMPLOYEES

Rather than focusing on the perceived problems of older age employment, the fact that older age discrimination is unlawful should be seen as an opportunity to deal more flexibly with retirement issues than in the past and, in the process, to plan for a better mix of experience and youthful enthusiasm. Evidence from France, for example, where early retirement schemes have been pursued intensively and employers have been unable to veto who leaves, the loss of "corporate memory" and firm-specific skills, technical and social, has at times been a cause for regret.

The move away from compulsory retirement also comes at a time when New Zealand's population, like the populations of many western countries, is starting to age. This means that there are demographic reasons, including a likelihood of skills shortages – which could lead to a demand for older skilled employees – for encouraging individuals to continue longer in paid employment, if they are able to. At the same time, changes in the nature of work and better standards of health are making the continued employment of older people increasingly possible.

TRAINING AND ADAPTABILITY

Technological change is tending to reduce the number of heavy manual labour jobs available with the consequence that any physical shortcomings associated with age are becoming less relevant for many older employees than might once have been the case. And while older employees have commonly been thought of as less flexible than younger employees and less willing to train, this may be as much from lack of opportunity as from lack of ability. Even so, recent evidence suggests that older employees learn best if training programmes refer to existing knowledge and aim to build on this. Training aimed at unfamiliar activities may take more time and effort than training of this kind directed to younger people.

Training programmes for older people, it has been suggested, should, in general:

- involve learning by doing,
- build upon existing concepts and structures,
- be directly applicable, and
- be suitably paced.[6]

That said, however, it has to be remembered that skills and aptitudes vary as much among older people as among younger. If more older people remain in the workplace for longer, it may be that expectations of ability will begin to change. It is worth noting that the overall finding from more than 100 research investigations into age and job performance showed that there was no significant difference between the job performances of older and of younger employees. In almost every case, variations within an age group far exceeded the average difference between age groups.[7]

What is more, the argument sometimes heard – that it is not worth training older persons because there is relatively less time in which the employer can earn a return on training costs – could not only be discriminatory in terms of the

Human Rights Act, but is not necessarily true. International comparisons have shown that in many countries the percentage of younger employees staying with the same employer for at least five years is quite low, although it is younger people who are the more likely to receive training. It is also the case that given the rate of technological change, most employees may well, from time to time, have to acquire some new skills and abandon others. Skills obsolescence is being increasingly recognised as a problem for all employees.[8]

FACTORS WHICH INFLUENCE EMPLOYEES' RETIREMENT DECISIONS

Apart from the kind of mandatory retirement rules which the Human Rights Act makes unlawful, five factors have been identified as affecting employees' retirement decisions, namely: health, earnings rules, non-pension alternatives to labour income, actuarial fairness of pension schemes and social norms.

Health

Poor health is frequently cited as a reason for retirement, particularly for early retirement, although this may be because health is considered a more acceptable reason than are some others. It is certainly not a reason that life expectancy tables – at least in western countries – appear to support. Health overall is improving, not getting worse.[9]

Earnings

For a few years the application of a tax surcharge to income earned over and above that provided through New Zealand superannuation encouraged many older employees to retire. Whether the ability to receive New Zealand superannuation once the age of eligibility is reached and to continue working will or will not act as an incentive to continue in employment is yet to be shown. The situation is further complicated by present uncertainty about the extent to which rules governing superannuation eligibility may change again at some future date.

Alternative incomes

In the absence of private alternative income provision – enjoyed to date by only a minority of former employees – it will likely be the perceived adequacy or inadequacy of state pension provision which will encourage or discourage retirement from paid work.

Actuarial factors

The amount of research done to test the extent to which older employees respond to changes in the level of wealth obtainable from any applicable pension scheme is much less than that done to show that such changes do occur. Many pension schemes, for example, provide persons who retire early with lesser amounts than they would have received had they stayed until the retirement age specified in the scheme.[10] It seems likely, therefore, that if the present value of a pension drawn late exceeds that of one drawn at the normal age then that is an encouragement to later retirement. Earlier retirement, on the other hand, might be encouraged where the present value of a pension drawn early exceeds that of one drawn at the normal age, because pension benefits are not fully reduced on an actuarial basis.

It is also the case that pension schemes more often than not provide a disincentive to continued employment after the age of full benefit entitlement is reached by not allowing additional years of service to add to accrual.

Social norms

As already noted, it is only over the last hundred years or so that retirement has become a social institution, with state pensions setting a de facto retirement age subsequently reflected in company pension schemes. Likewise, early retirement has frequently been used as a means of workforce management, although studies suggest that early retirement decisions have often had little to do with the productivity of individual employees. All this has led to both employers and employees having reduced expectations of employment duration. Whether the unlawfulness of discrimination on the ground of (older) age will change this state of affairs – or whether it will affect the notion of retirement at all – cannot yet be known.

PLANNING FOR RETIREMENT

Although work assessment systems are one way to ensure that with older employees as with younger, there is no obligation to retain someone in employment who is not able to do his or her job adequately, the fact that older age discrimination is unlawful does not prevent firms from addressing the issue of retirement. What it means is that retirement is a matter to be agreed on with each individual employee.

Pre-retirement education and counselling have an important part to play in helping employees to think positively about the time when it may be appropriate for them to retire or resign. Should poor work performance become an issue it will not be in the employee's own interests to keep on working in the job in question.

Where retirement counselling is to be undertaken, this should begin well before the final years of work to allow employees to adjust to the idea of retirement. While the age range 56–57 has been suggested as best for attitude changes to retirement, it is sometimes proposed that retirement planning should begin between the ages of 30 and 40, when choices are far less restricted. Indeed, to avoid possible complaints of discrimination, it may well be appropriate to make counselling of this kind available to employees of any age, if they choose to attend.

Seminars should be designed to fit the circumstances of participating employees and look at likely future income levels – including realistic expectations of, and opportunities for, future work – as well as at hobbies and other interests. Individual counselling should be available for those employees who need advice on specific matters. However, group counselling should help employees appreciate that all individuals need to think about the time when they will no longer be involved in paid employment.

Pre-retirement education should be ongoing in order to deal with any problems that arise in the weeks leading up to planned retirement. It should also involve an exchange of ideas between the facilitator and participants with the aim of ensuring that participants develop the ability to adjust to change.

RETIREMENT

While the fact that it is unlawful to discriminate in employment because someone has reached, or is above, the age of eligibility for New Zealand superannuation means that there can be no automatic age of retirement, this does not mean that retirement as such can no longer be contemplated. Although compulsory retirement, as a pamphlet prepared by the Human Rights Commission indicates, is a form of unlawful age discrimination, many employees will be only too anxious to retire and will do so voluntarily.

Consequently, **an agreed retirement age is still possible**. The difference is that the agreed age may be challenged by individuals who allege that they were either pressured into accepting it, or had no choice but to agree, and who consider themselves still capable of doing their job.

RETIREMENT COMPLAINTS

A complaint of age discrimination may be made either to the Human Rights Commission, under the Human Rights Act 1993, or brought as a personal grievance under the Employment Relations Act 2000. Under the Employment Relations Act, any personal grievance complaint must be raised first with the employer to enable settlement, if this can be achieved, as close to the workplace as possible. By contrast, age discrimination complaints under the Human Rights Act need not first be notified to the employer.

Where a personal grievance claim is raised it will go initially to mediation and, should it remain unsettled, can proceed to the Employment Relations Authority for investigation, with the further possibility of an Employment Court hearing. An appeal to the Court of Appeal on a question of law only is also possible.

In the case of a complaint to the Human Rights Commission, mediation will also be used in an attempt to have the parties agree on an outcome. This may well involve the payment of an agreed amount of compensation to the

employee. Where there is no agreement, the complaint may be taken to the Complaints Review Tribunal, with the possibility of an appeal to the High Court, and a further appeal to the Court of Appeal, again on a question of law only.

A successful personal grievance under the Employment Relations Act could lead to any or all of the following: an order for reinstatement, payment of lost wages, compensation for humiliation, loss of dignity, and injury to the employee's feelings. Under the Human Rights Act possible remedies are a declaration that the employer has committed a breach of the Act, damages for pecuniary loss, loss of any benefit, or for humiliation etc., or any other relief that the Complaints Review Tribunal thinks fit.

A more detailed description of the Human Rights Act complaints process can be found in the guide to that Act published in this series. The personal grievance process is dealt with more fully in the guidelines on Rights and Responsibilities in the Employment Relationship, also published in this series. Both booklets are obtainable from your Employers' Organisation.

In order to answer a complaint of age discrimination, employers must ensure they can establish that the motivation for termination was not age-related. Employment must never be terminated on grounds of age but grounds such as misconduct, or, more usually, poor work performance, *are* open to an employer. Where a termination is challenged as being in fact age-related, properly-documented evidence must be available if the claim is to be refuted.

An employer can present evidence of declining work performance but for this to succeed, the deteriorating standard of performance must have been brought to the employee's attention prior to termination, guidance given, and time for improvement allowed. With age-related complaints, as with any other claim of unjustified dismissal or termination on discriminatory grounds, the employer must be able to show that employment termination was both justified and procedurally fair, that is, was carried out in a fair and reasonable manner.

WORK ASSESSMENT PROCEDURES

Assessment of all employees' work has become an issue to be managed, with the ability to carry out effective work assessments dependent on the existence of clear, relevant job descriptions and measurable performance standards. Having a work assessment procedure helps to reveal any decline in an employee's work performance. Such a procedure, properly carried out, can play a big part in overcoming any problem of procedural fairness that might arise. Lack of procedural fairness can be an issue going to an award of compensation even though there were substantive grounds for terminating employment.

Proper work assessment procedures will bring poor work performance to an employee's attention, will allow the employee to put his or her case, and, if explanations given are unsatisfactory, will provide for a warning, with time for performance improvement. In the absence of improvement, a further warning can be given which may then lead on to employment termination. Lack of competence is a reason for terminating employment at any age. Across-the-board assessment, where a failure to improve consistently leads to employment termination, can help to ensure that charges of discrimination on grounds of older age are successfully countered.

In the event of both poor work performance and a failure to improve it may be thought desirable to suggest to an employee that retirement may be preferable to termination for poor work performance. Such a suggestion would, however, have to be made without pressure and would need to be handled carefully to avoid a future claim of either age discrimination or constructive dismissal. Your Employers' Organisation can advise you on this.

Alternatively, an employee made aware of declining work performance, may, without discussion, request retirement, seeing it as a better option than termination on work performance grounds. It would seem preferable to end working life with retirement rather than with dismissal for incompetence or poor work.

The kind of work assessment procedure used must, of course, be appropriate for the particular employing organisation. Much, for example, has been written about performance appraisal systems, some of it positive and some of it negative. Some commentators see performance appraisal as getting in the way of efficient organisational systems and providing "feed-down" rather than feed-back.[11] Others consider that traditional appraisal systems are

not properly effective because they rely on a limited number of sources for performance assessment. Instead, a move to 360-degree assessment is advocated involving not just assessment by managers but also by customers and peer groups.[12]

Recently, there have been moves to incorporate performance appraisal in performance management systems, focusing particularly on employee competency.[13] This approach involves looking at an employee's performance from the point of view of achieving certain agreed skill levels. The aim here is to emphasise and reward those competencies that contribute to the basic goals of the organisation concerned.

Then again, some organisations retaining a system of "top down" appraisal are also tending to make increasing use of employee self-appraisal as part of this process.[14] Other organisations, however, have moved to a more decentralised appraisal system where team-based assessments are developed on the basis of an agreed and established corporate purpose.[15]

Brief as the above discussion is, it illustrates how for organisations lacking some kind of assessment procedure, deciding on what will work in their particular situation is not a simple task. However, a major aspect of any appraisal or assessment system must be its impartiality. No system should discriminate, intentionally or unintentionally, in respect to any ground which the Human Rights and Employment Relations Acts make unlawful, older age included.

The Employment Court has provided a list of the sorts of matters to be addressed when considering dismissal for poor performance (although the Court was careful to state that the list was not exhaustive and that in some circumstances there might be other questions which should be asked): [16]

- Did the employer in fact become dissatisfied with the employee's performance?
- Did the employer inform the employee of the dissatisfaction and set out the expected standard?
- Were the criticisms and future requirements objective and readily comprehensible by the employee?
- Was reasonable time allowed for attainment of the required standard?
- Having addressed the above , did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:
  - using an objective assessment of measurable targets;
  - giving the employee an opportunity to answer the questions arising;
  - listening to the employee's explanations with an open mind;
  - considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;
  - exhausting all possible remedial steps such as training, counselling, and redeployment (if the employee agrees to this).

The Employment Court's procedure serves to underline what has already been said; choosing and operating an appropriate assessment procedure are not simple matters. Contact your Employers' Organisation for specialist advice.

PROCEDURAL FAIRNESS

As previously emphasised, in any termination of employment on poor performance grounds, certain minimum standards of procedural fairness must be observed. Employers, in the first instance, should be careful to take note of their own house rules, codes of conduct, and warning procedures, as well as of the provisions of the relevant employment agreement.

As a general rule, however, procedural fairness requires the following steps to be taken, and documented:

1. Bring to the employee's attention the fact that his or her job performance is causing concern by asking the employee to a meeting at which the particular problem (or problems) is spelled out. A clear description should be given of the performance standard required and of the ways in which the employee's performance fails to meet this standard;

2. Allow the employee a proper opportunity either to explain or to refute the allegation made;
3. Consider the employee's response with a fair and open mind, not pre-judging the matter in any way;
4. If the explanation provided is not acceptable, warn the employee and provide a reasonable time for improvement;
5. Be sure the warning given states what corrective action must be taken and, if employer assistance is required – for example by way of training or further training – what assistance the employer will provide;
6. Set out in the warning a reasonable timetable for improvement;
7. Repeat the process if there has been little or no improvement in the time allotted, but ensuring the employee is clearly aware that any further lack of improvement is likely to result in employment termination.

All employees should be warned in advance if job loss is a possibility and older employees are no exception. If, however, after opportunity for improvement has been given and improvement has not occurred, retirement might be suggested, although, as earlier noted, with no pressure applied. A decision to retire must be genuinely the employee's own if complaints of employment discrimination or constructive dismissal are to be avoided.

Any employee facing a work performance interview is entitled to have a representative present and frank discussion may well encourage the choice of resignation, or, possibly, in the case of an older employee, retirement, over dismissal for incompetence or inability to do the job.

With any termination of employment the way in which the termination is carried out is important. Employers should first consult their Employers' Organisation.

WHERE RETIREMENT PROVISION REMAINS ENFORCEABLE

The Human Rights Act provides that retirement remains enforceable where a written contract containing a retirement age was in force on 1 April 1992 and, since that time, the employee has agreed in writing to confirm the retirement clause. (For "contract" the word "agreement" should now be read.)

There are also a few occupations where specific legislation applies which overrides the Human Rights Act and requires retirement at a certain age. Judges and airline pilots are cases in point. High Court judges, for example must retire at age 68.

TERMINATION OF EMPLOYMENT ON HEALTH AND SAFETY GROUNDS

Termination of employment, or requiring an employee to retire for health and safety reasons should be permissible although neither, under the Human Rights Act not under the Employment Relations Act is any health and safety exception expressly applied to the ground of age. However, where the issue is the effect of disability, the employer is expected to provide reasonable accommodation for the individual concerned if this can be done without risk of harm either to the individual or to other people.

If termination on grounds of safety and health is challenged, the employer will need to be able to show that the health and safety reasons cited are genuine.

As well, under both the Human Rights and Employment Relations Acts, where the dismissal of an older person was on health and safety grounds, because of the element of disability involved, the Human Rights Commission, mediator, Employment Relations Authority or Employment Court might conclude that the employer had not fulfilled the statutory obligation to adjust the older employee's activities by giving part of his or her duties to someone else. Both Acts require adjustments to be made when an exception (for example, disability) applies. Adjustments which can be made without unreasonable disruption to the employer may mean that safety is no longer an issue.

CONCLUSION

The demise of compulsory retirement should not be seen as a difficulty to be surmounted but as an opportunity to think again about how the process of retirement can be managed. It may also encourage a more flexible approach to employment issues.

While a retirement age can still be agreed, the agreement must be genuine; imposed retirement may result in claims of age discrimination or constructive dismissal. Age cannot be the motivating factor for the termination of an older employee's employment, any more than employment can be terminated on any other ground of prohibited discrimination – because a female employee is pregnant, or because of the employee's political opinion, for example. Termination of employment must always be for a genuine reason such as poor work performance, backed by proper evidence and a procedurally fair warning procedure.

Because employer-imposed retirement is not possible, the introduction of some form of work assessment system is recommended, at least for larger organisations. Such a system should apply to all employees and should not only be scrupulously fair but should operate in a scrupulously fair manner – which demands proper and effective training for all those involved in the system's administration.

Work assessment procedures could also have a part to play if an employee, having agreed to a retirement age, subsequently changes his or her mind. It is always open to an employee to allege that he or she had no option but to agree to a retirement age and, accordingly, to take an age discrimination complaint under either the Human Rights Act or the Employment Relations Act.

Work assessment procedures aside, however, employers should also consider taking greater care in helping employees to plan for their retirement, encouraging the view that retirement provides the opportunity to take up new interests and initiatives. Voluntary retirement will always be preferable to employment termination for work performance reasons. What matters is that no retirement should be open to challenge because its voluntary nature is in doubt.

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