The age-old problem of mandatory retirement

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OPINION

On 1 February, the Government will complete its consultation prior to its review of the current UK default retirement age (DRA) of 65 for employees.

The consultation follows last year's successful defence by the Government of the so-called 'Heyday' challenge to the DRA, contained in the Employment Equality (Age) Regulations 2006.

The Government is casting its net wide and looking for evidence relating to, for example: the operation of the DRA in practice; the reasons that businesses use mandatory retirement ages; the impact on businesses; individuals and the economy of raising or removing the DRA; the experience of businesses operating without a DRA; and cost implications.

Although the High Court ruled in September last year that the UK's DRA was not a breach of the European Equal Treatment Framework Directive, Mr Justice Blake was quick to indicate that the DRA would be unlikely to be lawful if it was introduced in today's economic conditions. In addition, the High Court acknowledged that in coming to its decision it was influenced by the fact that the Government already planned to review the DRA in 2010.

Is change likely? In short, yes. Blake J's judgment will almost certainly prompt the Government to change current default retirement arrangements.

Commentary from various government ministers supports this view. The Minister for Pensions and Ageing Society, Angela Eagle, for example, stated: "As Britain's demographics change, it's sensible that we have the debate on what works for business and individuals. The retirement laws need to reflect modern social and economic circumstances."

More recently Labour Deputy Leader Harriet Harman gave her view that the DRA of 65 was wholly arbitrary.

But what is likely to change? Given the current economic climate, scrapping the DRA altogether would certainly be met with strong resistance from many businesses and the Confederation of British Industry (CBI).

Far more likely is an increase in the DRA to at least 68, in line with the hike of the state pension age. Indeed, it would seem wrong if people were not able to draw their state pension at 65, while permitting employers to dismiss them.

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If the DRA is simply increased by two or three years, it will be a case of 'as you were' for employers and employees, save for the increased default retirement threshold.

But what if the DRA is scrapped altogether? By contrast to the UK position, in the US there is, subject to certain exceptions, no mandatory retirement age, allowing most employees to work for as long as they are capable of doing so. Harman echoed this principle of capability in coining the new term 'welderly', meaning the well and active elderly.

If the DRA is scrapped altogether, employers would have to show that the forcible retirement of a particular older employee was justifiable by showing that the contractual retirement age was a proportionate way of achieving a legitimate business aim, for example essential succession planning in the workforce.

It will also mean that effective performance management of all ages will become more important, as almost every employee who does not leave voluntarily ultimately has to be dismissed in some way; for older employees this may well mean a potentially humiliating capability dismissal following a long and successful career.

Clearly, if Harman's view that the DRA of 65 is wholly arbitrary is correct and a policy shift towards capability of individuals is intended, simply increasing the DRA to 68 would arguably be just as arbitrary.

CM Murray associate Anna Birtwistle assisted with this article