

**CANNOCK CHASE COUNCIL**  
**COUNCIL**  
**9<sup>TH</sup> AUGUST 2006**  
**REPORT OF THE CHIEF EXECUTIVE**  
**AGE DISCRIMINATION LEGISLATION**

**1. Purpose of Report**

- 1.1 To advise Members of the implications arising from the introduction of the Employment Equality (Age) Regulations 2006 and determine the Council's approach to setting a default retirement age for the future.

**2. Recommendations**

- |     |                                                                                                                                                                                                                                                                                                         |
|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2.1 | That Members approve the adoption of a default retirement age for all permanent employees in line with the national retirement age which is currently 65.                                                                                                                                               |
| 2.2 | In the event of Members adopting a default retirement age, that requests to work beyond the default retirement age be considered on an individual basis on their merits and that a formal policy be determined following consultation with the Trade Unions and subject to a further report to Council. |

**3. Key Issues**

- 3.1 The Government has recently introduced new legislation, which will come into force on 1 October 2006 designed specifically to address age discrimination in employment. The effect of this legislation will be to give employees a number of new rights, details of which are set out in the body of the report. It is anticipated that the impact of this legislation will be far reaching and significant, not least because of the knock on effect it has had on the local government pension scheme.
- 3.2 As a consequence, it will be necessary for the Council to review, and where necessary adapt, a number of its human resources policies and procedures to ensure that they meet the requirements of the new legislation.
- 3.3 However, before this work can commence it is necessary for the Council to determine the approach it will take in respect of whether, or not, it wishes to set a default retirement age for employees, and the approach it wishes to take in respect of requests from individuals to work beyond any default retirement age. Section 2 of the report (enc 5.5 – 5.7) explains these issues in detail and concludes that there is no case at present for adopting other than the national default retirement age.

- 3.4 Following these key decisions by members a full review of the human resources policies and procedures can be conducted and detailed proposals developed, in consultation with employee representative, for members' future consideration.
- 3.5 It must be noted, however, that since the age discrimination legislation is still untried and untested law there is the potential for challenge to any approach taken by employers. Therefore to some extent the Council's approach will need to evolve over time to take account of case law as it emerges.

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Section 1

Background

**Employment Equality (Age) Regulations 2006**

The Employment Equality (Age) Regulations 2006 become effective from 1<sup>st</sup> October 2006. The legislation implements EC Directive 2000/78 and is primarily focussed on protecting employees from discrimination, victimisation or harassment on grounds relating to their age both in terms of employment and in access to training and development opportunities. It is anticipated that the impact of these regulations will be far reaching and significant – not least because they impact significantly on the Local Government Pension Scheme and the ‘rule of 85’ which will be deemed to be discriminatory. As a consequence, there have been changes made to the Local Government Pension Scheme Regulations and these are addressed in a concurrent report to Council.

The Regulations give employees a number of new rights, which are briefly summarised as follows:

- Employees have the right not to suffer discrimination or detriment on the basis of their age compared with another person. This has implications particularly for recruitment in that any criteria in person specifications that are dependent upon a number of years experience will need to be amended to be more focussed around the levels of competence a person will have achieved. An action plan is already in place to address this.
- In terms of the recruitment of older workers it will be unlawful to refuse a person access to an employment opportunity on grounds of their age except where the person exceeds the organisation’s normal retirement age (or the national default retirement age of 65) or will attain the organisation’s normal retirement age (or 65) within 6 months of the date of appointment. Under these circumstances the protections from discrimination do not apply. This has important implications for our recruitment practices and the approach to recruitment will depend on the decision taken by Members on the matter of the default retirement age discussed later in this report.
- Employees have the right not to suffer victimisation or harassment related to their age, harassment being defined as a situation where an individual experiences unwanted conduct from others which creates an environment that is intimidating, hostile, degrading, humiliating or offensive. This has implications regarding the culture of the organisation that will be addressed by general raising of awareness around age discrimination issues.
- It will be unlawful to dismiss someone on grounds related to their age unless the grounds are related to retirement at age 65 or over. If an employer requires an individual to retire at 65 or over there is no discrimination. However, any other type of age related dismissal would be deemed unfair under the rules on unfair dismissal. There is a new duty on employers to give individuals at least 6 months written notice of our intention for them to retire. An employee can make a complaint to a tribunal for unfair dismissal where an employer requires an employee to retire at 65 or over but has failed to comply with the prescribed procedure in terms of giving notice. Should the Council decide to continue requiring people to retire at 65 or over there will need to be stringent procedures in place to ensure that proper notice is given within the appropriate timescales.
- Employees will have a statutory right to request to work beyond the age of 65 and they can ask either to stay on indefinitely, for a fixed period of time or until a specific date. The employer has a duty to consider such requests, to meet with the employee and give them a written response. The

employee has a right of appeal against the employer's decision. One of the purposes of this report is to determine the Council's overall approach to retirement and the circumstances in which it would consider retention of individuals beyond the age of 65, in order that detailed proposals can be developed in consultation with the relevant trade unions.

- The regulations remove the upper limit for rights to redundancy pay which means that anyone employed over the age of 65 potentially has a right to redundancy pay in circumstances where their post is deleted, although as yet the final draft of these regulations is not available. The right to redundancy pay would not arise where there is a genuine retirement or there is a termination of employment on retirement grounds.

## Section 2

### Details of Matters to be Considered

#### **Age Retirement**

Under the new age discrimination legislation retirement at the age of 65 or over will be considered a fair reason for dismissal so long as the proper procedure for the dismissal is followed. In addition there will be no unlawful discrimination against employees if employers require them to retire at, or over, the age of 65. However, as already mentioned, employees have the statutory right to request to stay on at work beyond this age.

Members are asked to consider two alternative options of dealing with this aspect of the new age discrimination legislation.

#### *Option 1 – Adopt Default Retirement Age:*

One approach could be to adopt the national default retirement age and continue to require all employees to cease employment on grounds of retirement upon reaching the age of 65. This has some advantages:

- The age of 65 corresponds with the current 'normal' retirement age of the Local Government Pension Scheme.
- It is the age that most employees have come to expect to be their retirement age.
- A default position of 65 is supported in the law in that employers have the opportunity to dismiss on retirement grounds at 65 or over without discriminating against staff and without incurring complaints of unfair dismissal so long as they can demonstrate that the reason for dismissal is retirement and that the appropriate procedure has been followed.

Requiring employees to retire at 65 provides the simplest approach and may hold the lowest level of risk of employment tribunal claims so long as retirement is correctly administered.

However, on the other hand, it should be noted that dismissal on retirement grounds could occur on or *over* the age of 65 – which implies that employers are not necessarily limited to adopting 65 as their default retirement age; they could select a different age as long as it is over 65. It should also be noted that, in the long term, the Government is considering increasing the default retirement age (i.e. the age at which people can access the state pension) to 66 from 2024, 67 from 2034 and 68 from 2044 because of the projected demographics of the population and the associated strain on the state pension scheme. Clearly there is a national trend towards encouraging people to stay in employment longer and it is for the Council to decide whether to adopt that ethos and consider now whether to take

a more forward looking view of age. This could be achieved by setting a default retirement age which follows the national retirement age as it increases in the future.

It should also be noted that whilst the 'normal' retirement age in the local government pension scheme is currently 65 employees will have the option to continue working and contributing to the pension scheme until the age of 75 and accrue additional benefits (under changes to the Local Government Pension Scheme effective from 6<sup>th</sup> April 2006.)

*No retirement age:*

It would, therefore, be possible for the Council to adopt a different approach and take a decision now not to impose a specific retirement age at all. This will be a very different way of dealing with older workers but broadly reflects the direction of Government policy over the next few decades.

If the Council chooses to adopt no fixed default retirement age there would be no need for employees to request to stay on beyond the age of 65 as that age bar to continued employment would have been removed. This would, of course, have the effect of avoiding the risk of unfair dismissal claims related to retirement dismissals. Employees would be permitted to stay on for as long as they are able to work. There are, however, a number of implications to this approach that would need to be considered:

- The Council's policy will not override the legislation, which permits an employer to dismiss on the grounds of retirement subject to a fair process. Theoretically the Council could still decide to retire a person over the age of 65 but if the Council generally takes an approach of permitting people to work beyond this age, with no limit, it will be important to set out the circumstances under which we would make use of the dismissal on retirement grounds rule. It is more likely that, without a default retirement age, the Council would need to rely more heavily on other grounds for termination of employment for older workers, rather than age retirement – such as ill health, capability, discipline, redundancy or efficiency.
- There will need to be very stringent management procedures to ensure that anyone over the age of 65 who is dismissed from employment will have to be dismissed on grounds not related to their age. The implication of this is that much greater focus will need to be placed, both in terms of recruitment and ongoing employment, on managing the competency of employees and dealing effectively with competency issues as and when they arise. The custom and practice of requiring older workers to undergo annual health checks in relation to continued employment over a certain age will be discriminatory.
- There will be no bar on recruitment and employees could be taken on over the age of 65 as new starters and be permitted to pay into the pension scheme until they are 75. This may enable us to recruit skilled, experienced and qualified staff that are currently barred from applying for permanent vacancies on the grounds of their age. This may be helpful in fields where there are currently skill shortages such as planning.

Based on an assessment of the options set out above it is recommended that Members adopt the approach outlined in option 1, namely to adopt the national default age which is currently 65 although, in the longer term it may be beneficial to fully explore the opportunities for the Council to employ older workers.

*Requests to Work Beyond the Age of 65*

Should the Council decide, as recommended, to retain a default retirement age for Cannock Chase District Council it will need to consider its approach to individuals requesting to stay on beyond the age of 65. Employees have a statutory right and the Council, as an employer, is legally obliged to give consideration to such requests. Again there are a number of approaches to this:

- First, the Council could take a view that the answer to all requests will be 'no' and there will be no agreement under any circumstances. However, it should be noted that the Council currently permits casual employees to work up to the age of 70 so a blanket 'no' would be somewhat inconsistent with the current approach for at least one category of staff. In addition it is conceivable that a blanket 'no' could be open to challenge, as there is actually a statutory duty for employers to consider such request, although there is clearly no English case law on this at present. Consequently, this is not an approach that is recommended.
- A second approach might be to decide that extensions beyond 65 will be granted in *all* cases, where a request is made, up to a maximum of set number of years (for example – no more than a year, or two years) and that thereafter the employee must be dismissed on grounds of retirement. This has advantages in that it allows for retention of key skills and experience beyond what is a fairly arbitrary retirement date of 65 but has a disadvantage in that there is no judgement on the continued usefulness and value of that employee's skills and experience to the organisation. A blanket 'yes' approach may result in a slowing down of new and developing talent emerging into senior positions. For this reason this approach is also not recommended.
- A third approach would be to take the view that the Council will consider each request on its merits. This approach has an advantage of giving the employer an option to retain valuable skills and experience within the organisation and provide additional lead time on the approach to the person's alternative retirement date to prepare for it and to arrange for transfer of knowledge. However, if the Council decides to tackle each case on its merits it is imperative that some general guidelines or criteria for consideration of such request are developed so that we avoid inadvertent discrimination on the grounds of age. Unfortunately the legislation is silent in terms of setting out circumstances in which an employer could reasonably refuse a request to work beyond 65 and clarity on what is or is not reasonable grounds to refuse the request will not be achieved until there is some case law on the subject. However, in many ways this duty to consider working beyond 65 is not unlike the current duty to consider requests from women with children for flexible working arrangements and the principles for this are reasonably well established. Following the guidance and principles associated with other flexible working arrangements may be a means of ensuring that any decision in respect of the over 65 request is considered on objective grounds rather than grounds related specifically to the age of the employee.

The recommendation to Members is to adopt the approach described in third bullet point under this section and agree to a general principle of considering each request on its own merits. If Members agree to this principle a formal policy will be developed setting out the criteria to be used to agree to such requests. Following consultation with the Trade Unions, this will be forwarded to Members for consideration and approval prior to implementation.

**Section 3**

**Contribution to CHASE**

The proposed changes do not contribute directly to the achievement of the CHASE objectives. However, the decisions taken as a result of this report and the approach we take as an organisation towards retirement will have a direct impact on the retention of important and valuable skills within the organisation - which underpins all of the CHASE objectives.

**Section 4**

**Section 17 (Crime Prevention) Implications**

There are no identified implications in respect of section 17 arising from this report.

**Section 5**

**Human Rights Act Implications**

There are no specific implications in respect of the Human Rights Act

**Section 6**

**Data Protection Act Implications**

There are no specific implications in respect of the Data Protection Act

**Section 7**

**Risk Management Implications**

The insurers for Cannock Chase Council indicate that, at the present time, there are no working age limits specified in the Employers Liability policy. The implication of this is that there is no constraint in this respect to employing staff over the age of 65. The insurers do not yet have any specific guidelines concerning insurance and the impact of the age discrimination legislation.

There is a possible impact in terms of the Personal Accident Policy as this currently only covers employees up to the age of 70 and Members up to the age of 80. Again the insurers have no specific guidelines concerning the impact of the age discrimination legislation.

**Section 8**

**Legal Implications**

The main legal implications of the Regulations are set out throughout the report.

However, as mentioned in the report, employees who consider they have been discriminated against or have suffered harassment on the grounds of age have the right to bring a claim in the Employment Tribunal. If the employee satisfies the Tribunal that an act of discrimination or harassment has occurred, it is then up to the employer to prove that he did not commit that act.

If the claim is found to be justified and the Tribunal considers it just and equitable, it may make

- an order declaring the rights of the employee and the employer in relation to the act to which the complaint relates;
- an order requiring the employer to pay to the employee compensation of an amount corresponding to any damages he could have been ordered by a county court to pay in compensation to the employee;
- a recommendation that the employer take, within a specified period, any action to reduce the adverse effect on the employee of any act of discrimination or harassment

Alternatively, the employee may start civil proceedings in the County Court which is empowered to pay damages in compensation. Similarly, if the employee satisfies the Court that an act of discrimination or harassment has occurred, it is then up to the employer to prove that he did not commit that act.

As the legislation only comes into effect on 1 October 2006, there is no case law as yet to give guidance on how the Employment Tribunal or the County Court will deal with any breaches of the Regulations.

## Section 9

### Financial Implications

There are no specific financial implications to retaining a default retirement age of 65. This retains the status quo with current practices.

In terms of permitting employees to remain in employment beyond the age of 65, should they make a request to do so, it should be noted that any individual in this situation who contributes to the pension scheme will continue to pay into the Local Government Pension Scheme and continue to accrue pension rights (this is a change to the pension scheme arising from the Local Government Pension Scheme (Amendment) Regulations 2006).

The Employment Equality (Age) Regulations 2006 remove the upper limit for rights to redundancy pay which means that anyone employed over the age of 65 potentially has a right to redundancy pay in circumstances where their post is deleted. This is a new financial obligation that employers have not had until the implementation of these regulations. The exception would be where there is a genuine retirement or termination of employment on retirement grounds.

## Section 10

### Human Resource Implications

The changes detailed in this report are significant and wide-ranging. A number of policies will need to be reviewed or written including re-deployment of staff, retirement, capability, equal opportunities, long service award scheme, recruitment and selection and flexible working to name but a few.

Section 11

Conclusions

In conclusion it is suggested that adopting the national default retirement age and determining an approach to requests for working beyond the normal retirement age will be an appropriate course of action for Cannock Chase Council

Section 12

List of Background Papers

None