



A-Z OF EMPLOYING

Retirement

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

Business**Central** 

Retirement

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It should not be a
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Please seek advice
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The Human Rights Act makes it unlawful to discriminate on the basis of age. An employer cannot refuse to employ, or give less favourable terms and conditions of employment, to an older employee on the basis of their age. Employees who wish to retire at an agreed age may do so, but that must be an agreement entered into without pressure or coercion.

The following guide offers advice 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.

Discrimination

The Human Rights Act 1993 and the Employment Relations Act 2000 make it unlawful to discriminate against a person, on the basis of age, in employment. Compulsory retirement at a particular age is unlawful, unless the employment relationship is bound by a current employment agreement that:

- ▶ Was entered into prior to 1 April 1992; and
- ▶ Is in writing; and
- ▶ Contains the stipulated retirement age; and
- ▶ Where the parties agreed in writing any time after 1 April 1992, to confirm or vary that stipulated retirement age.

Where an employee complains that he or she has been discriminated against because he or she has been retired against his or her will, the employee may make a complaint to either the Human Rights Commission or the Employment Relations Authority.

Refer to the A-Z Guide on Discrimination in Employment for information about liability under these Acts.

Superannuation schemes

The age of eligibility for New Zealand superannuation is currently 65 and the age of retirement has been gradually moving up. Compulsory retirement no longer possible because there is no upper limit beyond which age discrimination cannot be claimed.

However, even without age discrimination legislation, there has always been a group of people continuing on in paid employment, regardless of state superannuation eligibility. The Statistics New Zealand Household Labour Force Survey shows the growth in labour force participation rates for those aged 60- 64 rose from 26.3% in 1990 to 75.9% in June 2017. Over the same period the participation rate of those over 65 years of age also increased from 6.8% to 23.9% with strong growth in recent years.

The percentage of employees over the age of 65 who are remaining in the workforce has continued to increase. This may be partially due to New Zealand's ageing population and a skills shortage within the labour market. However it may also be reflective of a trend that recognises that keeping older employees in the workforce has benefits both for the employer and the employee. Statistics New Zealand reported in 2012 that the proportion of the 65+ population in the labour force will increase to about 30% from the mid- 2020s.

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The Human Rights Act 1993 has special provisions for superannuation schemes and permits different treatment on the basis of age (and sex and disability) where they confer benefits on its members' retirement or another person's retirement, or other benefits such as accident, disability, sickness or death benefits. The relevant section may be viewed at the following website:

[Human Rights Act 1993, section 70](#)

KiwiSaver

KiwiSaver is a government initiated saving scheme and further information may be viewed at [KiwiSaver](#) or refer to the A-Z guide on KiwiSaver.

Retiring allowances

A retiring allowance is a payment made to an employee on retirement. Retiring allowances are taxable as a lump sum payment, but are not liable for the ACC earner levy or fringe benefit tax.

Refer to the **A-Z Guide on PAYE** for more information or at www.ird.govt.nz

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.

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 Human Rights 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.

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 claims of unjustified dismissal

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Performance

If you have an employee who is not performing to the required standard you should approach the issue as a performance issue, regardless of whether you believe age is the underlying cause. If you focus on an employee's age or disability, you run the risk of unlawfully discriminating. The issue is not the employee's age or health, rather it is his or her inability to perform the required duties to a satisfactory standard, and so that is what should be managed.

In any performance management process 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. Where employers have performance concerns it is important to raise the issues with the employee as soon as possible and allow time for improvement before considering a formal procedure. It is vital the employee is aware of your expectations and that you discuss and consider any reasons why the employee may not be performing as expected.

A formal performance management procedure may be implemented if the required improvement is not shown within a reasonable period of time.

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.

Refer to the A-Z Guides on Incapacity, Discrimination in Employment, Discipline, and Performance Management for information about managing issues that may arise with older employees.

Enforceable retirement provisions

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. Supreme Court judges, for example.

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, nor 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 the 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. Under both the Human Rights and

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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. Where adjustments can be made without unreasonable disruption to the employer, safety may no longer be an issue.

Conclusion

It will become increasingly common for people to work well into their 60s and 70s in New Zealand. 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. Employers must have an understanding of what is, and what is not, permitted under the Human Rights Act 1993, and what the implications of employing older people may be.

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to BC Learning courses and conferences designed for those who manage employees.

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