

# AGE DISCRIMINATION – GUIDANCE FOR SCHOOLS

The Employment Equality (Age) Discrimination Regulations 2006 come into effect on 1 October 2006. These Regulations have far reaching implications for recruitment and selection, employment, promotion, terms and conditions, pay, training and dismissal (including retirement).

This guidance arises from legal and other professional consideration of the Regulations. However, it is generally accepted that there is scope for interpretation in some areas of the Regulations which will only be clarified by case law. We will of course keep you updated.

This Guidance is in two parts

- Part 1 The **implications** of the Regulations and **action** schools should take to ensure compliance
- Part 2 The **procedure** which **must** be followed in respect of all staff approaching retirement age.

The Guidance is relatively long but this is an important and detailed piece of legislation and it is essential for schools to be aware of their legal responsibilities.

## Part 1 Implications and action

### 1.1 What is Age Discrimination?

1.1.1 As with all discrimination legislation, the Age Discrimination Regulations prevent unfair treatment based on a person's actual or perceived\* age. Discrimination can occur against younger as well as older people.

- Direct discrimination – treating someone less favourably because of their age than a comparable younger/older person e.g. seeking applicants for a vacancy under the age of 30.
- Indirect discrimination – an apparently neutral provision which has the effect of disadvantaging a particular age group e.g. requiring an applicant to have graduated in the last five years will have the effect of disadvantaging older workers who are likely to have graduated more than 5 years ago.

\* e.g. a person can make a complaint that they were not appointed because the interviewer thought they looked old or young, even if their actual age was unknown.

1.1.2 The legislation also mirrors other discrimination legislation in:

- preventing harassment, bullying and victimisation
- protecting former employees
- rendering the employer vicariously liable for the actions of its employees unless it can demonstrate it took all reasonable steps to prevent their action.

### 12 To whom does it apply?

#### 1.2.1 Workers

The general Regulations (i.e. duty not to discriminate, harass or victimise on the grounds of age) apply to all workers, volunteers and contract staff (e.g. those from

supply agencies). Schools will need to ensure that agencies they work with comply with equalities policies and legislation. In addition, the school, not the agency, may be liable if it tells or implies to an agency that it should discriminate e.g. by asking for a young teacher.

### Office Holders

The general Regulations (i.e. duty not to discriminate, harass or victimise on the grounds of age) apply to office holders, including Governors. However, there is no ability to fix a 'retirement' age unless objectively justified (see 1b above) or to dismiss fairly on the grounds of retirement for office holders. The procedure in 2. below does not therefore, apply to office holders.

## **1.3 Are there any exceptions?**

There are a number of exceptions, some specific and some which may be applied on a case by case basis.

### 1.3.1 Specific exemptions

- **The Normal Retirement Age (NRA) for Local Government employees and teachers will remain at 65.**
- Statutory authority – employers may discriminate on the grounds of age where other legislation requires it
  - e.g. must be 17 to drive, 18 to serve alcohol.
  - e.g. certain age limits remain in relation to pension schemes, calculation of redundancy payments, minimum wage
- 5 years' service – benefits awarded to employees with up to 5 years' service are allowed e.g. additional leave for Local Government workers remains.
- Employment of persons over 65 – employers are permitted not to interview or appoint someone over the age of 65 or within 6 months of this age.

NB if schools have any employees on unique Conditions of Service other than Local Government or Teachers' where the retirement date is below 65 please seek advice from your HR Adviser as this will need to be reviewed.

### 1.3.2 Other exemptions

Objective justification – it is possible to discriminate on the grounds of age if the employer can show it is a 'proportionate means of achieving a legitimate aim' e.g. if it takes 2 years to achieve a particular qualification and the person is age 63, it might be reasonable to say it would be uneconomic to provide this training so near to retirement.

Objective justification will be a very difficult test to meet, not least because of the need to provide objective evidence, and schools should seek advice on individual cases.

## **1.4 What is the impact of the legislation?**

### 1.4.1 Removal of age limits (all currently limited to age 65) on:

- ability to claim unfair dismissal
- eligibility for statutory sick, maternity, adoption and paternity pay
- eligibility for redundancy payments (lower age limit also removed)

***Schools should be particularly aware of the following:***

1.4.2 Advertising, recruitment & selection

- Do not set any age limits on advertisements or in selection criteria.
- Avoid terminology which might have potential to stereotype and which relates directly to, or imply, a particular age group e.g. mature, young, dynamic, graduate, energetic etc.
- Do not ask for a specific number of years' of experience unless objectively justifiable (see 1.2.2 above). Ask for relevant skills/ability levels instead.
- NQTs can of course be of any age, however most are younger graduates and there may be some vulnerability to indirect age discrimination in selecting only from an NQT pool. Schools will be safer in evidencing that they selected NQTs for interview as part of a wider recruitment process.
- Essex has decided to retain date of birth, dates of education and training etc. on application forms in the interests of enabling effective safeguarding checks. However, it is essential that age is not considered as a factor in any part of the selection process (except where exemptions are allowed).
- Be cautious in using images in advertising which may represent a particular age profile of the workforce.
- Avoid inadvertent comments in interviews such as “how would you feel about managing older/younger workers?” or suggesting that a worker might be too life experienced/mature for a routine post.

1.4.3 Promotion & Pay

- The principles outlined above apply equally to promotions. Candidates should not be selected for promotion on the basis of their length of service or age, but on the extent to which they meet the requirements of the promoted post.
- Similarly, the award of pay increases should be based on performance, not experience especially beyond 5 years (differences in benefits are permitted up to 5 years' service) e.g. incremental progression for Local Government Services staff is performance related. If schools cannot evidence an objective performance assessment process, and effectively automatically increment staff, they may be vulnerable to claims under age discrimination.

1.4.4 Vocational Training

Schools providing training e.g. SCITT should ensure that there are no explicit or implied age restrictions in their processes.

1.4.5 Redundancy

Selection for redundancy on the basis of length of service is potentially unlawfully discriminatory. ‘Last in, first out’ (LIFO) has been removed from the revised model redundancy procedure to be issued in the Autumn Term 2006. It may however be

used exceptionally when all other selection methods have failed to distinguish between employees.

#### 1.4.6 Health & fitness

It will not be acceptable to insist that all employees over a certain age undergo a health check, unless there is another statutory basis for this (e.g. train drivers). Schools should of course carry out risk assessments and follow management of ill-health procedures appropriately for all staff.

#### 1.4.7 Pre-retirement leave

Schools have the discretion (within their Leave of Absence Policy) to grant pre-retirement leave to those approaching age 65. This is likely to be age discriminatory and schools are advised to withdraw the discretion to offer any pre-retirement from their policy. It will be acceptable for staff to attend pre-retirement courses, as long as they are made available to employees of any age.

#### 1.4.8 Raising awareness

Employers will need to ensure that all workers are aware of the new legislation and of their particular and general responsibilities. In particular, workers need to be cautious of inadvertent comments or actions which, whilst they may appear 'normal', 'just a joke', or inoffensive, may constitute harassment, bullying or discrimination under this legislation. Some examples are:

- 'jokey' birthday cards relating to a person's age
- comments such as someone being 'green' or 'wet behind the ears' or 'over the hill' or 'an old stick in the mud'
- organising events which would make certain age groups feel excluded

### 1.5 **Policies & Procedures**

Although most will be compatible already, the HR Service is in the process of reviewing all of its policies and procedures to ensure compliance with Age Discrimination legislation. Amended policies will be issued as necessary.

### 1.6 **Pensions**

Changes have been made to the Local Government and Teachers' Pension scheme in the light of Age Discrimination legislation (among other things).

The normal retirement age under both schemes remains 65, although both can be accessed on a voluntary basis at age 60. In addition, employees in both schemes may (with their employer's consent) access benefits earlier than 60 and continue working in a reduced capacity.

Details of changes to the Local Government Pension Scheme were published in May 2006 and come into effect on 1 October 2006. Consultation on further changes to the LG Scheme will begin in November 2006. Most of the changes to the Teachers'

Scheme are due to come into effect on 1 January 2007 and detailed advice will be issued once the consultation period has ended.

## Part 2 Retirement Procedure

### 2.1 The Law

- 2.1.1 The retirement of employees at, or above, the Normal Retirement Age (NRA) (age 65) is, from the 1 October 2006, a fair reason for dismissal, provided that:
- a) the reason is genuinely retirement
  - b) the statutory 'Duty to Notify and Consider' procedure is followed (See 2.2)

NB previous guidance issued in January 2006 on employment beyond age 65 is now obsolete. There is no longer a limit on employment at age 70.

- 2.1.2 Employees age 65 or over can now claim unfair dismissal, so it will be important for the employer to be able to demonstrate the genuine reason for the dismissal. The reason for dismissal could become blurred, especially if there is a need to review staffing levels, or performance issues arise.

### 2.2 Duty to 'Notify and Consider'

All schools **must** follow the duty to notify employees of their Intended Retirement Date (IRD) and consider any request not to be retired. Failure to follow the procedure exactly, will mean any dismissal is automatically unfair and the employee will be entitled to remain in employment until the procedure is complied with and to receive compensation (see 2.4 below).

The procedure is summarised at Appendix A.

***NB transitional arrangements apply for those employees due to retire between 1 October 2006 and 31 March 2007. See Appendix E.***

Monitoring – schools will need to have systems in place to ensure that they identify those employees approaching their normal retirement age. Employers MAY NOT dismiss employees on the grounds of retirement before their Normal Retirement Age.

#### 2.2.1 Stage 1 - Employer obligations

The school must write to any employee who will attain the age of 65 no later than 6 months and no earlier than 1 year\* before their Normal Retirement Age (NRA)\*\* to notify them of this, their Intended Retirement Date (IRD).

\* It is recommended that notification is given around 8-7 months before NRA

\*\* In most cases the NRA will be their 65<sup>th</sup> birthday. However, the normal retirement age for teachers is the last day of the term in which they reach their 65<sup>th</sup> birthday

A model letter is attached at Appendix Bi.

### 2.2.2 Stage 2 - Employee rights

The employee is entitled to request not to be retired on or after the intended retirement date. The employee must make such a request in writing between 3 and 6 months before their retirement date as notified by the employer. They must indicate whether their request is:

- for a specified period
- until a given date or
- indefinitely.

A form for employees to use is attached at Appendix Bii.

### 2.2.3 Stage 3 – Employer's duty to consider

Within a reasonable period of receiving such a request, the employer must hold a meeting with the employee (and their representative if they so wish) to consider the request not to be retired.

However, there is no need to hold a meeting if:

- the employer and the employee agree a later retirement date before this meeting
- the employee wishes to be retired

In all cases however, the employer must write to the employee with the decision and, where the decision is not to alter the retirement date (where the employee has requested this) or to agree different conditions than those requested, offering the right of appeal. A further letter must be sent following any appeal.

It is recommended that the first meeting is conducted by the headteacher and that any appeal (see Stage 5 below) is heard by the Governing Body Dismissal Appeals Committee. The Governing Body terms of reference must have delegated initial dismissal decisions to the headteacher.

A model letter is attached at Appendix C.

### 2.2.4 Stage 4a - Agreeing to a request not to be retired

The employer must state whether the request is granted for a specified period, until a given date, or indefinitely.

It is recommended that requests are granted for a specified period or until a given date (e.g. 2 years). In this case the above Duty to Notify and Consider must be repeated for the new retirement date and all subsequent agreed new retirement dates. However, if the agreed new date is within 6 months of the original intended date, no further notification is required and the Duty to Notify and Consider does not apply.

NB Employers should be cautious of offering indefinite extensions. If the request is granted for an indefinite period, it appears the employer may still retire the employee by following the Duty to Notify and Consider procedure for a chosen future date. However, the employer will need to be able to demonstrate that any future dismissal was genuinely for reasons of retirement (see 2.1.2 above).

In considering any request not to be retired, the school must be objective and balance the employee's request against the needs of the school. Although there is no requirement to provide reasons to the employee, and it is legitimate to refuse an extension, schools must ensure they do not discriminate on other grounds e.g. disability. Some business needs for agreeing an extension might be:

- the needs and requirements of the school
- employee's skills, experience and or knowledge
- recruitment and retention issues - including cost and training of new staff
- performance and conduct issues
- attendance record

#### 2.2.5 Stage 4b - Refusing a request not to be retired

The employer is not obliged to give reasons for refusing a request not to be retired, although in practice employers may wish to offer an explanation and indeed may find it necessary to discuss their grounds for refusal at any appeal. Schools should have regard to the areas outlined in 2.2.4 above and may seek advice on this from their HR provider.

Model letters are attached at Appendix D.

#### 2.2.6 Stage 5 – Appeals

Employees have the right to appeal against a refusal to grant a request not to be retired and/or against any time limit. Appeals must be submitted in writing as soon as possible after the decision is notified to the employee.

The employee should be invited to a meeting to put their case, should make every effort to attend and may be accompanied by a representative, friend or colleague. The headteacher will also be present. The decision of the Governing Body Dismissal Appeals Committee is final and must be notified to the employee in writing as soon as possible after the appeal meeting.

The model letter(s) at Appendix D may be adapted for this purpose.

### **2.3 What if the employee wants to retire earlier than their NRA?**

Employees are free to leave employment at any time, subject to contractual notice periods. Where an employee wishes to retire and instigates this, there is no dismissal.

### **2.4 What if the employee wants to carry on working in a reduced capacity?**

There is nothing in the Regulations which requires the employer to consider a changed working pattern although this could of course benefit both employer and employee. If the employee makes such a request this should be considered during the process and any agreements confirmed in writing (see also 1.6 Pensions).

## **2.5 What if the ‘Duty to Notify and Consider Procedures’ are not followed?**

There are consequences for employers who fail to comply with any part of the duty to notify and consider procedure e.g.

- an Employment Tribunal may award up to 8 weeks’ pay where the 6-12 months timescale to Notify is not adhered to.
- In this case, the Duty to Notify may be carried out up to 2 weeks before the retirement date and the employee is entitled to remain in employment until the whole procedure has been complied with
- If the 2 week deadline is missed, the dismissal will be automatically unfair and amount to age discrimination

## **2.6 Ill-health retirement**

Ill-health retirement falls outside these procedures. Schools should refer to their Sickness Absence Management Procedure.

## **2.7 Employees already in employment aged over 65**

Some schools will have employees who are already over the age of 65. These employees should either be on a fixed-term contract or have been issued with a variation letter deferring their retirement.

The end date of the fixed-term contract, or the end date stated on the variation letter is the new Intended Date of Retirement for these staff and the procedure described in 2.2 above should be followed for this date.

If there is no end date, the school should set an intended retirement date (IRD) and follow the duty to notify and consider procedure in respect of that date.

## **2.8 Recruiting people who are already aged 65 or over**

It will not be discriminatory to refuse to employ someone age 65 or over. However it is recognised that some schools will wish to employ older workers. Where this is the case, it is recommended that the employee is issued with a temporary fixed term contract for at least one year\*. The contract should contain the clause set out below:

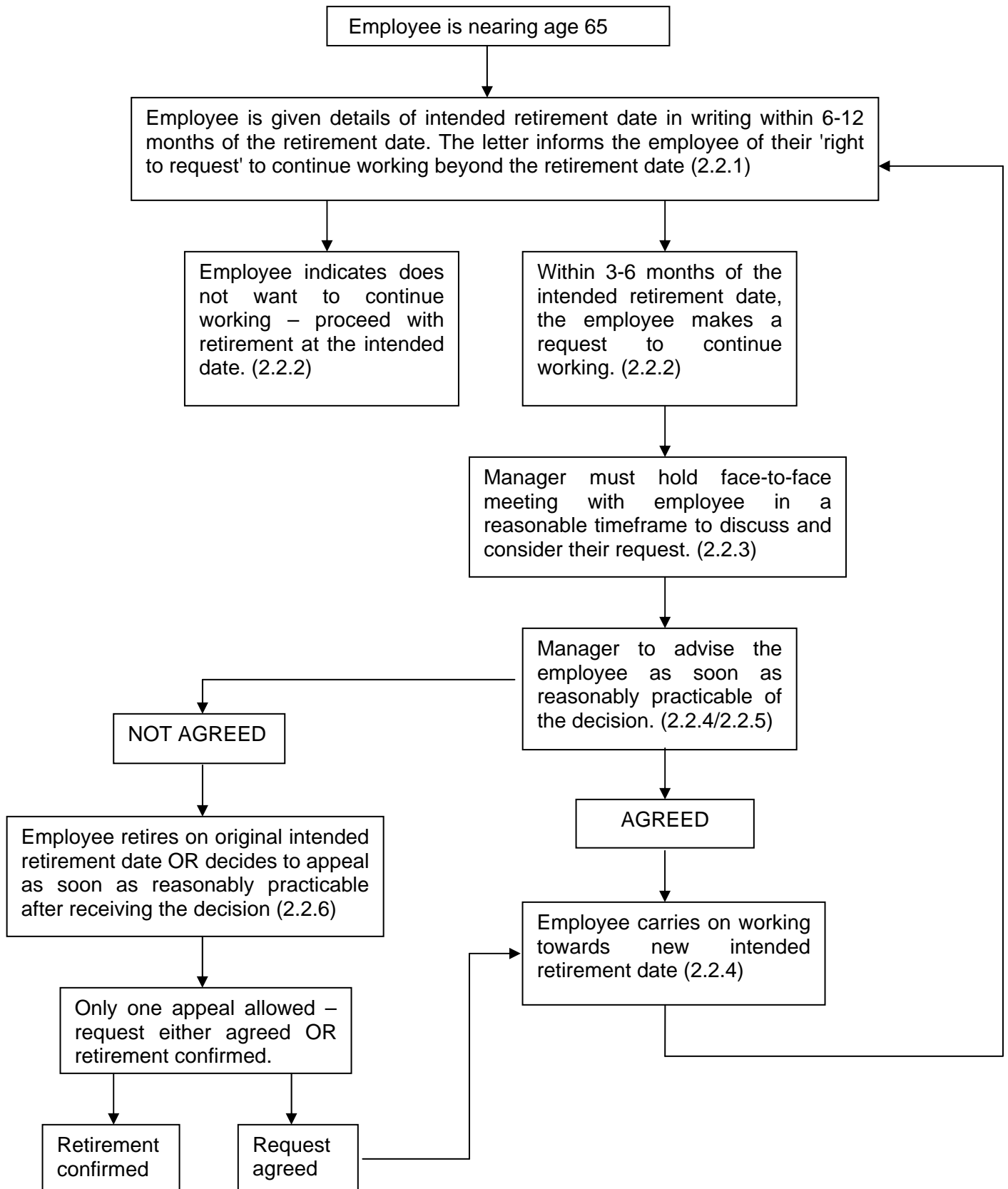
“The normal retirement age for [enter employment terms i.e. teachers or local government] is 65. However, it is agreed to extend this [to date agreed or for period agreed]. Your new retirement date will therefore be [enter date of agreed extension]. You will be informed, in writing, between six and 12 months before the date on which your extended retirement will end that you will retire on that date and about your statutory right to make a request to continue working after that date.”

\*Any lesser period will make it difficult for the school to comply with the duty to notify and consider.

## APPENDIX A

### SUMMARY OF DUTY TO NOTIFY & CONSIDER

(References in brackets relate to relevant paragraphs in the Guidance)



## **APPENDIX Bi**

### **EXAMPLE OF A LETTER INFORMING EMPLOYEE OF THEIR RETIREMENT**

Dear [name]

(For teachers)

From our records I note that you will reach the age of 65 on [insert date]. The normal retirement date for teachers is the end of the term in which they reach age 65 and I write to notify you therefore that your intended date of retirement is [end of term date (31 Dec, 31 Aug, 30 April)].

(For other employees)

From our records I note that you will reach the age of 65 on [insert date] which is the normal retirement date for employees of [enter school (foundation and VA schools) or Essex County Council (community and VC schools)] employees and I write to notify you therefore that this is your intended date of retirement.

You should be aware that you can request to work beyond your normal retirement date if you wish. If you want to work beyond this date you will need to put your request to me in writing between [dates (between 3 and six months of NRA)]. You should indicate in this letter how long you wish this extension to last. A form below is provided for this purpose. Failure to meet these timescales will mean that you lose your statutory right to have your request considered and you will be retired on the retirement date above.

If you wish to retire on the date stated in the first paragraph of this letter, please complete and return the form below. You should be aware that nothing prevents you from terminating your employment earlier if you so wish.

I will give careful consideration to any request you may make to work beyond this date and will inform you if I cannot let you. I am not required by law to give a reason.

If you have any queries regarding this matter, please do not hesitate to contact me.

Yours etc,

Signature  
Headteacher

**APPENDIX Bii**

**FORM FOR EMPLOYEES TO STATE THEIR WISHES**

Dear Headteacher

**Retirement at Age 65**

I wish to proceed with my retirement on the intended date notified to me of  
.....(enter date)

I wish to request that I continue to work beyond my retirement date, I wish to work on:

Indefinitely

For a specified period of.....months/terms/years (if known at this stage)

Until.....(enter date if known at this stage)

Name..... Signature.....

Date.....

## **APPENDIX C**

### **EXAMPLE OF A LETTER INFORMING EMPLOYEE OF A MEETING TO DISCUSS A REQUEST NOT TO RETIRE**

Dear [name]

I am writing to inform you that after receiving your request not to be retired that there will be a meeting to discuss your request. The meeting will be held on [insert date] at [insert time] at [insert location].

You have a right to be accompanied at the meeting by a fellow worker or a trade union representative. You should make every effort to attend this meeting.

After the meeting, if it is decided to continue your employment beyond the intended retirement date of [insert date] you will receive written notification reflecting these agreed changes to your contract.

If no agreement is reached you will receive further notification confirming your intended retirement date and informing you of your right to appeal.

I should be grateful if you would confirm your intention to attend this meeting and the name and status of any representative who will be accompanying you by [date (at least 3 days before the meeting)]

Yours sincerely

Signature  
Headteacher

## **APPENDIX D**

### **EXAMPLE OF A LETTER CONFIRMING RETIREMENT ON THE INTENDED DATE**

Dear [name]

I am writing to inform you that after our meeting held on [insert date] to discuss your request not to be retired, that [school] still intends to retire you on [insert intended retirement date]. [enter reasons if wish – seek HR advice]

You have a right to appeal this decision. If you wish to appeal you must inform [insert name] within 5 working days.

If you do not appeal the decision notified after our meeting on [date of meeting] will stand and your retirement date will be [date].

Yours sincerely

Signature  
Headteacher

### **EXAMPLE OF A LETTER TO EMPLOYEE CONFIRMING NEW RETIREMENT DATE**

Dear [name]

I am writing to inform you that following our meeting/appeal meeting [delete as appropriate] to consider your request not to be retired [school] has agreed that your new intended retirement date shall be [insert date] [OR] that your employment will continue at the school indefinitely [delete as applicable].

This letter constitutes an amendment to your contract of employment. All other terms and conditions remain the same.

Yours sincerely

Signature  
Headteacher/Chair of Dismissal Appeals Committee (delete as applicable)

## APPENDIX E

### **TRANSITIONAL ARRANGEMENTS FOR THOSE REACHING AGE 65 BETWEEN 1 OCTOBER 2006 AND 31 MARCH 2007**

*A fuller version of the transition advice was first issued on 30 May 2006 with model letters specifically adapted for the transition period. Otherwise the model letters in Appendices B-E above can be adapted to suit the transition arrangements.*

#### **Employer obligations**

The school should write to any employee who will attain the age of 65 between 1 October 2006 and 31 March 2007 at least 12 weeks before their 65<sup>th</sup> birthday to notify them of this, their 'intended date of retirement'.

#### **Employee rights**

The employee is entitled to request not to be retired on or after the intended date of retirement. Within the transitional period (1 October 2006 to 31 March 2007), the employee must make such a request in writing no later than 4 weeks before their due retirement date as notified by the employer.

#### **Duty to consider**

Within a reasonable period of receiving such a request, the employer must hold a meeting with the employee (and their representative if they so wish) to consider the request not to be retired. However, nothing prevents the employer and the employee from agreeing to a later retirement date before this meeting. In this case, no meeting needs to be held. In either case, the employer must write to the employee with the decision and, where the decision is not to alter the retirement date, offering the right of appeal. A further letter must be sent following any appeal. It is recommended that the first meeting is conducted by the headteacher and that any appeals are heard by the Governing Body Dismissal Appeals Committee.

#### **Agreeing to a request not to be retired**

The employer must state whether the request is granted for a specified period, until a given date or indefinitely. If the request is granted for a specified period or until a given date, the standard timescales will apply). If the request is granted for an indefinite period the employee will not be able to retire the employee and could only dismiss them for one of the other fair reasons in the same way as other employees.

\*It will often be the case that both the employer and the employee will wish to agree to a retirement date at the end of the term in which the employee reaches age 65. Where the agreed new retirement date is within 6 months of the intended date of retirement (age 65) there is no need to repeat this procedure.

#### **Refusing a request not to be retired**

The employer is not obliged to give reasons for refusing a request not to be retired although, in practice, employers may wish to offer an explanation. Schools should seek advice on this from their HR provider.