

technical factsheet 150

Age discrimination

The law in relation to age discrimination was introduced by the Employment Equality (Age) Regulations 2006. They apply to England, Scotland and Wales, with Northern Ireland covered by Employment Equality (Age) Regulations (NI) 2006. The law prohibiting age discrimination came into force on 1 October 2006, with some pension related matters introduced later in the year.

ACAS published a code providing guidance on law and practice on 27 April 2006, and this can be found at acas.org.uk, under Guidance on Age and the Workplace: a guide for employers.

Who do these regulations cover?

All employees and workers are covered, as well as those accessing vocational training, including job applicants and people who have left their job (and, for example, have not received a reference). The law specifically includes partners in a partnership, and self-employed people where the dominant purpose of the contract is that the individual carries out the work personally. There are a number of other specified categories including the police and office holders, but the armed forces are excluded. Also, age must not affect the way an employment agency provides its service or offers services and the agency will be liable for age discrimination if it accepts unlawful instructions from a principal.

Who is liable?

An employer will be liable if its employee carries out an act of unlawful discrimination in the course of his/her employment, unless the employer has taken reasonably practicable steps to prevent it.

Territorial extent

Acts of discrimination are covered where they relate to employment and contract work at an establishment in Great Britain (GB) ie where the employee does his work wholly or partly within GB. If the employee works wholly outside GB, s/he still falls within the legislation where

- (i) the employer has a place of business at an establishment in GB
- (ii) the employee's work is done for the purposes of the business carried on at that establishment, and
- (iii) the employee ordinarily resides in GB at the time of recruitment or at any time during the employment or contract work

What is unlawful?

Age discrimination has been formulated in a similar way to the other discrimination grounds. A person may be liable for:

- **Direct** discrimination – where, because of B's age, A treats B less favourably than he or she treats, or would treat, other persons
 - This includes discrimination on the grounds of age and of youth
 - It also includes discrimination on the basis of someone's perceived age
 - Age discrimination is different in that it is possible for the employer to defend itself by proving that the discrimination was justified (this is not possible in relation to the other discrimination grounds)
 - The applicant will have to show that he has been treated differently from someone else in the same position of a different age, or differently from how such a person would have been treated. There probably needs to be a significant difference in age to make such a claim likely to succeed. In an Irish case, the court rejected a claim from a 31 year old that she had been passed over for promotion in favour of a 28 year old

- **INDIRECT** discrimination – where:
 - A applies to B a provision, criterion or practice which A applies equally to other persons; and
 - That provision, criterion or practice puts persons of B's age group at a particular disadvantage, and
 - B suffers that disadvantage

Unless

A can show that this provision, criteria or practice can be **objectively justified**

- **VICTIMISATION** – A discriminates against B where he treats B less favourably than he treats or would treat other persons by virtue of something done by B under or in connection with the Regulations eg, B has brought a case, or given evidence, or made an allegation, in relation to a matter covered by these Regulations.
- **INSTRUCTIONS TO DISCRIMINATE** – this is a separate ground under the Regulations and relates to a situation where A alleges that s/he has been treated unfavourably because s/he has refused to carry out instructions which are unlawfully discriminatory eg refused to carry out an order from his or her boss to shortlist only those under 40 for a position. This is swiftly followed by a poor appraisal and a failure to award a pay rise to A.
- **HARASSMENT** - the complainant has to show
 - either that their dignity has been violated, or
 - that they have been subjected to an intimidating, hostile, degrading, humiliating or offensive environment
 - and the reason for the unwanted conduct was that person's age.

Are there any exceptions?

It may be possible to argue that age is a Genuine Occupational Requirement and that a person be a particular age in order to perform a role. At the moment examples seem to be confined to acting jobs where being of a particular age is a critical part of the role.

It is also acceptable for employers to practice **positive action** ie making an effort to recruit older or younger workers where they are unrepresented in your workforce or in a particular area by targeting training and advertising.

As noted above, compulsory retirement at 65 is excluded.

Specific exceptions are also made for:

- Minimum Wage Regulations – which are set on the basis of age bands
- Job applicants who are at, or near the employer's normal retirement age or, in default, 65. If the worker is within 6 months of this age, it will be lawful to refuse to recruit him on the grounds of age
- Service related benefits – which can be paid on basis of length of service
- Redundancy pay – this is calculated based partly on length of service and will remain this way – this includes both the minimum statutory scheme and any enhancement that the employer might choose to make, as long as it is in line with the statutory scales. The tapering provisions when someone reaches 64 have gone, as the upper and lower age limits for qualifying for redundancy payments have been abolished.
- Life Assurance Cover to employees who have retired for ill health - it will still be lawful to provide such cover only to those employees who have not reached 65, or the normal retiring age (if it is higher). **NOTE** that this exemption does not apply to workers who remain working for you after the age of 65, or to private health cover, which is likely to be much more expensive for older workers. Most people are currently assuming that it will be possible to justify its removal where costs are prohibitive. The Nationwide Building Society has recently extended its flexible retirement policy to allow employees to continue working 'til they are 75, with all benefits, including PHI, continuing'.

OBJECTIVE JUSTIFICATION

This is relevant here in justifying both direct and indirect discrimination and the test is the same. The employer will have to show that the treatment in question is shown to be a 'proportionate means of achieving a legitimate aim'. Proportionate is to be equated with 'appropriate and necessary' and involves a balancing exercise between the discriminatory impact of the treatment in question and the legitimate aim of the employer. The sorts of things envisaged by the consultation were things like health and safety, facilitation of employment planning, encouraging and rewarding loyalty, training requirements and the need for a reasonable period of employment before retirement.

Advertising/method of recruitment

There is no specific provision making discriminatory advertisements unlawful as such, but adverts may evidence an intention to discriminate and unsuccessful candidates for jobs might use such an advertisement to support his or her case. Job specification criteria accompanying adverts may constitute 'arrangements [an employer] makes for the purpose of determining to whom he should offer employment' and so might well be covered – eg practices like the 'milk-round' might be inherently discriminatory. In the recent case of **McCoy**, the fact that the employer advertised for someone with 'youthful enthusiasm' was an important part of the evidence in Mr McCoy's successful claim for age discrimination when he was not recruited for a sales role.

Requirements for the job

- Beware of wording in an advertisement which tends to indicate an intention to discriminate, such as 'energetic' or 'youthful', also words that might appear to restrict applications to particular age groups eg 'recent graduate', 'junior'
- Do not require only those qualifications which relate to a particular era, and therefore to a particular age of applicant eg 'O' levels, media studies degree.
- Need to watch requirements for post qualification experience (PQE) – there may be a big difference between a one year and three year qualified accountant, but what about eight years v 10 years?
- Perceptions of 'over-qualification' need to be tested at interview otherwise they are likely to be age discriminatory.

Interviews

It is not unlawful per se to ask someone their age at interview, but it may be evidence of an intention to discriminate if there is a later claim.

DISCRIMINATION DURING EMPLOYMENT

It is unlawful for an employer to discriminate

- In the terms of employment afforded the employee
- In the way in which the employee is afforded access to opportunities for promotion, transfer or to any other benefit
- By subjecting the employee to any other detriment

Wages and salaries

Employers can still pay the actual minimum wage, which can still lawfully be determined on the basis of age, or they can also base their pay structure on these bands, even where they pay more than the minimum, but

- The employer cannot pay different amounts to people in the same age national minimum wage (NMW) bands, unless it is objectively justified
- The employer cannot pay different rates to workers in different NMW bands where he pays his young workers more than the NMW.

Employers are also allowed to differentiate on the grounds of age when they are giving young people an apprenticeship ie they can pay more once the apprentice becomes entitled to the national minimum wage, but less before.

Service Related Benefits

The five year exception

Age and service related benefits are inextricably linked as they accrue with the passing of time. It is standard practice for employers to reward employees for length of service by giving them eg extra days of holiday. This is usually justified on the basis that it is aimed at ensuring that the employer attracts, retains and rewards experienced staff. The rules about service related benefits apply to all workers.

The Regulations provide an automatic exception from the age rules for benefits based on length of service of up to 5 years. Such benefits will not need to be justified individually.

The five year criterion might relate to

- The overall length of time that the employee has been working for the employer, or
- The length of time the employee has been doing work of a particular standard eg five years since qualification, five years in management

Benefits relating to service over five years

An example of this might be a paid sabbatical upon attaining 10 years of service, or a long service gift.

Here the employer must show that it 'reasonably appears' that his use of length of service 'fulfils a business need of his undertaking (for example by encouraging the loyalty or motivation or rewarding the experience of all of his workers'. It is not a particularly high standard but it is suggested that employers will need to go through a process of actively considering whether the long-service criteria they impose really do fulfil business needs, and articulate reasons why those criteria remain in place.

Insurance

Where an employer offers medical or life assurance to existing employees who are working, then if this is age based, it will need to be objectively justified. The government seems to think that the cost will be something which will contribute to this, but case law in other areas suggests that employers generally are not able to rely simply on cost considerations when arguing justification. The choice for employers would therefore seem to be:

- Provide a fixed amount of money towards the costs (still potentially discriminatory)
- Withdraw the benefit altogether by renegotiating contracts

Promotion

It is important that selection criteria are relevant and objective and do not contain an element of indirect discrimination. Performance management processes, which may form a factor in decision making, ought to be free of age bias. It is very important that:

- Promotion opportunities should be communicated to everyone in the workforce equally
- Older workers should not be denied the opportunity to carry out more responsible tasks making it possible for them to be promoted
- Selection criteria should not discriminate against younger workers by requiring unnecessary levels of experience
- Interviewers should ask same questions and only deviate in a non-discriminatory way
- Training of interviewers and managers in age awareness is important
- The 'at or near retirement age' exception that applies to recruitment does **not** apply to promotion, although it may be justified as part of the employer's planning and training considerations
- Provision of training will depend upon the type and duration of training – a 64 year old should not be left out of a day's computer training which would help him with his day to day work, but might not be considered for a one year management training course.

Disciplinary action

The employee must not eg treat an employee more harshly because he 'should have known better', but more importantly and more likely is that employers take length of service into account in deciding on disciplinary measures ie in considering whether a dismissal is reasonable it has long been accepted that you can take long periods of blameless service as mitigating factors. It looks as though such a practice will need to be objectively justified.

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Issued 01/09