

Technical factsheet

Age discrimination

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

- The contract of employment
- The standard statement of terms and conditions
- Working time
- Age discrimination
- Dealing with sickness
- Managing performance
- Disciplinary, dismissal and grievance procedures
- Unlawful discrimination
- Redundancy
- Settlement offers
- Family-friendly rights
- Employment status: workers

The law in relation to age discrimination is covered by the Equality Act 2010.

Acas has published a code providing guidance on law and practice; this can be found at bit.ly/acas-age. The Equality Act 2010 can be viewed at bit.ly/eq-act2010.

WHO DOES THE LAW 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 other self-employed people where the dominant purpose of the contract is that the individual carries out the work personally. The police and office holders are also covered 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 an employer seeking staff.

WHO IS LIABLE?

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

TERRITORIAL EXTENT

The law on age discrimination applies to individuals in the categories above, where they are:

- working in the UK
- based in the UK, although peripatetic
- expatriate employees who are permanent employees of a UK company providing their work into the UK, eg foreign correspondents for newspapers
- expatriate employees working in a UK enclave in a foreign country, eg on a British military base in Germany.

WHAT IS UNLAWFUL?

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

Direct discrimination – where, because of the worker's age, the employer treats them less favourably than they treat, or would treat, other persons, eg a person is made redundant because of their age, or is forced to retire for that reason.

- This includes discrimination on the grounds of age and youth.
- It also includes discrimination on the basis of someone's perceived age or because of their association with someone in a particular age group.
- Age discrimination is different from other discrimination strands in that it is possible for the employer to defend itself from a claim of direct discrimination if it can prove that the discrimination was objectively justified.

- The applicant will have to show that they have 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

There is a defence, if A can show that this provision, criteria or practice can be **objectively justified**. Therefore, both direct and indirect discrimination may be defended if the employer can show justification for the discrimination.

An example of this might be if an employer requires applicants for a post to undergo a stringent health check. This would be likely to indirectly discriminate against older people and also potentially those with a disability, and it might be unlawful unless it could be shown to be necessary in the context of the job under consideration.

Victimisation An employer will discriminate against a worker where they treat them less favourably than they treat or would treat other persons because the worker has done something in relation to the age discrimination regulations. So a worker may be treated badly because they have brought a case, or given evidence, or made an allegation, in relation to a claim or grievance about age discrimination.

Instructions to discriminate This is where A alleges that they have been treated unfavourably because they have refused to carry out instructions that are unlawfully discriminatory: for example, A refuses to carry out an order from their boss to shortlist only those under 40 for a position. If this is then followed by A receiving a poor appraisal and then not being awarded a pay rise, A is likely to have a claim of unlawful discrimination.

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.

This could involve any hostile or unpleasant treatment of someone related to their age, eg being teased as being 'grandad' or, as in a recent case, being told that they were 'more suited to a more traditional estate agency'.

Are there any exceptions?

It may be possible to argue that age is a genuine occupational requirement and that a person needs to be in a particular age group in order to fulfil a position. 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 practise both positive discrimination and positive action in certain limited situations, ie recruiting or making an effort to recruit older or younger workers where they are under-represented in the employer's workforce or in a particular area. For example, this may be done by pursuing a policy of targeted advertising to increase applications. This can only be done in certain circumstances and more details of this can be found in *Technical factsheet: Unlawful discrimination*.

Exceptions are also made for:

- minimum wage regulations, which are set on the basis of age bands
- service-related benefits, which can be paid on basis of length of service (see below)

- redundancy pay, which is calculated based partly on age and length of service. 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
- insurance and financial services. An employer is permitted to 'make arrangements for, or afford access to, the provision of insurance or related financial service to or in respect of an employee for a period ending when the employee attains whatever is the greater of 65, or the state pensionable age'. Thus it is lawful for, for example, the employer to provide group health cover for employees which ends at 65.

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 defined as '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 prior to the legislation 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. These factors may be relevant in decisions that might otherwise appear discriminatory, such as refusing employment to an older applicant, or granting more valuable benefits to longer serving (and therefore probably older) employees.

AGE DISCRIMINATION AND RECRUITMENT

Advertising/method of recruitment

Discriminatory advertisements are not unlawful as such, but a claimant may use the wording of an advert as evidence of an intention to discriminate. Also, job specification criteria accompanying adverts and some recruitment methods might well be relevant; for example, practices like the 'milk round' targeting graduate recruits at universities might be inherently discriminatory.

Requirements for the job

Beware of wording in an advertisement which tends to indicate an intention to discriminate, such as 'energetic' or 'youthful', as well as words that might appear to

restrict applications to particular age groups: for example, 'recent graduate', 'junior', 'would suit school leaver', 'mature applicant sought'. Also, employers should not require only those qualifications that relate to a particular era and therefore to a particular age of applicant: for example 'O' levels, media studies degree.

You need to be careful about 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 versus 10? One can always argue that what matters is what the employee has actually done during their period of PQE, and that the recruiter should concentrate on the quality of the experience that the candidate has obtained in their career.

Perceptions of 'over-qualification' need to be justifiable, otherwise they are likely to be age discriminatory, as level of qualification and experience tend to be related to age. What does it mean when you say 'over-qualified'? Do you believe for good reason that this person will quickly become bored or demotivated, or do they have a good reason for seeking a less demanding role than they might be capable of? In a recent case, an employer successfully defended a claim by a job applicant who was rejected because the employer considered them to have experience well beyond what was required for the role. Their argument that the marketing team would become unbalanced (his new boss would have far less knowledge and experience than the applicant had) and that he would quickly become bored because of the routine nature of the role was accepted by the tribunal.

Interviews

It is not unlawful as such to ask someone their age at interview but, again, such a question may be used as evidence of an intention to discriminate if there is a later claim, and it is thus very unwise.

DISCRIMINATION DURING EMPLOYMENT

What is covered?

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 lawfully pay the current minimum wage on the basis of the worker's age, or they can also base their pay structure on these bands, even where they pay more than the minimum. Employers are also allowed to differentiate where apprentices are concerned by paying them the lower minimum wage specified in the legislation.

Service-related benefits

The five-year exception

Age- and service-related benefits accrue with the passing of time, and therefore older workers tend to benefit from this. It is standard practice for employers to reward employees for length of service by giving them, for example, 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 and rewards loyalty. The rules about service-related benefits apply to all workers. Where benefits are based on length of service of up to five years (either in the business or in that role), they do not contravene the age discrimination legislation. Such benefits will not need to be justified individually.

Benefits relating to service over five years

Here, the employer must show that it 'reasonably appears' that using length of service as a basis for awarding benefits '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 actively consider whether the long-service criteria they impose really do fulfil business needs and be able to explain why those criteria remain in place. An example of this might be a paid sabbatical upon attaining 10 years of service, or a long-service gift for 25 years' service.

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 similar questions to all candidates and only deviate in a non-discriminatory way
- training of interviewers and managers in age awareness is important
- 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 them with their day-to-day work, but they might not be considered for a one-year management training course.

Disciplinary action

The employer must not treat an employee more harshly because they 'should have known better'. Employers do routinely take length of service into account in deciding on disciplinary measures, and in considering whether a dismissal is reasonable it has always 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, although it is very widespread and has yet to be challenged.

Redundancy

Many employers have used length of service as one of the factors to be considered in any selection matrix that is being used to identify candidates for redundancy. Longer serving employees will be given a higher mark than lesser serving staff. Recent case law has indicated that, although this is discriminatory, it can be justified on the grounds that it rewards loyalty. It would, however, certainly not be wise to use this as the only criterion to select, and it would certainly be most unwise if it constituted a tie-breaker.

Retirement

There is no retirement age at which the employer can require the employee to retire. It is only employees who can decide to retire, and they are free to do so when they choose. Any purported dismissal by the employer for 'retirement' will be an unfair dismissal, as

this is not a legitimate reason. Whatever reason is given for the dismissal of an employee on or past the retirement age, the decision must be taken in the same way and for the same reasons as would be the case for any employee, and it can be challenged legally in the same way regardless of the age of the employee in question.

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