Think Ahead

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. The law seeks to outlaw unfavourable treatment on the basis of age in the UK, unless it can be objectively justified.

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 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 or the person(s) controlling the business carries out an act of unlawful discrimination in the course of their employment or the business, unless the employer has taken reasonably practicable steps to prevent it.

What this means in practice for the employer is taking a number of steps by way of prevention. A regularly updated training programme for staff, reminding them of the employer's policies, current employment law and the organisation's zero-tolerance of discriminatory behaviour, will provide an important defence to an allegation of discrimination. It demonstrates that every effort has been made to advise staff on what constitutes discriminatory behaviour and to eliminate such conduct as far as possible. If employees are observed by colleagues and managers behaving in a discriminatory manner towards an older employee, or indeed a younger one, steps should be taken immediately; the perpetrator should be warned that they must cease such conduct immediately and/or, depending on the seriousness of the situation, further disciplinary action may be taken.

Which workers are affected?

The 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.

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, or is not promoted because they are considered 'too young'

- Discrimination is unlawful both 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 the employer can show that either the direct or indirect discrimination can be objectively justified (for this defence, see p5).

Victimisation – where an employer discriminates against a worker by treating them less favourably than they treat or would treat other people because the worker has taken some form of action in relation to the age discrimination regulations. For example, a worker may be subjected to a detriment because they have brought a case against their employer, or

given evidence or supported someone else who has, or they have made an allegation concerning age discrimination in relation to a workplace claim or grievance.

Instructions to discriminate – 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 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 one case, being told that they were 'more suited to a more traditional estate agency', or in another being nicknamed 'Half-Dead Dave'. In a recent case ***Glenn Cowie v Vesuvius plc 2024***, an employee in his 60s won £3.2m for age-related discrimination including harassment; the CEO had called him an 'old fossil' and he had been increasingly at odds with the senior management, which had implemented a policy encouraging managers not to hire people over the age of 45. Some industries have particular problems in this area, and recent research indicates that age discrimination issues are particularly prevalent in the tech sector, with 41% of employees within that industry having observed ageism at work (compared with 27% of those employed elsewhere). In one recent case, a young tech entrepreneur instructed a recruitment consultant to 'find me a younger team member who is more in tune with a young tech start-up'.

There are likely to be some changes to the law on harassment as a result of the new government's approach. It looks likely that there will be an obligation on all employers to take reasonable steps to protect their staff from all forms of harassment perpetrated by third parties. It is possible that the proposed strengthened statutory duty to the employee

to take ‘all reasonable steps’ to prevent sexual harassment in the workplace may be extended to age discrimination. None of this is clear at the moment and there is no date for introduction of any change to the law.

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 permissible 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*.

The regulations also make exceptions for:

- minimum wage regulations, which are set on the basis of age bands
- service-related benefits, which can be paid based on 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 that ends at 65.

The defence: objective justification

This can be a defence to 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 justifying 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.

Such cases are often focused on public policy issues around the issue that the treatment is designed to address. An example is the recent case of *Lockwood v DWP*. The DWP’s voluntary redundancy scheme provided greater benefits to older employees than to younger employees taking redundancy. This was found to support a valid social policy objective aimed at helping older employees while they find alternative employment, based on the premise that it was generally harder for them to find alternatives than their younger counterparts. This is the essence of the public interest test which has been established by the Supreme Court in previous cases.

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 that 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, HND or

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 the period of PQE, and that it makes more sense for the recruiter to concentrate on the quality of the experience that the candidate has obtained.

In the recent tribunal decision *Levy v McHale*, a firm of solicitors did not help themselves by initially advertising the role based on PQE, and they were found to have discriminated against Raymond Levy by reason of his age after he was denied a job because he was 'expensive'. The tribunal concluded that the firm's decision not to offer him the position was 'synonymous with his being an experienced and [therefore] older solicitor'. The tribunal noted that Levy met all the required qualifications for the role and, had the application gone further, he would have likely been offered the job. McHale made no effort to negotiate pay with Levy, despite his being the only interviewee.

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?

In a recent case, a job applicant's claim was rejected by the tribunal; 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. This argument 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.

Employers should be particularly aware of issues around age discrimination given the government's stated aim of attracting older workers back into the workforce as a response to labour shortages. It is also interesting to note that age discrimination cases can attract high levels of damages, and that older workers are usually not deterred from making claims by concerns about whether or not they will get a reference.

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 legislation. Such benefits will not need to be justified individually.

Benefits relating to service over five years

Here, the Act requires the employer to 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' employment.

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 vital that opportunities should be communicated to everyone in the workforce equally.

- Older workers should not be denied the opportunity to carry out more responsible tasks which would make 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 that 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 shorter serving staff. Recent case law has indicated that, although this is discriminatory, it can be justified on the grounds that it rewards loyalty. However, it would 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. In fact, an employment tribunal has recently found that Oxford University acted unlawfully in dismissing Professor Paul Ewart under its employer justified retirement age policy (EJRA). The EJRA, under which staff at senior grades must retire in the September before they turn 68, was introduced in 2011 with the stated aim of bringing younger and more diverse staff into the university.

A recent case that received considerable publicity involved a finding that it could have been actionable age discrimination where a manager 'offered a chair' to an employee in

his sixties at a meeting. This caused consternation in the media, but was in the context of the employee's belief, with some evidence, that the manager wanted him to retire, and that he was being 'singled out' because of his age. In fact, the employee lost his case on other grounds, so there was less to this than met the eye!

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