



## Age Discrimination - The Employment Equality (Age) Regulations 2006

The Employment Equality (Age) Regulations (the Age Regulations) 2006 will prohibit direct and indirect age discrimination, harassment and victimisation. The Age Regulations are expected to come into force on 1 October 2006, subject to Parliamentary approval and will implement the final strand of the European Employment Directive (2000/78/EC). A consultation on the draft regulations has just closed and the DMA is awaiting the Government response to the consultation. They will also provide for a questionnaire procedure matching that in other discrimination legislation.

The Age Regulations will cover:

- employers
- providers of vocational training (including adult, further and higher education)
- trade unions, professional associations, and employers' organisations
- trustees and managers of occupational pension schemes.

The Age Regulations will remove the current upper age limit for unfair dismissal and redundancy rights. They will establish a default retirement age of 65 and create a new duty for employers to consider employees' request to continue working after 65.

### Direct and Indirect Discrimination

The Age Regulations will create two forms of age discrimination – direct and indirect – and also give examples of treatment which may be justifiable. The Age Regulations are unique in that the general justification defence is available for direct as well as indirect discrimination.

A discriminates against B if:

- Direct**            **(a)**    on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
- Indirect**           **(b)**    A applies to B, a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –
- (i)            which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
  - (ii)           which puts B at a disadvantage when compared with other persons, and
  - (iii)          which puts B at that disadvantage,

and A cannot show the treatment, or, as the case may be provision, criterion or practice to be a proportionate means of achieving a legitimate aim.



Examples of treatment which a tribunal may find to be a proportionate means for achieving a legitimate aim are:

- (a) setting age limits in order to ensure the protection or promote the vocational integration of people in a particular age group
- (b) fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people
- (c) fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period in post before retirement.

A discriminates directly if he treats B less favourably "on grounds of B's age". An example would be where A advertises for a recruit who is under 30.

A might discriminate indirectly for example where he invites applications only from recent graduates.

As in other discrimination legislation, a comparison must be drawn with another person where the relevant circumstances are the same, or not materially different. While it is relatively easy to find, or construct, a comparator of the opposite sex, or of a different race, it may be much more difficult to identify a proper comparator for these purposes. While some cases will be relatively clear cut, e.g. a 55 year old comparing his treatment with that of say, a 35 year old there will also be cases, particularly in industry sectors where the age range of employees is small, in which a 32 year old might well seek to compare himself with say a 27 year old.

### **Harassment**

- 1 A subjects ... B to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of:-
  - a violating B's dignity, or
  - b creating an intimidating, hostile, degrading, humiliating or offensive environment for B
- 2 Conduct shall be regarded as having the effect specified in paragraph A or B only if, with regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

There is no defence to a valid harassment claim.

To constitute age discrimination, the harassment must be on grounds of age and the conduct must be unwanted. The test is both subjective and objective.



### **Genuine Occupational Requirements**

.....where, having regard to the nature of the employment or the context in which it is carried out –

- a possessing a characteristic related to age is a genuine and determining occupational requirement
- b it is proportionate to apply that requirement in the particular case and
- c either-
  - i the person to whom that requirement is applied does not meet it, or
  - ii the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

### **Vicarious liability**

As is the case with other discrimination legislation, the Age Regulations will provide that acts done by an employee in the course of his employment are treated as done by the employer as well, whether or not done with the employer's knowledge or approval.

There is a defence where the employer can prove that it took reasonable steps to prevent the employee from doing that act.

In practice, to rely on this defence an employer will need to have policies in place aimed at preventing age discrimination.

### **Exceptions**

The Age Regulations will provide that many common practices do not constitute unlawful discrimination.

### **Positive action**

The Age Regulations will permit acts which:

- a afford persons of a particular age or age group access to facilities for training which help fit them for particular work, or
- b encourage persons of a particular age or age group to take advantage of opportunities for doing particular work

where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to age suffered by persons of that age or age group doing that work or likely to take up that work.

While positive action will be permissible, positive discrimination is not. For example, where an employer "asks a headhunting firm to search particularly for candidates in a certain age group (because that age group is under represented in its workforce). As long as applications from people in other age groups are not excluded, this is covered by the positive action provision". To use this provision great care should be taken.



## **Retirement**

The Government has opted for a standard “default” retirement age of 65.

Retirement may amount to a fair or unfair dismissal. Retirement dismissal can be a fair dismissal if:

- it is genuinely a dismissal on grounds of retirement
- it takes place at or after the national default retirement age of 65 or a lower retirement age which has been set and objectively justified by the employer, and
- it takes place in accordance with the new procedural requirements for compulsory retirement.

A retirement dismissal will be unfair where:

- prior to “retiring” the employee, the employer has not informed the employee of the right to request to continue working and the intended retirement date, or the employer has informed the employee less than two weeks before the retirement date
- the dismissal takes effect while a duty to consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision, or
- once a duty to consider procedure has started, the employer fails to comply with it properly.

Any retirement under the age of 65 must be objectively justified: this may be difficult for many employers. If this can be done, or the employee is 65 or over when retired, the dismissal is fair only if it can be established that the retirement was really a retirement, and not a dismissal for other reasons.

## **Work-related invalidity benefit schemes**

In relation to a “work-related invalidity scheme” a term wide enough to cover PHI, sick pay and ill-health retirement schemes, certain provisions will be exempted:

- a the fixing of an age for admission to such a scheme or
- b the fixing of an age for entitlement to invalidity benefits under such a scheme

including the fixing of different such ages for different workers or for different groups or categories of workers.



### **Pension of service-related benefits**

There is a complete exemption where benefits are provided on the basis of no more than five years' service. This provides that an employer can award A a benefit, but not B:

this can be done if and to the extent that –

- length of service is the criterion by reference to which the benefit is awarded
- the benefit is awarded to all of the employer's workers who meet the length of service criterion and whose circumstances are not otherwise materially different, and
- B does not satisfy the length of service criterion.

The employer can choose to treat "length of service" as either the length of time a worker has worked for the employer in a post or in posts carrying out "work like nature" or, more simply, the length of time the worker has worked for the employer.

### **Longer service**

Where benefits are based on more than five years' service, an employer may rely on a general exemption if it has the necessary evidence. Provision of benefits based on length of service is permissible if and to the extent that –

- length of service is the criterion by reference to which the benefit is awarded
- it reasonably appears to the employer that there will be an advantage to him from rewarding the loyalty, encouraging the motivation or recognising the experience of workers by awarding benefits on the basis of length of service
- B does not satisfy the length of service criterion.

### **Pensions**

The Government's stated aim is to "tackle unfair age discrimination without risking the continuing provision of occupational pensions". It expects pension schemes to operate "largely as they do now".

The Age Regulations will make it unlawful for trustees or managers (but not employers) of an occupational pension scheme to discriminate against a member or prospective member of the scheme.

However, the Age Regulations will expressly exempt most age-related rules and practices in occupational pension schemes. These will not be unlawful.



### **Provisions of statutory and “more generous” benefits**

Benefits which an employer is legally obliged to provide to A not B, because B does not satisfy any statutory qualifying period, but chooses to give redundancy payments to those with less than years’ service. An employer can also give A a benefit but not B where length of service is the criterion and the benefit is provided “in place of” and is “more generous” than the statutory benefit. The same method of calculating the benefit must be used. In such cases, where B does not receive the benefit because he does not satisfy the length of service criterion there will be no unlawful discrimination.

### **Redundancy and unfair dismissal claims**

At present, statutory redundancy payments are available only to employees with two years’ service or more. This qualifying period will remain.

The statutory redundancy scheme has a lower age limit of 18 and an upper age limit, which is the normal retirement age of the particular business, or 65 if there is none. Both age limits will be removed. In principle, therefore, a worker aged over 65 may be entitled to a redundancy payment if he loses his job by reason of redundancy.

The scheme uses length of service for calculation of the redundancy payment, capped at 20 years. This will stay. Currently, the statutory redundancy payment tapers to nil for employees within one year of the upper age limit. This provision will go.

The calculation of the redundancy payment uses a multiplier linked to age bands – from half a week’s pay (capped) for work at age 18-21 to one and a half week’s pay for years when the worker is over 40. The multiplier will no longer vary and might be fixed at one week’s pay for each year of work (meaning that older employees will lose out) though no final decision has yet been made.

Currently, employees with more than one year’s qualifying service have the right to be unfairly dismissed. Successful claimants will receive a basic award, calculated in the same way as a redundancy payment, plus a compensatory award.

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