

**EMPLOYMENT LAW FOR CHARITIES SEMINAR
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AGE EQUALITY I

The Employment Equality (Age) Regulations 2006

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October this year brings a further change to UK anti-discrimination law, the Employment Equality (Age) Regulations 2006, which implements the final requirements of the European Framework Equal Treatment in Employment Directive 2000/78/EC. The Regulations aim to prohibit discrimination on the grounds of age. This adds to the existing body of anti-discrimination legislation on the grounds of sex, race, nationality, disability, gender re-assignment, sexual orientation and religion or belief. The legislation impacts on the whole period of employment to cover recruitment, staff policies, promotions, training and dismissals (including retirement). It does not cover the provision of goods and services.

As a reminder, age discrimination does not just focus on discrimination against older workers but to workers of any age, including the young and old and those in the middle.

Definitions

The definitions essentially follow a similar form to that seen in other anti-discrimination legislation.

1. Direct discrimination

This is defined as “a person (“A”) discriminates against another person (“B”) if on the grounds of B’s age, A treats B less favourably than he treats or would treat other persons; OR

2. Indirect discrimination

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:

2.1 Which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons; and

2.2 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.

Both direct and indirect discrimination will be justified if it is:

- A proportionate means (of)
- Achieving a legitimate aim.

In this context “proportionate” means that there must be evidence to support what you are doing achieves a legitimate aim, that the need for the action significantly outweighs any discriminatory effect and there is no reasonable alternative.

A ‘legitimate aim’ might include economic factors such as business needs and efficiency, health and safety of employees. Saving money is not a legitimate aim by itself. This is likely to be the most controversial “legitimate aim” particularly for grant funded organisations. Presumably, UK courts and tribunals will adopt a similar approach to “legitimate aims” as for indirect sex discrimination. The leading case of **Cross -v- British Airways [2005] IRLR 423** suggests that cost alone cannot amount to a legitimate aim, but can be taken into account together with other legitimate aims. Until this case is overturned or distinguished, this is the position which employees must have in mind when making decisions - and this will include any termination in grant funding.

3. Harassment

Harassment is unwanted conduct that violates a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for that person having regard to all the circumstances, including the perception of the victim.

The definition “harassment” in the Regulations points to “on grounds of age” - so jokey remarks about an employee’s very young partner would be included within the definition of harassment of the employee or their partner because it is not dependant purely on the actual object’s age. Employees are advised to ensure “age” is considered in your organisation’s harassment policies.

And finally:

4. Victimisation

To victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination on grounds of age.

It is worth noting that in line with other discrimination employers can also be responsible for the acts of employees who discriminate on the grounds of age. Recent cases have also made employees liable for the acts of third parties where

there is a “deemed employment” (**Hawley v (1) Luminar Leisure Ltd etc CA [2006] EWCA Civ. 18**). As well as reviewing policies organisations should ensure the policies are implemented through

Lawful discrimination

There are very limited circumstances when it is lawful to treat people differently because of their age.

1. Objective justification

For example, where it is necessary to fix a maximum age for the recruitment or promotion of employees, reflecting the training requirements of the post.

2. Where a person is older than, or within six months of, the employer’s normal retirement age, or 65 if the employer does not have one, there is a specific exemption allowing employers to refuse to recruit that person.

3. There are some specific exemptions given in the regulations - for example, pay related to the National Minimum Wage or where other statute provides, for example, the calculation of redundancy using age modifiers this exception is limited to the statutory provision so that having a graded scale for employees or redundancy taking account of age (over and above the statutory weekly wage) may discriminate. So, to elaborate, an employer using the statutory £290 per week wage is fine as is the employer who uses the employees’ normal weekly wage as a basis in the calculation; but as soon as an employer decides to do more than that or add other benefits, then that becomes potentially discriminatory and needs to be objectively justified.

4. Genuine Occupational requirement

This does not apply across the board. It can only be applied in the areas of recruitment, promotion, transfer, training and dismissal. There is no GOR defence available where a claim of discrimination relates to the terms being offered to a prospective or present employee. It also does not apply to complaints or victimisation or harassment.

It might be possible to claim a GOR for a specific age-related role in a play or perhaps where the organisation gives counselling and advice to the elderly, that organisation should have an older chief executive.

The Start of Employment

Regulation 7(1) makes it unlawful to discriminate on the grounds of age in relation to the recruitment process, job offers and decisions to make job offers, subject to one exception.

This area is likely to provide the most work for tribunals. In Ireland, where the Directive has been implemented for some time, this area already forms a substantial percentage of its tribunals. However, it is possible that there, as well as over here, some ‘professional’ claim-makers count towards these statistics. All employers should be wary of this group of individuals.

Simple examples of what might be held as discriminatory on the grounds of age are easy to identify, such as the advertisement which offers employment only to those above or below a certain age, or only advertising in publications likely to attract a particular age group, or advertising for particular IT skills which older workers may not have. A solution to the latter may be to specify in the advertisement that training is available. It will be important in this area, as others, to keep a complete record of why and how decisions are taken.

The only exception, in Regulation 7(4) is that the rules in 7(1) do not apply to someone who is refused employment and who is 65 or over. They will not have a right to complain to a tribunal. However, if that person is successful in his/her job application and is employed, he will be entitled to the same rights as younger employees in the same circumstances.

There are, however, some other justifications possible. The first of these is in Regulation 3(2)(c) which states

“The 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.”

Thus, if some particular training takes two years and the employer has fixed a retirement at the statutory minimum of 65, then that would be a basis for imposing an age limit of 63. But that is just the training. There is a cost to that training for which the employer would usually require to get something back from the employee in terms of recovering economic value. However, the decision to roll back the upper limit further cannot be justified on the grounds of cost alone.

Health and safety or capability would also appear to be a legitimate aim and it is possible to conceive that the age of applicants might pose a health and safety risk. This is difficult given, for example, not everyone is the same and a very fit older worker might be better equipped for a particular role than a young TV couch potato.

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Employment planning is also a legitimate aim. An example of this would be a smaller company with say an older workforce all of whom are approaching a fixed retirement age or indicating an intention to retire. The business would be disrupted by the loss of the staff all at the same time. It would therefore be desirable to recruit some younger staff.

Job specifications and in particular experience for jobs raises areas of concern. The issue here is one of justification. The need for experience to occupy a particular post would appear to be capable of being a legitimate aim. There remains however the need to balance the discriminatory effect against the achievement of that aim. Is three years experience really necessary for the particular post? Might not an assessment of individual skills be appropriate rather than a defined category of experience? In other words, there may not be more than means of achieving a particular aim. And, there will undoubtedly be the argument put forward that if suitable training were provided by the employer it would go a long way to undermine the argument that any level of experience is necessary.

Graduate recruitment could also be a problem area. It will be preferable, for example, to welcome applicants from graduates of all ages, but still consider whether a graduate is a requirement or just desirable.

There is also under Section 8 a provision for age being a genuine occupational requirement of a post. This is therefore similar to other areas of discrimination. This applies equally to promotion, transfer, training and dismissal, as well as applications.

In this respect possession of a characteristic related to age is, a “genuine and determining occupational requirement”. Thus, suppose that Age Concern wanted to appoint a rights advisor then it might be contemplated that in order to better communicate with the group served it was a genuine and determining requirement that the candidate be above a certain age. It will be necessary to show that the application of the requirement is proportionate. That will clearly require some careful thought as to the age that is specified.

Acting, interestingly, was specifically mentioned in the consultation document. Again, difficult, as especially with modern techniques it is possible to make individuals look a different age to their own. The consultation document observes that there will be few jobs that fit within this tight definition.

There are other age aspects of recruitment, selection and promotion besides upper age limit that are not explicitly mentioned in the Requirements, for example:

1. Requiring a birth date or age on application forms. This is not anti-discriminatory in itself. However, an employer could use this information to make anti-discriminatory decisions. For the avoidance of doubt, an employer may prefer to move questions regarding age to a diversity monitoring form (which those who take the recruitment decisions would not get to see).

2. Again, considering application forms, employers should be wary of the language they use when drafting application forms the use of terms such as “mature”, “vibrant” and “active” for the individual to be recruited might be taken to infer a set of discriminatory values.
3. Employees must also think about the hidden messages in their advertisements, for example in the case of photographs. If they show a group of only young people, then this might point towards indirect discrimination of older workers.

Employers must also take account of these new Regulations during the next step of the recruitment process - the interview. In general terms, interviewing should preferably not be carried out by one person on their own. And, in any event focus should remain on the applicant’s competence.

Employers should also note that, if working with employment agencies, they should ensure that the agency has an equality and diversity policy at least, if not better, than their own.

Employment

Turning now to focus on the period of employment itself. Once recruited the Regulations also regulate terms and conditions of employment. Regulation 7(2) states that employers must not discriminate on the grounds of age against an employee:

1. in the terms of employment
2. in relation to promotion, transfer, training or receiving any other benefit
3. by not giving said employees these opportunities
4. or by dismissing him.

To give some examples, unless an employer can justify the decision, it is not permissible to award salary increases or have enhanced sick pay for length of service. So before October we suggest employers check the benefits offered in their policies etc to ensure that they can be objectively justified, for example:

- sickness absence - is there implied implications in the policy that one group will be off sick more than others?
- leave and holidays - are these increased on the basis of length of service - possible indirect discrimination against younger workers.
- discipline and grievance - particularly in relation to dismissal on the grounds of retirement.

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- flexible working - employers should consider being open to requests to where a staff member has to care for an elderly relative not just those with small children.
- use of computers - does this indirectly discriminate against older employees who may not have these skills. Is suitable training offered?
- harassment - ensure that age is included as one of the factors on which a claim for harassment can be made and make employees aware of these changes.

However, specific exceptions are included within the Regulations to the basic principle that if an employer has two employees carrying out the same job it is expected that they would receive the same salary and benefits regardless of any difference in their age.

Service-related pay and benefits

Here, take note of regulations 32 and 33, which entitle an employer to award benefits on the basis of length of service.

- where the length of service is less than 5 years
- where it is more than 5 years and the same criteria applies to all other workers and it “reasonably” appears to the employer there will be an advantage to him by rewarding loyalty, encouraging motivation or reorganising experience.

Employers, somehow, will need to provide evidence for the latter - perhaps through monitoring or staff surveys.

A more general exception is length of service benefits as in Regulation 33 – it is a “rewarding of loyalty” exception. To justify this it must “reasonably appear to the employer” thus not an objective test, that there will be an advantage to it from:

- Rewarding the loyalty
- Encouraging the motivation
- Recognising the experience of workers

Evidence as to who this decision was aimed at would be required and that the employer believed a business advantage would be gained as a result. Therefore, before October it would be sensible to review all service benefits to consider whether or not there is an advantage to the business in their retention.

If a service benefit cannot be shown to fall within the scope of Regulation 32 or 33 then it remains open to the employer to seek to objectively justify under Regulation 3 on the assumption that the service benefit will be subject to challenge on the basis that it was

indirectly discriminatory. The requirements of proportionality make that a more difficult test to satisfy.

The question of pay generally may also arise with the prospect of a challenge from, for example, a younger solicitor where, typically, older solicitors will have more experience and will be paid higher salaries. This is at risk of being indirectly discriminatory. Thus it would require justification. Legitimate aims would clearly embrace rewarding loyalty and service, motivating and rewarding experience in the case of length of service.

Experience may be justified by a legitimate need for the business to have employees of varying experience. Some uncertainty must remain depending upon how Tribunals will determine issues of justification.

These are:

Work Related Invalidity Benefit Schemes

These form part of the common benefits offered by employers to employees and include permanent health insurance, private health cover, death in service benefits, accident cover and life insurance. All of these arrangements are insurance backed and become more expensive the older the employee in question. The exception, as set out under paragraph 30(3) does not however extend to medical expenses payments such as BUPA because the benefit must relate to “work” and under such a scheme it is possible to obtain cover for non-work connected expenses. Death in service benefits also do not fall under the exemption for the same reason, although it would cover the situation where these benefits relate solely to death at work. On its face the regulation makes lawful the fixing of an age for membership or entitlement of the scheme. This would appear to suggest that an employer could say employees must be 25 to join. The reality is that this is not the aspect employers will be concerned with. Their concern will be the upper cap where the expense is. This is not so clear from the Regulations but must have been the intention.

Sick pay would also appear to be within the scope of the provision, so the employer may fix an upper age limit for sick pay. It is also still permissible to provide these benefits once an employee has completed a qualifying period. Regulation 32 provides for a five year exception. This essentially enables the employer to provide for benefits where the service to be taken into account for five years or less. This exception covers all these kinds of benefits but would also cover others such as holiday – always remembering to treat all workers engaged in work of a like nature in the same manner.

The National Minimum Wage and Statutory Benefits

There is some discrepancy here, arising out of the general legislative framework where age criteria often used, including minimum wage, statutory maternity pay, statutory sick pay and redundancy payments. These in principle would place younger workers at a

disadvantage by their inability to have that length of service (on which most of these benefits are based). Their payment is therefore taken out of the scope of the Regulations by Regulation 34. Therefore, the employer must follow the relevant statutory provisions and will not be infringing the age regulations by doing so.

Pensions

Pensions are regulated by Schedule 2 of the Regulations. This has received much criticism. From 1 October 2006:

- it will be unlawful for occupational pension schemes to discriminate against members or prospective members on the grounds of age;
- it will also be unlawful for employers to discriminate on the grounds of age (unless it can be “objectively justified”);
- pension benefits accrued and discriminatory practices up to 1 October 2006 will not be affected by the Regulations;
- trustees of pension schemes will be allowed to amend any scheme rules that conflict with the legislation.

Mandatory Retirement Age

The area that has probably received most coverage in the press is that of a mandatory retirement age. Many had hoped that the new legislation would either abolish the fixed retirement age or at least increase it to 70. This is not the option which has been chosen by the Government which instead plans to introduce a statutory default retirement age of 65. Employers who wish to have an earlier retirement age than 65 must be able to show that it can be objectively justified. Employees who wish to work beyond 65 will have the right to apply to an employer to do so and their request will have to be considered by the employer. It is essential that all organisations incorporate the “duty to consider” provisions into their firm’s retirement procedures. Remember that retirement is basically another form of dismissal - and therefore you need to factor this into the dismissal procedures. Retirement essentially becomes one of the potentially “fair” reasons for dismissal.

The amendments basically encourage employers to have reasonably fixed retirement dates and to be careful about letting people stay on – although they must consider any such request.

However, it is just that, a right “to request” not to have the right to remain working after 65 (similar to the provisions in the Flexible Working Regulations). There is also no right

to make an employer objectively justify why it does not want you to stay on. However, an employee does have a right to appeal.

Where there is no planned retirement date because the employer has not set one or the employee has been allowed to continue beyond the planned retirement date, then the employer must show the reason for dismissal is redundancy.

This would not seem to be in line with the original intention of the regulations as it encourages employers to have a planned retirement age and to enforce the same and not to allow employees to continue on in employment after that date.

So, if employees currently have a retirement age of 65, or no retirement age this can remain the case for genuine retirements under the unfair dismissal system but employees will now have a duty to consider requests to work longer.

Employees who have retirement age above 65 can also remain unchanged. However, those under 65 will no longer be possible. Employers would have to objectively justify this. The Government does however intend to review the default retirement age in 2011.

The Right to Request procedure is as follows:

1. **Notice by Employer**

At least 6 months but not more than 12 before intended retirement of right to request

2. **Continuing duty to inform employee**

An ongoing duty of right to request up to two weeks before dismissal

3. **Employee's right to request not to be retired**

4. **Employer's duty to consider such request**

An employer must consider so long as it is made at least 6 weeks but not more than a year before the planned retirement date

5. **Meeting**

An employer must hold a meeting with employee when considering the request

6. **Written decision**

Within 2 weeks of meeting

7. **Employee's Decision to appeal**

The employee may appeal within 2 weeks of receiving employer's decision.

8. **Appeal Meeting**

9. **Employer's written decision**

This process must be followed for each time extension to planned retirement age.

Again, any failure to follow this procedure will be deemed an automatic unfair dismissal.

Scope of Protection

Finally, the Regulations are not limited to employees. Other classes of workers are also protected. This mirrors other regulations.

It also covers partnerships in terms of complying with statutory requirements and GORs – everything else they must objectively justify.

And finally, it also covers office holders – to include the clergy, institutions of further and higher education, those that use employment agencies and trustees and managers of occupational pension schemes.

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