

SOUTHERNHAY CHAMBERS EMPLOYMENT TEAM

present

AGE DISCRIMINATION

Introduction

1. The Employment Equality (Age Discrimination) Regulations come into force on 1 October 2006 (“the Regulations”) and intended to be the UK’s compliance with age provisions in the EU Framework Directive (No. 2000/78).
2. The Regulations cover the wider definition of employee as follows:
“employment” means employment under a contract of service or of apprenticeship or a contract personally to do any work...
3. This definition does not however apply to Regulation 30, which deals with retirement (see below).
4. Note that there are a number of recent conflicting EAT decisions on the extent to which there needs to be mutuality of obligation to satisfy this wider definition; see for example Younis v Trans Global Projects Ltd and Another EAT 2.12.05 (0504/05), and Cotswold Developments Construction Ltd v Williams EAT (0457/05).
5. There is also protection in the Regulations for contract workers (Regulation 9), members or prospective members of pension schemes (Regulation 11), office holders (Regulation 12), police (Regulation 13), barristers (Regulation 15), partners (Regulation 17), members or prospective members of trade organisations (Regulation 18), those involved with qualification bodies (Regulation 19), those seeking or undergoing vocational training (Regulation 20), those involved with employment agencies (Regulation 21), and those involved with institutions of further and high education.
6. Those not protected include:
 - (a) those doing service in any of the naval, military or air forces, including regulars, full-time and also part-time reservists (when acting in their military capacity)
 - (b) unpaid (save for Crown appointed) office holders;
 - (c) unpaid volunteers (see the decision of the EAT on the ambit of the Disability Discrimination Act 1995 South East Sheffield Citizens Advice Bureau v Grayson [2004] ICR 1138; however unpaid work will be covered where it forms part of a paid employment relationship or a vocational

training relationship. For example, someone doing unpaid teacher training experience in a school would be protected.

Discrimination

7. Regulation 3 prohibits direct and indirect discrimination on grounds of age:

For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if

on grounds of B’s age, A treats B less favourably than he treats or would treat other persons, or

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

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

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.

8. In many aspects, this mirrors the discrimination provisions in the other equality legislation. The real difference is that it is possible to objectively justify direct discrimination.
9. The DTI’s initial public consultation entitled “Age Matters”, issued in July 2003, pointed to factors such as health and safety, the facilitation of employment planning, encouraging and rewarding loyalty, training requirements and the need for a reasonable period of employment before retirement, which might in exceptional circumstances justify directly discriminatory measures. The latter two examples – training requirements and the need for a reasonable period of employment before retirement – are repeated in the ACAS Guidance, “Age and the Workplace”, published in April 2006.
10. The original draft of the Regulations also gave three non-exhaustive examples of what might constitute a proportionate means of achieving a legitimate aim. Although these examples have been removed from the final draft, they were drawn from Article 6(1) of the Framework Directive and so are indicative of what may be lawful in appropriate cases:
 - (a) the setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group;

- (b) the fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people;
 - (c) 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.
11. Note that Article 6(1)(b) of the Directive suggests that the fixing of age requirements for access to employment or certain benefits linked to employment might be a proportionate means of achieving a legitimate aim – positive discrimination by the back door?
12. Note that:
- a. by Reg 3(3)(a), “age group” means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages;
 - b. by Reg 3(3)(b), discrimination on the ground of a person’s age includes discrimination on the ground of a person’s apparent age.
13. The proportionality test of justification is applied to both direct and indirect discrimination. As to justification of indirect discrimination, the “Coming of Age” consultation paper, issued with the first draft of the Regulations in July 2005, noted that discrimination will not be justified merely because it may be more expensive not to discriminate.
14. However, it would not be surprising if an employer was allowed to rely on a combination of both economic and non-economic factors, as was the position in the sex discrimination case of Cross v British Airways plc [2005] IRLR 423. Such an approach would be consistent with the ACAS Guidance which suggests that “economic factors such as business needs and efficiency” could constitute a legitimate aim for the purposes of justification.

Discrimination in Employment - General

15. Regulation 7(2) prohibits discrimination:
- in the terms of employment afforded
 - in the opportunities afforded for promotion, transfer, training or other benefits (or their refusal)
 - by way of dismissal or detriment
16. Examples
- a. A solicitor who took his Law Society Finals 25 years ago, is refused employment on the grounds that he is too old.
 - b. When conducting a performance appraisal, an employee’s supervisor remarks that the employee “displays considerable maturity for their

age.”

17. Tips

- a. Write and implement an equality policy that deals with age. Ensure that all employees know about the policy, and are trained in how to use it. Display your age policy on noticeboards and circulars, and refer to the policies in contracts of employment.
- b. Review all company policies for evidence of age bias, including sickness absence, holiday leave, discipline and grievance, and flexible working
- c. Add age discrimination to your disciplinary rules.
- d. Carry out an age healthcheck (see *ACAS Annex 1*). This should include creating an “age profile” of your workforce using the brackets:

16-21

22-30

31-40

41-50

51-60

60-65

65+

- e. Having done this, think about forward planning. Will there be a retirement peak to consider in 10 years time?
- f. Take positive action to rectify any obvious imbalance in the age bands.
- g. Further insight into an organisation may be gained from staff attitude surveys, focus groups and exit interviews. For this reason, exit interviews should not be conducted by line management.
- h. Always back up decisions with objective, written evidence – eg. meeting minutes, selection criteria, policy checklists. Second opinions can be sought from a Company’s Board, or from partners or colleagues in smaller firms.

Discrimination in Employment - Promotion and Training

18. Tips

- a. Beware of giving informal verbal references when an employee transfers between departments. These are still covered by the Regulations.
- b. Do not assume that all employees can use a PC when offering training courses.
- c. Check that any performance appraisal system works without bias.

Discrimination in Employment - Redundancy selection

19. Example:

A firm has financial difficulties, and decides to make a number of its employees redundant. It selects candidates for redundancy using the principle 'Last In, First Out' (LIFO).

20. Tip:

Review selection processes for redundancy so that they are free of age discrimination. Criteria based on length of service are likely to be discriminatory.

Victimisation

21. Regulation 4 prohibits victimisation in similar terms to the like provisions in the other equality legislation.

22. Examples

- a. A work colleague gives evidence on behalf of a fellow employee at an employment tribunal, and is subsequently denied a promotion for which she is suitably qualified and experienced. She is perceived as a troublemaker.
- b. An employee indicates that he might bring a claim for age discrimination, and leaves his current employment. He is subsequently given a poor reference which is unfair and undeserved.

Harassment

23. Regulation 6 provides protection against harassment on grounds of age:

For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of age, A engages in unwanted

conduct

which has the purpose or effect of

violating B's dignity; or

creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Conduct shall be regarded as having the effect specified in paragraph (1(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

24. Examples:

- a. A young employee is told he is 'wet behind the ears'.
- b. An employee is labelled as being "over the hill".
- c. People in the workplace tell jokes about 'old fogies'. An employee who associates with older colleagues at work finds this upsetting.
- d. An employee in his 50s is not invited to informal social occasions outside of work. These take place amongst his younger colleagues in their 20s and 30s, and are often held in the local pub. Despite the social nature of these gatherings, many workplace issues and problems are discussed and resolved. The employee feels excluded and undermined by being excluded from these meetings.
- e. An individual working for a different firm visits a company to repair the IT system. One of the company's employees remarks that he is "too old for the task, and the company should have used someone more up to date".

Discrimination against Applicants

25. Regulation 7(1) applies the above provisions to applicants as well as employees (see extended definition above).

It should be noted that, by Regulation 7(4), the provisions dealing with recruitment (Regulation 7(1)(a) and (c)) do not apply to applicants:

whose age is greater than the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65; or

who would, within a period of six months from the date of his application to the employer, reach the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65.

The reference here to “normal retirement age” is an age of 65 or more - which meets the requirements of s98ZH of the 1996 Act – Regulation 7(8).

26. Examples:

- a. A supermarket asks a recruitment agency to source checkout staff that have 5 or more years of retail experience.
- b. A company places a job advertisement in a magazine asking for a candidate who is “reflective” and who has “boardroom presence or gravitas”
- c. A large accountancy firm only recruits candidates for its entry-level audit positions by using the ‘milk-round’ at universities.
- d. When interviewing a candidate for a job, the manager conducting the interview asks whether the candidate ought to be looking for a position with more responsibility.

27. Recruitment Tips:

- a. Remove age/date of birth from job application forms, and instead include it in a diversity monitoring form to be retained by HR.
- b. Review application forms so that dates which gave away the age of applicants are removed – eg. Date of attendance at school
- c. Avoid references to age in the job description and person specification.
- d. Review the qualifications which you require for a job. Is there another way of specifying the skill level which you require? Is it really necessary to include the qualifications which you have listed?
- e. Avoid publications or employment agencies that focus on a niche market when advertising for jobs. Job adverts in FHM are unlikely to be seen by older candidates.
- f. Avoid using age-related language in job adverts – such as “mature” , “young” , “energetic” “boardroom presence” “gravitas”
- g. Remember that graduates can be almost any age. It is not code for someone in their early twenties.

28. Note however that while advertisements may provide evidence upon which an unsuccessful job applicant may attempt to rely, they (as opposed to any discriminatory job specification criteria that they contain) are not actionable in themselves – contrast the position in the Race Relations Act 1976.

Instruction to Discriminate

29. Regulation 5 provides protection to those who have been instructed to discriminate and fails to carry it out and/or complains about the instruction. This provision is unique to age discrimination.

Regulation 24

30. Post employment discrimination is covered.
31. Example:
- a. A manager of a company is telephoned about a previous employee, and indicates that he found it difficult to get on with younger colleagues because he was much older.

Regulation 25

32. Liability of employers and principals is dealt with in Regulation 25. It mirrors the corresponding provisions in the other equality legislation (including the statutory defence in Regulation 25(3)).
33. It is therefore crucial for every employer to have a clear and strictly enforced diversity policy (if there is to be any real chance of relying on the statutory defence).
34. Similarly, provision for aiding acts of discrimination is covered in Regulation 26.
35. Tip:
- a. Provide visitors to an organisation with a briefing on the Company's attitude to discrimination in the workplace, in addition to any health and safety information that they receive.

Genuine Occupational Requirement

36. There are exceptions to what would otherwise be discrimination contrary to Regulations 3 and 7 where paragraph 8(2) applies:

This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out

possessing a characteristic related to age is a genuine and determining occupational requirement;

it is proportionate to apply that requirement in the particular case; and

either

the person to whom that requirement is applied does not meet it, or

the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

37. Examples:

- a. Actors who are to play teenagers in a production are selected from a pool of applicants under 25
- b. An organisation which promotes rights for older people recruits a chief executive from a pool of candidates 50 years old or more.

General Exceptions

38. Regulation 29 deals with positive action and provides:

Nothing in Part 2 or 3 shall render unlawful any act done in or in connection with

affording persons of a particular age or age group access to facilities for training which would help fit them for particular work; or

encouraging 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.”

39. Example:

- a. A software firm places an advert in SAGA magazine, asking for applications from everyone irrespective of age, but particularly welcoming jobseekers who are over 50, because the firm is under-represented in this category.

40. Positive Action Tips:

- a. Give people of a particular age (eg. 50 plus) access to computer training.

- b. Place adverts where they might be seen by a disadvantaged group – in SAGA magazine.

NMW

- 41. Regulation 31 allows pay differentials consistent with the different rates of the applicable National Minimum Wage. While this rule effectively protects employers who pay only NMW rates, it does not mean that employers are free to pay arbitrarily different rates above the NMW to workers according to their age.

Length of Service benefits

- 42. Regulation 32 deals with the provision of certain benefits based on length of service and provides:

Subject to paragraph (2), nothing in Part 2 or 3 shall render it unlawful for a person (“A”), in relation to the award of any benefit by him, to put a worker (“B”) at a disadvantage when compared with another worker (“C”), if and to the extent that the disadvantage suffered by B is because B’s length of service is less than that of C.

Where B’s length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).

In calculating a worker’s length of service for these purposes, A shall calculate

the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision making) or

the length of time the worker has been working for him in total;

and on each occasion on which he decides to use the criterion of service in relation to the award of a benefit to workers, it is for him to decide which of these definitions to use to calculate their lengths of service.

- 43. Note that, in calculating length of service, there is no scope for part time work to be treated differently to full time work.
- 44. Note also that, by virtue of Reg 32(7), the general exemption for service related benefits does not apply to “any benefit awarded to a worker by virtue

of his ceasing to work for” the employer. Reg 33 makes specific provision for enhanced redundancy payments to employees (see below).

45. The Advocate General has delivered his opinion to the ECJ in the long running case of Cadman v Health & Safety Executive (Case C-17/05).
46. The AG recommended that where an employer uses length of service as a determinant of pay, and this has a disparate impact as between male and female employees, it should be required to show that its use takes into account the business needs of the undertaking and is applied proportionately so as to minimise its disadvantageous impact on women. He went on to say that where an employer cannot justify the use of a length of service criterion as a whole, it should provide specific justification for the difference in pay levels between the employee raising the complaint and others performing the same job. He recommended to the ECJ that the judgement should not have retrospective effect, save where a worker had brought proceedings or an equivalent claim prior to judgement date.
47. This opinion, if adopted by the ECJ, will plainly augment the provisions of Reg 32 in certain cases.
48. Reg 33 deals with exceptions for enhanced redundancy payments and provides:

Nothing in Part 2 or 3 shall render it unlawful for an employer-

(a) to give a qualifying employee an enhanced redundancy payment which is less in amount than the enhanced redundancy payment which he gives to another employee if both amounts are calculated in the same way;

(b) to give enhanced redundancy payments only to those who are qualifying employees...[by virtue of an entitlement under s135 ERA, or what would have been such an entitlement had the employee not agreed to the termination – RM]

49. Note that to be an enhanced redundancy payment, it has to be calculated in accordance with Reg 33(3):

For an amount to be calculated in accordance with this paragraph it must be calculated in accordance with section 162(1) to (3) of the 1996 Act.

or Reg 33(4)

For an amount to be calculated in accordance with this paragraph

(a) it must be calculated as in paragraph (3);

(b) however, in making that calculation, the employer may do one or both of the following things

- (i) *he may treat a week's pay as not being subject to a maximum amount or as being subject to a maximum amount above the amount laid down in s227 of the 1996 Act;*
 - (ii) *he may multiply the appropriate amount allowed for each year of employment by a figure of more than one;*
- (c) having made the calculation as in paragraph 3 (whether or not in making that calculation he has done anything mentioned in sub-paragraph (b)) the employer may increase the amount thus calculated by multiplying it by a figure of more than one.*

Retirement

50. Regulation 30 is key:

This Regulation applies in relation to an employee within the meaning of s230(1) of the 1996 Act, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this Regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

For the purposes of this Regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of the 1996 Act.

Duty to Consider Working Beyond Retirement

51. Regulation 47 provides:

Schedule 6, which sets out the procedure to be followed if an employee (within the meaning of that Schedule) is to be retired, shall have effect.

Schedule 6 contains detailed provisions on the right of employees (as referred to in Reg 30) to request post retirement work. In summary:

- a. An employee has a statutory right to request to his employer not to retire on the intended date of retirement; such a request must be in writing – para. 5
- b. An employer who intends to retire an employee has a duty to notify the employee in writing of both his right to make a request and the date on which he intends the employee to retire not more than one year and not less than six months before that date – para. 2

- c. If the employer complies with paragraph 2, the employee's request must be more than three months but not more than six months before the intended date of retirement- para. 5(5)
- d. Even where paragraph 2 is not complied with, the employer has a continuing duty to notify the employee in writing as described above until the fourteenth day before the operative date of termination – para. 4
- e. If the employer has not complied with paragraph 2, the employee's request must be before but not more than six months before the intended date of retirement – para. 5(5)
- f. The employer must consider any request (para. 6) in accordance with paragraph 7 (meeting), paragraph 8 (appeal) and paragraph 9 (right to be accompanied).
- g. The employee may complain to the Employment Tribunal if the employer has failed to notify him in accordance with paragraph 2 (maximum compensation 8 weeks pay) – para. 11, failed to allow him to be accompanied in accordance with paragraph 9 (maximum compensation 2 weeks pay) – para. 12 (with corresponding detriment and unfair dismissal provisions relating to the paragraph 9 rights being in paragraph 13).

52. Attached hereto are the *ACAS flow chart* and written guidance on these important provisions.

53. There are extensive amendments to s98 of the Employment Rights Act 1996 to provide for both fair and unfair retirement dismissals. These are found in paragraphs 21 et seq. of Schedule 8 (attached).

Enforcement

54. Regulation 36 provides the jurisdiction of Employment Tribunals to adjudicate on alleged discrimination and harassment in breach of the Regulations.

Burden of Proof

55. Regulation 37 contains the (now) usual provisions on burden of proof in discrimination cases:

Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent

*has committed against the complainant an act to which regulation 36 applies;
or*

is by virtue of regulation 25 (liability of employers and principals) or 26 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

56. See generally Igen Ltd (formerly Leeds Careers Guidance) and Others v Wong [2005] EWCA Civ 142, [2005] ICR 931.

Remedies

57. Reg 38 provides the remedies available upon proof of discrimination or harassment. They are identical to those in the other equality legislation (declaration, tortious compensation including injury to feelings and recommendations).

Questionnaires

58. Reg 41 provides for discrimination questionnaires and is identical to the corresponding provisions in the other equality legislation.

Limitation

59. Reg 42 provides limitation periods which are identical to the corresponding provisions in the other equality legislation (“...before the end of the period of three months beginning when the act complained of was done”). As with the other legislation, there is the possibility of a just and equitable extension, and there are specific provisions for contractual discrimination, continuing acts and deliberate omissions.

Pensions

60. As noted above, Reg 11 deals with pensions. It is subject to extensive exemptions and the detail in Schedule 2 which in overall result mean that, by and large, pension schemes can operate as they do now. For a summary of the position, see the *DTI Age Discrimination Fact Sheet No. 8 on Occupational Pensions*, attached to these notes.
61. Note also that the state pension age for men and women will rise gradually from 65 to 68 by 2044.

Transitional Arrangements

62. Schedule 7 contains transitional arrangements concerning the right to request working beyond retirement. See the summary in the ACAS Guidance attached.

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